



THE FMLA: HOW TO COMPLY

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Why Is The FMLA So Dangerous?

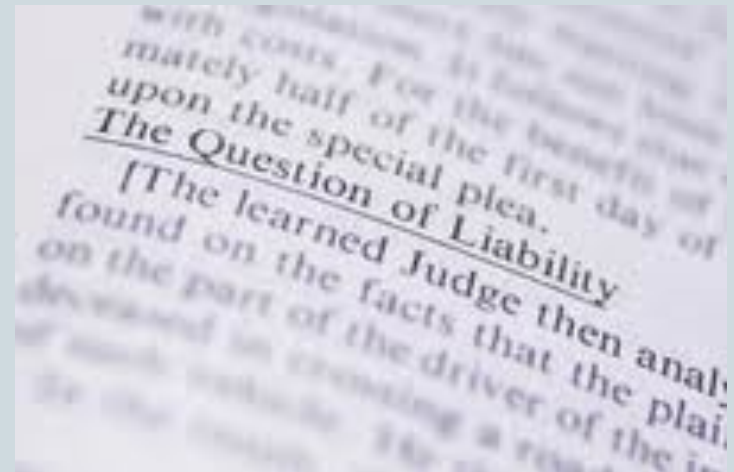


- Unlike most other employment law claims, FMLA interference claims do not generally require proof of bad or unlawful intent.
- *Wisbey v. City of Lincoln, Neb.*, 612 F.3d 667, 675 (8th Cir. 2010) (noting that an interference claim under the FMLA merely requires proof that the employer denied the employee his or her entitlements under the FMLA).

Why Is The FMLA So Dangerous?



- Courts have held that the FMLA provides for individual liability for managers.
- *Mitchell v. Chapman*, 343 F.3d 811, 827 (6th Cir. 2003) (Corporate officers acting in the interest of an employer “are individually liable for any violations of the ... FMLA.”).
- *Narodetsky v. Cardone Indus.*, No. CIV.A. 09-4734, 2010 WL 678288, at *3 (E.D. Pa. Feb.24, 2010) (“a person who has the authority to hire and fire may be considered an employer” under the FMLA).



Why Is The FMLA So Dangerous?



- Unlike most employment law claims, under the FMLA, simple paperwork oversights can lead to large liability.
- *Downey v. Strain*, 510 F.3d 534 (5th Cir. 2007) (employer's failure to provide individualized notice to employee that it was counting her time off as FMLA leave led to expensive FMLA suit that the employer lost).

Why Is The FMLA So Dangerous?



- Loose language by a well meaning manager or HR can lead to FMLA liability even when the FMLA never really applied in the first place.
- *Minard v. ITC Deltacom Comm.*, 447 F.3d 352 (5th Cir. 2006) (applying “equitable estoppel” theory in FMLA context).



Why Is The FMLA So Dangerous?



- An award of liquidated damages is “the norm under the FMLA.” *Nero v. Industrial Molding Corp.*, 167 F.3d 921, 929 (5th Cir. 1999).
- Plus attorneys’ fees, which can be significant.
- There are no administrative prerequisites to suit.

Why Is The FMLA So Dangerous?



- And, the Plaintiffs bar is at the ready:
- Shortly before the 2010 Thanksgiving holiday, the Obama administration's "Middle Class Task Force" announced a new program in which the DOL will partner with the ABA to refer complaints under the FMLA and FLSA to private plaintiffs' attorneys.



Top 10 FMLA Compliance Tips



- Our Methodology:
- We focused on the most common and expensive FMLA errors employers make that land them in court, rather than issues that almost never result in litigation.
- Then, we focused on how to avoid these types of budget-busting errors, and came up with this list of 10 FMLA compliance tips.

Tip #1: When In Doubt, Send Out The Notice of Eligibility And Rights



- Error: Overlooking the fact that the employee gave sufficient notice to trigger FMLA rights, and firing them for being absent. *Saenz v. Harlingen Med. Ctr.*, 613 F. 3d 576 (5th Cir. 2010).
- How to avoid this error: Send employee notice of eligibility and rights (Appendix D to regs) and related paperwork such as certification of a serious health condition (Appendix B).



Tip #1: When In Doubt, Send Out The Notice of Eligibility And Rights



- Doing this is a protective shield to guard against FMLA claims, because:
- If employee returns paperwork and certification within 15 days, then it's probably covered leave under the FMLA.
- If employee does not return paperwork and certification within 15 days, then it's probably not covered leave under the FMLA.



Tip #2: Provide Written Notice Of Approval Or Disapproval To The Employee



- Error: Failure to provide notice to the employee that their time off is being counted as FMLA leave. See *Downey v. Strain*, 510 F.3d 534 (5th Cir. 2007), *supra*.
- How to avoid this error: Send employee Designation Notice (Appendix E to regs).



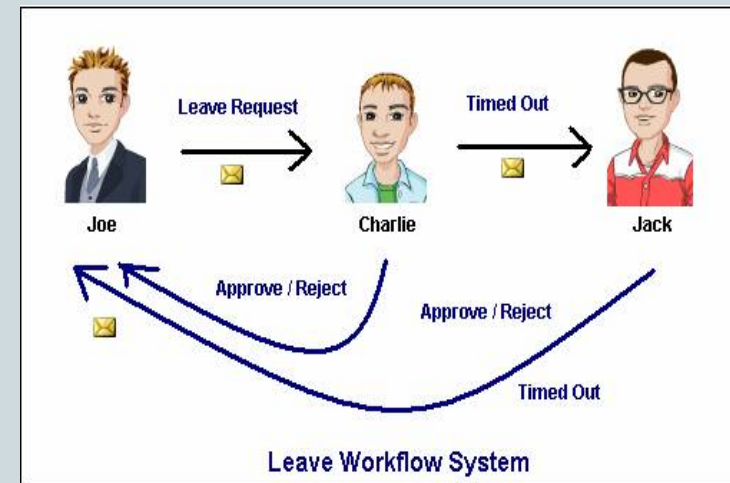
Tip #2: Provide Notice Of Approval or Disapproval To The Employee



- Related point:
- “FMLA by estoppel” has been recognized by courts. *Minard*, 447 F.3d at 359; *Murphy v. FedEx Nat. LTL, Inc.*, 618 F.3d 893 (8th Cir. 2010).
- Providing written notice that FMLA is not approved is also important, as this may defeat any claim of “FMLA by estoppel.” *Cf. Garcia v. Kinder Morgan, Inc.*, 2009 WL 1606938 (S.D. Tex. June 8, 2009).

Tip #3: Have A Specific Policy To Request Leave

- Error: Employee gives “informal” notice to supervisor, which is never recognized as a true request for FMLA leave until a lawsuit is filed.
- *Belerim v. Nelco, Inc.*, 2007 U.S. Dist. LEXIS 40447 (W.D. Ky. June 4, 2007) (finding that an employee telling his supervisor that he needs to go to Kosovo because “my mom, she is sick in the hospital” may have been sufficient to trigger FMLA protections).



Tip #3: Have A Specific Policy To Request Leave



- Generalized notice that make no mention of FMLA itself may nonetheless trigger FMLA, because the notice requirements “are not onerous.” *Burnett v. LFW, Inc.*, 472 F.3d 471, 477 (7th Cir. 2006) (stating that notice is sufficient when employee provides employer with probable basis that FMLA leave applies). It is not necessary for the employee to even mention FMLA.
- “The critical question is whether the information imparted to the employer is sufficient to reasonably apprise it of the employee’s request to take time off for a serious health condition.” *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 764 (5th Cir. 1995).
 - Sometimes, employees satisfy this lenient standard and the employer doesn’t even realize it.

Tip #3: Have A Specific Policy To Request FMLA Leave



- How to avoid this error: Under the 2009 revisions to the regs, an employer may now have a specific policy (e.g., a phone # to call, or person to contact in writing, form to fill out, etc.).
- Pre-2009, having such heightened requirements was some protection, but not a lot. *Saenz*, 613 F.3d at 582 (plaintiff's failure to comply with employer's internally-created heightened FMLA procedures did not bar her claim).
- Post-2009, this may be a significant protection for employers. *Saenz*, 613 F.3d at 582 n. 9 (noting that if 2009 revisions to regs had applied, the employer "might very well be entitled to summary judgment.").

Tip #4: Terminate Employees On FMLA Leave With Extreme Caution



- Error: Terminating employee on FMLA leave based on claim they made decision before the leave, but with nothing but “words in the air” to prove that. *Nero v. Industrial Molding Corp.*, 167 F.3d 921 (5th Cir. 1999) (finding employer liable in such a case).
- Suspicious jurors often don’t buy such a defense, as demonstrated by the *Nero* case.

**Sometimes
mere words
are not enough...**

Tip #4: Terminate Employees On FMLA With Extreme Caution



100%

- How to avoid this error: Only terminate employee after they go on FMLA leave for pre-FMLA conduct if you can 100% prove with undisputable evidence that the decision was made – or at least in substantial motion – before the employee gave notice of the leave.
- *Schaaf v. Smithkline Beecham Corp.* 602 F.3d 1236 (11th Cir. 2010) (demotion was in motion before FMLA, so employer won).

Tip #4: Terminate Employees On FMLA With Extreme Caution



- Related issue: What to do when you first learn of employee misconduct when employee is on FMLA leave
- Investigate - timing depends on situation.
- Give employee fair opportunity to respond (juries expect “due process”).
- Document the concern, investigation, and result.
- Apply normal disciplinary rules.
- Obtain legal review before making final decision.
- Case where employer did it right: *Daugherty v. Wabash Ctr., Inc.*, 577 F.3d 747 (7th Cir. 2009).



Tip #4: Terminate Employees On FMLA With Extreme Caution



- Related issue: Layoffs. Same rule – perfectly legal to lay off employee on FMLA, but be prepared to prove that FMLA leave played no role in selection.
- A court recently found that an employee's appraisal score, given during a RIF review, that was a lot lower than an annual performance review score given only 20 days earlier, might support a jury's finding that the true reason for the employee's layoff was her requested FMLA leave. *Cutcher v. Kmart Corp.*, 364 Fed.Appx. 183 (6th Cir. 2010).

Tip #5: Train Managers On FMLA Basics



- Error: Untrained managers fail to comply with the FMLA in any number of ways. *See, e.g., Smith v. BellSouth Telecomm'ns, Inc.*, 273 F.3d 1303, 1314 (11th Cir. 2001) (ruling for plaintiff in failure to rehire case because, according to notes in plaintiff's personnel file, her supervisor said she was "not eligible for rehire" because she "took a lot of FMLA").
- How to avoid this error: Give the managers some **basic** training on FMLA, including to keep HR involved. Remind them of possible individual liability.



Tip #5: Train Managers On FMLA Compliance

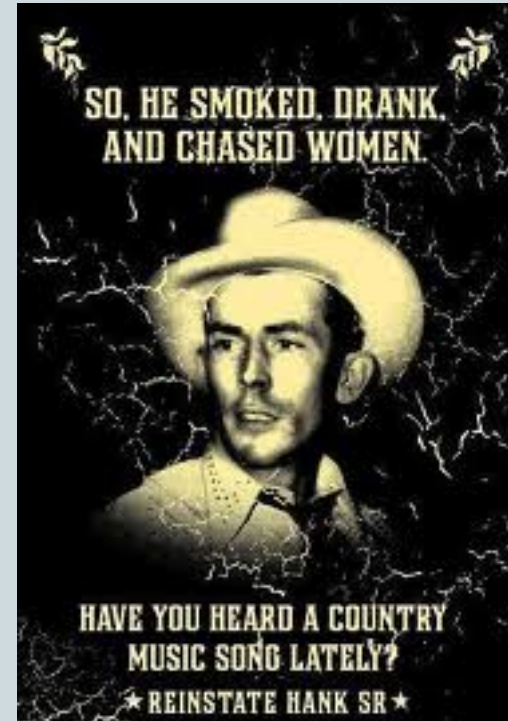


- Related point: Depending on the structure of your organization, it is a good idea to designate one or more HR managers as FMLA “czar(s).”
- This gives managers “a” person to go to, and (hopefully) ensures that someone takes charge of what sometimes becomes very complicated situations that play out over days, weeks, months, or even years.

Tip No. 6: After An FMLA Leave, Return The Employee To Their Same Job



- Error: Failure to reinstate employee to same or equivalent position, *including same shift*. See *Hunt v. Rapides Healthcare Sys.*, 277 F.3d 757, 763-68 (5th Cir. 2001).
- This sometimes happens because managers “fall in love” with whomever is filling in while the employee is on FMLA leave.
- How to avoid this error: Return employee to same job they had before. Manage their performance from there. Only make exceptions to this rule after very close scrutiny by HR and legal.



Tip No. 6: After An FMLA Leave, Return The Employee To Their Same Job



- Note: The definition of “equivalent position” is so demanding, that relying on it will invite risky litigation, as it did in the *Hunt* case.
- Specifically, an “equivalent position” is generally defined as one that is “virtually identical . . . in terms of pay, benefits and working conditions, including privileges, prerequisites, and status.” 29 C.F.R. § 825.215(a). It includes the same schedule/shift, duties, and responsibilities.

Tip #7: Invoke Your Rights In Intermittent Leave Situations



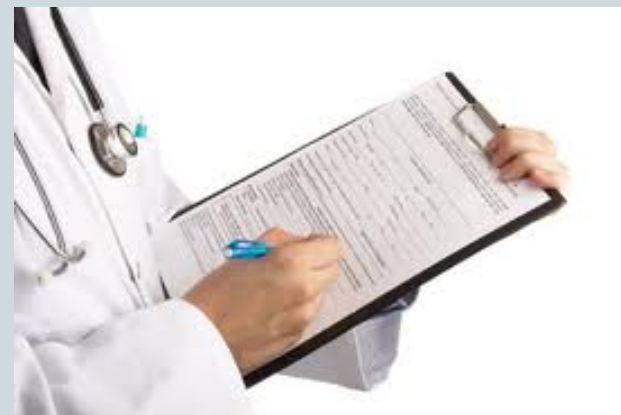
- Error: Not proactively managing “intermittent leave” situations, which then spin out of control.
- How to avoid:
 - (1) May transfer or reassign employee to alternative position with “equivalent pay and benefits” if need for time off is foreseeable. 29 C.F.R. § 825.204(a).
 - (2) May “dock” exempt employee’s pay without violating FLSA, if FMLA leave is unpaid. 29 C.F.R. § 825.206.
 - (3) May require employee to make a “reasonable effort” to schedule planned medical treatment so as not to unduly disrupt operations. 29 C.F.R. § 825.203.

Tip #7: Invoke Your Rights In Intermittent Leave Situations



May require recertification:

- Upon expiration of duration of condition according to original certification.
- If duration is uncertain, every 30 days in connection with an absence by the employee.
- Plus, when: (i) extension requested; (ii) changed circumstances; or (iii) new information casts doubt on need for leave. 29 C.F.R. § 825.308.



Tip #7: Invoke Your Rights In Intermittent Leave Situations



- Under 2009 regs, employer may also directly contact employee's health care provider for purposes of authenticating information provided on a medical certification (or recertification) form without first obtaining an employee's permission. 29 C.F.R. § 825.307.
- Note: HR can contact doctor, but direct supervisor cannot.

Tip #7: Invoke Your Rights In Intermittent Leave Situations



- Employers may now require Fitness for Duty certification from employee on Intermittent FMLA leave to return from an absence up to once every 30 days if there are reasonable safety concerns regarding the employee's ability to perform his or her job duties. 29 C.F.R. § 825.312(f).



Tip #8: Select Your 12 Month FMLA Period



- Error: Not selecting the 12 month period during which an employee may take 12 weeks of FMLA leave – if the employer has failed to select a calculating method, the regulations state that the method “that provides the most beneficial outcome for the employee will be used.” 29 C.F.R. § 825.200(e).
- How to avoid this error: The FMLA’s “leave year” regulation, 29 C.F.R. § 825.200, allows employers, at their option, to calculate the twelve-month period in which an employee is limited to twelve weeks of protected leave by one of four methods. The employer must apply its chosen calculating method consistently to all employees, and give 60 days notice of any change. 29 C.F.R. § 825.200(d)(1).



Tip #9: Don't Terminate < 1 Year Employees To Try Avoid FMLA Leave



- Error: Employee with <1 year tenure gives notice of need for FMLA leave after their 1 year anniversary, so employer terminates them immediately, thinking that will preempt any FMLA claim. **WRONG.** *Reynolds v. Inter-Indus. Conference on Auto Collision Repair*, 594 F. Supp. 2d 925 (N.D. Ill. 2009) (finding that plaintiff had a claim in this precise situation).
- Avoiding this error: Training, good HR, and knowing when to ask a L&E lawyer for help.

Tip #10: Do An FMLA Review Before Each Termination Decision



- Error: Accidentally count even just one FMLA protected absence as a basis for termination, thus resulting in liability. *See Sahadi v. Per-Se Technologies, Inc.*, 280 F. Supp. 2d 689, 700 (E.D. Mich. 2003) (genuine issues fact as to whether employee was terminated as a result of employer counting her protected absences against her under attendance policy, when it terminated her, precluded summary judgment for employer on employee's claim for retaliation under the FMLA).
- How to avoid this error: Add “FMLA scrub” to your “Termination Checklist,” and have an FMLA expert do one before any proposed termination. Find a “Termination Checklist” at: <http://www.osattorneys.com/presentations.html>.

Finally, Don't Forget About “No Retaliation”



- FMLA also has anti-retaliation clause, similar to Title VII, ADEA, and other anti-discrimination laws.
- The U.S. Supreme Court recently broadened the scope of what such anti-retaliation clauses prohibit – including retaliation against “friends and family.” *See Thompson v. North American Stainless, LP.*, -- S. Ct. – (Jan. 24, 2011). This changed the law in the Fifth Circuit.

Questions





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