




FMLA

The Who, the What and Why Should I Even Care!

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Let's talk about COMPLIANCE!



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What is FMLA?

Why you should care?

What is REALLY at Stake?



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A Look at the #'s



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In 2014 alone:

- 2,311 cases reviewed for violations of FMLA
 - While only 693 of those cases were found to be in violation, all 2,311 had to defend themselves
 - \$2,120,300 dollars in back wages paid for FMLA violations
- Recent judgments range from the mid six to low seven figures.
- Claims can include double liquidated damages

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FMLA: What is it?



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- What does the acronym stand for?
 - Family Medical Leave Act
- When was FMLA enacted?
 - 1993
- What does it provide?
 - Help employees better balance the demands of the workplace with the demands of their family and health.
 - It has since been expanded to include Military caregiver leave, and leave for Military families during times of deployment to a foreign country.

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FMLA: Who Regulates?



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- Who regulates it?
 - The DOL (Department of Labor)
- What agency in the DOL enforces it?
 - The WHD (Wage & Hour Division)
- What two types of employers are subject?
 - Private Sector
 - Public Sector

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CM1


FMLA: Who does it apply to?



- What size **private sector** employers are subject to FMLA?
 - Those with 50 or more employees
- What size **public sector** employers are subject to FMLA?
 - All sizes

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Who is an Employer?



- “...any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer...”
- ...any “public agency”
- So what does that mean?
 - Supervisors can be personally liable for violations of FMLA

A recent Chicago verdict set a record \$11.65 Million dollar verdict, with \$400,000.00 levied against two supervisors individually.

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Slide 7

CM1 Private Sector- The 50 or more employees within a 75 mile radius DOES NOT apply at the employer level. It is 50 or more employees period!!!

Carolyn McNairy, 3/25/2016

FMLA: Principal Requirements



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- **Any employer subject to FMLA is:**
 - Required to have a written policy
 - Designated 12-month period for counting leave
 - Required notification provisions
 - Required to have posted signage in a common area
 - Notifying EE's of FMLA provisions; AND
 - How to file a complaint with the DOL
 - Cannot interfere, deny, or retaliate against an employee for utilizing FMLA right
 - Required to provide job-protected leave to eligible employees
 - Required to keep benefits in place

FMLA: Who is Liable?



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- Do Employees have to know what FMLA means and use the term FMLA when requesting medical leave?
 - **NO**
- Is anyone besides Employer liable for FMLA violations?
 - **Yes, managers and supervisors can be held personally liable for violations**

FMLA: Notice Requirements



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- How many days does the Employer have to respond to an employees request for leave?
 - Five (5)
- **Four (4) Required Notices** employers must give to employees*:
 - Notice of Rights and Responsibilities
 - Notice of Eligibility
 - Request for Medical Certification
 - Outline Return to Work Requirements

*Employers subject to FMLA

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FMLA: Records Retention




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- How long must these records be kept?
 - Basic payroll and identifying employee data, including name, address, occupation, rate of pay, terms of compensation, daily hours worked, deductions from wages and total compensation paid
 - Dates FMLA leave is taken by FMLA eligible employees
 - Hours of the leaves if not full days
 - Copies of all notices
 - Any documents describing employee benefits or employer policies regarding the taking of paid or unpaid leave
- >> **Three years**

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FMLA: Employee Eligibility



- Employee must have ___ months of service prior to leave
 - 12
- Employee also needs _____ hours worked in the 12 months preceding their need for Leave
 - 1,250
- How long does an employee have for FMLA?
 - 12 weeks
 - Job-Protected Leave
- Can former employees bring lawsuit?
 - Yes

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Employee Eligibility (con't)



- The **12 Months** of service does NOT have to be consecutive!
- The **1250 Hours** does have to be in the past 12 Months
 - Employee must work at a location where there are 50 employees of the employer within a 75 mile radius
 - Former employees are also covered and are able to bring lawsuits
 - 2 Years: General Violation
 - 3 Years: Willful Violation
 - 7 Years: Former EE's not re-hired due to past FMLA Record of absences

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FMLA: Qualifying Events



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- **Six (6) FMLA Qualifying Events:**
 - Serious health condition for employee
 - Birth of a child
 - Placement of a child for Adoption or foster care
 - Serious health condition of a family member
 - Qualified Exigency
 - Caring for Military Personnel*

*26 week events

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Definition of 'Serious Health Condition'



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- Require an overnight stay in a hospital or other medical care facility; or
- Incapacitate employee or family member for more than 3 consecutive days and have ongoing medical treatment; or
- Chronic conditions causing occasional periods of incapacitation for employee or family member and require treatment by a health care provider at least twice a year; or
- Pregnancy

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Definition of 'Serious Health Condition' for a child over age 18



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- January 14, 2013: Department of Labor issued additional guidance clarifying how a person over age 18* qualifies under FMLA.
- Must be:
 - Disabled according to ADAA
 - Have a serious health condition
 - Be incapable of self-care
 - Need care for that condition

*Age the child became disabled doesn't matter for FMLA

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FMLA: Types of Leave



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- Two Types of Leave Permitted:
 - **Continuous:** Taken in one block of time
 - **Intermittent:** Taken in separate blocks of time as needed
 - Can take in smallest increment of time used by payroll
 - May have incapacitations lasting up to a month
 - May be a reduction of hours, such as no OT or reduced schedule

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Special Rules for School Instructional Employees



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- Leave that ends with the school year and begins the next semester is **consecutive** rather than **intermittent**.
 - Summer vacation is not counted against the employee's FMLA leave entitlement.
 - Instructional Employees must have benefits continued during the summer vacation, as if they had been at work.
- Special Rules apply to a leave involving >20% of the working days over which the leave extends.
- Employees taking leave which <20% of the working days, not be subject to transfer to an alternative position.

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FMLA: Employer Rights



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- Does the Employer have any rights?
 - Yes
- Employer Rights:
 - Expect 30-day notice for planned absences and notice within 2 days of an unplanned event
 - May require certification of condition from employee as frequently as every 30 days
 - May insist on a second opinion
 - May choose to require that paid time be used before unpaid time off is granted

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Med. Certification Requirements



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- Employee has **15 days** to provide medical certification
- Employer has **5 days** from the date medical is received to send Designation notice to the employee
- Employers must have record of what days and times are FMLA protected and retain these records for 3 years

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FMLA: Continued Benefits



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- What employee benefits must remain in force during an employee's FMLA Leave?
 - Life insurance
 - Health insurance
 - Disability
 - Sick leave
 - Pensions

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FMLA: Continued Benefits



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- Benefits must be maintained under the same terms prior to leave:
 - Employer may require EE to continue paying their portion of benefit cost during leave, even if it is unpaid leave.
 - There is a 30 day Grace Period UNLESS the employer's P&P's offer a longer Grace Period
- EE can be dropped from coverage for failure to pay their portion of premium following the Grace Period

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FMLA Cost Association



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- Productivity Costs
- Legal Costs
- Tracking & Administration Costs
- Mistakes-by Owners, Managers & Supervisors that could land you in court



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FMLA: Top 5 Costly Mistakes



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#1) Adverse action against employees returning from leave

- Failure to return employee to the same or equivalent job
 - Same level of pay
 - Same level of benefits
 - Same level of authority
 - Same or similar shift/hours

FMLA: Top 5 Costly Mistakes



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#2) Saying the wrong thing when employees request leave

- Comments that discourage taking time off
- Comments that discuss the personnel needs of the department in conjunction with leave requests
- Comments that question the validity of the leave request circumstances
- Comments that seem judgmental in nature

FMLA: Top 5 Costly Mistakes



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#3) Making assumptions about what situations qualify for leave

- FMLA defines conditions that are eligible for leave, NOT managers and supervisors
- All questions regarding eligible leave should be handled per P&P and by the designated individuals tasked with administrating FMLA leave
- The employee does NOT dictate what a qualifying sickness is
- Following P&P's and FMLA regulations are the safest actions

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FMLA: Top 5 Costly Mistakes



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#4) Disclosing a worker's private medical information (also a HIPAA violation)

- Protected Health Information MUST be protected, end of story!
- Even disclosure to other senior level executives, not in a "need to know" position, could be a violation
- All employees tasked with handling PHI should be trained
- Good intentions do NOT absolve employers of guilt in a PHI violation

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FMLA: Top 5 Costly Mistakes



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#5) Actions taken against employees for unforeseeable FMLA leave

- Foreseeable vs. Unforeseeable -- KNOW the dividing line
- Is the leave related to medical emergency
- Did the employee have sufficient time and capacity to provide advance notice
- Were P&P's followed?

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Can an off-hand comment cost an employer BIG \$\$\$\$\$?



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- Hefti v. Brunk Industries
 - One comment by a manager to an employee.....and a case that likely would have been dismissed is headed to a jury trial.
 - Important Reminders to Employers:
 - Communications, are they compliant?
 - Be honest in your annual employee evaluations!
 - Documentation, must be complete and accurate
 - Training, Training and more, quality training....it can save you BIG money!

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CASE: Saint-Gobain Containers



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MISSOURI – 2008

- A Missouri worker was hired in June 2006 as a production line supervisor. A year later, she requested FMLA leave for her own serious health condition. Her supervisor was not pleased. The boss was even less pleased when the worker asked for leave again in January 2008 to care for a spouse.
- Fired two days after requesting the subsequent leave in the following year for her spouse's upcoming surgery
- Sued for FMLA Retaliation. The court she proved retaliation and awarded her **more than \$400,000** in damages and it was upheld on appeal multiple times
- Judges and Juries do not like interference or retaliation

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CASE: Motel 6



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Knoxville, TN – October 2013

- Motel 6 agrees to pay nearly \$52,000 in back wages and to comply with the FMLA following US Department of Labor investigation
- An investigation disclosed that employees regularly worked more than 40 hours a week, but were only paid straight-time wages for all hours worked. The FLSA requires that workers be paid time and one-half their regular rates of pay for all overtime hours worked.
- The employer failed to post required FMLA posters in an area visible to workers and did not provide information about the FMLA in the company's handbook, in violation of FMLA requirements.

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CASE: Houston ENT



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Houston, TX – December 11, 2013

- Houston Ear, Nose & Throat Clinic required to pay more than \$17,000 in back wages following US Labor Department investigation.
- Violated FMLA when an FMLA-eligible employee returned to work and was not placed in the same full-time position held prior to leave but instead placed in a part-time position with fewer working hours and without the same benefits held before taking FMLA leave.
- This violation resulted in \$17,390 in back wages, medical expenses and unpaid monetary benefits due to the employee.

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CASE: ASRC Energy



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ANCHORAGE, AK – February 2013

- ASRC Energy Services Alaska Inc. agreed to a consent judgment in federal court that will to pay \$43,000 in back wages for an employee who was allegedly terminated in violation of FMLA.
- Filed in the U.S. District Court of the District of Alaska after an investigation by the Seattle District Office of the department's Wage and Hour Division. The investigation found that the employee was terminated while he was on leave for a serious health condition, in violation of the FMLA.
- The division found that the employer incorrectly counted against the employee's FMLA leave entitlement weeks and terminated him for exceeding the approved amount of leave. If an employee is not scheduled to report for work it may not count against the leave entitlement. Investigators determined that the employer failed to comply with this requirement.

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CASE: Take Charge America, Inc.



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PHOENIX, AZ – 2014

- Take Charge America Inc., agreed to pay \$29,000 to one employee who was wrongfully terminated under FMLA.
- A review of most-recent performance evaluation showed explicit references to FMLA absences as a reason for lack of production.

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CASE: U.S. Cotton



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Cleveland, OH– 2015

- DOL Sues U.S. Cotton for terminating a pregnant machine operator
- Employer had previously approved a medical condition note for intermittent leave
- Terminated for “no call, no show” when a family member called in on her behalf
- DOL Asks for reinstatement, back wages, benefits, other compensation and liquidated damages in an equal amount

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CASE: FedEx



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Fairfield, CA– 2015

- Investigation by the DOL Wage and Hour Division discovers FedEx Ground violated the FMLA rights of a worker
- The violation was related to a mis-communication by a third-party insurance carrier handling FMLA leave administration
- FedEx acknowledges the error, reinstates the works and agrees to a \$35,000.00 settlement covering wages and benefits.

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FMLA Trends



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- Increased investigations and suits
- EEOC initiated over 42% of the wage and hour division investigations in 2015
- 79% of the investigations found a violation
- Average of \$8,900 in paid back wages

SOURCE: 2016 RSA Group

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Administration Options



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- **Can an employer administer their own policies?**
 - Yes, but need proper training and liability increases
- **Who can help?**
 - Third Party Administrators
 - Certain Disability Carriers
 - Certain PEO's (professional employer organizations)
- **Why outsource?**
 - Limit the risk
 - Reduce workload
 - Distance company from personal aspect of FMLA administration

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Ask an FMLA Administrator



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- Do you provide a policy review?
- Do you provide management and supervisory training on event identification and reporting?
- Do you provide all FMLA notices?
- Do you provide storage and processing of FMLA medical certification?
- Do you offer a dedicated representative?
- ***What type of guarantee do you offer?***

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Questions?



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