Employer Tips For Managing FMLA Compliance

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Marking the 20th anniversary of the Family and Medical Leave Act, about a year ago the U.S. Department of Labor trumpeted a survey concluding that the law "continues to make a positive impact on the lives of workers without imposing an undue burden on employers." According to the DOL, 85 percent of employers reported that FMLA compliance was easy or had no noticeable effect on their administrative processes — fewer than two percent of employees taking intermittent leave were off work for a day or less and, perhaps most striking, less than three percent of covered worksites reported they suspected FMLA abuse.

A year later, those statistics still seem to fly in the face of reality, particularly from the perspective of the very people who are responsible for ensuring that employers are in compliance. For example, before military leave provisions were even added or the DOL issued several hundred more pages of "clarifying" regulations addressing the existing law, human resources professionals reported numerous headaches related to FMLA compliance.

In a survey commissioned by the Society for Human Resource Management ("SHRM"), the world's largest organization for human resources professionals, 63 percent of respondents described FMLA compliance as somewhat or very difficult overall. They also reported concerns over difficulty tracking intermittent leave (73 percent); chronic abuse of intermittent leave (66 percent); vague documentation in medical certifications received from health care professionals (57 percent); and uncertainty about the legitimacy of leave requests (57 percent). In fact, 39 percent said that due to DOL interpretations, they had granted what they considered illegitimate requests for FMLA leave.

Anecdotal evidence, informal surveys and practical experience show that the management of FMLA leave — particularly intermittent leave — still present very significant challenges. It also shows that about half of covered employers actually provide more benefits and protections than the FMLA requires.

Among the thorny scenarios that frequently arise, it is not unusual for an employee on intermittent leave to become predictably absent on Mondays or Fridays, hence the touch-in-cheek "Friday-Monday Leave Act" moniker sometimes used to describe the law.

Likewise, it is not unusual for a poor job performer to suddenly request FMLA leave, based upon a vague diagnosis of a stress-induced disorder. And, of course, there are garden-variety malingerers

who seize every opportunity to exploit covered leave by prolonging it.

The FMLA aspires to the noble goal of permitting eligible employees of covered employers to take unpaid, job-protected leave for specified family or medical reasons, with continuation of health insurance under the same terms and as if the employee had not taken leave.

Eligible employees may generally take up to 12 workweeks of leave during a 12-month period for a qualifying reason. Additionally, the spouse, child, parent or next of kin of a covered servicemember may take up to 26 weeks of leave during a 12-month period to care for the servicemember's serious injury or illness. So for human resources professionals and supervisors, the challenge is how to comply with the law's intent and specific provisions without allowing significant numbers of employees to game the system. Experience shows that the following tips can go along way toward helping employers meet these goals.

Tip No. 1: **Ensure That Your Polices and Practices are Up-to-Date and Compliant**

For good reason, current regulations make employers responsible for detailed, ongoing communication with employees requesting or taking FMLA leave. This helps confirm employee eligibility and the employee's understanding of her rights and responsibilities while taking leave.

Among other things, the regulations require designation of FMLA and explanations of what information the employee is required to provide throughout the process. Among the most important document is the certification form, to be completed by the health professional caring for the employee or family member with a serious health condition.

The certification form literally provides a roadmap for the employee and employer, including the expected duration of the leave and, especially important for intermittent leave, the circumstances under which time off will be covered. Despite the importance of this form, and employers' rights to ensure that it is complete and clear, it is surprising how many times leaves are approved based on late, incomplete or ambiguous certification forms. So it is critical to require complete forms to be submitted — failure to do so can legally result in delay or denial of FMLA leave.

It is important to ensure that the health care practitioner's documentation is clear and complete. For example, a leave request for follow-up physical therapy appointments does not give an employee carte blanche to miss work. The employee must still follow established call-in procedures and, to be covered by the FMLA, the employee's absence must be for the reason certified.

It is of course critical to ensure that policies, practices and communications with the employee are clear. Equally important, supervisors must treat all policy violations consistently, whether or not they are covered by the FMLA. Beyond the specific requirements of the FMLA itself, employees taking FMLA leave have no more, or fewer, rights than employees taking non-FMLA leave.

If an employee appears to be abusing an approved leave, employers can and should seek clarification of the certification. This could occur, for example, if a medical certification states that an employee may need intermittent leave two-to-three times a month, but the actual frequency of leave turns out to be substantially greater.

In that case, the employer may ask the health care provider to clarify the certification or whether the employee's circumstances have changed. Used properly, clarification can be an extremely effective tool in curbing FMLA abuse. Under appropriate circumstances, when abuse is suspected, employers can consider using even more creative tools, such as surveillance of a suspected abuser. Whatever techniques the employer chooses, the key is often consistent, even-handled application of them.

Tip No. 2: **Train Supervisors to Spot and Respond to Situations Potentially Involving the FMLA**

Although it is clear that employees need not explicitly mention the FMLA or use particular magic words to invoke FMLA protections, supervisors still frequently fail to notify their human resources department of potential covered situations. This creates tremendous headaches because the threshold for triggering an employer's legal duty to make further inquiry is very low. In fact, all an employee must do is provide enough information to suggest that FMLA leave may be needed. Supervisors should develop a standard practice of timely reporting such situations to their human resources representative. And, of course, the human resource or a designated employee health representative — not the supervisor — should make further inquiry when warranted.

Supervisors should not question employees about their medical condition or contact the employee's medical provider. They certainly should not discipline or terminate an employee for any absence that may be covered by the FMLA.

To avoid misunderstandings or worse, supervisors should also minimize email communications regarding employee's possible leave. If email communication is necessary, it should be objective and succinct, completely free of conjecture and opinion. Too often, rapidly-composed or speculative communications can be present in a manner that supports a claim of FMLA interference or retaliation (e.g., "John is absent from work again. How long is this going to go on?")

So the focus of supervisor training should actually be on spotting and timely reporting to human resources when a potential FMLA situation arises. Such training can save employers considerable time and money.

Tip No. 3: **Destigmatize the FMLA**

More than one commentator has astutely observed that employees too often shy away from having time off classified under the FMLA, apparently fearing that the designation somehow reflects negatively on them. Such misperceptions can lead to misunderstandings or even hard feelings. It is

negatively on them. Such misperceptions can lead to misunderstandings or even hard feelings. It is therefore important to use new employee orientation, follow-up training, policies and other communications to make it clear that certification and tracking of the FMLA is simply a routine part of doing business. Employees must understand that these activities are merely part of their employer's overall compliance with the law. However, postings, letters and other communications should not only reflect the company's commitment to, but also its pride in complying with these laws.

Along this line, it should go without saying that employers must never tolerate even the appearance of retaliation or a suggestion that it frowns upon any employee who exercises these rights. As the Americans with Disabilities Act and/or state workers' compensation issues often arise in connection with FMLA leave, regular refresher training on all three of these topics will help managers effectively navigate these potentially tricky scenarios. And it will help engrain the concept that doing so is just a regular exercise of management's duties.

To support the employer's compliance efforts, it can be very helpful to publish occasional reminders about employee rights in these areas and off course to ensure that employees know where and how to obtain answers to related questions. As more employers are recognizing each year, employee hotlines or similar tools can effectively support compliance in these and other areas. Such tools also promote positive employee relations.

Tip No. 4: **Investigate Before Taking Action**

It is becoming increasingly common for questions to arise about the activities of employees while they are on FMLA leave, with varying and sometimes disastrous results. For example, when an employer legitimately received photos of an employee on FMLA leave apparently enjoying herself in Las Vegas, it made the mistake of terminating her employment before finishing a complete investigation. The company wound up losing a lawsuit when it turned out that the employee was providing care for her terminally-ill mother, who was in fact in Las Vegas on a last wish trip.

Other courts have similarly concluded that it does not matter where an employee is providing care or support for an immediate family member with a serious health condition, only that the employee was indeed providing such care pursuant to a medically-certified reason. These cases are very fact-specific and the results can vary, but they illustrate the importance of a thoughtful, case-by-case investigation before drawing conclusions.

These situations further illustrate the importance of destigmatizing, or perhaps "de-mystifying," the FMLA. Once again, it is helpful for all employees — not just those taking FMLA leave — to understand the fundamentals of the law. And they should be reminded periodically that each employee's medical and/or personal circumstances are private, and therefore not to be addressed in gossip or speculation. In other words, while the employer welcomes good faith questions and reports of possible misconduct, it will carefully investigate before reaching any conclusions — and those conclusions will remain private.

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Conclusion

Notwithstanding the DOL's rosy report regarding the ease of FMLA compliance, the law exists for good reasons and its requirements are the law of the land. Hundreds of pages of regulations aside, compliance does not require companies to allow malingerers or abusers to game the system either. Effectively managing the FMLA, however, requires employers to ensure that their policies are up-to-date, that their practices match those policies and that they periodically remind supervisors and all other employees of their practical application.

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