TEXAS HIGHER EDUCATION
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STRATEGIES TO AVOID
FMLA LIABILITY AND
PREVENT LEAVE ABUSE

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FMLA OVERVIEW

Four Basic Obligations:

1. Provide eligible employees 12 weeks of unpaid leave within designated 12-month period: (1) for employee’s serious health condition; (2) to care for newborn child or newly placed adopted or foster child; or (3) to care for a spouse, child, or parent with a serious health condition;

2. Maintain health coverage;

3. Upon returning from leave, employees (other than certain “key employees”) must be reinstated to the same or an equivalent position;

4. Employers must not interfere with or deny FMLA rights and must not discharge or otherwise discriminate against employees for opposing practices made unlawful by the FMLA (i.e. retaliation).
EMPLOYER COVERAGE

1. 50 employees within 75-mile radius for at least 20 weeks in current or previous calendar year.

2. Employees includes:
   a. In U.S., or Territory;
   b. Part-Time employees;
   c. Employees on leave of absence (layoff only if reasonable expectation of returning to work);
   d. Jointly employed employees (only primary employer has to give notice);
   e. Seasonal employees, interns.

3. Integrated Employers – Separate Legal Entities —
   a. Common management;
   b. Interrelation between operations;
   c. common ownership;
   d. centralized control of labor relations.
**Employee Coverage**

1. Employed by covered employer for 12 months (total) [Service prior to 7 year break in service need not be counted unless due to military service or CBA]
   - Any part of week worked counts a whole week

2. Employed by covered employer for at least 1,250 hours of service during the 12-month period immediately preceding the leave (not the request)
   - Burden on employer

3. Employed at a worksite with 50 employees within 75 miles
   - Separate but Interrelated facilities count as one worksite
   - No fixed worksite – Base from where work is assigned

4. Employer must notify employee prior to commencement of leave if not eligible or waived

5. If employee is not eligible and employer fails to notify employee within 2 [now 5] days of request, the employee is eligible
QUALIFYING REASONS FOR FMLA LEAVE

• Employee’s own serious health condition;

• Need for the employee to care for a close family member with serious health condition;

• Birth, adoption, or foster care placement of a child with the employee;

• Active Duty leave;

• Caregiver Leave.
WHICH FAMILY MEMBERS QUALIFY FOR ASSISTANCE?

• Leave to care for family member with serious health condition: parent, spouse, child
  • Included: Child over 18 incapable of self care
  • Excluded: Grandparents, in-laws
  • Excluded: Family member’s needs not medical in nature
HUSBAND AND WIFE — SAME EMPLOYER

- Birth or adoption of child — 12 weeks total
- To care for employee’s parent — 12 weeks total
- To care for their own serious health condition — 12 weeks each
- To care for employee’s child — 12 weeks each
SERIOUS HEALTH CONDITION -- HOW SERIOUS IS “SERIOUS”?

- Must generally involve period of incapacity, i.e. inability to work or perform regular daily functions

- Does not have to arise from a single medical condition

- Generally involves multiple visits to health care provider
What Qualifies as a Serious Health Condition?

An employee has a “serious health condition” warranting FMLA protection if the employee has:

1. A health condition lasting more than three consecutive days which involves: (a) treatment two or more times [first visit within 7 days; twice within 30 days of absence] by a health care provider or (b) one treatment by a health care provider with a continuing regimen of treatment;

2. A chronic serious health condition continuing over an extended period of time, which requires periodic [at least 2 times/year] visits to a health care provider;

3. A permanent or long-term condition for which treatment may not be effective (e.g., Alzheimer's, a severe stroke, terminal cancer); or

4. Any absences to receive multiple treatments for restorative surgery or for a condition which would likely result in a period of incapacity of more than three days if not treated (e.g., chemotherapy or radiation treatments for cancer).
SERIOUS HEALTH CONDITION — WHAT IS IT?

1. Employee presents condition you are not sure qualifies as serious health condition.
2. Do not play doctor.
4. Absence due to substance abuse is not covered; however, absence to receive treatment for substance abuse is covered if it meets criteria.
5. Plastic surgery not covered unless in-patient hospital care is required.
6. Generally, colds, flu, ear aches, stomach aches, headaches, and routine dental issues are not covered unless there are complications.
7. Mental illness may be covered if it meets criteria.
WHO ARE HEALTH CARE PROVIDERS?

- Medical Doctor
- Doctor of Osteopathic Medicine
- Podiatrist
- Psychologist
- Optometrist
- Chiropractor
- Nurse Practitioner

- Clinical Social Worker
- Christian Science Practitioner
- Any of the above in a foreign country
- People who stayed in a Holiday Inn Express Last Night
Vague Requests For FMLA Leave

Courts have refused to require clairvoyance on the part of employers in interpreting request for medical leave.

Employee must provide enough information to put the employer on notice:

- Employee cannot merely call in sick
- Employee need not say “FMLA”
WHAT IS ENOUGH NOTICE?


WHAT IS ENOUGH NOTICE? (Cont’d.)

• Seaman v. C.S.P.H. (N.D. Tex.) (needed time off to consult a doctor and see if he had bipolar disorder). Enough? No.

• Scatterfield v. Wal-mart Stores (5th Cir.) (note from mother that employee was “sick” and having a lot of pain in her side). Enough? No.
FORM WH 380

1. If any doubt, send Form WH 380 to employee’s health care provider.

2. If no doubt, send Form WH 380 to employee’s health care provider.
DESIGNATING LEAVE AS FMLA

• Employer’s Responsibility
• Arises Upon Notice of Leave as Qualifying
• Consequences of Failure to Designate
• *Ragsdale v. Wolverine World Wide* (S.Ct.)

- May still count against 12 weeks
- Case-by-case determination
- Key = whether plaintiff prejudiced by lack of notice
WHAT IF EMPLOYEE DOES NOT WANT LEAVE TO COUNT TOWARD FMLA ENTITLEMENT?

1. It is the employer’s decision.

2. Employee requests sick leave, but never mentions FMLA. Employer may designate as FMLA if information received reasonably supports such position.

3. Employer must notify employee (within 2 [now 5] business days) that the leave will be counted against his/her FMLA entitlement (retroactive to 1st day of leave).

4. Failure to notify employee of FMLA leave status delays commencement of 12-week period, but employee has FMLA protection prior to the notice being sent.
Timing of Certification

How long does an employee have to provide medical certification?

✓ Not less than 15 days from employer request

What happens if employee provides incomplete medical certificate?

✓ Reasonable opportunity to cure [Now 7 days]
QUESTIONING A MEDICAL CERTIFICATION

• Second and third opinions -- How are they done?
  ➢ Second option requested by employer with reason to doubt validity of initial certification
  ➢ Third opinion may be obtained when 1st and 2nd differ

• Who pays for them?
  ➢ Employer!
CALLING THE EMPLOYEE’S DOCTOR

• [Company (except direct supervisor) can call employee’s doctor directly for clarification]

• Require employee to remedy deficient forms

• [Must satisfy HIPPA]
LIMITS ON SECOND AND THIRD OPTIONS

• Medical care provider cannot be employed on a “regular basis” by the employer.

• Must provide employee with copy of second and third medical opinions.

• Must reimburse for out-of-pocket travel expenses to incur 2nd and 3rd opinions.
Recertification Rights

• Generally limited to once per 30 days, [unless certification indicates the condition will last longer than 30 days, then recertification not permitted until the time period runs out]

• No recertification for short-term illnesses (less than 30 days).

• Exception for change of circumstances.

  ➢ Example: Notice of sudden “improvement”
Benefits During FMLA Leave

1. Group health must be offered at same level.

2. Any changes to group health plan apply to employees on FMLA leave.

3. If employee chooses not to have group health while on FMLA leave, or fails to pay premium (after receiving 15 days’ advance written notice of cancellation), must be reinstated to coverage on same terms as prior to taking leave without any qualifying period, examination, pre-existing exclusions, etc.

4. Holiday Pay — Only if employer pays during other leaves of absence.

5. Vacation Pay Accrual — Only if employer allows during other leaves of absence.
6. If employer pays employee’s portion of group health premium, it may recover such payments from the employee.

7. Employer may recover its share of group health premiums paid from employees who do not return to work from FMLA Leave, unless failure to return is due to a serious health condition of employee or immediate family member.

8. Unconditional pay increases.

9. [Goal oriented bonuses (i.e. hours worked, productivity) can be denied even if failure to achieve is due to FMLA leave as long as denial would occur due to other types of leave].
SUBSTITUTION OF PAID LEAVE

1. Employee may choose to apply applicable, available paid leave during FMLA leave.

2. Employer may require employee to apply applicable, available paid leave during FMLA leave.

3. Employer cannot preclude employee from applying applicable, available paid leave during FMLA leave.

4. Sick leave may not be available to care for another’s serious health condition or adoption.

5. Can you require employee to choose between FMLA leave and paid leave — probably not, but unclear.
FITNESS FOR DUTY REPORTS

1. Employer can require only if required for all similarly-situated employees returning from other leaves of absence [unless employee has already provided one for the same condition within the past 30 days].

2. Same restrictions as ADA physical exams — no broader than business necessity, i.e. no HIV tests unless job-related.

3. Limited to health condition that necessitated the leave.

4. Paid for by employee.

5. No second or third fitness for duty exam may be required.

6. Not available for return from intermittent leave.

7. Delay/refusal to provide may result in delay in return to work/termination as long as consistent with non-FMLA situation.
WHAT IF AN EMPLOYEE CANNOT RETURN TO WORK AFTER FMLA LEAVE EXPIRES?

• Under the FMLA, employers are **not** required to extend FMLA leave beyond the period of eligibility.

• However, if at the end of the FMLA leave period the employee cannot return to work because of a continuing medical condition, the employer must consider whether the condition constitutes a disability, and whether a **reasonable accommodation** could be made under the ADA that would allow the employee to continue in employment.
REDUCED SCHEDULE OR INTERMITTENT LEAVE

• For birth or adoption — only if employer agrees.
• When medically necessary as determined by health care provider.
• Can be taken in [minimum] increments of 1 hour
• [Amount of leave – look at regular work schedule on dates of notice going back 12 months].
• Can transfer employee to alternate position with equivalent pay and benefits (but not equivalent duties) during the period of intermittent leave which better accommodates the employee’s absences. However, needs to be same shift, same location, and same general classification (white collar — white collar, etc.).
• You can always quit.
KEY EMPLOYEES

1. Salaried FMLA-eligible employee who is among the 10% highest paid (YTD) of all employees within 75 miles.

2. Determination made at the time employer receives notice of need for leave.

3. Employer must give written notice to employee of key employee status and potential consequences at beginning of leave. Failure to timely notify employee of such status results in waiver of right not to reinstate.
4. No obligation to reinstate key employee if reinstatement will cause substantial and grievous economic injury to employer’s operations —
   a. cost of reinstating if had to permanently replace;
   b. more than undue hardship.

5. As soon as employer determines that reinstatement will cause substantial and grievous economic harm will occur, written notice must be given to employee explaining basis for determination. Employee must be given a reasonable time to return to work.
**NO RETALIATION**

- Against employee requesting or taking FMLA leave.
- Against employee for complaining about unlawful practices under the FMLA.
- Against employee who files Charge with the Department of Labor under the FMLA.
- Against employee who gives information or testimony in connection with any proceeding under the FMLA.
- FMLA leave cannot be counted under no fault attendance programs.
- Employer can enforce consistently applied no outside employment during leave rule to employees on FMLA.
OTHER STATUTES

• FMLA leave applies to on-the-job injuries if a serious health condition exists.

• An employee on FMLA leave cannot be required to return to work on light duty. However, if light duty is available and the employee is receiving workers’ compensation lost income benefits, refusal to return to work will result in cessation of such benefits.

• The FMLA does not require an employer to return an employee to work if employee cannot perform an essential function of the job; however, the ADA may require a reasonable accommodation.

• FMLA is superseded by any other law or contractual obligation that affords the employee greater benefits.
Active Duty Leave

• **What it Does:**
  – Gives employees that are parents/spouses/children of Reservists, National Guard, and Retirees/Call-ups another basis to take leave

• **How it Works:**
  – If there is a “qualifying exigency” the employee gets to take up to 12 weeks off of work each year
Active Duty Leave

• Qualifying Exigencies:
  • Short-Notice Deployment
  • Military Events
  • Childcare/School Activities
  • Financial/Legal Arrangements
  • Non-medical counseling for employee or kids
  • R&R when servicemember home (5 days)
  • Post-deployment activities (including issues dealing with a posthumous return)
  • Anything else company and employee agree to
Caregiver Leave

- **What it Does:**
  - Gives employees whose loved ones require care due to an injury/illness incurred in line of duty while on active duty time off to care for that loved one.

- **How it Works:**
  - Worker gets up to 26 weeks per injury, per family member to care for injured servicemember.
  - Creates separate “leave year” that is distinct from standard “leave year”.

Caregiver Leave (Cont’d.)

• **How Caregiver Leave Works (Cont’d.):**

  • Covers employees that have parents, spouse, kids, or next-of-kin that need care
  • Can only have maximum of 26 weeks of leave once “caregiver leave year” starts, but possible to have more than 26 weeks of leave in one calendar year
  • Married couples must combine the 26 weeks of leave in event child is hurt
Settlement of FMLA Claims

• **Old:**
  • Real question of whether FMLA claims could be released as part of settlement and/or severance without court or DOL approval

• **New:**
  • DOL reaffirms that companies can settle FMLA cases without involvement by the DOL or a court
  • Cannot settle cases prospectively, however
Light Duty

• **Old:**
  • Light duty counted against FMLA leave

• **New:**
  • Light duty does not count against 12 weeks of FMLA leave
Five Common Employer Mistakes
Mistake #1: Failure to Provide Proper Notice

• General Notice Obligations
• Specific Notice Obligations
• Significance?
  • Proper general notice places burden on employee to provide timely notice of need for leave
  • Failure to provide proper specific notice may render an otherwise ineligible employee eligible for FMLA leave
Mistake #2: Failure to Require Medical Certification

• What is a “serious health condition?”
  • Period of incapacity
    • i.e. inability to perform essential job functions
  • Period of treatment

• Best Practice?
  • Provide essential job functions to health care provider and require every employee to obtain certification
Mistake #3: Not Restoring Employee to Same or Similar Job

• Must restore employee to the same or “nearly identical” position

• Exception:
  • An employee is only entitled to reinstatement if they would have remained in their position regardless of FMLA leave
Mistake #4: Using FMLA as Time to Terminate Employee

- Employers must use caution when terminating employees at or near the time of FMLA leave
Mistake #5: Inconsistent or Incomplete Policies

Key Policies:

• Consistent calculation of 12-month period
• Running FMLA leave concurrently with other types of leave
• Consistent notice requirements for FMLA and non-FMLA leave
Five Successful Responses by Employers
Success #1: Certify, Certify, Certify

- Require certification and recertification of a serious medical condition whenever possible
- Utilize the “second opinion” option
- Utilize the “fitness-for-duty” certification
Success #2: Concurrent Leave

- Run different types of leave concurrent with FMLA leave
- Provide NOTICE to employees that leave will run concurrently
- Advantage?
  - Prevents Leave “Stacking”
Success #3: Anticipating ADA Obligations

• ADA may allow more than 12-weeks of leave as a “reasonable accommodation”

• If an employee is “disabled” under the ADA, he may not be entitled to reinstatement under the FMLA
Success #4: Knowing When to Say When

• Know when to conclude FMLA leave:
  • Ask for a statement of intent
  • If an employee intends to cease working, don’t be afraid to cut off FMLA leave
  • NO SPECIAL EXCEPTIONS: Consistently conclude leave of employees who have exhausted FMLA leave
Success #5: Document, Document, Document

- Retain documentation as to each FMLA leave, including supporting payroll and attendance records
- Keep records for only 3 years
- Be prepared for a routine DOL audit
- Use Form documentation provided by the DOL Wage and Hour Division
THE END