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Understanding the Landscape and
the Potential Burdens Behind the Law

The Family Medical Leave Act (FMLA)

At first glance the Family Medical Leave Act (FMLA) can seem relatively straightforward: one of your employees has a personal or family health situation, and you grant him or her the required time off. Unfortunately, accurately interpreting the law and making the appropriate claims decision can be a daunting task for employers. Keeping current with the regulatory provisions applicable to Family Medical Leave (FML) is not an easy task and can have potentially significant risks and burdens for employers.

This guide highlights some of the main points of the FMLA, the continually evolving regulatory environment and how all these factors can have a potentially negative effect on an employers' business.

What is the FMLA?

The FMLA is a federal law that provides eligible employees of covered employers with up to 12 or 26 workweeks of unpaid, job-protected leave.¹ If an employee is eligible and entitled to FML under the FMLA and/or similar state laws, FML cannot be denied by the employer, nor may an employer discriminate against an employee who asserts rights under the FMLA or similar state leave laws.

How to Determine if Your Company Must Provide FMLA Leave?

Employees are eligible for leave if they have worked for their employer at least 12 months, at least 1,250 hours over the past 12 months immediately preceding the commencement of the leave, and at a location where the company employs 50 or more employees within 75 miles.

What Circumstances Qualify an Employee for Leave Under the FMLA?

Eligible employees must be granted FML for:

- Birth, adoption, or foster care of a child
- Care of a family member with a serious health condition
- Employee's own serious health condition
- A qualifying exigency arising out of a family member's active duty in the armed forces in support of a contingency operation
- Care of a covered servicemember with a serious illness or injury

¹An employee is generally entitled to up to 12 workweeks of FMLA leave in any leave year, unless the leave is for the purpose of caring for a covered servicemember with a serious injury or illness. Covered servicemember leave carries an entitlement of up to 26 weeks per year.

How is FML Calculated and Tracked?

A covered employer is permitted to choose any one of the following methods for determining the “leave year” in which the 12 weeks of leave entitlement are to occur:

- Calendar year
- Any fixed 12 month year (e.g., fiscal year, year required by state law, year starting on employee’s anniversary date)
- Rolling forward (measured from date employee’s first FML begins)
- Rolling backward (measured from date employee uses any FML)

However, for purposes of the 26 week covered servicemember leave, the “leave year” is always the rolling forward 12 month period, regardless of the method chosen by the employer for 12 week leave entitlements.

The Changing Landscape of the FMLA

New Regulations that Affect Employee Entitlement under the FMLA

Since 2008, the FMLA has been expanded by:

- National Defense Authorization Act (NDAA) for Fiscal Year 2008 (Included in revised FMLA regulations effective in 2009)
- Airline Flight Crew Technical Corrections Act of 2009
- National Defense Authorization Act of Fiscal Year 2010

After several years remaining unchanged, these three new laws expanded the FMLA into additional requirements that can bring additional complexities to employers when deciding if an employee is entitled to an FMLA leave.

Additional State FMLA Laws that can Impact FMLA Leave

Many states have adopted their own family and medical leave laws that are similar to the FMLA. There are currently 21 states that have their own FMLA laws, with many other states in the process of adopting similar legislation.

Generally, FMLA does not supersede a provision of state law that is more beneficial to the employee, and employers must comply with the more beneficial provision. For example, states may have different requirements for service eligibility and notice.

State Paid Family Leave Laws

State Paid Family Leave (PFL) provides paid leave for qualified employees for leave taken to care for a newborn or newly adopted child or foster child, or to care for a seriously ill or injured qualified family member.

States that have added PFL leave laws:

- California PFL
- New Jersey PFL
- Washington PFL (Effective date delayed until 2012)

Complying with FMLA while Making the Appropriate Claims Decision Can Be a Burdensome Task for Employers

Complying with the FMLA can be a burdensome task for employers. For example, the FMLA has strict time requirements, such as the requirement that employees be notified of eligibility within five days of a leave request. In addition to dealing with such issues as well as the complexities of federal and state laws, employers encounter numerous other issues that may affect their confidence about the accuracy of claims decisions.

As a result, employers often err on the side of approving leave even when the employee may not qualify for leave under applicable laws. Such approvals can create a productivity risk to an employer's business. Small business owners will benefit from the ability to ensure that leave decisions are accurate and compliant with applicable laws.

Keeping Current on Regulatory Changes

Keeping current on the regulatory environment can also be burdensome for employers. Focusing time and resources to follow new regulations will take away time better spent on focusing on important business matters.

Compliance Challenges and Litigation Exposure

In addition to keeping current with the evolving leave laws, employers can have a difficult time interpreting the Federal FMLA requirements, and when combined with requirements resulting from court decisions and state leave laws, following the rules can present challenges.

Employers who are found to have violated FMLA provisions may be forced to pay fines, and employees who pursue private action may be awarded damages for lost wages, employment benefits, and other monetary losses directly caused by a violation, together with attorney's fees and court costs.

According to the U.S. Department of Labor, during the fiscal year 2010, employers were found to owe \$1,643,761 in back wages to 1,012 employees who filed FMLA enforcement actions.²

Telecommunication Company FMLA Settlement

In 2010, a large telecommunications company settled a class action law suit, filed by the California Department of Fair Employment and Housing. The settlement amount exceeded \$6 million. The suit alleged that, over a three-year period, the company denied or failed to timely approve requests for FML. The suit was filed under the California FMLA, which is very similar to the federal FMLA. As part of the settlement, the company also agreed to train all of its California human resource personnel on legally compliant leave procedures. The settlement amount does not include the company's expenses in defending the suit, which observers estimate to have been as high as \$1 million.

The federal FMLA also allows employees to file class action lawsuits against employers if their FML rights have been violated.

FMLA Tools and Resources:

Department of Labor – FMLA overview

<http://www.dol.gov/whd/fmla/>

Department of Labor – FMLA Benefits

<http://www.dol.gov/dol/topic/benefits-leave/fmla.htm>

Department of Labor – Compliance Assistance

<http://www.dol.gov/compliance/laws/comp-fmla.htm>

Department of Labor – Fact Sheet

<http://www.dol.gov/whd/regs/compliance/whdfs28.htm>

Department of Labor – FMLA Poster

<http://www.dol.gov/whd/regs/compliance/posters/fmla.htm>

² Department of Labor, Wage/Hour Fiscal Year 2009 & 2010 Enforcement Statistics, <http://www.printing.org/page/6490>

This guide is offered as educational information and is not intended to offer legal advice or direction. Further, this guide does NOT include all aspects of the FMLA.

For full and complete information on Family Medical Leave, Federal and/or State Mandated, please contact the federal and state agencies that administer these programs, as well as your own legal counsel.

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