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MANAGEMENT
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Leave: FMLA, ADA, Pregnancy

Katrina Grider
Houston, Texas

Board Certified in Labor and Employment Law
Texas Board of Legal Specialization

Deal with the Preliminary Stuff

- ✓ **Use the DOL FMLA Forms (not your own stuff) (exp. 5/31/18) and just renewed through 08/31/21**
- ✓ **Use DOL Fact Sheet #28 as a written policy if you don't have one**
- ✓ **Make sure employees know their rights (train supervisors, have central points of contact)**
- ✓ **Update all FMLA policies (handbooks, online, intranet, everywhere)**

Check Out the DOL FMLA Guides

- **The Employer's Guide to the Family and Medical Leave Act:**

www.dol.gov/whd/fmla/employerguide.pdf

➔ **Best explanations of counting method, military regs, certification nuances**

- **The Family and Medical Leave Act Employee Guide:**

www.dol.gov/whd/fmla/employeeguide.pdf

Make the EEOC/DOL Happy!!

Use Job Descriptions

- 1. Establish performance requirements**
- 2. Explore the parameters of reasonable accommodation**
- 3. Make decisions on job restructuring**
- 4. Evaluate medical certifications and fitness for duty**
- 5. DOL Form WH-380-E**
 - ✓ Employee's essential job functions**
 - ✓ Check if job description is attached**
- 6. EEOC: employer can articulate and identify the essential and marginal job functions**

Make Job Descriptions ADA/ADAAA Compliant

1. Wording for the time required
2. Wording to describe general and specific **physical** demands
3. Wording to describe general and specific **mental** demands
 - General: e.g., general and verbal intelligence, motor coordination skills
 - Specific: e.g., Comprehension, organization, reasoning and decision-making, communication
4. Wording to describe **workplace environmental conditions**

Other Job Description Tips

- ✓ **Don't confuse "function v. method"**
 - Can have lot of methods to do a function
 - "An essential function is what the completed task is, not how that task is done"
 - ✗ **NO:** employee must **walk** around office
 - ✓ **YES:** employee must **move** around office

- ✓ **Clearly state that **attendance** is an **essential function****
 - 5th Circuit: regular attendance at work is an essential function of most jobs. *Credeur v. State of Louisiana*, 2017 U.S. App. LEXIS 11269 (5th Cir. June 23, 2017).

Notice, Notice, Notice - 4 Types

1. **General Notice (DOL Fact Sheet #28, handbook)**
2. **Notice of Eligibility (WH-381)**
 - ✓ Within 5 business days
 - ✓ Provide reason if not eligible
3. **Notice of Rights and Responsibilities (WH-381)**
 - ✓ Provided when eligibility notice required
 - ✓ Must be in writing
 - ✓ Must include the basic rights and responsibilities of leave
4. **Notice of Designation (WH-382)**
 - ✓ Within 5 business days
 - ✓ Must be in writing

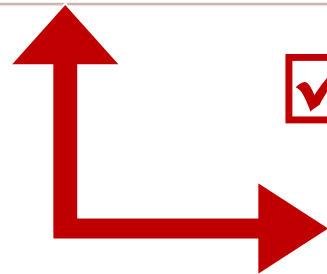
DOL's Employer Guide: Notice

- DOL FMLA Employer Guide states the following regarding notice:

“An employer could be exposing itself to liability by failing to make a timely eligibility determination or failing to provide timely notice to its employees. *Failure to timely notify employees of their eligibility status may constitute interference with, restraint, or denial of an employee's FMLA rights.*” (emphasis added) DOL Employer FMLA Guide, p. 20.
- Stringently follow the notification guidelines

Conquer Certification Conflagrations

Step #1	Notice of Rights and Eligibility WH-381	+	Certification WH-380-E	+	Job Description (current)
Step #2	Notice of Designation WH-382	+	Job Description (current)	=	Use option to get 2nd/3rd opinion



WH-382 states that employee will be required to submit fitness-for-duty note upon return to work, and further states, “a list of the essential functions is or is not attached.”

Conquer Certification Conflagrations

- ✓ **Conspicuously specify the 15-day certification due dates and reminders**

Remind employees of upcoming 15-day deadline via email, phone, and certified mail (even FedEx if needed)

- ✓ **Don't be afraid to seek recertification (it's not called the Friday Monday Leave Act):**

- Allow employees 15 days to return
- < 30 days – recertify every 30 days
- > 30 days – recertify upon expiration of minimum duration or every 6 months

DOL's FMLA Employer Guide: 15-day Period

- **How does the 15 calendar day period work?**
 - “An employer gives an employee 15 days to provide a certification and the employee does not provide certification for 45 days without sufficient reason for delay. *The employer may deny FMLA protections for the period following the expiration of the 15-calendar day period, i.e., from day 16 through 44* (emphasis added).
DOL FMLA Employer Guide, p. 30

DOL Employer Guide: Incomplete or Insufficient Medical Certification

- **Incomplete** = one or more applicable entries have not been completed
- **Insufficient** = information provided is vague, ambiguous, or non-responsive
- Employee has 7 calendar days to correct the problem.
- If employee fails to correct within 7 days, the FMLA leave may be denied.
- See DOL FMLA Employer Guide, p. 33

DOL Employer Guide: Complete and Sufficient Certification

- The DOL Guide states the following:

“After acquiring a complete and sufficient certification, an employer is not permitted to ask for more information, such as requiring a doctor’s note for each FMLA-related absence. *Requiring a doctor’s note for each unpaid FMLA related absence may be considered interference with the employee’s use of FMLA leave.*” (emphasis added). DOL FMLA Employer Guide, p. 33.

Become an FMLA Mechanic

- ✓ Make a preliminary designation of FMLA leave:
 - ▶ During waiting periods
 - PTO (days 1- 6) ➔ STD (days 7 - 90 or 7- 120)
 - ▶ While obtaining more info or 2nd\3rd opinions
- ✓ Determine FMLA eligibility before approving leave (avoid equitable estoppel)
- ✓
 - ➔ Run PTO, vacation, sick, STD, LTD, and WC *concurrently* with FMLA leave
 - ➔ Must use STD to get LTD (don't forget this!!)

Do **NOT** Allow Employees to Work from Home on FMLA Leave

- ⊗ Time working from home cannot be counted as FMLA leave!!!
- ⊗ C.F.R. states “unable to perform the functions of the position”
- ⊗ Time working from home is considered “hours worked” – overtime must be paid
- ⊗ Do not pressure employees to work from home (emails, text messages, phone calls, etc.)

Don't Go Fishing on Fitness-for-Duty Certifications

- Can only ask about the particular condition that caused the need for leave**
- Asking for overbroad information violates the FMLA and the ADA/ADAAA**
- Fitness for duty must state that the employee is able to resume work**
- May require fitness-for-duty to address ability to perform essential job functions**

Attach the Job Description to the Fitness-for-Duty

- ➔ Use the DOL-FMLA Designation Form (WH-382) **twice**
- ➔ Attach a copy of the job description and **then send it again** to the employee **before** they are due to return
- ➔ Check the box “a list of essential functions of your position is attached”
- ➔ Make sure that the fitness-for-duty addresses those functions

Don't Ask For Second Opinions on the Fitness-for-Duty

- ➔ **May only contact doctor and ask for **clarification****
- ➔ **No second or third opinions may be required**
- ➔ **Once employee returns, then address the issues as performance matters and not FMLA medical issues**
- ➔ **Use the job description here!!!**
- ➔ **May need to engage in the ADA interactive process to provide any reasonable accommodations**

Curtly Curb FMLA Abuse

- ✓ **Respond to all frequent flier FMLA requests**
 - ▶ **Employees trying to avoid discipline**
 - ▶ **Document each denial of leave**
- ✓ **Don't allow employees to use FMLA leave as a discipline shield**
 - ▶ **Have no greater protection for reasons unrelated to FMLA leave than they did before taking leave**
 - ▶ **Document, document, document**
 - ▶ **Discipline would have occurred regardless of whether FMLA leave was requested**

Curtly Curb FMLA Abuse

Know what ask for when employees call in sick:

- ▶ **WHO:** employee calls (no family members)
- ▶ **WHAT:**
 - ❖ Reason and length of absence, can't just say intermittent – need enough info to indicate that absence was for condition for which leave was approved
 - ❖ Do you intend to see a doctor?
- ▶ **WHEN:** as soon as practical and possible
- ▶ **WHERE:** report to a specific individual (HR, etc.)
- ▶ **HOW:** verbal – NO TEXTS!!!

Curtly Curb FMLA Abuse

- ✓ **Enforce usual and customary call-in procedures**
- ✓ **Don't use different call-in rules only for FMLA**
- ✓ **May deny leave when employees fail to follow call-in policies**
- ✓ **May discipline for failure to follow policies**
- ✓ **Uniform and consistent application**

Tenuous Tentacles: Intermittent and Reduced Leave

- Transfers to other positions **only** permitted when it's foreseeable intermittent leave!
 - Transfer is temporary
 - Qualified for alternative position with equivalent pay and benefits
- Intermittent/reduced leave for birth/adoption only if employer agrees
- Require non-disruptive treatment schedules for planned leaves
- Follow call in procedures

Manage the Managers



Provide managers with specific notice regarding personal liability under the FMLA

HR manager held personally liable for failing to respond to the employee's FMLA requests, and for making the recommendation to terminate the employee.

To be liable, it is not required that the manager intended to violate FMLA rights. **Liability exists even for inadvertent FMLA violations.**

Don't' Forget the ADA/ADAAA

- ✓ **Don't automatically terminate at the end of the FMLA leave period**
 - ✓ **For leaves beyond FMLA, use the ADAAA interactive process to determine accommodation**
 - ✓ **Refer to the EEOC Policy Guidance: Employer-Protected Leave and the ADA**
- ✓ **If you start the ADA/ADAAA interactive process—finish it**

Resist Retaliation Rage



Don't interfere with FMLA rights by discouraging employees from taking intermittent leave



Don't constantly phone/text/email employees who are on FMLA leave



Implement a retaliation prevention checklist



Review the DOL Fact Sheet on FMLA Retaliation



Review the EEOC Fact Sheet on Retaliation



Give managers the Fact Sheets during training

DOL Employer's Guide: FMLA Interference

- ✘ Refusing to authorize leave**
- ✘ Discouraging employees from using leave (be aware of remarks, comments)**
- ✘ Changing the essential functions of the job in order to preclude taking leave**
- ✘ Manipulating an employee's work hours to avoid employee eligibility**
- ✘ Failing to provide benefits while on unpaid FMLA leave when benefits are provided on other forms of unpaid leave**

All the Other Stuff

- ✓ **Don't count time spent on light duty against FMLA**
- ✓ **Steer clear of creating permanent and indefinite light duty jobs**
- ✓ **Review the new EEOC Guidelines on Pregnancy Discrimination**
- ✓ **Intermittent leave may be a reasonable accommodation (thus, no need to transfer)**