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**A Three-step Approach to
FMLA Compliance:
Automate, Educate, Integrate**

By David S. Warner, Esq. and Rod M. Fliegel, Esq.¹

Recent studies point to some of the significant challenges that employers face with respect to compliance with the Family and Medical Leave Act (FMLA) and its state law counterparts. The 2008 WorldatWork survey shows, for example, that “tracking” the use of intermittent FMLA leave in order to comply with the law’s requirements poses a major challenge, hampered by confusion over to whom and when to provide notices, and inadequate information systems.² Employee abuse of the intermittent leave benefit is actually the top complaint of employers that are subject to the FMLA.³ In a 2007 survey by the Society for Human Resource Management (SHRM), 80 percent of HR professionals found tracking intermittent leave is either somewhat or very difficult, while 57 percent struggle to meet FMLA designation and certification requirements, and 55 percent indicated significant confusion over what constitutes a “serious health condition.”⁴

This paper highlights three steps that employers can utilize to help ensure compliance with the FMLA. These steps include (1) automating the systems that track leave requests, responses and time off; (2) educating the workforce on how to comply with the FMLA and spot potential issues; and (3) integrating leave policies and procedures to ensure they comply with all applicable laws, not just the FMLA.

1. Automate

Manually tracking requests for leave, responses to those requests, and leave itself can be difficult, particularly when FMLA time is being taken intermittently or in small increments. Automated systems that effectively and accurately monitor these events can help streamline the administration of the company’s leave policies and help flag absence trends and patterns. When overseen by knowledgeable professionals, these systems can be an efficient tool for employers to ensure their policies are being administered consistently and fairly.

An automated leave management solution that automates and streamlines the administration and tracking of leave policies provides companies with an easier way to determine employee leave eligibility, monitor absence trends, and satisfy state, local and federal reporting requirements. The ideal leave management solution will provide the flexibility to handle concurrent FMLA, state, and company leave compliance, variable tracking periods (including rolling forward, backward, quarterly and yearly), different rules for new hires or part-time employees, and the ability to calculate and track intermittent leave in weeks, hours, or minutes. Ideally, a leave management solution should be part of an overall time and labor management system that is integrated with payroll so that managers can access accurate, up-to-the-minute scheduling information, eliminate duplicate data entry, and ensure tight control over labor costs.

Automated leave management solutions today offer sophisticated functionality to significantly simplify the administration of, and compliance with, leave policies. Among these features are:

- **Eligibility tools** – Can enhance and expedite the process of determining leave eligibility.
- **Calendar view** – A familiar, intuitive format that helps make it easier for employees and managers to see leave absences over a specified period of time and spot trends.
- **Pre-populated templates** – Pre-designed, readily accessible forms that help improve the speed and efficiency of requesting leaves of absence and providing manager approval.
- **Leave entitlement** – Automated systems for calculating, granting and enforcing leave absence rules, preferably in real time.
- **Automatic alerts** – Reminder systems that help managers monitor deadlines and thereby help companies reduce the risk of non-compliance and unnecessary penalties and costs.
- **Automated document management** – Automatic tracking of due dates and generation of mandated documents and forms enhances compliance and frees HR managers for more strategic initiatives.
- **Trend analysis and reporting** – A broad range of reports and insightful tools to help simplify the task of monitoring absence trends and patterns.

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2 A summary of the April 2008 WorldatWork survey is available at <http://www.worldatwork.org/waw/adimLink?id=25671>.

3 WorldatWork, FMLA Practices and Perspectives Survey: Reactions to the Proposed FMLA Changes and New Military Provisions, April 2008, at 2, 7.

4 SHRM, FMLA and Its Impact on Organizations: A Survey Report, 2007, at 20.

2. Educate

It is important for managers to know the contours of the FMLA, particularly after it was expanded in January 2008 to provide various types of military service-related leave. It is equally important for managers to learn how to recognize situations that may trigger a need for FMLA leave, how to respond appropriately to leave requests, and how to communicate with employees who are on FMLA leave.

A. Amendments to the FMLA

On January 28, 2008, the FMLA was amended to provide eligible employees with two new leave rights related to military service. In addition to the established types of leave mandated by the FMLA, employers covered by the FMLA must now also provide up to twelve weeks of unpaid leave during a twelve-month period for a “qualifying exigency” arising out of notice to the employee’s spouse, son, daughter or parent of a call to active duty or an impending call to active duty in support of a contingency operation.⁵ In addition, employers covered by the FMLA also must provide up to twenty-six weeks of unpaid leave during a twelve-month period to care for a spouse, child, parent or nearest blood relative who is a “covered servicemember” recovering from a serious illness or injury sustained in the line of duty or active duty.⁶

B. Proposed Amendments to the FMLA Regulations

In February 2008, the Department of Labor issued notice of proposed changes to its FMLA regulations. See 73 Fed. Reg. 7875 (Feb. 11, 2008). If implemented, these proposed changes will likely have a material impact on how employers should respond to certain FMLA leave issues (e.g., determining eligibility for FMLA, complying with certain notice requirements, and dealing with incomplete medical certifications). It is therefore important to stay abreast of these proposed changes to ensure continued compliance if and when they go into effect.

C. Best Practices to Avoid Interference Claims

i. Know Leave Triggers

It is important for managers to know there are no magic words to trigger a request for FMLA leave. Rather, it is the employer’s responsibility to recognize, based on the information before it, when an employee’s absences may be FMLA-qualified and to ask for more information, if necessary, to confirm it. For example, last year in *Williams v. Illinois Dep’t of Corrections*, 2007 U.S. Dist. LEXIS 17119 (S.D. Ill. Mar. 9, 2007), a federal judge held that it was up to a jury to determine whether an Illinois correctional facility interfered with one of its supervisor’s FMLA rights when it denied the supervisor’s request for leave to care for his elderly mother. In that case, the supervisor told the warden that he needed to take time off and go out of state to care for his mother. The warden rejected the request on the grounds that the supervisor did not have enough time off available, telling him resignation was his only option. Relying on the warden’s advice, the supervisor gave two weeks’ notice of his resignation. Shortly thereafter, the supervisor read his employer’s FMLA policy and requested FMLA leave. His request was denied on the grounds that it was too late to rescind his resignation. In rejecting the employer’s motion to dismiss the case before trial, the court held that the employee did not need to mention his mother’s ailment to put the employer on notice that his requested leave may be protected under the FMLA. By telling the employee that resignation was his only option, the court found that the employer made a “preemptive denial of FMLA leave without adequate investigation.”⁷

Some courts have found that employers may have constructive notice of an employee’s need for FMLA leave when the employee is unable to communicate his illness or has exhibited clear abnormalities in his behavior. For instance, in *Stevenson v. Hyre Electric Co.*, 505 F.3d 720 (7th Cir. 2007), a federal court of appeals held that “clear abnormalities” in an employee’s behavior may be sufficient to put the employer on constructive notice of the need for FMLA leave. In that case, a stray dog that climbed through the window of a warehouse caused the plaintiff, who had no record of safety concerns, to become especially agitated. She began to yell and curse, screaming “F* animals shouldn’t be in the workplace.” She then advised her manager that she was sick and needed to go home. When she returned to work two days later, she met with the president of the company and screamed at him about the dog incident. She later went to the emergency room, where she was diagnosed with “anxiety and stress.” She subsequently called

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⁵ Congress left it to the Department of Labor to define the term, “qualified exigency.”

⁶ A “covered servicemember” includes any member of the armed forces, including the national guard, who is undergoing medical treatment, recuperation or therapy, is in outpatient status, or is otherwise on the temporary disability retired list for a serious injury or illness.

⁷ The employee later recovered at trial his lost pay, plus double damages, interest and his attorney’s fees.

out sick for several days. While she was out, her employer boxed up her belongings and moved them to another room to accommodate her apparent fear of stray animals. When she returned to work and saw what had been done, she complained to the police of harassment and left work shortly thereafter. Before departing, the plaintiff left a copy of her emergency room report on her supervisor's desk. The employer then sent her FMLA leave request forms, noting that that because she had already exhausted all of her accrued vacation and sick leave, any further absences needed to be FMLA-qualified to be excused. The employer then rejected the doctor's note she provided just before the deadline and did not respond to her doctor's subsequent, clarifying note. It refused to consider the second note because it was late and terminated her employment based on the insufficiency of the first note. After she filed suit under the FMLA, the appellate court ordered the case to trial because a jury could have found the employee's behavior so "aberrant" that the employer was placed on constructive notice of her need for FMLA leave well before it sent her its FMLA request forms.⁸

ii. Centralize & Monitor Communications

It is also important to carefully oversee communications between managers and employees who have sought or taken FMLA leave. To highlight how things can go wrong, one need only look at the case of *Xin Liu v. Amway Corp.*, 347 F.3d 1125 (9th Cir. 2003). There, the employee was a scientist who went on maternity/FMLA leave thirteen months after being hired. When her supervisor called her during her leave to confirm her return date, noting that her work was piling up, the employee asked for more time. He denied her request. When she subsequently asked for a three-month extension, he allowed her two months and then re-classified her maternity leave to personal leave, which he had special authority to deny. One month into her extension, the plaintiff asked her supervisor for another extension, this time to care for her father in China who had become terminally ill. When he refused, she called the human resources department, which granted her one more week. The employee later sued and the federal court of appeals found that the denial of her requests to extend her leave, the grant of shorter extensions than requested, and the mischaracterization of her FMLA leave as "personal leave" qualified as actionable interference with her FMLA leave rights. It held that an employer violates the FMLA by discouraging an employee from taking FMLA leave, which can occur when the supervisor interferes with the length and dates of leave.

Employers should therefore refrain from trying to delay an employee's FMLA leave. In *Shtab v. Grete Bay Hotel & Casino, Inc.*, 173 F. Supp. 2d 255 (D.N.J. 2001), the court found actionable an employer's alleged suggestion that the employee delay his FMLA leave to accommodate the employer's business needs, even if the employee suffered no harm from it because he ultimately took the time he initially sought. The court concluded that the mere suggestion violated the FMLA because it effectively chilled the plaintiff's exercise of his FMLA rights.

iii. Secure the Employee's Authorization Before Communicating About Work Issues During Leave

Before initiating any work-related communications with an employee on FMLA leave, employers should be mindful to first secure the employee's authorization and then confirm it in writing. In *Benitez v. International Paper Co.*, 2007 WL 4436874 (W.D. Tex. Dec. 19, 2007), the court refused to dismiss the plaintiff's complaint about his employer's initiation of work-related discussions while he was on FMLA leave to care for his wife. The employer argued that the manager orally authorized it to contact him during his leave but the manager denied it. Noting that such unauthorized contacts may interfere with an employee's FMLA rights, the court decided to send the issue to a jury because there was no evidence that proved the plaintiff had in fact authorized his employer to initiate the contacts at issue.

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⁸ The case settled in 2008.

3. Integrate

Employers are wise to have a comprehensive FMLA policy that integrates other potentially overlapping laws, benefits and policies. This includes workers' compensation, short-term disability benefits, federal, state and local disability discrimination laws, and the like.⁹ By integrating all of these in advance, the employer will effectively minimize the risk of unwittingly violating one law while earnestly trying to comply with another.

Conclusion

The FMLA has been a steady source of confusion and litigation. Whether employees are suing their employers, alleging that employers are not granting unpaid leave under the FMLA when they should, or employers are claiming that workers are abusing the FMLA and using it for purposes that it wasn't intended, there is a compelling need to improve automation, education and communication around FMLA compliance and related issues. Employers can help ensure compliance with the FMLA, particularly costly human errors due to inadvertence or oversight, by following the three steps outlined above. By automating the systems that track leave requests, responses and time off, educating the workforce on how to comply with the FMLA and recognize potential FMLA issues, and integrating leave policies and procedures, employers can go a long way toward achieving their compliance goals.

About Littler Mendelson

Founded in 1942, Littler Mendelson is the nation's largest employment law firm. Littler Mendelson offers unparalleled depth and expertise in all leave of absence and related compliance areas, including the FMLA and ADA. With more than 700 attorneys strategically located in 45 offices, and a counseling and litigation-defense practice that extends into every area and sub-area of workplace law, Littler Mendelson's task force can help companies successfully implement and manage compliance programs.

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⁹ Congress recently passed new legislation amending certain provisions of the Americans with Disabilities Act. For a summary, see Littler Mendelson's summary, "Congress Tells the Courts How to Interpret the ADA" (www.littler.com/PressPublications/Lists/ASAPs).

