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FMLA Need Not Be a Four-Letter Word:

*Keeping Your
Company Compliant*

"The ADA, FMLA and state workers' compensation laws impose numerous and not always consistent obligations on employers. This legal minefield has created a potential bonanza for plaintiffs' attorneys and has heightened the level of frustration for professionals responsible for dealing with these issues." Alan M. Koral, Esq. (The Medical Disability Advisor, Fourth Edition.)



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Depending upon the (lack of) precision with which FMLA leaves are administered in your workplace, your company may be unnecessarily exposed by having to protect employee jobs for an additional 12 weeks beyond an employee's medical disability leave (90 days, 180 days, 365 days). Granted that time away from work for FMLA leave is unpaid, it involves many hidden costs. Can your company afford this exposure in today's challenging economic environment? Employers are entitled to track FMLA leaves of absence together with other medical leaves and should exercise this right to its fullest extent.

The Family and Medical Leave Act of 1993 (FMLA) mandates that designated employers must allow employees up to 12 weeks of unpaid leave (annually) for qualifying medical and family reasons. This federal law protects employees from losing their jobs while attending to legitimate and time-consuming personal needs. The law also necessarily requires that employers be responsible for the

work-loss and administrative costs incurred by FMLA leaves. Employers should have the ability to track qualified leaves concurrently with disability absences or on a stand-alone basis; the leaves can be taken intermittently or on a reduced work schedule. Being vigilant regarding these matters, self-insured employers should understand how best to juggle the overlapping (and sometimes conflicting) responsibilities of administering short-term disability, workers' compensation and FMLA leave.

Assuming that most companies are aware of the risks and costs incurred by workers' compensation coverage and administration, this article focuses on those less obvious costs associated with the FMLA. Research highlights the increasing cost of employee absences, and some of these are directly related to the FMLA. That is because these increasing costs extend far beyond the visible costs of medical coverage and benefits.

The Integrated Benefits Institute (www.integratedbenefitsinstitute.org/) has done extensive research in assessing the cost of absences. The chief hidden cost, according to the Integrated Benefits Institute, involves lost productivity through employee absences. The following facts should compel employers to re-examine their absence-tracking and management programs:

- the full costs of absences often far outweigh direct benefits costs
- improved absence management, in the best instances, can average 11%—often more depending on industry—to corporate bottom lines through productivity gains
- broken down into percentages, absence costs are approximately...
 - 50% (lost productivity)
 - 40% (medical care for both non-occupational and occupational conditions)
 - 10% (wage replacement payments for lost-time programs)

Better management of FMLA absences can have a profound effect on both “lost productivity” and “wage replacement payments.”

It is for fiscal reasons such as these that many companies have adopted “total” or “integrated” absence management as standard business practice. The services provide a single-point of intake by which employees report their (pending) absence, and that request is evaluated according to its legitimacy under company policy as well as under federal and state regulations. Comprehensive treatment of absences is no small feat when one considers that a US Department of Labor survey noted that 40% of companies are not in compliance with at least one of the four basic FMLA provisions. Integrated absence management recognizes that the FMLA does not need to cost employers as much lost work time as many of them end up providing. Nor does it need to be an administrative nightmare when adequate tools and training are implemented. It is often avoidable FMLA pitfalls that contribute a significant portion of the increasing costs of absences to US corporations over the last ten years.

All self-insured employers with 50 or more employees should begin integrating FMLA administration into their management of medical disabilities and workers' compensation. This article touches on some key factors for such integration, which are organized around (1) a review of FMLA stipulations, and (2) the concurrent tracking of FMLA with workers' compensation and medical disability leaves as a primary means of controlling lost work time among employees.

FMLA Review

While most companies are familiar with FMLA responsibilities, a brief review of the essential aspects of the law may be useful to companies who need to check for complicity, or those that are only now reaching the size that makes them responsible to comply to the FMLA.

Designated Employers: If you employ 50 or more employees (for each working day during at least 20 calendar weeks in the current or preceding calendar year), you are required to provide FMLA leave to all your qualifying employees.

The exception to this rule is if, per work site, you have fewer than 50 employees within a 75-mile radius. In that case, your company lies beyond FMLA regulation.

Qualifying Employees: The general rule for employee eligibility is that the employee must have worked for your company at least 12 months (not necessarily consecutively) and, during that accumulated 12-month period prior to the leave, must have worked at least 1,250 hours.

Qualifying Leave Requests: There are four legitimate reasons for which FMLA leave may be granted:

1. Birth of a child of the employee and to care for the child, provided the leave is completed before the child's first birthday (“birth leave”).
2. Placement of a child with employee for adoption or foster care (“placement leave”).
3. To care for a child, spouse or parent of the employee who has a serious health condition (“family medical leave”).
4. Because of a serious health condition of the employee that renders the employee unable to perform one or more of the essential functions of his or her job (“personal medical leave”). This specific leave should be tracked concurrently with other medical leaves (e.g., workers' compensation, short-term disability).

One notably vague phrase is “serious health condition.” The general rule is that the employee or the employee's family member has a health problem that has come under institutional diagnosis and care. It is an injury, illness, or physical/mental health condition involving:

1. Inpatient care (i.e., an overnight stay) in a hospital or other medical care facility
or
2. Continuing treatment by a health care provider.

Various qualifications are attached to these criteria and should be considered before making a determination concern-

ing any FMLA leave request. As a starting point, consult the handbook posted on the US Department of Labor's web site (<http://www.dol.gov/asp/programs/handbook/fmla.htm>), as well as the Act itself (<http://www.dol.gov/esa/regs/statutes/whd/fmla.htm>).

Concurrent Tracking of FMLA Leave with Workers' Compensation and Short-Term Disability

Because the FMLA grants up to 12 weeks of job-protected, unpaid leave for employees, your company must undertake operational changes to compensate for absent employees. Replacement staff must be recruited to fill in for the missing employee, and, even with personnel adjustments, a prolonged absence may lead to possible delays in your company's delivery of goods or services. Additionally, those employees who must fill in for the absent ones may eventually regret their increased workloads and will, at least, lose some of their effectiveness through fatigue. The cascading effects of an employee's absence contribute to the figures quoted earlier in this article, making work-loss more expensive than out-of-pocket benefit costs in many cases.

The foremost way to reduce overhead from FMLA leave is through "concurrent tracking." If a company does not perform concurrent tracking, it may be exploited by offering both short-term disability or workers' compensation leave to employees and then, once that leave is exhausted, having to re-set the clock and offer an additional 12 weeks of FMLA leave (and in some states, more FMLA-protected time off).

Companies may stipulate that certain paid leaves be counted against the employee's FMLA leave. For example, workers' compensation and short-term disability may be counted concurrently with FMLA leave. So may vacation time. To fail to publish carefully written policy and to

objectively administer leaves is to open the door for an employee to legitimately take extensive disability leave under Workers' Compensation Law (WCL), followed by continued unpaid leave under FMLA, followed by paid vacation.

Each leave request, however, requires expert knowledge, both of the medical condition and the legal requirements. The permutations among FMLA, WCL, and ADA for medical leave are complex. A pregnancy, for example, qualifies under FMLA but not of course under WCL or ADA, being neither a work-related injury nor a major-life-activity disability. Most workers' compensation TTD (Temporary Total Disability) benefits do qualify as "serious health conditions" under FMLA, because the WCL seven-day waiting period surpasses the FMLA requirement of an incapacity having to exceed three days. Some ADA disabilities, such as blindness, do not qualify as FMLA "serious health conditions," because an individual who is legally blind is not necessarily incapacitated for periods of time from working.

The key element in concurrent tracking of FMLA and other accrued leave is for the employer to notify the employee at the commencement of the leave that the leave will be counted as FMLA leave. This task may sound easier than it is. The employee does not need to and certainly does not necessarily announce that a requested absence might qualify for FMLA leave. It is often long after the absence, when other occupational difficulties arise that the integrity of tracking FMLA leave has critical consequences. During these retrospective moments, employers see an absence as having fit the FMLA criteria and employees see just the opposite. Now that integrated absence management is an established industry, employers can find third-party services to ensure that their FMLA absences are tracked concurrently with other leaves. If these service providers are experienced in FMLA administration, they will make sure the employee notifications are timely and that they clearly lay out the concurrent aspects of the leave.

Both employees and employers may find it in their best interests to combine FMLA with company-provided paid leave. For the employee, the continued income will be welcome. For the employer, the consolidation of permissible employee absences will limit the work-loss period.

It would be naive, though, to underestimate the permutations involved in concurrent tracking. Alan M. Koral, Esq. draws attention to an important pitfall to be avoided by employers:

"An employee on an FMLA leave may receive Temporary Total Disability (TTD) benefits if the leave is due to a work-related injury or illness. In order to avoid providing injured employees with an incentive not to return to work as soon as they are able, employers should make sure that their paid leave policies do not provide compensation for employees receiving TTD benefits (which, unlike wages, are not taxable income). Otherwise, the employee may end up making more (on an after-tax basis) while on leave than he or she would make working." (from *The Medical Disability Advisor*, Fourth Edition, 2001).

The prescription here and elsewhere is to make sure your company policy takes into consideration the consequences of its provisions, not only in and of themselves, but also in conjunction with federally and state mandated provisions.

None of this is to say that the legal terrain cannot be traversed with assurance. While all the labor laws (WCL, ADA, and FMLA) protect employees in one respect or another, they do not necessarily "side" with the employee in all cases, particularly when their conflicting definitions and stipulations are considered by the federal courts.

In fact, the majority of the recent US Supreme Court rulings have limited the scope of the FMLA language, protect-

ing employers from excessive responsibilities. For example, in December 2001, the Seventh Court of Appeals dismissed the suit of employee, Linda Collins, who sued her former employer on the grounds that she had called in "sick" but had not received FMLA leave. Although the employer must remain vigilant, in this case the court ruled that "sick" and "serious health condition" are not synonymous and that, therefore, the employer had no reason to issue FMLA leave.

Concurrent tracking of FMLA leave with other types of absence is the way to go. However, even the right way runs into complications when the employee is able, according to one or another standard, to return to work. The laws are particularly divergent when it comes to reinstating an employee's position.

A main tenet of the FMLA is that the employee's job must be held for that employee's return. If that is not possible, the employee must be offered an "equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment" (FMLA Sec. 104, I, B). In contrast, both WCL and ADA regulations insist that the employer offer, when necessary, a light duty assignment to accommodate the worker. Thus, the employer is at the same time not permitted by FMLA to require that the employee take a light duty assignment and is encouraged under WCL and ADA to minimize the workers' compensation by offering the light duty assignment. In the midst of this quagmire, sound legal advice suggests, "As a matter of practice, an employer ordinar-

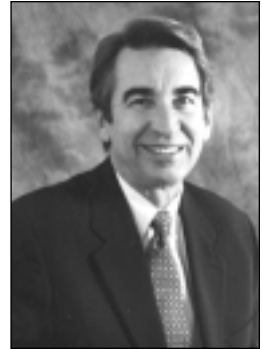
ily should offer an available light duty position in order to satisfy its duty to accommodate under the ADA. If the employee refuses the offer and elects to remain on FMLA leave, the employer may use the refusal as a basis for terminating the employee's Temporary Total Disability benefits" (Alan M. Koral, Esq., *The Medical Disability Advisor*, Fourth Edition, 2001).

Companies who are aware of the conflicting requirements of these laws wisely write policy that is broad enough to capture the various leave requirements, and firm enough to dismiss an employee who is not functioning in the work place. For example, some policies state that after a year, an employee who remains absent is subject to termination. The policy takes into account the various leave-requirements of WCL, ADA, and FMLA. And, being written in advance, applied uniformly, and not dependent upon the particulars of an absence, such a policy is much easier to defend against legal retaliation in the event that the employee feels unjustly treated.

The cost of doing business must ultimately include the costs of covering for necessary absences. Employers must also remember that there are legitimate reasons for employees to be absent from work. Expenditures of this sort, as well as those in obtaining good counsel in preparing company policy, are dwarfed by the costs of dealing with absences reactively and often poorly. The real danger to employers is having too little information. Ignorance will work against employers in both directions: causing them to ignore legitimate leave requests

and causing them to take responsibility for complaints that are not justified. The starting point for reducing FMLA overhead is to make sure your company tracks the relevant FMLA occurrences with other company-approved leave. The end point, of course, is to obtain work conditions and workforce cohesion that preempt some of the ostensibly legitimate leaves.

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Disability Advisor: Workplace Guidelines for Disability Duration (MDA). The MDA guidelines are in active use by more than 10,000 multi-national employers, insurance carriers, and health care professionals across the US and in 38 other countries. Reed Group solutions include the MDA guidelines books and software, absence management software, data analysis services, consulting, education/training, and full-service outsourced absence and medical disability management services with advice-to-pay. Additional information about the firm can be found at www.rgl.net. You may also contact Dr. Reed at (800) 347-7443.

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