

Personnel Notebook

For Your Most Important Resource -- The Human Resource

Prepared For:

HUMAN RESOURCE ASSOCIATES

FAMILY AND MEDICAL LEAVE ACT (FMLA)

Part II: Making It Work

In the previous issue of **Personnel Notebook**, *FMLA, The Good, The Bad and The Ugly*, we reported on the problems the FMLA has caused employers and employees alike. This apparently beneficial law has created a storm of abuse, expanding expense, exploding absenteeism, expanding paperwork, ridiculous interpretations and a boon for litigation attorneys.

I. FMLA, Summary Of The Issue

The FMLA became enforced law almost two years before it was fully written. Very little knowledgeable thought was applied to the law. Human Resource (HR) professionals and affected businesses were allowed little input in its creation.

The law was written with the philosophy that employers were the enemy and employees were illiterate victims.

The two major specific difficulties in the law were:

1. the interpretation of a serious health condition and
2. the ability to take incremental leave in time chunks as small as six minutes.

Beyond those two specific flaws, the overlapping time off allowances of the Americans with Disability Act (ADA) and Workers' Compensation have led to further confusion and systematic abuse.

The Society for Human Resource Management (SHRM), the largest organization of HR professionals in the world, is but one of the many organizations calling for hearings to allow

public input into the FMLA as a means of stopping the abuses or stopping the regulation. Instead, the Department of Labor is making public announcements of the overwhelming success of the FMLA, and in 2000/2001 intends to expand it in the following manner:

- Expand the coverage to include employers with 25 employees (currently 50 employees)
- Expand the coverage to include more people (temps, independent contractors, etc.)
- Include new reasons for time off under FMLA, such as:
 - o school activities
 - o routine medical checkups
 - o community activities (Scouts, sports)
 - o family literacy programs
 - o domestic violence
 - o anything related to education (public schools only, not private).

In addition, the intent is now to find ways to pay the employee for this leave. The Department of Labor suggests using unemployment compensation or Workers' Compensation, totally misunderstanding and misusing those two already abused entitlements. However, many believe it will come down to employer-funded pools of government-controlled money.

Soon we may see unemployment compensation and workers compensation funds going deficit the same way the social security

fund did. All because of using it for other than its intended purpose.

In the meantime, we need to better understand the workings and management of the FMLA in order to make it work without violating the provisions of the regulation.

II. The FMLA In Practice

Let's concentrate on the key issues facing us in the FMLA:

- The confusion between FMLA, ADA, and Workers' Compensation.
- The interpretation of a serious health condition.
- Intermittent leave.
- The forms needed.
- The procedure.

And follow that up with a Q & A that hopefully will cover some of the areas of concern.

A. The confusion between FMLA, ADA, and Workers' Compensation:

Companies are reporting confusion on the use of leave between these three regulations. Even more so when an employee completes leave on one regulation and immediately applies for leave on another. When an employee applies for any leave related to illness, accidents or handicaps, you must first determine specifically which leave you are granting or rejecting, and then follow the regulations on that leave! (See page 4 for the difference between these leaves.) If it is FMLA leave, you must then formally, in writing, notify the employee that you are approving or disapproving the leave and what conditions, guarantees or limits will be affecting this leave.

Even if the employee does not request FMLA leave, you, the employer, must determine if they are eligible for FMLA benefits! If they are eligible, then you, not the employee, are mandated to assure the employee's coverage unless the employee specifically rejects these benefits. If they do, then you must document his/her refusal to accept them. If an employee later is adversely affected (termination, lay off, loss of benefits, etc.), and then claims he/she was not aware that they could have received these benefits, you will be held liable.

B. The interpretation of a serious health condition:

- 1) Any illness, injury, impairment, or physical or mental condition that involves in-patient care or continuing treatment by a health care provider. (Health care provider generally means one that would be acceptable by your health care plan for a medical certification of the related illness. With the exception of a registered Christian Science practitioner, the provider must be licensed to practice in the state.) This includes any illness, injury, impairment or physical or mental condition that involves an overnight hospital stay or continuing treatment.

"Continuing treatment" means treatment for:

- 2) An incapacity of more than three consecutive days involving two or more treatments or a supervised schedule of continuing treatments.
- 3) An incapacity due to pregnancy including morning sickness or prenatal care.
- 4) An incapacity due to a chronic health condition (such as asthma, diabetes, or epilepsy).
- 5) An incapacity that is permanent or long term (such as severe stroke or terminal cancer).
- 6) Any condition that if not treated would likely result in an incapacity of more than three days (such as kidney dialysis or chemotherapy or drug rehabilitation).

Items not covered under a serious health condition include:

- Common cold
- Flu
- Ear aches
- Upset stomach
- Minor ulcers
- Headaches (other than migraine)
- Routine dental

- Periodontal disease
- Allergies*
- Mental illness resulting from stress*
- Cosmetic treatments*
- Alcoholism*
- Drug abuse*

**Asterisked items may be covered as a serious health condition if they also meet the requirements listed above as continuing treatment, but not for any independent occurrence. Absences due to substance abuse are not covered under FMLA unless the leave is for a medically supervised rehabilitation or treatment.*

C. Intermittent leave:

FMLA leave was originally perceived as long term or at least in one or two week segments. Subsequent interpretations, however, have defined the term intermittent leave to cover time periods as small as six minutes.

Intermittent leave must be granted if medically necessary and if each segment is for the same approved serious health condition. You, the employer, are not required to grant intermittent leave to an employee who is merely arriving at work late or leaving early claiming a variety of illnesses or doctors' appointments or family care needs.

Intermittent leave must be granted when an employee must schedule medical appointments during regular business hours or for several days spread out over several months as medically required for chemotherapy or physical therapy or other intermittent treatment.

The employer may not demand that an employee take off a half-day when all the employee needs is two hours. The employer can require that the leave time be no smaller than the time increments the payroll system uses to account for absences, tardiness or leave.

However, as in all FMLA leave, if your payroll system uses accrued time for benefits such as vacation, sick leave, pensions, etc., you do not have to allow such accrual for the time not worked (the leave).

D. Forms needed:

- Application for FMLA leave. All employees requesting FMLA leave

should complete this form. (See Sample Form #1 on page 5.)

- Medical certification statement. You may require this certification to be completed by the employee. It is recommended that you do so. You may choose the form for the employee or for the employee's family. (See samples on pages 6-8.) Note: Item #3 in Sample Form #2B refers to the six conditions listed under serious health conditions on page 2.
- Employer Response To Employee Request For FMLA Leave. You must provide this or a similar notice to employee within two days following their request for leave. (See Sample Form #3 on page 10.)
- Notice Of Intent To Return From Leave. You may require all returning employees to complete this form. It is highly recommended that you do so. (See Sample Form #4 on page 12.)

E. The procedure:

- 1 Post FMLA notice.
- 2 When an employee requests leave, identify the leave for which they are applying.
- 3 If leave is FMLA covered, explain procedure and rights and have them complete an Application For FMLA Leave.
- 4 Give them the Medical Certification form for physician to complete.
- 5 Send them the Employer Response To Employee Request For FMLA, form informing them of your approval/refusal.
- 6 Provide them with the Notice Of Intention To Return From Leave form for them to complete and return to you.
- 7 If they return, restore them to their position (or one of equal pay, level and stature) and to their benefits. Keep records of time used and all documents.
- 8 If they do not return (approximately 16% do not return) on time, you have the option of terminating them, or assigning them to another position. If they do not return you may charge them for your cost of the insurance premiums you paid during their absence.

WHICH LEAVE ARE YOU GRANTING?

The Differences In The Three Federally-Mandated Leaves

What Constitutes FMLA Leave?

FMLA requires employers with 50 or more employees to grant all eligible employees up to 12 weeks of unpaid leave in any 12 month period to care for family members or because of their own illness.

FMLA is granted for the following reasons:

1. The birth, and the care of the employee's child,
2. The placement of a child with the employee for adoption or foster care,
3. The care of a spouse, child, or parent (of the employee) who has a serious health condition, or
4. The employee's own serious health condition that renders them unable to perform their job.

Only Item No. 4, above, will overlap the leave conditions of the ADA or Workers' Compensation as no other items involve a disability or a work place injury.

FMLA is meant to provide time off to employees for health and adoption purposes. The intent is not to get the job performed, but to accommodate the "time off" needs. The employee may take intermittent leave in small chunks of time. The employee is guaranteed to regain their former job and benefits.

What Constitutes ADA Leave?

Employers with 15 or more employees must provide a "reasonable accommodation" to a disabled employee if that accommodation thereby enables them to perform the job. This means that if you can make changes in work assignments, physical environment, work schedules, etc., that will thereby enable this person to adequately perform the essentials of the job, you must make those changes if they require no more than a "reasonable accommodation." That "reasonable accommodation" may include allowing this employee to work less hours, take extended leave or take off time in incremental amounts, even if that results in them taking off more than the 12 weeks covered by the FMLA.

However, you can count that time off against the employee's FMLA allowance even though you may not (under ADA leave) limit them just to the 12 weeks allowed by FMLA. The employee may take intermittent leave in small chunks of time if that accommodation enables them to perform the job essentials. The employee under ADA leave is not guaranteed to regain their former job or benefits.

ADA is meant to provide "reasonable accommodation" to a disabled employee to enable them to do the job. The intent is not to acquire time off, but to get the job accomplished in spite of the employee's disablement. That often means allowing time off, short term, long term, incremental periods, flextime, etc., without time restrictions as long as the end result is that the job is being performed and the overall effect on the company is "reasonable."

What Constitutes Workers' Compensation Leave?

Workers' Compensation generally requires all employers to cover employees with Workers' Compensation protection. If an employee is injured "out of and in the course of" their employment, then they are allowed to receive necessary compensation for medical treatment and work time lost as a result of the injury.

Workers' Compensation is meant to recompense employees for job accidents. The intent is neither to acquire time off nor to get the job done, but to replace compensation lost and medical expenses incurred as a result of a job-related injury. The employee on Workers' Compensation leave may not take intermittent leave in small chunks of time as in FMLA or ADA leave; nor can the employee sue the company for injuries covered under Workers' Compensation.

In the course of dealing with Workers' Compensation, most employers will try to limit the time off an injured employee needs by creating a "light duty" work assignment, thereby reducing the work time lost and the ultimate cost of the injury.

The employee on Workers' Compensation leave is not guaranteed to regain their former job or benefits. Nor may an employee on Workers' Compensation leave use paid sick days or compensation from the employer while they are receiving Workers' Compensation pay.

Sample Form #1

Application for Family or Medical Leave

Employee's Name: _____

Department: _____

Current Address: _____

Start Date of Anticipated Leave: _____

Expected Date of Return to Work: _____

Reason for Leave (Explain): _____

Note: A leave request based on an employee's serious health condition or the serious health condition of an employee's spouse, child or parent must be accompanied by a verifying medical certification from a physician. I hereby authorize [the company] to contact my physician to verify the reason for my requested leave or for any other information concerning my requested family and medical leave.
I understand that a failure to return to work at the end of my leave period may be treated as a resignation unless an extension has been agreed upon and approved in writing by [the company].

Employee's signature: _____ Date: _____

APPROVED BY:

Supervisor: _____

Human Resources: _____

FMLA
Medical Certification Statement
(Employee's Own Serious Illness)

Employee's name: _____

Date condition began: _____

Date condition ended (or is expected to end): _____

Medical facts regarding the condition: _____

Explanation of extent to which employee is unable to perform the functions of his or her job:

Health care provider signature: _____ Date: _____

Office phone: _____

Medical Release:

I authorize the release of any medical information necessary to process the above request.

Employee/Patient's signature: _____ Date: _____

FMLA
Medical Certification Statement
(For Employee's Family)

1. Employee's name: _____

2. Patient's name (if different from employee): _____

3. The attached sheet describes what is meant by a "serious health condition" under the Family and Medical Leave Act (FMLA). Does the patient's condition¹ qualify under any of the categories described? If so, please check the applicable category:

(1) ____ (2) ____ (3) ____ (4) ____ (5) ____ (6) ____, or None of the above _____

4. Describe or attach the medical facts which support your certification, including a brief statement as to how the medical facts meet the criteria of one of these categories:

5 a. State the approximate date the condition commenced, and the probable duration of the condition (and also the probable duration of the patient's present incapacity,² if different):

b. Will it be necessary for the employee to take work only intermittently or to work on a less than full schedule as a result of the condition (including for treatment described in Item 6 below)? _____

If yes, give the probable duration: _____

c. If the condition is a chronic condition (condition #4) or pregnancy, state whether the patient is presently incapacitated² and the likely duration and frequency of episodes of incapacity²:

6 a. If additional treatments will be required for the condition, provide an estimate of the probable number of such treatments.

If the patient will be absent from work or other daily activities because of treatment on an intermittent or part-time basis, also provide an estimate of the probable number and interval between such treatments, actual or estimated dates of treatment if known, and period required for recovery, if any:

b. If any of these treatments will be provided by another provider of health services (e.g., physical therapist), please state the nature of the treatments:

¹ Here and elsewhere on this form, the information sought relates only to the condition for which the employee is taking FMLA leave.

² "Incapacity," for FMLA purposes, is defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom.

Sample Form #2B (cont'd.)

- c. If a regimen of continuing treatment by the patient is required under your supervision, provide a general description of such regimen (e.g., prescription drugs, physical therapy requiring special equipment):

- 7. a. If medical leave is required for the employee's absence from work because of the employee's own condition (including absences due to pregnancy or a chronic condition), is the employee unable to perform work of any kind? _____
- b. If able to perform some work, is the employee unable to perform any one or more of the essential functions of the employee's job (the employee or the employer should supply you with information about the essential job functions)? _____ If yes, please list the essential functions the employee is unable to perform:

- c. If neither a. nor b. applies, is it necessary for the employee to be absent from work for treatment?

- 8. a. If leave is required to care for a family member of the employee with a serious health condition, does the patient require assistance for basic medical or personal needs or safety, or for transportation?

- b. If no, would the employee's presence to provide psychological comfort be beneficial to the patient or assist in the patient's recovery? _____
- c. If the patient will need care only intermittently or on a part-time basis, please indicate the probable duration of this need:

Signature of health care provider: _____ Date: _____

Type of practice: _____

Address: _____

Telephone number: _____

The section below to be completed by the employee requesting family leave to care for a family member.

State the care you will provide and an estimate of the period during which care will be provided, including a schedule if leave is to be taken intermittently or if it will be necessary for you to work less than a full schedule:

Employee's signature: _____ Date: _____

Sample Form #2B (Attachment.)

The interpretation of a serious health condition:

- 1) Any illness, injury, impairment, or physical or mental condition that involves in-patient care or continuing treatment by a health care provider. Health care provider generally means one that would be acceptable by your health care plan for a medical certification of the related illness. With the exception of a registered Christian Science practitioner, the provider must be licensed to practice in the state.) This includes any illness, injury, impairment or physical or mental condition that involves an overnight hospital stay or continuing treatment.

“Continuing treatment” means treatment for:

- 2) An incapacity of more than three consecutive days involving two or more treatments or a supervised schedule of continuing treatments.
- 3) An incapacity due to pregnancy including morning sickness or prenatal care.
- 4) An incapacity due to a chronic health condition (such as asthma, diabetes, or epilepsy).
- 5) An incapacity that is permanent or long term (such as severe stroke or terminal cancer).
- 6) Any condition that if not treated would likely result in an incapacity of more than three days (such as kidney dialysis or chemotherapy or drug rehabilitation).

Items not covered under a serious health condition include:

- Common cold
- Flu
- Ear aches
- Upset stomach
- Minor ulcers
- Headaches (other than migraine)
- Routine dental
- Periodontal disease
- Allergies*
- Mental illness resulting from stress*
- Cosmetic treatments*
- Alcoholism*
- Drug abuse*

**Asterisked items may be covered as a serious health condition if they also meet the requirements listed above as continuing treatment, but not for any independent occurrence. Absences due to substance abuse are not covered under FMLA unless the leave is for a medically supervised rehabilitation or treatment.*

Sample Form #3

Employer Response to Employee Request for Family and Medical Leave (Form WH-381)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

Date: _____

TO: _____

(Employee's Name)

FROM: _____

(Name of Appropriate Employer Representative)

SUBJECT: Request for Family / Medical Leave

On _____, you notified us of your need to take family/medical leave due to:

(Date)

- the birth of your child, or the placement of a child with you for adoption or foster care; or
- a serious health condition that makes you unable to perform the essential functions of your job; or
- a serious health condition affecting your spouse child parent, for which you are needed to provide care.

You notified us that you need this leave beginning on _____ and that you expect leave to continue until on or about _____.

(Date)

Except as explained below, you have a right under the FMLA for up to 12 weeks of unpaid leave in a 12-month period for the reasons listed above. Also, your health benefits can be maintained during any period of unpaid leave under the same conditions as if you continued to work. In any event, you will be reinstated to the same or an equivalent job with the same pay, benefits, and terms and conditions of employment on your return from leave. If you do not return to work following FMLA leave for a reason other than (1) the continuation, recurrence, or onset of a serious health condition which would entitle you to FMLA leave; or (2) other circumstances beyond your control, you may be required to reimburse us for our share of health insurance premiums paid on your behalf during your FMLA leave.

This is to inform you that: (check appropriate boxes, explain where indicated)

- 1. You are eligible not eligible for leave under the FMLA.
- 2. The requested leave will will not be counted against your annual FMLA leave entitlement.
- 3. You will will not be required to furnish medical certification of a serious health condition.

If required, you must furnish certification by _____ *(insert date)* (must be at least 15 days after you are notified of this requirement) or we may delay the commencement of your leave until the certification is submitted.

**Form WH 381
December 1994**

Sample Form #3 (cont'd.)

4. You may elect to substitute accrued paid leave for unpaid FMLA leave. We will will not require that you substitute accrued paid leave for unpaid FMLA leave. If paid leave will be used, the following conditions will apply: *(Explain)*

5. (a). If you normally pay a portion of the premiums for your health insurance, these payments will continue during the period of FMLA leave. Arrangements for payment have been discussed with you and it is agreed that you will make premium payments as follows: *(Set forth dates, e.g., the 10th of each month, or pay periods, etc., that specifically cover the agreement with the employee.)*

(b) You have a minimum 30-day *(or indicate longer period, if applicable)* grace period in which to make premium payments. If payment is not made timely, your group health insurance may be cancelled, provided we notify you in writing at least 15 days before the date that your health coverage will lapse, or, at our option, we may pay your share of the premiums during FMLA leave and recover these payments from you upon your return to work. We will will not pay your share of health insurance premiums while you are on leave.

(c) We will will not do the same with other benefits (e.g., life insurance, disability insurance, etc.) while you are on FMLA leave. If we do pay your premiums for other benefits, when you return from leave you will will not be expected to reimburse us for the payments made on your behalf.

6. You will will not be required to present a fitness-for-duty certificate prior to being restored to employment. If such certification is required but not received, your return to work may be delayed until the certification is provided.

7. (a) You are are not a “key employee^a as described in §825.218 of the FMLA regulations. If you are a “key employee,” restoration to employment may be denied following FMLA leave on the grounds that such restoration will cause substantial and grievous economic injury to us.

(b) We have have not determined that restoring you to employment at the conclusion of FMLA leave will cause substantial and grievous economic harm to us *(Explain (a) and/or (b) below. See §825.219 of the FMLA regulations.)*

8. While on leave, you will will not be required to furnish us with periodic reports every _____ *(indicate interval of periodic reports, as appropriate for the particular leave situation) of your status and intent to return to work (see §825.309 of the FMLA regulations).* If the circumstances of your leave change and you are able to return to work earlier than the date indicated on the reverse side of this form, you will will not be required to notify us at least two work days prior to the date you intend to report for work.

9. You will will not be required to furnish recertification relating to a serious health condition. *(Explain below, if necessary, including the interval between certifications as prescribed in §825.308 of the FMLA regulations.)*

Sample Form #4

Notice of Intention to Return From Leave

Employee's Name: _____

Supervisor: _____

Date leave commenced: _____

Date of planned return: _____

I understand that my restoration to employment is subject to the following conditions:

1. As a condition of restoration, each employee must provide a written certification from his or her health care provider that the employee is able to resume working. (This is optional for employers.)
2. Every attempt will be made to restore an employee returning from leave to his or her original position. If the employee's original position is unavailable, the employee will be placed in an equivalent position with equivalent pay and benefits.
3. An employee returning from family and medical leave shall not be entitled to the accrual of any seniority or employment benefits during the period of leave.

Employee's signature: _____ Date: _____

I have examined [employee] and can certify that he/she is fully able to resume working.

Health care provider's signature: _____ Date: _____

**FAXABLE SIGN UP SHEET TO:
FMLA TECHNICAL CORRECTIONS COALITION**

TO: FMLA Corrections Coalition
 c/o Society for Human Resource Management
 Governmental Affairs Department
 Fax: (703) 836-0367
 Phone: (703) 535-6028
 1800 Duke Street, Alexandria, VA 22314
 e-mail: charlotte@shrm.org

FROM: _____

Name (please type or print clearly)	Phone Number	
E-mail Address		Street Address
Company Name	Company Size	

_____ Please add my company to the list of those who support SHRM in their effort to oppose FMLA expansions and urging Congress to address current problems under the FMLA. Please list my company name as follows:

Additional comments (if any):

Q & A On The FMLA:

Q. Does the law guarantee paid time off?

A. No. FMLA leave is unpaid leave. However, either you or the employee may decide to apply unused sick leave, vacation time, personal days, etc., as a means to:

1. Provide the employee with income during leave, and/or,
2. Minimize the overall amount of lost time the employee will create.

Q. What is a "family member"?

A. An employee's spouse, son or daughter, and parents. The term "parent" does not include an "in-law." There are special considerations, however, for cases of foster parents and guardians.

Q. Is there a limit to the number of times FMLA can be taken in one year?

A. No! It may be taken all at once as in one 12-week leave for a pregnancy or taken as hundreds of 30 minute segments to accommodate tardiness for therapy.

Q. What about spouses who work for the same employer?

A. If a husband and wife work for the same employer, the company may limit them to a combined total of 12 weeks FMLA leave for the birth, placement, adoption or foster care of a child or the care of a parent or child with a serious health condition. However, for the employee's own "serious health condition," each individual may apply FMLA separately.

Q. Can an employee be required to return to work before the leave is exhausted?

A. Only if the employee fails to fulfill the required obligations to provide supporting medical certification. The employer, within reason, may require periodic updates from the physician of the employee's medical condition and require the employee to return to work if the FMLA requirements are no longer met.

Q. Can an employee do whatever he/she chooses during the FMLA leave?

A. Yes. They may take on other employment, attend classes, take vacations, etc. However, if the company has an established policy regarding, or forbidding outside employment, they may uniformly apply this policy to employees on FMLA leave as well.

Q. Can an employee be terminated while on FMLA leave?

A. Yes, but not because they took the leave. If they would have been laid off anyway due to seniority or department closing or a legitimate job abolishment, the employee can be terminated, laid off, etc. Being on FMLA leave is not a defensive mechanism to avoid layoff, termination or demotion, etc. But, be absolutely sure of your motives and be prepared to defend and document your decision.

Q. If the employee does not return to work after the leave, can I recover my insurance premium costs?

A. Yes. You are not required to continue the employee's medical coverage during the leave. However, if that means that the employee can not be re-instated to full benefits upon return, then you may have to continue the benefits during leave. Whatever conditions apply the employee must be fully re-instated in benefits upon return! If the employee already pays part of the premiums; and wants to continue the coverage during the leave, then they are required to continue to pay those premiums during the leave.

However, whether they pay those premiums or not, you are still required to fully restore the employee's benefits when they return. This may mean that you will be paying their premiums in addition to your own. If the employee fails to return after the leave or does not stay for at least 30 days, then you may charge either or both those premiums to the employee. It is highly recommended that you require the employee to sign an agreement to this effect at the time of the leave. (See clause 5A in the sample form on page 11.) There are far too many specifics covering the restoration of your lost premiums to list here, but a few to note are:

1. Monies due the employee are theirs. You do not have automatic rights to take money due you from an employee's paycheck. You need to at least arrange a signed agreement before you do so.
2. You cannot attach payment from the employee's retirement or savings fund.
3. Although you cannot require it, the employee can pay their share of the premiums in advance of the leave through

payroll deduction.

Q. What if the employee does not want insurance coverage during the leave?

A. Then you do not have to provide it or to pay your premiums either. However, you must still restore full coverage without further qualifications upon the employee's return. Also, be aware that your insurance carrier may not allow automatic reinstatement after a policy lapse.

Q. Does FMLA constitute a COBRA event?

A. Generally no! Only when the insurance coverage is going to cease is a COBRA event triggered.

Q. Are all executives also covered under FMLA?

A. No! Employers are not required to provide FMLA to the highest-paid 10% of their executive employees if granting such leave would "create substantial and grievous injury to the business operations."

Q. Will my exempt employees lose their exempt status taking 1/2 day leaves under the FMLA?

A. No. A newer provision in the FMLA alters the current interpretation of the Federal Labor Standards Act (FLSA) to allow exempt employees to take off partial days and to be docked in pay without losing their exempt status but only when they are on a qualified FMLA leave.

Q. Can I count FMLA leave as absences for the purpose of employee evaluations, pay increases, etc.

A. No! An employee cannot be evaluated lower on performance evaluations, downgraded or adversely impacted on wage increases, etc., due to any use of FMLA. FMLA is not considered an unexcused absence.

Q. Am I violating the FMLA if I have separate sick leave policies for union and non-union employees?

A. No. Contract negotiations even with different unions in the same company may result in broadly different sick leave policies. As long as no employee is provided less coverage than mandated under FMLA, no violation has occurred.

Q. Can an employer require an employee to take more leave than is needed?

A. No. The employee cannot be required by any company policy to take off more time or in larger segments than is medically necessary. In fact, if the employee's health condition improves to the point where the physician indicates no further need for continuing the leave, the employee, upon two days' notice to the employer, must be allowed to return to work.

Q. Can I offer my employee "light duty" to limit the FMLA or to return them to work sooner?

A. No! As long as the employee meets the requirements for FMLA leave, you cannot deny them their FMLA benefits. However, if the employee is collecting Workers' Compensation (WC) during the leave, the WC carrier may cease or reduce WC payments for refusal to accept the light duty assignment.

Q. Can an individual supervisor be sued under the FMLA?

A. Yes. Although court cases have often defined that an individual supervisor is not an employer, new court decisions have held that for purposes of the FMLA, an employer is defined as "any person who acts, directly or indirectly in the interests of the employer." On that basis, an individual supervisor can be (and has been) personally sued for firing an employee who stayed home to care for sick children under the FMLA.

Needless to say, the FMLA can be a tremendous ball of red tape. The original law was 13 pages long; the final law was over 300 pages.

If it was intended to help poor families deal with illness without losing their job, it is a failure. Poor families don't use it. Few non-married people use it, few people with no children use it. It has been generally tagged in Washington as the "Soccer Mom" law. With the current plans to expand the law to cover more employees, cover more people, allow more benefits, provide more pay, etc., it will likely become much more complicated.

Those of us who may find the law very helpful and beneficial while receiving these benefits must objectively measure the issues on balance. The existing and growing costs and negative impact of this type of regulation on employers and other employees must eventually cause a negative impact on us all. Employers are

not the enemy.

It is not likely that this regulation will ever be rescinded. It is quite possible that it may be expanded. We can, with effort, re-examine it, clean it up, trim off the rougher edges and make it workable for all. If you would like to voice your opinion on this issue, you can join the Society for Human Resource Management (SHRM) in their effort to do just that by completing the form on page 12 and faxing it to SHRM.

Bill Cook
Human Resource Associates

The opinions expressed in this publication are those of the author and do not necessarily reflect those of the sponsor. The information contained herein should not replace the advice of your attorney.

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