

Kramer Rayson LLP

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KRAMER RAYSON LLP

Managing the Employee Who Is Absent

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FMLA Is An HR Migraine

- FMLA concerns top the lists of HR professional concerns. Why?
- Regulations are confusing, and difficult to administer.
- FMLA leaves intersect frequently with ER obligations under disability, workers' compensation and Tennessee parental leave laws.
- Some (you know the ones) take advantage of FMLA to shield absenteeism.

The Bad News: No Relief Appears in Sight

- The law, passed in 1993, is firmly entrenched.
- Attempts to clarify existing regulations or roll back entitlements have fallen on deaf ears.
- Attempts are being made in Congress to broaden its scope – even make it paid leave.

The Good News:

Employers that create systems for
identifying, designating and tracking
FMLA leaves are not powerless.

When Employee is Covered By FMLA

- Employee has been employed by employer at least 12 months.
 - Temporary service counts.
 - Need not be consecutive.
- Employee must have worked 1250 hours in previous 12 months.
- Employee must work at worksite with 50 or more employees.

FMLA Eligibility: Beware of Mistakes, Estoppel and Waiver

- FMLA regulations provide employer who mistakenly confirms FMLA eligibility “may not subsequently challenge eligibility.”
- *Sorrell v. Rinker Materials Corp.*, 395 F.3d 332 (6th Cir. 2005) (applied estoppel where employer approved leave and then reneged).
- *Mutchler v Dunlop Memorial Hospital*, 485 F.3d 854 (6th Cir. 2007) (no estoppel where employer wrongly assumed plaintiff was eligible but then corrected itself before second leave; **regulation of dubious enforceability**).

For What Reasons?

- The *birth* of a child, and newborn care;
- Placement with employee of child for *adoption* or foster care;
- Employee's *serious health condition* that renders the employee unable to perform essential functions; and
- Care of spouse, child or parent with *serious health condition*.

What is an FMLA “Serious Health Condition”

- **Overnight hospitalization** plus follow up incapacity or treatment.
- **More than 3 days** incapacity plus **2 doctor visits**.
- **More than 3 days** incapacity plus **1 doctor visit** and **continuing treatment** (prescription or therapy).
- Any incapacity for **pregnancy/pre-natal care**.

What is an FMLA “Serious Health Condition”) (continued)

- Any incapacity from “**chronic serious health condition**” requiring periodic treatment, episodic absences, e.g., asthma, diabetes.
- Any period of incapacity from “**long term serious condition**,” e.g. Alzheimer's, AIDS, cancer.
- NOT colds, the flu, headaches, routine dental care, upset stomach (unless “complications arise”).

How Much Leave?

- Twelve work weeks of leave during any 12 month period.
- Each time employee takes FMLA leave, the remaining leave entitlement is the balance of 12 weeks not used during the immediately preceding 12 months.
- We **strongly recommend choosing** your “twelve month period” - - **rolling twelve months** is most employer-friendly - - and applying it uniformly.

Medical Certification

- Always insist on employee providing completed medical certification.
- Use DOL Form WH-380.
- Employee's medical certification controls both serious health condition and leave duration.
- Employee has **15 days** to return certification. If incomplete, you **must** give opportunity to cure.
 - *Killian v. Yorozu Automotive Tennessee*, 454 F.3d 549 (6th Cir. 2006) (employer's policy imposing shorter limits on extended leave requests was unlawful interference).

FMLA Fitness for Duty Certification

- Must have uniform policy requiring medical certification upon return to work.
 - *Saroli v. Automation & Modular Components, Inc.*, 405 F.3d 446 (6th Cir. 2005) (finding employer's verbal demand for fitness for duty statement only when new mom tried to return to work violated FMLA).
- Should always be required prior to or upon return.
- Unfortunately, certification need only be simple statement of employee's ability to return.

FMLA-ADA Interplay and Return-to-Work

- Give employee greatest benefit under the two laws.
- Simple fitness-for-duty certification gets employee back into his or her job under FMLA, even with restrictions.
- If employee can't perform essential functions, further medical examination can be required **after** the employee is returned to work.
 - *Brumbalough v. Camelot Care Centers, Inc.*, 427 F.3d 996 (6th Cir. 2005).

Ten Tips to Navigate the Treacherous FMLA Waters

1. Update and Evaluate Your Policies Regularly

- If you have an employee handbook it **must** have an FMLA policy (if you have a location with 50 employees).
- If you have none, you **must** include it with any other written policy documentation.
- Policy **should closely track** FMLA regulations.
- Set your “twelve month period,” establish requirement for medical certifications and for return to work certifications.
- Get employees to **acknowledge receipt.**

Update and Evaluate Your Policies Regularly

- Display the poster (WH 1420).
- Use DOL forms:
 - Certification of health care provider (“CFH”) (WH 380)
 - Response to request for leave (WH 381)
- You can insist **on strict compliance** with the 15 days to provide health care certification **if** you properly communicate it.
 - *Frazier v. Honda of Am. Mfg., Inc.*, 431 F.3d 563 (6th Cir. 2005) (CFH submitted **one day late** was untimely -- discharge upheld).

2. Focus on Proper Notice

- Employee must provide notice by **stating “qualifying reason** for the needed leave.”
- Employee **need not** assert rights under FMLA or **mention** FMLA.
- If Employee does not give complete information, Employer **must** inquire further.

What's enough notice?

- Employee advises he/she will be absent due to medical or family-medical condition that could be “serious health condition.”
- Key words: sick children, spouse or parents; in-patient hospitalization; doctor visit; prescription medication; pregnancy; specific chronic/long term conditions like asthma, migraine, cancer.
- Key facts: coupling the above with 3 days absence should trigger inquiry.

What's enough notice?

- “I need time off for nasal surgery.”
- “I need a few days off to care for my sick son.”
- “I need to go to the doctor because of my diabetes.”
- “I cannot come in because I am depressed.”
- “I have been hospitalized from an accident.” *Cavin v. Honda of Am. Mfg., Inc.*, 346 F.3d 713 (6th Cir. 2003).

What's not enough notice?

- Saying “I’m sick” and taking three days off – the period of absence alone does **not** constitute adequate notice.
Phillips v. Quebecor World RAI Inc., 450 F.3d 308 (7th Cir. 2006).
- “If you have brain cancer but just tell your employer you have a headache, you have not given the notice that the law requires.” *Aubuchon v. Knauf Fiberglass, GMBH*, 359 F.3d 950 (7th Cir. 2004).
- “I twisted my knee and need a sick day” is **not** sufficient.
Walton v. Ford Motor Co., 424 F.3d 481 (6th Cir. 2005).

3. Get and Use the Right Information

- When in doubt, designate leave **conditioned** upon returning medical certification.
- Give employees 15 days to return it - - nothing less.
- Incomplete certifications - - document communication with employee and **give chance to correct**.
- Disputes about RTW deadlines can lead to interference and retaliation claims. Be **very certain** no dispute exists regarding timelines before acting.
 - *Edgar v. JAC Products*, 443 F.3d 501 (6th Cir. 2006) (no liability for employer only because plaintiff could not have returned to work even if her “late” verification was accepted)

3. Get and Use the Right Information (cont.)

- Medical certification **controls** whether EE has serious health condition and leave duration.
- Do **not** call the employee's healthcare professional (except in workers' compensation situations).
- Properly use the **doctor to doctor** "clarification" provision when you question adequacy of certification.

4. Understand “Serious Health Condition”

- Don’t focus exclusively on “more than three consecutive days” - other conditions qualify, too.
- Err on the side of **granting** requested FMLA instead of counting the absence under attendance policy.
- Be very **slow to reject** medical certifications-- grant the leave as FMLA-covered, count the days, and move on.

5. Manage Intermittent Leaves Effectively

- Certification and Recertification Requirements
 - Scrutinize initial certification carefully; decide whether to accept or reject as incomplete or not supported, or, with employee's permission, clarify through your doctor.
 - Require recertification where allowed.
 - Carefully track the FMLA leave used.
 - Make sure the absence is related to the condition requiring intermittent leave.
 - *Hoffman v. Professional Med. Team, Inc.*, 394 F.3d 414 (6th Cir. 2005) (no violation where employer insisted on correction of insufficient certification and terminated employee who went into tirade.)

Manage Intermittent Leaves Effectively (cont.)

- Reassignment during intermittent leave
 - May be utilized to minimize disruption
 - Employee must receive equal pay and benefits.
- Recertification can be required not less than **“minimum period specified on the certification,”** or if employee **requests extension** or **doubt is cast** on validity.
- Require certification no less than every 12 months.

Manage Intermittent Leaves Effectively (cont.)

- Require written verification for absences when connected to treatment or examination.
- Look for suspicious patterns, e.g., Monday/Friday absences - - discuss with employee.
- Discuss with employee the need for non-disruptive scheduling where absences are for treatment or examinations.

6. Coordinate Leaves

- Don't forget to designate workers' compensation leave time as FMLA time ASAP after the injury.
- Don't allow the end of the 12 week FMLA leave to sneak up on you--communicate early with the employee.
- Send letter to employee prior to exhaustion of FMLA asking employee to coordinate return, obtain return to work certification, etc.

7. Develop a Process for Leave Administration

- Designate a “Leave Coordinator”.
- Train supervisors on FMLA basics and when to report absences to the Coordinator.
- Probe supervisors over reason(s) employee gave for absence.
- Use form letters to assist in communicating with employees (do not send blindly- each situation is different).

8. Keep the Right Records

- **Meticulously** track leave days and hours, retain employee notices, responses to requests for leave, medical certifications, related correspondence, premium payment records, and records of disputes related to leave designations.
- These records are your best ally in any subsequent dispute.

9. Get Reinstatement Right

- When employee is ready to return to work and supplies a Fitness for Duty statement, return them to work **within two business days**.
 - *Hoge v. Honda of Am. Mfg., Inc.*, 384 F.3d 238 (6th Cir. 2004).
 - *Brumbalough v. Camelot Care Centers, Inc.*, 427 F.3d 996 (6th Cir. 2005).
- Address job function doubts and/or ADA accommodation issues **after** returning employee to work.

10. Repel Retaliation Claims

- Do **not** discipline or terminate under attendance policy without close review of documentation/facts by HR and Counsel.
- Carefully scrutinize any discipline shortly before or after FMLA or workers compensation leave. Always consult HR and counsel.
- If terminating for inability to return or perform job functions, make sure you have reliable information in hand **before** acting.
 - *Bryson v. Regis Corp.*, 2007 U.S. App. LEXIS 19481 (6th Cir. 2007) (retaliation claim established where employer terminated **before** it received notice that EE could not return after 12 weeks.)

11. Bonus: Watch Out for Retaliation

- **Negative comments** about leave will come back to haunt.
 - *Bryson v. Regis Corp.*, 2007 U.S. App. LEXIS 19481 (6th Cir. 2007).
 - *Saroli v. Automation & Modular Components, Inc.*, 405 F.3d 446 (6th Cir. 2005).
- View taking leave as **any other protected activity** and analyze decisions under a retaliation analysis.
- Retaliation claims **much harder** to defend than interference claims.