



Bailey Cavalieri LLC
ATTORNEYS AT LAW

CLIENT ALERT

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Family And Medical Leave: Beyond The Basics

The Family and Medical Leave Act of 1993 ("FMLA") became law over a decade ago and most employers are generally aware of its basic requirements. Generally, the FMLA applies to employers employing fifty (50) or more employees, or who operate a private elementary or secondary school. The FMLA applies only to those employees of a covered employer who have worked one thousand two hundred fifty (1,250) hours in the last twelve (12) months, and have been employed by the employer for at least twelve (12) months before the beginning of the leave. To be covered, an employee must also work at a worksite where there are fifty (50) or more employees within a seventy-five (75) mile radius. If an eligible employee works for a covered employer, the employee is entitled to up to twelve (12) weeks per year of job-protected, unpaid leave for the birth or care of a newborn child or the placement of a child for adoption or foster care. Leave may also be taken to care for an immediate family member (spouse, child or parent) with a serious health condition, or because of the employee's own serious health condition.

The FMLA, however, provides employers with everyday challenges which go beyond the basics of the FMLA. Some common examples include the following:

(1) Eligible Employee.

An employee is not eligible for the benefits of the FMLA, unless the employee has been employed for at least one thousand two hundred fifty (1,250) hours and been employed for a continuous year prior to the beginning of the requested leave. Employers should be aware that employees who seemingly fall just short of the hour threshold may actually be entitled to coverage. For example, one court has allowed an employee to use uncompensated "setup time" before the beginning of her work shift as a means of achieving the one thousand two hundred fifty (1,250) hour threshold for eligibility. Another court allowed an employee to use accrued but unused vacation time to achieve the minimum hour requirement.

Employers should also know that the Department of Labor requires that members of the National Guard returning from active service since September 11, 2001, are entitled to be treated for FMLA purposes as if they had been working for their employer during their

time on active duty. The hours to be credited are those the employee would have worked for the employer if not on active duty.

(2) Covered Employers.

It is generally believed that employers with fewer than fifty (50) active employees are not covered by the FMLA. **BUT**, employers are covered if they employ fifty (50) or more employees for each working day during each of twenty (20) or more calendar work weeks in the current or preceding calendar year. As a result, employees on the payroll need not actually work any hours in a week to be counted and an employer covered by the FMLA last year is covered this year, even if it employs fewer than fifty (50) employees.

(3) Employee Notice of Intent to Take FMLA Leave.

When the need for leave is foreseeable, an employee must provide at least thirty (30) days advance notice before FMLA leave is to begin. For example, foreseeable events such as childbirth are known well in advance and are "foreseeable." If the leave is not foreseeable, an employee must provide as much notice as possible under the circumstances. The FMLA does not require that notice be in writing. The regulations simply require that an employee provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave and the anticipated time and duration of the leave. For example, simply calling in "sick" without more information is insufficient to put the employer on notice that the FMLA has been invoked by the employee. On the other hand, an employee who had frequent bouts of depression and called in to state that she would be absent due to "depression again" is sufficient notice under the FMLA.

(4) Employee Obligation to Provide Medical Information.

An employer may require that an employee's leave to care for the employee's seriously ill parent, spouse or child, or to care for the employee's own serious health condition be supported by a certification issued by the healthcare provider of the employee or the

employee's ill family member. The medical information which may be requested by the employer is set forth in the regulations and specified in a form available at the Department of Labor's website at www.dol.gov. If the employee fails to provide the medical certification requested in a reasonable period of time, an employer may delay the FMLA leave or deny it entirely.

If an employee submits a completed medical certification signed by a healthcare provider, the employer may not request additional information from the employee's healthcare provider. A healthcare provider representing the employer, however, may contact the employee's healthcare provider, with the employee's permission, for the purpose of clarification and authenticity of the medical certification. If an employer doubts the authenticity of the medical certification, the employer may request a second opinion, at the employer's expense, and the employee is provisionally entitled to FMLA leave pending the results of the second medical opinion.

(5) Employee Compliance With Employer Absence Requirements.

An employee who otherwise qualifies for FMLA leave cannot ignore an employer's usual and customary notice requirements when the employee is to be absent from work. For example, a federal appeals court upheld the discharge of an employee who otherwise qualified for FMLA. The employer had a policy providing for discipline where employees failed to call in prior to the start of their shift. The subject employee repeatedly failed to call in or to provide a doctor approved return-to-work date and was fired. Employers should be cautious, however, to avoid inconsistent application of such policies.

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