

**Employer Tools:
Management of Abuse and Misuse
of FMLA Leave**



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FMLA Fraud

FMLA Regulations provide:

“An employee who fraudulently obtains FMLA leave from an employer is not protected by the FMLA’s job restoration or maintenance of health benefits provisions.”

29 C.F.R. § 825.216(d).

Employee Protections

FMLA protects against:

- Interfering, restraining or denying the exercise (or attempted exercise) of FMLA rights
- Discharging or discriminating against an individual for opposing unlawful practices
- Retaliating against an employee for exercising or attempting to exercise FMLA rights
- Violating the FMLA or its regulations

29 C.F.R. § 825.220(a) - (c).

FMLA Interference

Unlawful interference includes:

- Refusing to authorize FMLA leave
- Discouraging an employee from using FMLA leave
- Manipulation by an employer to avoid its responsibilities under the FMLA

29 C.F.R. § 825.220(b).

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Most Problematic Cases

- Chronic health conditions
 - Migraines, chronic sinusitis, severe allergies, asthma, back pain or other soft tissue injuries, stress-related conditions
 - Conditions with subjective symptoms
- Intermittent Leave
 - Recurrent absences
 - Episodic flare-ups of symptoms
 - Treatment often not sought for each "episode"

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Employer Tools

- Managing problem cases means using tools available to employer under FMLA:
 - Notice provisions
 - Serious health condition definition and medical certification processes
 - Cooperative scheduling and transferring an employee in cases of medical treatment
 - Counting paid and unpaid leave

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Tool No. 1 – Notice Requirements

- **Foreseeable Leave**
 - 30-days notice is still required
 - If employee fails to give 30-days notice, employee must explain why notice was not practicable
 - “As soon as practicable” means the same day or the next business day
 - Employer may require an employee to comply with “usual and customary notice and procedural requirements” for leave
- **Unforeseeable Leave**
 - “As soon as practicable” remains the standard
 - However, “it generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer’s usual and customary notice requirements applicable to such leave.”
 - DOL requires “prompt” notice in instances of non-emergent cases

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Tool No. 2 – “Serious Health Condition”

- DOL retained the six categories of serious health condition but made definitional changes to two key categories:
- **Absence Plus Treatment**
 - “Treatment” must be sought twice within 30 days of the first day of incapacity, absent extenuating circumstances
 - First visit must occur within 7 days of the first day of incapacity
 - Treatment means in-person visit
- **Chronic Conditions**
 - “Periodic visits for treatment” means that employee must seek treatment two or more times within a year

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Tool No. 3 – Initial Medical Certifications

- Employer must determine if condition is covered
- New medical certification forms contain more detailed information about condition (symptoms, diagnosis, regimen of continuing treatment, dates of treatment, essential functions)
- For chronic conditions, obtain very important “baseline” information:
Based on patient’s medical history and your knowledge of the medical condition, estimate the frequency of flare-ups and the duration of related incapacity that the patient may have over the next 6 months (e.g., 1 episode every 3 months lasting 1-2 days):
Frequency: ____ times per ____ week(s) ____ month(s)
Duration: ____ hours or ____ days(s) per episode
- Certifications must be “complete and sufficient.” Vague, ambiguous or non-responsive certs should be returned to employee to cure (7 calendar days)
- Common ailments (cold, flu, ear ache, upset stomach, etc.) are not covered, absent complications.

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Tool No. 4 – Authentication & Clarification

- If employer doubts authenticity of certification or needs clarification, employer now may contact HCP directly
 - Authentication means verifying that HCP provided information on form
 - Clarification means understanding handwriting or meaning of responses
- Employer contact may only occur after employee has been given opportunity to cure any deficiencies

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Tool No. 5 – Second/Third Opinions

- Employer can require that employee obtain a second opinion from a HCP selected by employer at employee's expense
- If two opinions differ, employer may require employee to obtain a third opinion at employer's expense through jointly selected HCP
- Second opinions may be useful to test frequency and duration of FMLA usage for chronic conditions

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Tool No. 6 – Re-Certification

- New recertification rules clarify timing of recerts:
 - 30 Day Rule: Employer may request recertification no more often than every 30 days, subject to two exceptions:
 - More than 30 days: Minimum duration on certification is more than 30 days, or
 - Less than 30 Days: Employee requests an extension; there is significant change in circumstances; or employer obtains information that casts doubt on stated reason for absence
- Pattern of absences in conjunction with scheduled days off, or episodic absences lasting longer or more often than certified, are grounds for recertification.

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Tool No. 7 – Transfer to Alternative Position

- Employer may require employee on foreseeable intermittent or RWS leave to transfer to alternative available position:
 - Must have equivalent pay and benefits
 - Must better accommodate the recurring leave
- Transfer may include part-time or half-time position
- This right only is available in cases of foreseeable leave for planned medical treatment

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Tool No. 8 – Scheduled Medical Treatment

- Employee must make “reasonable effort” to schedule intermittent or RWS leave so as not to disrupt unduly employer’s operations
- “Reasonable effort” means trying to arrange treatment on schedule that accommodates employer’s needs
 - Employee “must consult” with employer before scheduling
 - Employee “convenience” doesn’t justify disrupting operations
- This right only is available in cases of foreseeable leave for planned medical treatment

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Tool No. 9 – Return to Work

- New regulations permit employer to obtain fitness-for-duty (FFD) certification that employee can perform “essential functions” of job
 - Must inform employee of this requirement in Designation Notice
 - May attach list of essential functions
- Employer may seek authentication and clarification of certification, but no second/third opinions
- Limited FFD certification right in case of intermittent leave – reasonable safety concerns must exist (ADA direct threat standard)

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Tool No. 10 – Exhausting Leave Entitlement

- FMLA protection is lost once employee exhausts 12 week entitlement
- Manage intermittent leave by counting all qualifying absences
- New regulations:
 - Leave ordinarily must be tracked in smallest payroll increment
 - However, if employer uses larger increment for other forms of leave, that may be used for FMLA leave
 - No larger than 1 hour

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Tool No. 11 – Concurrent Use of Paid Leave

- Some employers opt to control FMLA usage by requiring concurrent usage of paid leave (vacation, sick, personal, STD, etc.).
 - If not required, employee has option to use paid leave on leave-by-leave basis
- New regulations: right to use paid leave concurrently with FLMA leave is determined by terms and conditions of employer’s normal leave policies
- Examples:
 - Vacation time can be used in full-day increments
 - Completion of sick leave request form
 - Two days advanced notice for personal leave usage

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Tool No. 12 – Private Investigators

- Private investigators and surveillance may help employer show it had “honest belief” or “honest suspicion” that employee abused FMLA leave
- Employers routinely use surveillance when workers’ compensation fraud is suspected
- Nothing in FMLA regulations prohibits or expressly sanctions use of investigators and surveillance

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Tool No. 13 – Bonuses

- Lawful, negative consequences for FMLA leave may discourage improper usage
- New regulations: perfect attendance or perfect safety bonuses may be denied to FMLA users
 - Cannot be denied if bonus otherwise would be paid to employees on equivalent leave status – can't single out FMLA users from other leave users
 - If FMLA runs concurrently with paid leave (and bonus is given to paid leave users), it must be given to FMLA user

Tool No. 14 – Contractual Limits

- Be careful when employer attempts to force employees to give up rights through contractual mechanisms – may violate FLMA
- Example: Employer tried to impose six-month limitation on FMLA claims via its employment application. Held – unlawful interference. (*Conway v. Stryker Med. Div.*)
- Example: Employer tried to circumvent bargaining agreement rule that employees may choose (but are not required) to use paid leave during FMLA leave. Held: FMLA violation. (*Bhd. of Maint. of Way Employees v. CSX Transp.*)

Case Study 1: The Drunken Call-Off



Facts

- Employee called off from work several times while drunk
- Gave conflicting information to supervisor – referred to nervous breakdown; attending funeral; said he was “f#@%ed up”; needed to “get some help”; going to quit his job
- Employee later was diagnosed with alcohol dependence, depression
- Demoted due to unauthorized absences

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Possible Tools?

- Notice Requirements
 - Was employer on notice of FMLA issue?
- “Serious Health Condition” Definition
 - Does employee have SHC? Just drunk?
- Medical Certification Processes
 - Initial Certification

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Scobey v. Nucor Steel-Ark.

- Majority upheld summary judgment in favor of employer: employee failed to give adequate notice of FMLA condition
- Conflicting reasons, some of which were clearly not FMLA protected, failed to demonstrate notice of serious health condition that rendered employee unable to work
 - Inebriation alone is not a serious health condition
- Close call: Dissent disagreed, noting that reference to “nervous breakdown” should trigger notice and employer duty to inquire further

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Case Study 2:
The Moonlighting Stripper



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Facts

- Employee diagnosed with chronic anemia
- Symptoms included fatigue, nausea, headaches
- Employee presented medical certification for intermittent FMLA leave
- Took off work on three intermittent shifts and then one continuous week
- Employer suspected employee of moonlighting

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Possible Tools?

- Medical Certification Processes
 - Initial Certification: frequency and duration of episodes (week-long absence?)
 - Second Opinion
 - Recertification (assuming FMLA usage is inconsistent with certification)
- Surveillance

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Stanley v. Volvo Parts North America

- Employer hired PI in this case
- Employee observed entering nightclub with suitcase; changing into red thong swimsuit and lingerie; dancing erotically; and receiving cash tips
- Employer fired employee for moonlighting and submitting false FMLA claim
- Employee argued she wasn't moonlighting because she wasn't "employed" as stripper
- Held: Employer had "honest belief" that employee was moonlighting and not using FMLA leave consistently with purpose; no interference with FMLA rights.

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Case Study 3:
The Porch Builder



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Facts

- Assembly worker in Honda plant suffered work-related injury when tailgate section was pulled down on his head
- Worker diagnosed with concussion and muscle strain
- Worker was off work, on certified FMLA leave, for approximately 5 weeks
- While on leave, another employee "tipped off" employer that assembly worker was building a porch on his house

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Possible Tools?

- Medical Certification Processes
 - Initial Certification – what were functional limits?
 - Recertification – information casting doubt on validity
 - Second Opinion
- Confronting Employee
 - Intent to return to work
- Private Investigator
 - Determine if employee used leave for its intended purpose

Weimer v. Honda of Am. Mfg., Inc.

- Employer obtained video surveillance of employee at home – showed employee carrying planks of wood, installing them, using a drill. Employee admitted that he “dicked around the house and yard, did yard work, and worked on his house.”
- Employee terminated for dishonesty, then sued for FMLA retaliation and interference -- working on porch was consistent with FMLA leave because company doc had not yet cleared him for return to work.
- Court recognized: Employees may not use FMLA leave for “unintended purpose.” Nevertheless, court denied summary judgment to employer.
 - Undisputed facts do not show that employee was using FMLA leave for unintended purpose.
 - Leave it to jury to determine if plaintiff was “opportunistic schemer.”

Case Study 4: The Stressed Out Tech



Facts

- Employee worked for City as heavy duty maintenance technician
- Employee had perfect attendance for two years
- Employee diagnosed with “deep anxiety reaction and stress” based on home and work factors
- Employee was absent intermittently – 26 days one year nearly 3 months in next year
- Time out certified as FMLA and sick leave

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Possible Tools?

- Medical Certification Processes
 - Initial Certification: Is leave justified? How often?
 - Second Opinion: Is there reason to doubt validity?
 - Recertification: How often?
- Concurrent Use of Paid Leave
 - Employer’s sick leave policy
- Surveillance/Investigator

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Callison v. City of Philadelphia

- Employee opted to use paid sick leave concurrently with FMLA leave
- City’s Sick Control Policy – excessive sick leave usage triggers requirements:
 - Obtain medical certification for all sick days
 - During work hours, notify Sick Control before leaving home
 - Employee may be called or visited by sick investigator
 - Progressive discipline for violations of sick leave policy
- City investigated during FMLA leave and found that employee left home on three separate occasions without notifying Sick Control Hotline
- Employee received warning, 1-day and 3-day suspensions. Employee sued, arguing Sick Control Policy interfered with FMLA rights
- Third Circuit disagreed – Policy does not compromise FMLA rights – it doesn’t discourage or prevent employees from taking FMLA. Policy ensures no abuse of sick leave.

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Case Study 5: The Trash Transfer



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Facts

- Employee worked as transfer station supervisor for solid waste authority, performing primarily office and non-manual work
- Employee suffered work related injury to back
- Employee was absent intermittently over several months
- Leave was certified as FMLA by occupational health clinic
- During one period of absence, HCP released employee to return to work with modest lifting restriction and direction to return for follow-up in two weeks
- Instead of returning to work, employee called to advise manager that doctor had put him "off work" for two weeks

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Possible Tools?

- "Serious Health Condition" Definition
 - Does employee have SHC for period in question
 - Incapacitated for more than 3 days?
- Medical Certification
 - Is employee unable to perform an essential function?
- Ordering Employee to Return to Work

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Helmick v. Solid Waste Authority of Central Ohio
2009 U.S. Dist. LEXIS 19301 (S.D. Ohio Mar. 10, 2009)

- Employer discharged employee for being AWOL during two-week leave period when he should have returned to work
- Employee claimed that employer violated FMLA by retaliating and interfering with his protected rights
- Held: Employer is entitled to rely on medical certification which indicated that employee was able to work and, therefore, was not FMLA eligible
- Employee argued he was FMLA eligible because of lifting restriction – unable to perform one essential function of job
- Applying ADA analysis of “essential functions,” court concluded that employee could do job’s routine tasks, which were non-manual and required no lifting.
- Employee cannot impose his or her own restrictions

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Case Study 6

It’s Better to be OTB



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Facts

- Employee worked night shift (7 pm – 7 am) in plastics extrusion plant
- Employee’s father was hospitalized following house fire and underwent numerous surgeries
- Employee used intermittent FMLA leave while caring for his father who remained hospitalized for months
- On one particular day, employee was at hospital from 7 am – 5 pm with father, awaiting decision about surgery
- Later that day, employee left hospital and was observed by coworker drinking at Charlie’s OTB
- Coworker called supervisor who drove to bar and observed employee drinking with friends
- Employee, who was supposed to be working by 7 pm, did not call off this absence

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Possible Tools?

- Qualifying Reason for Leave
 - Is Employee "Needed to Care" for Father?
 - Was leave "medically necessary" from 7 pm – 7 am?
- Notice
 - Did employee give timely notice?
- Surveillance
 - Was leave used for unintended purpose?

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Brunelle v. Cytex Plastics, Inc.

- Employer discharged employee for attendance issues, including his misuse of FMLA leave on evening in question – treated as "no call no show."
- Employee sued for denial of FMLA leave and retaliation for exercise of protected rights.
- Held: Summary judgment for employer denied
- Leave was medically necessary -- employee spent day-long vigil at father's bedside providing "psychological comfort"
- Employee may have given proper notice of leave -- Court refused to grant employer's SJ motion on notice issue, finding material disputed facts exist

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Case Study 7: Lawn of the Dead



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Facts

- Employee worked for car parts manufacturer
- Employee was approved for intermittent FMLA leave for migraine headaches
- Migraines crept up on employee with short notice; notice of absence often given just before shift
- Between May-September, employee used 33 days of FMLA leave, including some back-to-back call offs
- Employer noticed more frequent requests for leave during summer months
- Employee was known to work part-time for husband's cemetery lawn mowing business

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Possible Tools?

- Medical Certification Processes
 - Initial Certification – frequency and duration
 - Recertification – usages casts doubt on validity
 - Second Opinion
- Exhaustion of Leave Entitlement
 - Depends on frequency of usage
- Investigation/surveillance
 - Moonlighting

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Vail v. Raybestos Products Company

- Employer hired off duty police officer to conduct surveillance during day between two back-to-back call offs by employee:
"About ten minutes later, Vail left her house and, under Sergeant Lawson's watchful eye, filled up two lawn mowers at a nearby gas station. She then proceeded to take both mowers to the New Richmond Cemetery where she had another person mow the lawn."
- Employer fired employee for abusing FMLA leave
- Employee sued, claiming violation of FMLA's non-interference provision
- Held: Employer had honest suspicion based on surveillance that employee was "gaming" her FMLA leave
- CBA contained policy prohibiting any gainful employment or physical labor while on leave of absence from company

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