

# The Leave & Disability Coordination Handbook

Human Resources Series

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## DOL Rules Attempt To Clarify USERRA Pension, Benefit Rights

Explaining to employers what they have to do about pension and other benefits after employees return from active duty in the uniformed services is not easy, but the long-awaited U.S. Department of Labor regulations try. The preamble to the rules notes that there are conflicts between the Uniformed Services Employment and Reemployment Rights Act and the Internal Revenue Code. The new rules cannot reconcile those conflicts because the DOL cannot speak for the IRS. It is hoped that some revenue rulings will be forthcoming. In the meantime, employers are advised to follow DOL regulations for USERRA requirements and IRS guidance for tax code purposes. The IRS and Treasury Department have indicated that they will be lenient when it comes to USERRA compliance.

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## Questions and Answers About FMLA ‘Caring for Children’ Provisions

Employers continue to struggle with some of the basic Family and Medical Leave Act requirements such as caring for newborn, adopted and foster children. The questions came from subscribers and the answers from FMLA experts. What about retroactive designation in certain circumstances? What happens when more than one period of leave is needed? When can fathers take leave for newborn children? Can an employer limit the amount of leave a new mother can take to eight weeks? Do you know what to do? Find out in this “what to do when” article.

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## When Can Employers Grant Leave To New Mothers, But Not Fathers?

Leave for childbirth can involve two laws, the Pregnancy Discrimination Act and the Family and Medical Leave Act, which serve different purposes and cover different things. One law is meant to provide for the period during which a woman needs to recover from the temporary disability of giving birth, as well as prevent discrimination against pregnant women. The other provides for leave while the mother is recovering, but also provides for leave for both parents to bond with the child, regardless of the adults’ physical condition. How can these laws be reconciled and what are a new father’s rights under each? A federal court of appeals explained when faced with the issue.

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# Rules Attempt To Clarify USERRA Pension Rights

The long-awaited Labor Department rules implementing the Uniformed Services Employment and Reemployment Rights Act, issued last December and effective Jan. 18, 2006, try to explain to employers what they have to do about pension and other benefits after the employee returns from military leave.

The preamble to the regulations notes that there are conflicts between USERRA and the Internal Revenue Code in this regard. For example, USERRA requires that the absent employee be considered on furlough or leave of absence, while IRS guidance states that such a person is considered to be terminated from employment for tax purposes.

Caught between two different federal laws and agencies is not the most envious position for employers to be in, but DOL cannot make rules implementing the tax code. It advises employers that for purposes of compliance with most of USERRA, the employee should be considered on furlough or leave of absence and for purposes of compliance with the tax code, the IRS guidance should be followed.

That's fine as far as it goes, but what does an employer do when a returning employee wants to make catch-up contributions to a 401k plan to make up for the time he or she was in the military and those contributions are over the maximum permitted by law when added to regular contributions? This is only one of many questions left without an answer.

The DOL said the IRS and the Treasury Department indicated that "a health or pension plan will be deemed not to be in conflict with the applicable tax code requirements merely because of compliance with USERRA or its regulations." Small comfort, but it is anticipated that the IRS will issue some revenue rulings to clarify the situation.

In the meantime, the regulations explain what is expected of an employer under USERRA. Returning service members have rights to pension benefits as if they had not had a break in employment, including participation, vesting and accrual of benefits. Even some plans excluded from the Employee Retirement Income Security Act may be subject to USERRA. For example, USERRA covers plans sponsored by religious organizations and those established under state or federal law for government workers.

Benefits paid under federal programs such as Social Security and the Railroad Retirement Act are not covered by USERRA. Neither are benefits under the federal Thrift Savings Plan. If an employee dies during uniformed service, the employer need not give pension credit for the service period.

## Employer Contributions

In the case of a single-employer defined contribution plan, after the employee is reemployed, the employer must allocate the amount of its make-up contribution for the employee, his or her make-up contributions and his or her elective deferrals, in the same manner and to the same extent that it allocated those amounts for other employees during the period of the employee's military service.

In the case of a single-employer defined benefit plan, the employer must increase the employees' accrued benefit for the period of uniformed service once he or she is reemployed and, if applicable, has repaid any amounts previously paid to him or her from the plan and made any employee contributions that may be required under the plan.

The rules set a general 90-day deadline following reemployment for employer contributions. For employer contributions not dependent on employee contributions, the employer must make its contributions either 90 days following reemployment or when contributions are normally made for the year in which the uniformed service was performed, whichever is later. If it is impossible or unreasonable for the employer to make the contributions

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See *USERRA Pension*, p. 15

## Questions About Caring for Children Under FMLA

After 13 years, the Family and Medical Leave Act continues to pose questions regarding even its most fundamental element: caring for newborn and adopted children. The birth, adoption or illness of a child has a tremendous impact on an employee's life. At the same time, having an employee off the job for these events can create difficulty for an employer, especially one with only a few employees.

The following scenarios provide a chance to give employers some guidance on their responsibilities.

### Retroactive Designation

**Q:** An employee started leave on Sept. 1 for the birth of her child, but her notice of need for FMLA leave did not come to the employer's office until Sept. 14. Can the employer retroactively designate leave?

**A:** Yes, but both the employer and the employee have an interest in prompt and complete notice with respect to FMLA leave. The law's regulations (29 C.F.R. §825.208(d), (e)) provide that when an employer learns that an employee has taken FMLA leave after the leave has begun, the employer may designate retroactively all or some portion of the leave as FMLA leave, as long as the leave qualifies. This may be common in an emergency or other unforeseen absences.

In general, an employer may not designate leave as FMLA leave after the employee has returned from work. But there are two exceptions. First, if the employee takes leave for an FMLA reason and does not provide a reason to the employer, the employee must notify the employer within two business days of returning to work of the reason for leave.

If the employee does not make such timely notice, the employee may not subsequently assert FMLA protections for the absence, and may be exposed to discipline or termination.

At the same time, the employer, once provided with a valid reason for the leave, should designate that absence as FMLA leave retroactively within two business days of the employee's return, with appropriate notice to the employee.

Second, if the employer knows the reason for the leave, but has not been able to confirm that the absence

was for an FMLA-qualifying reason, or if the employer requested medical certification that has not yet been provided, or if the parties are in the process of obtaining a second or third medical opinion, the employer should make an interim designation that the absence was FMLA leave. The employer must notify the employee of this designation.

Once the employer confirms that the absence was for an FMLA-qualifying reason, the preliminary designation becomes final. If the medical certification fails to confirm that the absence was for an FMLA-qualifying reason, the employer must withdraw the designation and provide written notice to the employee.

This latter situation may create issues with respect to the right of the employee to benefit from FMLA protections. For example, the employee may be denied reinstatement.

### Multiple Needs for Leave

**Q:** An employee took 12 weeks of FMLA leave for a serious health condition, but then in the same 12-month period adopted a child and requested another 12 weeks of leave. Must the employer grant her the additional leave?

**A:** No. As stated in the regulations (29 C.F.R. §825.200(a)), an eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks of leave during any 12-month period for any one or more of the following reasons:

See *Common Issues*, p. 14

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# New Approach to Managing Leave May Reduce Employers' Costs

By Kristin L. Bauer, Esq., Michael J. Lotito, Esq., and Frank Alvarez, Esq.



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*The opinions in this article are the authors' own and do not necessarily represent those of The Leave & Disability Coordination Handbook.*

More than 12 years after its enactment, the Family and Medical Leave Act is experiencing the growing pains typical of adolescence. As evidence of those awkward years, one need only review the case law interpreting the FMLA and its implementing regulations.

Employers are understandably frustrated in their efforts to comply with the FMLA. Indeed, based on management surveys conducted by the Society for Human Resource Management, areas of particular concern for employers include determining whether a health condition qualifies as "serious," managing intermittent leaves, communicating with physicians and healthcare providers, and managing absences of less than one day.

The problems employers encounter when they interpret and apply the FMLA fall into two categories: those of definition and those of procedure. An example of a definitional issue is what some consider the definitional creeping of the term "serious health condition," or instances when courts extend FMLA protection to conditions such as an ear infection that some consider not so serious. Procedural issues, on the other hand, are those that arise when employers improperly or inefficiently administer FMLA leaves.

Until there is regulatory reform, there is no immediate solution for the FMLA's definitional issues. And if past experience is any indicator, it will be some time before regulatory change is realized. Reforming regulations in general is traditionally a long and drawn-out process, and the Labor Department has been hesitant to make reforms to the FMLA rules. However, employers can take immediate steps to address the procedural issues within their organizations and help minimize the costs associated with employee injuries and illnesses.

## Case for Procedural Change

To make the case for procedural change, it is helpful to examine the types of pro-

cedural issues employers often confront when applying the act. First, there are those instances when an employer may miss an FMLA issue entirely, either because there is no one knowledgeable about the FMLA or because the issues are not brought to the attention of those with sufficient knowledge to handle them.

Consider, for example, a lead supervisor on an assembly line who knows an employee will miss work for several days because of stomach cramps and indigestion. The supervisor may not consider this to be an FMLA issue because the employee has not requested FMLA leave or because an upset stomach does not sound serious. More importantly, the supervisor may not even know what the FMLA is.

Meanwhile, the employee may be receiving ongoing medical treatment sufficient to render the matter a serious health condition. If the employer penalizes the employee for any of those absences, it may be a jury two years down the road that determines whether the matter is a serious health condition and whether the employee has given notice of a need for FMLA leave.

If the front line supervisor had been able to spot the potential FMLA issue based on the employee's absence of several days for a medical-related condition and had asked the employee to complete a medical certification form, the problem might have been easily avoided.

Another procedural issue occurs when an employer is too generous in administering leaves. Although there is nothing wrong with an employer choosing that path, the employer that does so as a result of uninformed decisionmaking does so unnecessarily and at the risk of disrupting its business operations.

For example, an employer may allow an employee 30 days rather than the 15 required by regulation to return the medical certification

See *New Approach*, p. 9

# Leave for New Mothers, Not Fathers, Okayed

Can an employer grant a mother paid leave to care for a newborn but deny the same leave to the father? Although this sounds discriminatory, it can be legal.

At issue in *Johnson v. University of Iowa* (431 F.3d 325 (8th Cir. 2005)) was whether the university's leave policy, which granted up to six weeks of accrued sick leave for a "pregnancy-related temporary disability" and one week of accrued sick leave for a newly adoptive parent, was discriminatory toward biological fathers.

The appeals court upheld a ruling that dismissed the father's lawsuit, saying that the employer did not exclude the benefits from the employee because he was a biological father. Rather, the university denied the benefits to the employee because he was neither a biological mother temporarily disabled for a pregnancy-related reason or a newly adoptive parent – those designated to receive the benefits.

The university's policy of allowing biological mothers pregnancy-related disability leave on the same terms as employees with other disabilities is, in fact, required by the Pregnancy Discrimination Act of 1978. The act, an amendment to Title VII of the 1964 Civil Rights Act, bars employers from discriminating on the basis of pregnancy, childbirth or a related condition. Specifically, the law:

- requires employers to treat women affected by pregnancy, childbirth and related conditions the same as other persons similar in their ability or inability to work for all employment purposes, including receipt of benefits under health care programs;
- prohibits the discharge or refusal to hire or promote a woman solely because of pregnancy, childbirth or a related condition; and
- requires employers to treat employees returning from pregnancy-related leave the same as any other employee returning from disability leave.

## Dispute Over Disability Leave

The pregnancy law allows employers to establish policies granting favorable treatment to pregnant workers if the favorable treatment is related to an actual disability related to pregnancy. For example, an employer could grant a three-month "maternity

leave" under the act even though male employees are not eligible for maternity leave. An employer may not establish different "parental leave" policies for male and female employees.

The distinction between "maternity leave" and "parental leave" is important. Maternity leave is medical leave provided to female employees in connection with a pregnancy-related disability, while parental leave consists of leave to care for a newborn child or another child of the employee. Although an employer may provide more favorable maternity leave benefits to female employees than it does to male employees, it may not do so with regard to parental leave benefits under the FMLA.

Thus, employers that have policies that grant paid temporary disability leave to biological mothers or adoptive parents may want to review the facts in *Johnson*, because that case serves to demonstrate the interaction between paid disability leave, the Pregnancy Discrimination Act and the FMLA. 🏠

## PDA, FMLA – Know the Difference

The Pregnancy Discrimination Act was designed to prevent discrimination in employment against women who were or might become pregnant. In addition to prohibiting bias in hiring, it provides that pregnant women must be given the same leave for any sickness or disability they experience due to their condition as any other employee is afforded for a temporary illness or disability.

The FMLA provides unpaid leave for parents for bonding with a newborn or newly adopted child. It also may include the time during which the mother is incapacitated, but inability to work is not a prerequisite for the leave.

The differences in the requirements of leave for an illness and leave for bonding with a baby can be summarized as follows:

- Leaves for health conditions must treat all employees in a similar manner.
- Pregnancy can cause an incapacity, health condition or temporary disability that interferes with the employee's ability to work and must be regarded the same as any other health condition.
- Eligibility distinctions in leave policies for health conditions, not made in a discriminatory manner, are permissible.
- Leave for a health condition or temporary disability is not the same as parental or FMLA leave, which is for caring for and bonding with the newborn or newly adopted child.
- FMLA leave must be given to eligible parents on the same basis without regard to gender. 🏠


# Court Corner

## UNION ENTITLED TO ABSENCE INFO

Employers are not protected by confidentiality issues when it comes to providing their labor unions with pertinent employee absence information relating to a work policy challenge. It was a violation of the employer's duty to bargain in good faith to refuse to give a union steward redacted medical excuses for the union's investigation into the company's absence policy, a federal appeals court ruled.

The steward, Zachary Trosky, heard reports that the company's absenteeism policy was administered unfairly. Because employees who were absent without a doctor's note were assessed points leading to discipline, Trosky requested copies of employees' medical excuses for the previous six months on behalf of the union, United Steelworkers Local 4430.

The employer, Norris, responded that the information was confidential and could not be released unless the union got medical-release forms from the employees. Trosky modified his request, agreeing that the company should redact any specific medical information. The company's response was to restate its confidentiality objection. Trosky filed a complaint with the National Labor Relations Board and the board ordered the company to release the redacted medical excuses, but Norris still balked.


Upholding the Labor Relations Board, the court noted that the duty to bargain includes providing relevant information a union needs to perform its duties. A request for information "cannot be rejected outright just because it is overbroad," the court said. In this case, Norris should have proposed accommodations to make the request acceptable (*Norris v. National Labor Relations Board*, 2005 WL 1871154, 10th Cir.).  — SUSAN MEADER TOBIAS

## FIRST DOJ USERRA CLASS ACTION FILED

Accrual of vacation and sick time while on military leave was the basis for the first class action complaint filed by the United States under the Uniformed Services Employment and Reemployment Rights Act against American Airlines Inc.

The Justice Department suit, filed in the federal district court for the Northern District of Texas, claimed that the airlines denied some of its pilots the ability to bid on flight schedules based on seniority status and to earn paid vacation and sick leave while on military leave. USERRA protects civilian job rights and benefits while members of the uniformed services are on active duty.

American placed pilots who took time off for military service on leave of absence. Under the terms of the airline's contract with the pilots' union, pilots on leave of absence could not bid on flight schedules for the upcoming month or earn other employment benefits.


One of the pilots named in the DOJ complaint was denied two days of earned paid vacation for 16 days of annual reserve training because American considered him on leave of absence. Three pilots represent the class of about 1,000 of American's pilots who took military leave after January 2001, when the airline started its leave of absence policy for active duty military service (*Woodall v. American Airlines Inc.*, N.D. Tex., No. 3-06CV-0072M, filed 1/12/06). 

## VACATION NOTICE REQUIREMENT VIOLATED FMLA

Even though federal Family and Medical Leave Act leave is unpaid, employers must be careful about putting too many restrictions on using paid vacation time during the leave or risk violating the law.

The collective bargaining agreement between a Pennsylvania hospital and its union employees required that workers give two-weeks notice before taking any paid vacation. When an emergency room nurse took FMLA leave to be with her dying father, she was paid for only two of the days she was gone under the hospital's "family ill" days policy. She was denied vacation pay for the rest of her absence because she did not give two-weeks notice. Following unsuccessful arbitration, Sandra Solovey sued, claiming the notice policy violated her FMLA rights.

"While the two-week notice policy does not prevent an employee from taking FMLA leave, it discourages her from doing so if the need for the leave is unforeseeable," the federal district court said, point out that taking two weeks without pay is an economic hardship for most workers. The policy undermines the purpose of the FMLA, which is accommodating an employee's need to assist family members by taking leave, the court noted.

An employer does not have to permit any paid leave, and the hospital did not argue that Solovey's use of vacation without the required notice violated a legitimate business interest such as preventing abuse of FMLA leave. But when paid leave is permitted, limitations such as this one are impermissible under the FMLA, the court found (*Solovey v. Wyoming Valley Health Care System – Hospital*, No. 04-2683 (M.D. Pa. 2005)). 

# What Can Employers Rely on in Ambiguous Situations?

By Peter A. Susser, Esq.

As in many areas of federal regulation, a plethora of direction and guidance is available to assist employers in approaching Family and Medical Leave Act questions involving the broad range of circumstances presented by workplace events and conditions affecting individual employees.

There is, of course, the statute itself, enacted in 1993 without subsequent amendment by Congress. However, the language contained in the U.S. Code, and even the act's legislative history, do not always provide meaningful direction as to the application of the federal leave law's broad mandates governing employee use of leave.

The regulations issued by the U.S. Department of Labor in 1995 outline many more specifics regarding the implementation of the statute's requirements and the administration of employer programs governing leave that is protected by the FMLA. These rules have been interpreted by the DOL and the courts in a great number of circumstances and currently are under consideration for partial revision by the agency.

The administrative rulings, or opinion letters, issued by the Wage and Hour Division of the DOL and the construction of the statute and regulations in the litigation context can be very helpful in resolving questions concerning applicable employee rights and enforcement of employer rules relating to protected leave.

There are, however, many FMLA-related circumstances that employees and employers face that have not been addressed or resolved by the agency or court opinions in which the application of complex rules triggers questions about how these requirements will be construed or applied. How should such questions be approached? Are there any rules of construction, interpretation or experience relating to FMLA questions that might point the interested parties toward an appropriate conclusion?

## Notification Requirements

Among these open questions are issues relating to communication of FMLA-related rules and policies. Much debate revolves around the impact of employer deficiencies in satisfying various notification requirements contained in the act and regulations, particularly after the U.S. Supreme Court disapproved of certain stringent aspects of those rules. Nonetheless, employers questioning whether they should notify employees about specific aspects of policies or procedures relating to protected leave probably should err on the side of over-communicating, if in doubt.

The regulations are written to limit employers' discretion if they fail to communicate key components of applicable policies such as requirements to submit return-to-work certifications from health care providers or mandated notice if original certifications are delayed or deficient.

Though certain notice aspects of the regulations might be subject to additional legal challenges, it seems clear that an employer's ability to take certain actions will not be limited in the same manner if those and other communications about applicable rules take place. The prudent course often is to provide notice and reminders, sometimes in multiple instances (and document such actions) to establish more clearly an employee's receipt of critical information involving the procedural and substantive elements of the leave process.

## More Beneficial Policy, Cost Recovery

Issues of overlap often are present when comparing an organization's leave and absence policies to the requirements of the FMLA and the DOL's regulations. One readily ascertainable guidepost is that in virtually all instances, when either the FMLA or the employer's policy on the same topics are more favorable than the other, the one that is more beneficial to the employee is the one that should control.



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See *Ambiguous*, p. 8

## **Ambiguous** (continued from p. 7)

Thus, on issues such as notice of absence, certification procedures and use of accrued leave, when the relevant policy under the employer's handbook, procedures or an applicable collective bargaining agreement provides the employee with more expansive rights or protections than the FMLA would dictate, the limitations of the employer's policy generally should control.

Many employers have discovered the reality of another set of circumstances raised by the DOL rules under the FMLA – it is often very difficult to recover costs advanced for maintaining a group health plan or other benefits coverage for employees who fail to return from protected leave. The regulations envision and outline the situations in which recovery is possible. However, the limitations on such capabilities established by those same rules suggest that in a great number of cases, it will prove impossible or economically inefficient to pursue such costs.

The rules spell out a number of criteria that will “excuse” the employee from repayment, including situations in which the medical condition giving rise to the initial leave merely continues past the time that leave is exhausted (29 C.F.R. §825.213).

In addition, the broad category of circumstances that are “beyond the employee's control” will prevent recovery, so a decision to pursue such costs and expenditures

may make business and operational sense in only a limited range of cases.

### **Clarifying Medical Certifications**

One general observation that may guide employer action is that it is difficult to obtain very meaningful data through the authorized “clarification” of the certification provided by the employee's health care provider. This is because the DOL regulations greatly restrict the area of permissible inquiry, both with respect to the adequacy of an initial certification and with respect to the certification that an employee returning from leave is fit for duty.

Thus, if a medical-based challenge to certification and eligibility appears to be appropriate, this is likely to be developed through the permitted second- and third-opinion process for initial certification and a subsequent analysis of true fitness for duty such as that authorized under the Americans With Disabilities Act, following a return to work from FMLA leave.

### **Impact on Business Profitability**

Finally, it should be recognized that limiting the use of FMLA leave in cases in which it is perceived that the employer's business will be seriously impacted is quite difficult. Unlike the ADA and certain other statutes that establish an “undue hardship” defense to accommodation requirements, no such limitation or constraint applies to the exercise of protected leave rights under the FMLA.

The closest provision within the FMLA framework is the ability to deny reinstatement to “key employees” – by definition a very limited class – when a “substantial and grievous economic injury” will result from reinstatement. Apart from the fact that this standard of proof is very high, the regulations outline procedural steps that must be taken carefully if this alternative is to be implemented. Thus, it will prove useful in only a very small number of circumstances.

Existing authority and more than a decade of experience with the FMLA provides these and other suggestions for administration and interpretation of the federal leave requirements. As they suggest (and as those experienced in the area have come to appreciate), the intersection of detailed rules and procedures mandated by the FMLA with the operation of employer policies and other federal and state statutes is a complex challenge. Expertise with the fine points of leave administration requires focus and familiarity with overlapping obligations. 🏠

## **Tips on Substituting Paid for Unpaid FMLA Leave**

Paid accrued vacation, personal or medical/sick leave generally may be substituted for unpaid FMLA leave needed to care for a family member or for the employee's own serious health condition. Employers are not required to allow substitution of paid sick leave for unpaid FMLA leave in any situation that would violate the employers' uniform policy.

For example, if the employer's uniformly applied policy prohibits the use of sick leave for any but the employee's own illness, paid leave to care for a sick family member would not be required. Similarly, the employee could not use paid sick leave for a serious health condition that is not covered by the employer's sick leave plan (29 C.F.R. §825.207(c)).

Paid vacation or personal leave, including unspecified “paid time off,” generally may be substituted for unpaid FMLA leave without limitation (29 C.F.R. §825.207(e)). It usually is to the employer's advantage to require that the employee use paid leave concurrently with FMLA leave to prevent “stacking” of leave, but employers should check their state and local laws before applying this practice. In the District of Columbia, for example, the employee, but not the employer, may decide whether to use paid leave during a period of FMLA leave. 🏠

## **New Approach** (continued from page 4)

form. If the employee fails to return the form within the 30 days, the employer may be able to terminate the employee by applying its absence-control policies. But the employer likely could have terminated the worker 15 days earlier. The employer's generosity may have served no purpose other than to disrupt its business operations.

Employers also encounter procedural issues when they manage employee absences too aggressively. Consider an employee who presents evidence of a serious health condition, but only after her employer terminates her for excessive absenteeism. The employer that refuses to re-evaluate that decision may violate the FMLA if the employee is still within the 15-day period to provide a medical certification form.

Finally, even if an employer does comply with the FMLA, it may fail to analyze employee absences as they relate to the Americans With Disabilities Act, workers' compensation laws or state leave laws.

The common denominator in each of these examples is that the employer was operating either without sufficient knowledge of the law or the people with sufficient knowledge were not involved in the decisionmaking process. Each of these procedural failures had a cost, either in terms of lost productivity or increased litigation risk. Each of those procedural failures may have been avoided by improving the employer's collective knowledge regarding the FMLA and its ability to lawfully manage employee leaves, not only as they relate to the FMLA, but also to other leave-related laws.

### **TEAM Approach**

One way employers can increase their organizational knowledge of the FMLA and implement procedural change is through a TEAM approach — targeted employee absence management. The TEAM should have overall responsibility for developing and coordinating the company's policies on health promotion, disease man-

agement and occupational and non-occupational leave management.

One goal of the TEAM approach is to integrate human resources sooner and deeper in the leave management process so that leave-related issues can be addressed when they first arise. Another goal is to ensure the employer views leave management as an integrated

**See *New Approach*, p. 10**

## **Absence Management Functions**

The TEAM approach to managing leave procedures can include the following:

- updating company policies and procedures on leave management;
- centralizing absence reporting;
- developing tools to track protected absences (e.g., forms, reports);
- developing forms and reports to manage leaves and responses to ill and injured employees;
- developing a timeline for specific responses to workplace injuries to ensure early intervention and Family and Medical Leave Act and Americans With Disabilities Act compliance;
- developing templates for letters to be sent to employees and their doctors in various leave-related situations (e.g., both FMLA and ADA);
- revising medical examination procedures for FMLA and ADA compliance;
- revising return-to-work procedures following injuries for FMLA, state law compliance, medical certifications and accommodations;
- implementing training for managers and supervisors on triggering points of leave, accommodation obligations under the ADA and company leave-related policies;
- implementing training for non-supervisory employees on corporate philosophy for injury prevention, health promotion, disease management, workplace attendance and leave management;
- implementing safety programs to ensure Occupational Safety and Health Administration compliance;
- revising short-term disability and long-term disability benefit plans to ensure consistency with objectives established for managing those with disabilities;
- revising hiring procedures to communicate the importance of workplace safety and policies and procedures employees must follow; and
- auditing company workplace health by analyzing objective data for a two- to three-year period, including matters such as workers' compensation premiums, numbers and types of injuries, length of service, position, department, shift, documentation, cause of injuries, corrective action, lost work days, length of absences, supervisory hours dedicated post-injury, out of pocket medical expenses, retraining costs, terminations due to prolonged leave, replacement and recruitment costs, discrimination charges or lawsuits filed by employees with injuries.

## **New Approach** (continued from p. 9)

whole rather than a fragmented process. The TEAM should be equipped to examine each medical-related absence with reference to not only the FMLA, but also the ADA, state workers' compensation laws, other state and federal leave laws and the employer's leave policies.

The TEAM also should help ensure that employers review and update leave-related policies such as sick leave, workers' compensation, short-term disability, long-term disability, family and medical leave, reasonable accommodations, return to work programs, light duty or transitional duty, ergonomic assessments and occupational health and safety so they operate as an integrated whole. Centralizing the leave management process also will ensure consistency within an organization and help employers to better plan for, spot and track protected absences, decrease perceptions of inconsistent treatment and avoid the potential for leave requests to become contagious.

The make-up of the TEAM will vary based on the organization's size, its management structure, the nature of its workforce and its resources. The TEAM may consist of one person or several. Regardless, it should be structured to effectively and lawfully track employee absences and centralize the decisionmaking process regarding those unable to work because of injury or illness. The TEAM should develop tools to track protected absences and procedures to contact employees about such things as their return to work, their leave and requests for accommodations.

For a larger employer, the TEAM approach may require several employees with leave-management

## **What To Include in Certification Request Documents**

Employers can request information to support a request for leave for the employee's own serious health condition. The request for certification by the employee's health care provider may include the following:

- a summary of medical facts to support the request;
- the date the condition began and how long it is expected to last;
- whether the employee needs intermittent leave;
- if the condition is chronic, the expected duration and frequency of the condition;
- any additional treatments that may be required; and
- whether the health care provider believes the employee is unable to perform work of any kind. 🏠

responsibilities. A larger employer may also require training for operational supervisors so they become issue spotters who can refer potential leave-related issues to the appropriate persons. A smaller employer may require only one or two persons to manage the leave process and may have small enough operations so those persons can partner with operations to track employee absences.

In short, the TEAM approach should assist not only with FMLA compliance, but also the entire leave management process. The TEAM is simply an extension of the idea that improving an employer's knowledge of the law and internal processes can reduce its litigation risks. Company training on lawful leave-management could be used as a factor weighing against an award of liquidated damages in an FMLA lawsuit or punitive damages in an ADA or workers' compensation retaliation lawsuit.

Likewise, in the workers' compensation arena, employers have shown that by taking proactive measures they can reduce both the costs associated with on-the-job injuries and the frequency of those injuries. Those measures include functional-testing programs, safety initiatives, safety training and modified-duty programs. The TEAM approach is the extension of those concepts to the entire leave management process.

This approach is not a panacea for employers when it comes to the FMLA or the leave-management process in general. But it is another weapon in an employer's proactive arsenal. 🏠

## **'Employment' and 'Reemployment' Rights: What's the Difference?**

The Uniformed Services Employment and Reemployment Rights Act provides certain rights for employees who are called to active duty in the uniformed services. But what is the difference between service members' "employment" and "reemployment" rights? Reemployment refers to the employees' rights to have their same job back when they are released from active duty for a period of up to five years (subject to the "escalator principle"). Employment refers to the employees' rights to be free from discrimination due to their military service and to keep that job, absent serious misconduct, for a specified period of time, depending on the length of time they were on active military service.

Source: Adapted from "HR and the Law in the News," a monthly publication of the FiveL Company. 🏠

## How To Keep Going While Employees Are Gone

If there is a health emergency such as an outbreak of bird flu or other illness that becomes a pandemic, employers will play a key role in protecting employees' health and safety as well as limiting the negative impact on the economy, according to the departments of Health and Human Services, Homeland Security and Commerce.


Employers should consider what would happen if a large percentage of the workforce was suddenly on sick leave or could not get to work due to quarantines. What would it take for the business to keep going?

To help employers plan and ensure continued delivery of essential services, HHS and the Centers for Disease Control and Prevention developed a checklist that identifies important activities businesses can do to prepare. Some of the activities will help in other emergencies as well. The following is a summary of the most important points.

- Identify a coordinator for preparedness and planning.
- Identify essential employees and critical supplies necessary to maintain business operations.
- Determine the potential impact of a pandemic on business financials.

- Establish an emergency communications plan.
- Forecast and allow for employee absences due to illness, quarantines and business or other closures.
- Identify employees and key customers with special needs.
- Establish policies for employee compensation and sick leave unique to a pandemic, including how long an employee should be considered infectious.
- Establish policies for flexible worksites and work hours.
- Provide infection control supplies such as hand-hygiene products.
- Enhance communications and information technology infrastructures to support telecommuting and remote customer access.
- Collaborate and communicate with health agencies.

### For More Information

A copy of the entire business checklist and other pandemic planning information is available online at <http://www.pandemicflu.gov>. 

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## Simple Statement Is Enough for Employers on FMLA Fitness-for-Duty Health Certification

Employers may request a fitness-for-duty certification when an employee seeks to return from FMLA leave, but all that can be required is a simple statement of the employee's ability to return to work, the 6th U.S. Circuit Court of Appeals ruled. Moreover, the employer cannot delay reinstating the employee while it obtains further information or clarification of the certification from the worker's health care provider.

Linda Brumbalough was the state clinical director for Camelot Care Centers Inc. She was responsible for five local facilities across the state and her job often entailed frequent travel and long workdays.

Brumbalough began having health problems and her doctor told her employer she needed to take FMLA leave for two to three months to recover. Camelot told Brumbalough she needed to keep them informed about her condition and would need a fitness-for-duty certification to return to work.

The employee informed her employer near the end of her second month of FMLA leave that she would be able

to return to work in a week or two. Her doctor provided her with a note that said she could return to work, but for no more than 40-45 hours a week and that her travel should be limited to no more than one day per week for the first two months, after which she would be reevaluated.

There was disagreement about whether Camelot ever received the note. Regardless, it wanted a more formal statement about Brumbalough's capabilities, which she failed to provide by the deadline set by the employer. Camelot fired her and hired a replacement.

Brumbalough sued, claiming the company could not legally fire her while she was on FMLA leave and that she was entitled to reinstatement. The district court dismissed the suit, finding that Brumbalough was not entitled to reinstatement because she failed to provide the proper certification and in any event, she was unable to perform the essential functions of her job.

FMLA leave ends when an employee seeks reinstatement, the appeals court found, so the issue is not whether

**See *Certification*, p. 12**

# ‘Continuing Treatment’ Means During Incapacity

In addition to inpatient hospital care, a serious health condition covered by the Family and Medical Leave Act includes “continuing treatment by a health care provider.” Just what that means was clarified somewhat by a federal appeals court.

The law’s regulations explain that among other things, “continuing treatment” means being seen by a health care provider at least twice during an incapacity that lasts more than three days, or being seen once and put on a regimen of continuing treatment.


Mark Jones was working for the Denver Public Schools as a telecommunications technician and was already in trouble for excessive absences when he claimed he fell at his home and aggravated a pre-existing back injury. Three days after the alleged fall, he visited his doctor, who wrote a note saying that Jones needed to rest another day.

By the time Jones was ready to return to work, he became ill with the flu and called in sick for two additional days. When he finally returned to work, nine days after the fall, he was fired for unreliable attendance, violations of the employer’s break policy and not having a driver’s license, which was a requirement of his job.

While Jones’ termination was being appealed with his employer, he visited his doctor again. The physician’s notes included a passing reference to the improvement in Jones’ back pain. After losing the appeal, Jones filed suit under the FMLA. The federal district court dismissed the case, finding that the termination was due to reasons other than his absence due to back pain and Jones appealed.

Jones’ absence from work was not due to a serious health condition, the 10th U.S. Circuit Court of Appeals ruled, and therefore was not covered by the FMLA. The fact that the worker suffered a period of incapacity from his back pain was not in dispute, because he was absent from work more than three consecutive days, the court reasoned.

The real issue was whether Jones’ two visits to his doctor, one on Oct. 4 and the other on Oct. 24, satisfied the requirement of “treatment two or more times by a health care provider” under 29 C.F.R. §825.114(a)(2)(i)(A), the court noted. Both visits could be considered treatment (see box “What Does Treatment Mean?”), the court explained, because at the first Jones was examined and at the second his condition was evaluated. It is the timing of the visits that “presents a separate question.”


To qualify for FMLA leave, the employee must have a health condition that is serious enough to entail “an absence of more than three consecutive days during which the employee obtained treatment by a health care provider at least two times” or one time followed by a regimen of continuing treatment, the court decided. Here the employee’s second treatment was not during the initial period of incapacity, so he did not meet the law’s requirements as spelled out in the regulations (*Jones v. Denver Public Schools*, 427 F.3d 1315 (10th Cir. 2005)). 

## What Does ‘Treatment’ Mean?

“Treatment” under the FMLA regulations includes examinations to determine whether a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations or dental examinations.

A “regimen of continuing treatment” includes a course of prescription medication such as an antibiotic or therapy requiring special equipment such as an oxygen tank or breathing tube to resolve or alleviate the health condition.


A regimen of continuing treatment that includes taking over-the-counter medications such as aspirin, or bed rest, fluid intake, exercise or other similar activities that can be initiated without a visit to a health care provider is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

Also covered, under the 10th Circuit’s reasoning, would be a subsequent flare-up of the original condition, even if it required only a day’s absence. The subsequent period of impairment would be included as part of the original serious medical condition because it related to the same condition. The same would be true if the employee had to take time off each week for follow-up medical treatments related to the original illness. 

## Certification (continued from page 11)

Brumbalough was illegally terminated, but whether Camelot violated her right to reinstatement. While the employer can seek a fitness-for-duty certification, it may not delay the employee’s return to work while contact with the health care provider is being made to gather more information.

The “regulations expressly state that only a simple statement is needed in a fitness-for-duty certification.” This is unlike the initial medical certification that can be required to determine whether the employee has a serious health condition covered by the FMLA, the court explained.

As for whether Brumbalough was able to perform the essential functions of her job, that is an issue of fact for a jury to decide, the appeals court ruled, returning the case to the district court (*Brumbalough v. Camelot Care Centers Inc.*, 427 F.3d 996 (6th Cir. 2005)). 

# Undocumented Employees' Rights to Workers' Compensation Benefits

By Christine Walters, Esq., SPHR

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You hired a new worker some time ago. Within the first three days of employment she provided you with documents verifying her identity and eligibility to work in the United States. You relied on those documents and recorded them when completing the I-9 Form.

That worker has now injured herself in the course of doing her job and filed a claim for workers' compensation insurance benefits. In the course of processing the claim you learn that the employee provided you with false documents. What now? Is she eligible for workers' comp benefits? If not, what rights might she have? What liability might you have for having hired an undocumented worker?

The basic premise on which workers' compensation benefits are based is a no-fault system. If the employee incurs an accidental injury or illness in the course of and arising out of his or her employment, the question of fault generally will not arise and the employee will be awarded benefits. In exchange for those benefits, the employee waives his or her right to file a lawsuit against the employer for the injury.

But what if your employee turns out to be unlawfully employed? If the person is not legally authorized to work in the United States, is she or he still eligible to receive benefits for an injury that arises out of unlawful employment? The answer depends on whom we ask.

As of this writing, there are at least 20 states whose workers' comp laws expressly include undocumented workers in the definition of an eligible employee: Arizona, California, Colorado, Florida, Illinois, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Ohio, South Carolina, Texas, Utah and Virginia.

In addition, there are at least 12 states where the statute is silent but the courts have held that undocumented workers are eligible for workers' comp payments: California, Connecticut, Georgia, Iowa, Louisiana, Maryland, Nevada, New Jersey, New York, Oklahoma, Pennsylvania and Texas. One state's law expressly excludes coverage for undocumented aliens (Wyoming) and two states introduced similar legislation in 2005-2006 (Maryland and South Carolina).

So what if you are an employer (or employee) in a state whose law or courts have not granted benefits to undocumented workers? If the individual is denied workers' comp benefits, can she or he sue the employer for medical coverage, lost income and other expenses incurred as a result of the injury or illness? The answer to that question is unclear. The likelihood, however, that the injured undocumented worker would sue may be low at best. To do so would likely require the individual to disclose his or her illegal status, not to mention covering the cost of the attorney's fees.

What liability exists for the employer that hired the person unlawfully? The Immigration Reform and Control Act of 1986 (IRCA) prohibits employers from "knowingly" hiring unauthorized workers. The first line of defense is being able to demonstrate due diligence in reviewing the documents received and ensuring that, on their face, they appeared valid. What about other claims or rights an undocumented worker might have with regard to alleged violations of other employment laws?

In 2002, the U.S. Supreme Court held in a 5-4 decision that an undocumented worker was barred from receiving a back pay award under the National Labor Relations Act. In *Hoffman Plastic Compounds, Inc. v. NLRB* the employer fired several employees who were engaged in union organizing. The firing was in violation of the NLRA, which protects employees' rights to engage in certain "concerted activity." One of the fired employees was an undocumented worker.

In direct response to that case, both the U.S. Equal Employment Opportunity Commission and the U.S. Department of Labor issued statements regarding their positions in enforcing the employment laws under their purview to undocumented workers.

On June 27, 2002, the EEOC issued a directive that rescinded its 1999 "Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws," which stated that unauthorized workers were eligible to receive remedy awards such as reinstatement, backpay, and compensatory and punitive damages under U.S. employment laws.

**See *Undocumented Workers*, p. 14**

## Undocumented Workers (continued from p. 13)

In that 2002 directive, the EEOC also noted its position that “undocumented workers are covered by the federal employment discrimination statutes and that it is as illegal for employers to discriminate against them. ... The Commission will continue vigorously to pursue charges filed by ... undocumented workers.” The laws to which the directive applies include Title VII of the Civil Rights Act of 1964, the Americans With Disabilities Act, the Age Discrimination in Employment Act, the Equal Pay Act and Section 501 of the Rehabilitation Act.

The DOL also issued a publication in response to the *Hoffman* decision, “Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers. ...” Not unlike the EEOC directive, the DOL Fact Sheet explains that the *Hoffman* decision does not affect the remedies available to undocumented workers for violations of the Fair Labor Standards Act. The DOL is still reviewing other labor laws under its purview and how they apply to the rights of undocumented workers. 🏠

## Common Issues (continued from p. 3)

1. the birth of the employee’s son or daughter, and to care for the newborn child;
2. the placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child;
3. to care for the employee’s spouse, son, daughter or parent with a serious health condition; and
4. the employee’s own serious health condition.

In other words, just because an employee may qualify for FMLA leave for one or several needs, he or she may not take more than 12 workweeks of leave within a 12-month period.

### Paternal Leave

**Q:** After an employee becomes a new father, he wants to take FMLA leave beginning nine weeks after the baby’s birth. Can the employer permit the worker to begin his FMLA leave then?

**A:** Yes. An employee’s entitlement to leave for the birth or placement for adoption or foster care of a child expires at the end of the 12-month period beginning on the date of the birth or placement, unless state law or the employer’s policy allows for a longer period during which leave may be taken.

Under the FMLA, any leave must be completed within the 12-month period. Therefore, the employee in this

## Tips on Aliens

What to do if you find yourself with an undocumented worker who is injured on the job? Avoidance is your best strategy. Proactive hiring practices can help ensure you are, in fact, hiring only persons who are legally authorized to work in the United States.

- If I-9s are completed by field managers and supervisors, be sure they are trained in what documents are and are not acceptable and what to look for when reviewing presented documents.
- Consider the IRS’ recent publications: I-9 Document Review, General Information About the I-9, and the I-9 in a Nutshell.
- Verify all Social Security numbers provided through the U.S. Social Security Administration’s verification process. 🏠

case may start his leave at any time during the one-year period that begins when the child is born. He could even begin FMLA leave when the child is 11 months old, but would have to conclude the leave four weeks later. This assumes, of course, that the employee is entitled to leave from his 12-week allotment.

### Limitations on Leave

**Q:** Can an employer limit the amount of FMLA leave an employee can take after childbirth?

**A:** An eligible employee working for a covered employer is entitled to take 12 weeks of FMLA leave in a 12-month period for the birth of a child. The only way an employer can limit the length of the leave is if the employee has a limited amount of FMLA leave remaining in her allotment for that 12-month period.

Federal FMLA leave is unpaid. The availability of paid leave would depend on the company’s policies and whether the employee has earned vacation and or sick leave that could be used during the 12 weeks of FMLA leave. But regardless of whether the employee has accumulated any paid leave, if the FMLA’s requirements have been met, a covered employer cannot limit the leave for the birth of a child to less than 12 weeks.

A key employee may lose her reemployment rights under circumstances specified in the law, but that is a different issue. 🏠

## **USERRA Pension** (continued from p. 2)

within that period, it must make the contributions as soon as practicable.

In some instances involving an extended period of service, two separate timeframes may apply. For example, assume that employer contributions for a particular calendar year are made on Feb. 15 of the following year. The employee leaves for military duty on May 1, 2004. The employee applies for reemployment and is reemployed on Feb. 10, 2005.

Pension contributions attributable to the period of the absence due to military service in 2004 (May 1 to Dec. 31) would be due 90 days after Feb. 10, 2005 (roughly May 11), the date of reemployment, because that date is later than Feb. 15, 2005, the date contributions for 2004 are normally made. Pension contributions attributable to the period of military absence in 2005 (Jan. 1 to Feb. 9) would be due on Feb. 15, 2006, because that date is later than the date that is 90 days following reemployment.

### **Employee Contributions**

When pension benefits are derived from employee contributions, elective deferrals, or a combination of both and matching employer contributions, the reemployed service member may make up his or her contributions or deferrals. Catch-up contributions can start on the date of reemployment and continue for up to three times the length of the employee's immediate past period of military service, but the total repayment period cannot exceed five years.

No employee payment may exceed the amount that would have been required or permitted during the time of the active military duty if the employee had remained continuously employed in the civilian job. Employees cannot include interest when making up contributions or elective deferrals.

If, following military duty, the employee leaves and then returns to employment with the original pre-service employer, the employee may resume pension repayments regardless of the break in employment as long as time remains in the statutory period – three times the length of the employee's immediate past period of military service, not to exceed five years.

If the employee enters a second period of uniformed service during the make-up period for the first period, the employer need not suspend the first make-up period during the subsequent service.

Employees can partially make up missed elective deferrals or pension contributions, including those to a

defined benefit plan. The employer is required to make any contributions that are contingent on employee make-up contributions or elective deferrals only to the extent that the employee makes contributions or deferrals.

Labor suggested that employers and plan administrators develop reasonable rules for make-up contributions and that those rules can be more generous than the DOL regulations.

### **Restoring Withdrawals**

If the service member withdrew funds from a defined benefit plan prior to reemployment, the employer must let him or her repay the withdrawn amount after reemployment. The amount must include any interest that would have been earned had the money not been withdrawn.

Repayment entitles the individual to appropriate credit in the plan. These repayments can start on the date of reemployment and continue for up to three times the length of the employee's immediate past period of military service, not to exceed five years unless the employer and employee agree to an extension. The restoration opportunity applies only to those funds withdrawn in connection with a period of uniformed service and not to any other kinds of withdrawal.

### **Adjustments, Gains and Losses**

The plan must make an adjustment to the amount of employee contributions or elective deferrals that can be made after reemployment for any employee contributions or elective deferrals the employee made to the plan during the period of uniformed service.

Funds left in the employee's account during active military duty accrue normal gains and losses (excluding forfeitures). However, the gains or losses that accrued during the military service (or absence due to military service) are not applied to contributions made by the employer or employee after reemployment.

### **Multiemployer Plans**

If the plan documents make no provision to allocate the obligation to contribute to a multiemployer plan, the individual's last employer before the military service period is liable for the employer contributions. In the event that entity no longer exists or functions, the plan still must provide coverage to the service member.

A service member does not have to be reemployed by the same employer for whom he or she worked prior to the period of military service to be reinstated in the

**See USERRA Pension, p. 16**

## USERRA Pension (continued from p. 15)

pension plan. However, the two employers must be connected by a common job referral plan or practice for USERRA's pension obligations to attach to the post-service employer.

Within 30 days after one of the employers in a multiemployer plan hires a returning service member and is notified that he or she has USERRA rights or otherwise becomes aware of those rights, that employer must give written notice of the reemployment to the plan administrator.

### Benefit Amount

When the employee's rate of compensation determines pension entitlement, the employer must calculate the pension payment due under USERRA using the rate of pay that the employee would have received but for the period of uniformed service. When the compensation rate varies (for example, because it is based on commissions or tips), the compensation rate is based on the service member's average compensation rate during the 12-month period before the service period. For an employee who worked fewer than 12 months before entering service, the entire employment period just prior to the military service is used.

Otherwise, the amount of the employee's pension benefit depends on the type of pension plan. In a non-contributory defined benefit plan, when the amount of

the benefit is determined according to a specific formula, the employee's benefit will be the same as though he or she had remained continuously employed during the uniformed service. In a contributory defined benefit plan, the employee will need to make up contributions to have the same benefit as if he or she had remained continuously employed during the uniformed service.

In a defined contribution plan, the benefit may not be the same as if the employee had remained continuously employed, even though the employee and the employer make up any contributions or elective deferrals attributable to the service period. The actual amount may be lower because the employee is not entitled to forfeitures and earnings. Conversely, it may be higher because the employee does not experience losses that accrued during the period.

### Sanctions

The employer must compensate the employee for any loss of wages or benefits suffered by reason of the employer's failure to comply with the law as explained in the regulations. A court may require the employer to pay the employee an additional amount equal to the amount of lost wages and benefits as liquidated damages if the court determines that the employer's failure to comply with USERRA was willful. A violation is willful if the employer either knew or showed reckless disregard for whether its conduct was prohibited by the law.

— BARBARA MAGILL AND KIERAN SHARPE

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