



## Are You Managing the FMLA or is it Managing You?

### 2014 Midsouth Employment Law Conference

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## Items to Cover

1. FMLA Trends
2. FMLA eligibility issues
3. Managing intermittent FMLA leave
4. Disciplining employees on FMLA leave
5. Avoiding interference and retaliation claims
6. Best Practices
7. Your Questions

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## FMLA Trends

- FMLA lawsuits tripled from FY 2012 (291) to FY 2013 (877) according to the Administrative Office of the U.S. Courts and PACER.
- Lawsuits filed in FY 2014 (950) exceeded all of FY 2013 six weeks before the close of the fiscal year.

### Potential Reasons for Increase

- Employee awareness of their rights under FMLA
- More leave requests = more chances for compliance failure
- Experienced Plaintiff's bar

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### FMLA: Covered Employer

Is your company covered under the FMLA?

- Private sector employer with 50 or more employees in 20 or more workweeks in the current or preceding calendar year;
- Public agency, regardless of the number of employees;
- Public or private elementary or secondary school, regardless of the number of employees.

29 C.F.R. § 825.104

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### FMLA: Eligible Employees

Is the employee eligible to take FMLA leave?

- Employee works for a covered employer;
- Employee has worked for the employer for at least 12 months (do not have to be consecutive);
- Employee has at least 1,250 hours of service for the employer during the 12-month period immediately preceding the leave;
- Employee works at a location where the employer has at least 50 employees within 75 miles of that worksite.

29 C.F.R. § 825.110

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### Qualifying Reasons for Leave

Eligible employees may take up to 12 work weeks of leave in a 12-month period for one or more of the following reasons:

- The birth of a son or daughter or placement of a son or daughter with the employee for adoption or foster care
  - Broad definition of "son or daughter" (biological, adopted, foster, stepchild, legal ward)
- Includes children 18 years or older who are incapable of self care because of a mental or physical disability as defined by the ADA

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## Qualifying Reasons for Leave

- To care for a spouse, son, daughter or parent who has a serious health condition
  - Parent includes person standing *in loco parentis* to employee

29 C.F.R. § 825.112(4)

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## Definition of "Spouse"

- The Department of Labor published a Notice of Proposed Rule Making (NPRM) on June 27, 2014 to revise the definition of spouse under the FMLA in light of the U.S. Supreme Court's decision in *U.S. v. Windsor*, which found Section 3 of the Defense of Marriage Act (DOMA) unconstitutional.
- Proposed definition of spouse expressly references the inclusion of same-sex marriages, regardless of where they live.

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## Qualifying Reasons for Leave

- For a serious health condition that makes the employee unable to perform the essential functions of his or her job.
- Employee has the burden of showing entitlement to leave.

29 U.S.C. § 825.112(4); 29 C.F.R. § 825.112(4)

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## “Serious Health Condition”

A “serious health condition” means an illness, injury, impairment or physical or medical condition that involves:

- In-patient care (overnight stay in the hospital), or
- Continuing treatment by a health care provider
  - Absence for three (3) full, consecutive calendar days of incapacity, and any subsequent period of incapacity relating to the same condition.
  - Regimen of continuing treatment by a health care provider.

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## “Serious Health Condition”

- Pregnancy or prenatal care
- Any period of incapacity or treatment due to a chronic serious health condition
- Permanent long-term conditions (Alzheimer’s)
- Conditions requiring multiple treatments

29 C.F.R. § 825.115

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## Qualifying Reasons for Leave

- For any qualifying exigency arising out of the fact that a spouse, son, daughter, or parent is a military member on covered active duty or call to covered active duty status
- Eligible employee may take up to 26 workweeks of leave during a single 12-month period.

29 C.F.R. § 825.112(5); 29 C.F.R. § 825.126

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## Qualifying Reasons for Leave

- To care for a covered service member with a serious injury or illness, if the employee is the spouse, son, daughter, parent, or next of kin of the covered service member.

29 C.F.R. § 825.112(6); 29 C.F.R. § 825.127

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## Intermittent Leave/Reduced Leave Schedule

- When it is medically necessary, employees may take FMLA leave intermittently – taking leave in separate blocks of time for a single qualifying reason – or on a reduced leave schedule, reducing the employee's usual weekly or daily work schedule.
- Leave taken may range from one hour to several weeks in length.

29 C.F.R. § 825.202

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## Intermittent Leave

- Intermittent leave may be taken for absences where the employee or covered family member is incapacitated or unable to work, even if not treated by a health care provider.
- Must be that such medical leave can be best accommodated through an intermittent leave schedule.

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## Intermittent Leave

- But, intermittent leave may be taken following the birth of a healthy child or placement of a healthy child for adoption or foster care only if the employer agrees.

29 C.F.R. § 202

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## Employee Transfer During Intermittent Leave

- An employer may require the employee to transfer temporarily during period of intermittent or reduced leave schedule to another job for which the employee is qualified .
- The job must have equivalent pay and benefits, but does not have to have equivalent duties.
- An employer may not transfer an employee to a less desirable position to discourage employee from taking leave or otherwise working a hardship on the employee.

29 C.F.R. § 825.204

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## Reinstatement of Employee

- An employee is entitled to reinstatement in same or equivalent job as the one he or she left when the leave commenced.
- An employee may not be required to take more leave than necessary to address the circumstance that precipitated the need for leave.

29 C.F.R. § 825.214

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### Employee Return to Work Issues

- Once an employee submits a statement from her health care provider that indicates that she may return to work, the employer's duty to reinstate her is triggered.
- Employees who, at the end of the twelve week leave period, remain "unable to perform an essential function of the position because of a physical or mental condition ... [have] no right to restoration to another position under the FMLA." 29 C.F.R. § 25.216(c).
- Consider obligations under the ADA to provide an unpaid leave of absence as a form of reasonable accommodation after the employee exhausts FMLA leave.

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### Employee Return to Work Issues

- When an employee is indisputably unable to return to work at the end of the leave period, the employee has not been denied any benefit to which she was entitled.
  - Neither application for nor receipt of social security disability benefits is by itself conclusive evidence that an employee is completely incapable of working.
- Terminating an employee when there is a dispute over employee's ability to return to work can lead to an FMLA interference claim. *Demyanovich v. Cadon Plating & Coatings, LLC*, 747 F.3d 419, 2014 U.S. App. LEXIS 5737 (6<sup>th</sup> Cir. Mar. 28, 2014).

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### Increments of Intermittent Leave

- Only the amount of leave actually taken may be counted towards the employee's leave entitlement.
- Minimum increments of leave cannot be < 1 hour.
- Actual workweek is the basis of leave entitlement.
- Where an employee works a part-time schedule or variable hours, the amount of leave used is determined on a pro rata or proportional basis.
- If the employee's schedule varies from week to week, a weekly average of hours is used to calculate the employee's leave entitlement.

29 C.F.R. § 825.205

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### Intermittent Leave

How it should (and does) work for most employees:

- The employee provides the employer with a complete, unambiguous medical certification from the employee's health care provider.
- The employee schedules appointments with a health care provider at times that minimize disruptions to the employer.
- The employee gives advance notice of leave where foreseeable and timely notice when not.
- The employee's absences are consistent with the serious medical condition, frequency, and probable duration of episodic flare-ups from the medical certification.

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### Potential Problems with Intermittent Leave

How it can happen:

- The employee gives the employer an incomplete, vague, ambiguous, and/or non-responsive medical certification.
- The employee's absences are inconsistent with the serious medical condition, frequency, and/or probable duration of expected absences certified by the health care provider.

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### Potential Problems with Intermittent Leave

- The employee sends last minute text messages or no advance notice of absences that occur at the worst possible time for the company.
- The employee abuses the leave entitlement.
- The intermittent leave causes headaches for supervisors and HR.

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## What can an employer do to limit abuse of intermittent FMLA leave?

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## Obtain a Complete and Sufficient Medical Certification

- Don't accept a vague, incomplete, or non-responsive medical certification .
  - Use DOL forms WH-380E and WH-380F.
  - Notify the employee in writing what additional information is necessary to make the medical certification complete and sufficient.
  - Advise the employee of the anticipated consequences of the failure to provide adequate certification.
  - Give the employee 7 calendar days to cure any deficiency.

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## Obtain a Complete and Sufficient Medical Certification

- If employee fails to do so, an employer may deny FMLA leave until the required certification is provided.
- In order to impose these sanctions, at the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of the employee's failure to provide adequate certification.

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## Obtain a Complete and Sufficient Medical Certification

- If an employer fails to give the employee notice of the consequences of the failure to provide a medical certification and then terminates an employee, the employer has interfered with the employee's FMLA rights. *Wallace v. Fed Ex Corp.*, 2014 U.S. App. LEXIS 16208 (6<sup>th</sup> Cir. Aug. 22, 2014)

29 C.F.R. § 825.307

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## Obtain Clarification and Authentication of Medical Certification

- If the employee fails to provide adequate certification after being given an opportunity, ask the employee for authorization to contact the health care provider for purposes of clarification and authentication.
- The employee's direct supervisor may not be the one to contact the employer's health care provider.

29 C.F.R. § 307

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## Obtain Clarification and Authentication of Medical Certification

- If employee refuses authorization and does not otherwise clarify the certification, the employer may deny the FMLA leave.
- Ask the medical provider for best estimates of leave start and stop dates
- Don't settle for frequency of leave "as needed."

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### Obtain Second or Third Opinions

- An employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second medical opinion (or third opinion) at the employer's expense.
- The employer may designate the health care provider to furnish the second opinion.
- The third health care provider must be approved jointly.
- The third opinion is binding.

29 C.F.R. § 307(b) & (c)

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### Request Recertification

- An employer may request recertification no more often than every 30 days, depending upon the minimum duration of the serious health condition
- In connection with an absence by the employee, an employer may request recertification at least once every six months.

29 C.F.R. § 825.308

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### Request Recertification

An employer may request more frequent recertifications (<30 days) if the circumstances of the original certification have changed significantly:

- Increase in duration or frequency of absences
- The employer receives information that casts doubt on the validity of the employee's absences (such as a Friday/Monday absence pattern)
- Employer may provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with the pattern.

29 C.F.R. § 825.308(e)

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## Compliance with Employee Notice Requirements

- Enforce employee's compliance with FMLA notice requirements for foreseeable and unforeseeable leave.
- An employee must provide sufficient information for an employer to determine whether FMLA leave may apply.

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## Compliance with Employee Notice Requirements

- Require employees to comply with company policy for requesting leave (in writing).
- If employee fails to follow policies, delay or deny leave request.
- Take appropriate action under employer's internal policies for failure to follow usual and customary notification rules – but apply policies uniformly.

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## Other Strategies

- Ask employees to schedule appointments with health care providers at times that minimize disruptions to the employer's operations.
- Prohibit employees from working second jobs while on any form of leave.
- Track employee absences.
- Require employees to use accrued paid leave while on FMLA leave.

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## Disciplining Employees on FMLA Leave

An employer may discipline an employee who is on FMLA leave, but an employer cannot:

1. Interfere with, restrain, or deny the exercise or attempt to exercise FMLA rights. 29 U.S.C. § 2615(a)(1) ("Interference Claim")
2. Discharge or in any other manner discriminate against any individual for opposing any practice made unlawful under the FMLA. 29 U.S.C. § 2615(a)(2) ("Retaliation Claim")

There is some overlap between the two claims, but the required proof differs.

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## Prima Facie Case of FMLA Interference

1. Eligible employee
2. Covered employer
3. The employee entitled to leave under the FMLA
4. The employee gave the employer notice of his or her intention to take leave.
5. The employer denied the employee benefits to which she was entitled.

The *McDonnell Douglas* framework applies.

An employer must respond with evidence that it had a legitimate reason unrelated to the exercise of FMLA rights for terminating the employee.

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## Defenses to Interference Claim

- When an employee receives all of the FMLA leave he or she requested, the employee has not been denied a benefit to which he or she is entitled. *Travers v. Celco Partnership*, 2014 U.S. App. LEXIS 17444 (6<sup>th</sup> Cir. Sept. 8, 2014)
- An employee must show prejudice by the violation of 29 U.S.C. § 2615.
- An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. 29 C.F.R. § 216(a).

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## Prima Facie Case of FMLA Retaliation

1. The employee was engaged in an activity protected by the FMLA;
  2. The employer knew that he was exercising rights under the FMLA;
  3. After learning of the employer's exercise of FMLA rights, the employer took an employment action adverse to him;
  4. There was a causal connection between the protected FMLA activity and the adverse employment action.
- The *McDonnell Douglas* burden-shifting framework applies.
  - The employer has the burden to show a legitimate, non-discriminatory basis for the employment decision.

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## FMLA Retaliation

- Employee has burden to demonstrate that employer's proffered reason
  - Had no basis in fact
  - Did not actually motivate the action
  - Was insufficient to warrant the action.
- The employer's "honest belief" defeats pretext
  - As long as an employer has an honest belief in the reason given for the employment action, the employee cannot show pretext simply because the reason is shown to be incorrect. *Tillman v. Ohio Bell Tel. Co.*, 2013 U.S. App. LEXIS 20723 (6<sup>th</sup> Cir. Oct. 8, 2013).

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## "Honest Belief" Rule

- In determining whether an employer has an "honest belief" in the basis for discharge, the employer must establish a "reasonable reliance" on the particularized facts that were before it at the time the decision was made. *Abdulnour v. Campbell Soup Supply Co.*, 502 F.3d 496, 502-03 (6<sup>th</sup> Cir. 2007)
- Courts do not require that the employer's decision making process "be optimal or that it left no stone unturned. Rather, the key inquiry is whether the employer made a reasonably informed and considered decision before taking an adverse employment action." *Seeger v. Cincinnati Bell Tel. Co.*, 681 F.3d 274, 285 (6<sup>th</sup> Cir. 2012).

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## Curbing Intermittent Leave Abuse

Can an employer terminate an employee for FMLA leave abuse? Yes.

- The "Honest belief" rule applies to FMLA retaliation claims. The Sixth Circuit has stopped short of holding that it applies to interference claims. *Tillman v. Ohio Bell Tel. Co.*, 2013 U.S. App. LEXIS 20723 (6<sup>th</sup> Cir. Oct. 8, 2013).

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### ***Tillman v. Ohio Bell Tel. Co.***

- Tillman is a case study in how employer should handle a case of FMLA leave abuse.
- Employee worked as a Telecommunications specialist.
- Employee diagnosed with lumbar DDD.
- Condition caused him periods of exacerbated pain 2-3 days a month. Employer granted him intermittent FMLA leave.
- Employer began noticing suspicious patterns in timing of employee's requests for FMLA leave over a period of three years.

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### ***Tillman v. Ohio Bell Tel. Co.***

Employee's suspicious pattern of intermittent FMLA leave:

- Employee's leave requests routinely fell on Fridays and weekends.
- Employee routinely requested three days of FMLA leave every month.
- Days employee requested leave were frequently adjacent to scheduled days off or holidays.
- Employee notified supervisor in advance of days he intended to use FMLA leave.

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### ***Tillman v. Ohio Bell Tel. Co.***

Employer's investigation:

- Employer tracked employee's leave pattern.
- Hired PI to conduct surveillance of employee on days he requested FMLA leave.
- Employee observed working in his garage and his yard, driving for personal errands, on days he claimed he was unable to work because of back pain.

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### ***Tillman v. Ohio Bell Tel. Co.***

- Employer provided surveillance report, video, medical certifications, and job description to outside medical consultant.
- Employer interviewed employee regarding FMLA usage.
- Based on employer's review of investigation, it denied employee FMLA leave for two days he was ineligible for leave based on surveillance video and terminated employee for abuse of FMLA leave and violation of employer's code of conduct.

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### ***Tillman v. Ohio Bell Tel. Co.***

- District court granted employer summary judgment on employee's "interference" and "retaliation" claims because employer's "honest belief" in legitimate, nondiscriminatory reason for termination defeated employee's pretext argument.
- Employer established a "reasonable reliance" on the particularized facts before it at the time it made the termination decision.
- Sixth Circuit upheld summary judgment on the retaliation claim based on the "honest belief" rule, but stopped short of applying honest belief rule to interference claim. Court upheld summary judgment on interference claim because Plaintiff failed to show entitlement to FMLA leave on the two dates employer denied leave.

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### Takeaways

- Employers can terminate an employee on FMLA leave for reasons unrelated to the leave and avoid interference and retaliation claims. Make sure the reason for the termination is legitimate, nondiscriminatory, and unassailable.
- In cases of suspected FMLA abuse, conduct a thorough investigation of employee's activities and medical condition before making a termination decision.

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### Takeaways

- Terminating an employee for FMLA abuse while the employee is still on FMLA leave can still result in an interference claim, unless the employer has irrefutable evidence that the employee was not entitled to leave. This defense is more difficult to prove if the employee's condition requires a longer period of incapacity rather than intermittent leave.
- Consider making termination decision after employee is reinstated following leave.
- Train management on employee entitlement to intermittent leave.

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### QUESTIONS?

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