

2018 Employee Benefits Webinar Series
FMLA and Employee Benefits
March 22, 2018

Agenda

- Family Medical Leave Act (FMLA) and Employee Benefits
- FMLA Basics
- FMLA from an Employee Benefits perspective

FMLA Basics

- Worksite must be covered by the FMLA (at least 50 persons employed within 75 miles of worksite)
- Employee must meet minimum service (12 months) and hours (1,250 hours) requirements
 - Requires 12 months of employment and at least 1,250 hours of service in the 12 months preceding leave
- Reason for leave must be covered by the FMLA

FMLA Basics

- 12 weeks in a 12 month period
 - Includes “qualified exigency” military leave
- 26 weeks in a 12 month period to care for “covered servicemembers” with a “serious injury or illness”
 - 26 weeks per-covered service member, per-injury

Company must define the 12 month period

- Calendar year
- Fixed year (e.g., fiscal or anniversary date)
- Measured forward
 - Measured from date first leave begins
 - Subsequent 12-month periods begin first time leave is requested after initial 12-month period expires
- Rolling backward
 - Measured back from date FMLA leave begins
 - Prevents back-to-back 24-week leave periods

Reasons for FMLA

- Birth of a child and to take care of newborn, including bonding time
- Placement of a child for adoption or foster care
- To care for an immediate family member with a serious health condition
- Employee's own serious health condition
- Qualifying exigent circumstances (a "covered military member" has been notified of an impending call to active duty)
- To care for a "covered servicemember's" "serious injury or illness" (a/k/a "military caregiver leave")

Military Caregiver Leave

- “Covered service member” includes a member of the Armed Forces, the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in an outpatient status, or is otherwise on the temporary disability retired list for a serious injury or illness
- “Serious injury or illness” is one incurred in the line of active duty that may render the member unfit to perform his/her duties

Limitations on FMLA Leave

- Care for newborn or newly placed child must conclude within 12 months of birth or placement
- Spouses working for same covered employer
 - Combined total of 12 workweeks for childbirth/placement or to care for ill parent
 - Each may be entitled to FMLA leave (up to 12 workweeks) for other FMLA reasons
 - BUT: both spouses entitled to full 12 weeks of FMLA leave to care for a child with a serious health condition

Serious Health Condition

- Inpatient care
- A period of incapacity of 3 or more consecutive calendar days, that involves:
 - Treatment 2 or more times by a health care provider within 30 days of the beginning of the period of incapacity; or
 - Treatment by a health care provider on at least one occasion that requires a regimen of continuing treatment (e.g., an Rx)
- Any period of incapacity due to pregnancy or prenatal care
- Any period of incapacity due to a chronic serious health condition which:
 - Requires periodic visits for treatment (e.g., diabetes);
 - Continues over an extended period of time (Alzheimer's); or
 - May cause episodic rather than continuing incapacity

Serious Health Condition

- The healthcare provider decides whether a second visit is needed during the 30-day period
- The first (or only) visit to a health care provider must take place within 7 days of the first day of incapacity
- Presumptively serious health conditions:
 - Appendicitis
 - Asthma
 - Back surgery
 - Cancer
 - Childbirth
 - Emphysema
 - Epilepsy
 - Injuries from serious accidents
 - Pneumonia
 - Pregnancy
 - Severe morning sickness
 - Severe nervous disorder
 - Severe respiratory conditions
 - Spinal injuries

Absences Not Protected by FMLA

- Conditions requiring cosmetic treatment (unless inpatient hospital care or complications)
- Absence due to current, untreated substance abuse
- Common colds
- Headaches (other than migraine)
- Routine dental problems
- Upset stomach
- Ear aches
- Car breaks down
- Have to care for a friend
- Pet is ill

Healthcare Providers

- Doctors of Medicine and Osteopathy
- Podiatrists
- Dentists
- Clinical Psychologists
- Optometrists
- Certain chiropractors
- Nurse-practitioners and nurse-midwives
- Certain Christian Science practitioners
- Clinical Social Workers
- Physician Assistants
- Any health care provider accepted by employer or benefits manager
- Foreign doctors

Employer Responsibilities

- Provide notices
 - General Notice to employees of FMLA rights
 - Notice of Eligibility and Rights and Responsibilities
 - Designation of FMLA leave
- Maintain group health insurance
- Restore the employee to same or equivalent job and benefits
- Maintain records

Employer's Notice Requirements



General Notice

- Poster
 - Required regardless of whether employer has any “eligible employees”
- Policy
 - General notice must be included in employee handbook or provided at time of hire (if no handbook exists)
- Electronic posting of the notice is okay if:
 - Posting is conspicuous on employer’s website;
 - Accessible to all applicants and current employees; and
 - All employees have access to company computers.
 - Physical distribution required otherwise

Employer's Notice Requirements

Notice of Eligibility and Rights and Responsibilities

- Employers must:
 - Within 5 business days, provide employee with this form, along with Certification forms;
 - Notify employee whether he/she has met the eligibility requirements for leave and, if not, indicate reasons why;
 - Refer employee to the employer's leave policies, including paid leave (and if FMLA-eligible, the right to take unpaid leave if the employee does not meet the requirements of the employer's paid leave policies);
 - Notify the employee that paid leave may be designated and counted against any FMLA entitlement; and
 - Notify the employee of the maintenance of health benefits

Employer's Notice Requirements

Designation of FMLA leave

- Employer has 5 business days to provide this notice indicating whether the reason for leave is FMLA-qualifying
- Designation Notice must include:
 - If qualifying, number of hours, days, or weeks designated as FMLA leave;
 - If not qualifying, reasons why;
 - Return to work/fitness-for-duty certification (list of essential job functions)
- When the amount of leave needed is unknown, the employer must provide the number of hours counted against the FMLA leave entitlement (but no more often than every 30 days)
- Retroactive designation permitted provided that failure to timely designate does not harm the employee

Employer's Rights Under FMLA

- Right to get **advance notice** (at least 30 days if practicable) **if need for leave is foreseeable**
- Right to get **immediate notice** (no more than one or two working days if feasible) **if need for leave is not foreseeable**
- Right to get **medical certification and re-certification** for medically-related leaves
- Right to get **clarification and authentication of the medical information** (but only through the employer's physician)
- Right to get a **second or third medical opinion** if necessary
- Right to **delay continuation of the FMLA leave** if timely medical certification is not provided

Employer's Rights Under FMLA

- Right to **require employee to report periodically** on status and intent to return
- Right to insist that employee **try to schedule intermittent or reduced leave schedule to avoid disrupting the employer's operations**
- Right to **transfer the employee to an alternate position** to accommodate the employee's desire for intermittent or reduced leave
- Right to require employee to submit a **fitness to return to duty report**
- Right to **avoid giving employee preferential treatment** for reinstatement or other terms or conditions of employment merely because employee is on FMLA leave
- Right to **not reinstate a "key employee"** under certain circumstances
- Right to **require employee to use vacation or sick leave**

Substitution of Paid Leave

- Employees may choose, or employers may require, the substitution of accrued paid leave for unpaid FMLA leave
- “Substitution” means paid leave provided by the employer runs concurrently with unpaid FMLA leave and normal terms and conditions of paid leave policy apply
- Employee remains entitled to unpaid FMLA if procedural requirements for employer’s paid leave are not met

Substitution of Paid Leave

- Worker's compensation and disability leave may run concurrently with FMLA
 - “Topping off” allowed if state law permits
 - Because paid disability leave is not unpaid, the provision for substitution of the employee's accrued paid leave is inapplicable
 - Therefore, an employer cannot require substitution of paid leave when an employee is receiving disability plan benefits while on FMLA
 - If permitted under state law, the employer and employee may agree to have paid leave supplement the disability plan benefits, such as in the case where a plan only provides replacement income for two-thirds of an employee's salary

Long-Term Absence

- Personnel Policies – do they address the issue?
- ADA/State law considerations
- Executive employment agreements

Organizational Landscape

- Employee's length of service
- Company policies
- Company precedent
- Co-employees' perceptions
- Replacement cost
- Burden on supervisor

FMLA from an Employee Benefits Perspec

- Do nothing
- Incentivize employee to return
- Assist in employee return
- Evaluate adverse action

FMLA from an Employee Benefits Perspective

- Employees off for periods of time and then back to work typically remain qualified for active coverage under health, dental, vision, etc.
- They typically **do not** qualify for COBRA continuation coverage
 - They must have qualifying event resulting in a loss of coverage
 - They typically have neither

FMLA from an Employee Benefits Perspective

- Health benefits must be maintained during FMLA leave as if employee had continued in employment
- No other accrual or continuation of other benefits is required (e.g., vacation, sick, seniority)
- Either employer or employee may elect to continue other benefits (e.g., life insurance or disability)
- Upon return to work, all benefits must be restored without requalification
- Even if employee chooses not to retain coverage during leave, employer obligated to restore same coverage upon reinstatement
- In some circumstances, employee may be required to repay the employer's share of the premium if the employee does not return to work after leave

FMLA Coverage Rules

- A covered employer must maintain health coverage during FMLA leave if coverage was provided before the leave was taken
- Coverage must be on the same terms as active participants
- Coverage—whether medical, surgical, hospital, dental or vision, mental health counseling, or substance abuse treatment, among others—must be maintained if provided in a group health plan by the employer, whether or not provided through a flexible spending account or other component of a cafeteria plan

FMLA Premium Payment Rules

- Even though employees who take other forms of unpaid leave must pay their own premiums while absent (directly or through the employer's recoverable advances), employees taking unpaid FMLA leave must have that portion of their cafeteria plan allotment allocated to group health premiums paid by the employer in the same amount as paid before the start of leave
 - Employer contributions while an employee is on paid leave are not recovered by the employer
- Premiums paid by an employee before FMLA leave continue to be paid by the employee while on leave
- If premiums are increased or decreased while the employee is on leave, the employee must pay the new premium

FMLA Premium Payment Rules

- The method for paying the premiums may depend on the nature of the leave:
 - If the leave is paid, the normal method for paying—such as payroll deduction—should continue to be used
 - If the leave is unpaid, employee may be required to pay either the employer or the insurance carrier directly
 - No additional charge for administrative expenses

FMLA Premium Payment Rules

- Payment may be made by any of the following methods:
 - At the same time as on normal payroll date
 - As payments are due under COBRA schedule
 - Prepayment under a cafeteria plan at employee's option
 - Existing methods for handling leaves of absence (so long as not prepayment)
 - By any other method voluntarily agreed to by the employer and employee, including prepayment (such as by increased payroll deductions when the leave is foreseeable)

FMLA Coverage Termination Rules

- If employee fails to pay premiums, employer may terminate coverage if payment is >30 days late
- Must provide written notice to the employee that payment has not been received—at least 15 days before coverage is to cease
- Must advise that coverage will end on a specified date unless premium has been received
- Employer may retroactively drop coverage only if it has established policies for other unpaid leave dropping coverage retroactively to the date that the unpaid premium was due
- However, if no other policy, coverage terminated only at the end of the 30-day grace period

FMLA Coverage Termination Rules

- If employer continues to maintain coverage by paying the employee's share of the premiums, it may recover those amounts if employee fails to return to work for at least 30 days (unless failure to return to work is due to circumstances beyond the employee's control)
- If coverage ends because employee misses payment, when employee returns to work, insurance must be reinstated without qualification requirements

FMLA and COBRA

When does the “Qualifying Event” occur?

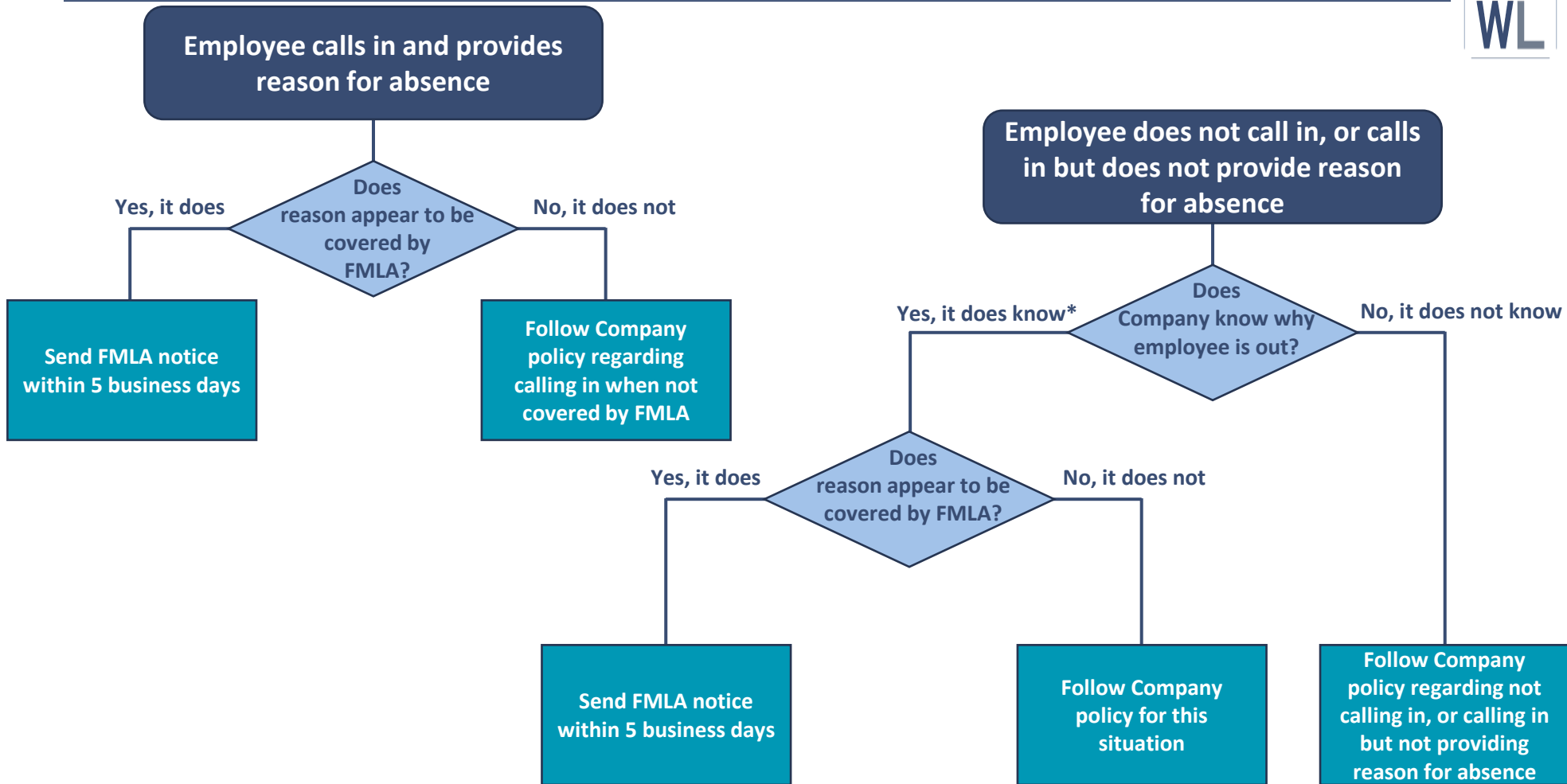
- Not when FMLA begins (unless COBRA for other reasons)
- It occurs when employee does not return to work on the day after the leave period ends
 - Or earlier if employee advises employer not returning
 - Or earlier if employee (or spouse or dependent) otherwise loses coverage under the group health plan
- COBRA period is measured from date coverage is lost

FMLA and COBRA

- COBRA continuation coverage **MAY NOT** be conditioned upon reimbursement of the premiums paid by the employer for coverage under a group health plan during FMLA leave
- When FMLA leave ends and the employee does not return to active employment, he/she should be provided a COBRA Qualifying Event Notice & Election Form

- Enforcement Actions
 - Employee complaint to DOL
 - Employee private action
 - Enforcement action initiated by DOL
- Relief
 - Lost wages and benefits
 - Cost of care (if leave denied)
 - Interest
 - Liquidated damages
 - Reinstatement, promotion
 - Attorneys' and experts' fees

FMLA Decision Tree



*For example, the employee does not call in, but the spouse does, or there is an article in the local newspaper.

Questions?



HR Professional Credits



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