

# Curbing FMLA Abuse

*a/k/a*

What? The Employer has Rights, too?

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## I. Introduction

The Family and Medical Leave Act is a comprehensive and complicated federal law that gives eligible employees protection for absences related to certain serious health conditions of the employee or his or her spouse, parent, or child. Although sometimes as employers it is hard for us to remember -- the FMLA<sup>1</sup> was written to balance employees' needs to protect their families with the employers' needs to develop high-performance organizations.<sup>2</sup> You can tell by how short it is that this paper is neither a treatise on the FMLA nor a guide on how to administer or apply the FMLA in your organization! Instead, my goal is to focus on the tools the FMLA provides to employers for preventing or curbing FMLA abuse. The vast majority of employees only use FMLA for legitimate reasons. But for those employees who do abuse or take advantage of the system, it is important for human resource professionals to know the employer's rights under the law. I've also attached several forms that I hope you will find helpful.

## II. Designate, Designate, Designate

### A. Capture 12 weeks of FMLA leave ASAP

One of the simplest ways of preventing FMLA abuse is to designate as many FMLA absences as possible as early as possible. That's because once an employee has exhausted his 12-week entitlement for the year, he has no more FMLA protection for that year.<sup>3</sup> So, once you have *sufficient knowledge* that an employee has an FMLA-qualifying event, start designating and tell the employee in writing that you are. This is particularly true for serious health conditions that may never end.

To be clear, I'm not suggesting that you fire an employee the minute he exhausts FMLA. You can be as generous as you want after you have fulfilled your legal obligation. But until you have captured 12 weeks of FMLA for that employee, he will have the legal right to take the time off later, if necessary.

When a beloved (or even a not-so-beloved) employee announces that he has a serious health condition, such as cancer, it is very easy to give an emotional response. "Take all the time you need. We'll be here for you. Don't worry about work." And that's okay. Compassion is an excellent quality in a supervisor or human resources professional! But none of us can predict the

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<sup>1</sup> The FMLA is codified at 29 U.S.C. § 2601 *et. seq.*

<sup>2</sup> 29 U.S.C. § 2601(b)(1); 29 C.F.R. § 825.101(b).

<sup>3</sup> Employers have several options for designating an FMLA year. They can use a calendar year; any fixed 12-month period, e.g., a fiscal year; a fixed 12-month period from an employee's first use of FMLA; or a rolling 12-month period measured backward from the first day of FMLA leave. 29 C.F.R. § 825.200(b).

future. We don't know in early 2014 what our precise needs will be at the end of 2014. We may have a good idea, but it isn't always 100% accurate.

Therefore, in addition to those compassionate comments, make sure you protect the employer's side of the equation, too, by saying things like, "We'll work with you *as much as we can*." "We will do *everything we possibly can* to help you and your family." It's okay to give the employee a few days to breathe. But get the FMLA ball rolling as quickly as possible because once the employee has exhausted FMLA, the employer has more flexibility if something unexpected comes up later and the employer really needs that position to get the work done.

## B. Designate without documentation

The FMLA gives employers the right to designate FMLA without the employee's consent.<sup>4</sup> Some employees think they can avoid an FMLA designation by refusing to provide the medical certification. But where the employer has sufficient information to recognize an FMLA-qualifying event, the employer can designate the absences as FMLA even without a certification from a health care provider.

For instance, if you have hosted a baby shower for an employee and sent flowers to the hospital, you don't need a doctor's certification to tell you she had a baby! That's an FMLA-qualifying event. Start designating.<sup>5</sup> Similarly, many lost-time workers comp injuries qualify for FMLA. That's because a period of incapacity greater than three days with at least one doctor visit and a course of continuing treatment (e.g., a prescription) is another qualifying event.<sup>6</sup> Don't most employees seriously injured at work see a doctor and get a prescription for muscle relaxers or pain killers? If that is the case, the absences would qualify for FMLA protection. The employer does not have to trouble the employee with getting a medical certification. I'm sure you can think of other situations where an employer has ample reason to know of a qualifying event.

Capturing FMLA-protected absences without medical certification or against the employee's wishes isn't as important for conditions that are temporary. First instance, if an employee requests two weeks of leave to have minor surgery, it isn't as pressing of a matter. But where an employee is frequently out sick for a medical condition that has no end, then it becomes increasingly important. If you don't start designating, the employee will ALWAYS have 12 weeks of FMLA available. So get started. Maybe he will exhaust his FMLA, maybe he won't. But he will NEVER exhaust if you don't start.

If you decide to designate FMLA without the employee's consent, **always** notify the employee in writing that you are doing it. See Form Letter A. If the employee will be taking intermittent FMLA, put the burden on him to say which of his absences are related to the FMLA-

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<sup>4</sup> 29 C.F.R. § 825.300(d)(1) and (2) (authorizing the employer to give designation notice once it has sufficient knowledge); 29 C.F.R. § 825.301(a) (employer's responsibility to designate FMLA).

<sup>5</sup> This paper assumes the employee is an "eligible employee" under the FMLA. To be eligible, the employee must have been employed 12 months, actually worked 1,250 hours within the 12 months preceding the leave, and work at a worksite with 50 or more employees within a 75 mile radius. 29 C.F.R. § 825.110(a).

<sup>6</sup> 29 C.F.R. § 835.115(a).

qualifying event and which are not. **See Form Letter B.** Otherwise, you may inadvertently discipline him for protected absences.

### III. The Certification of Health Care Provider

As we have seen, the employer can designate FMLA without the benefit of having a certification from a health care provider. Where you have good reasons to believe the employee is experiencing an FMLA-qualifying event, you don't have to ask for one. But where an employee asks for FMLA for a condition the employer has no way of knowing about, especially for someone else's serious health condition, the employer should exercise its right to get a medical certification.<sup>7</sup>

#### A. Authenticate the medical certification

The FMLA allows employers to authenticate any medical certification even without the employee's consent.<sup>8</sup> Because it does not involve receiving any additional medical information, the employee does not have to sign a HIPAA release. The only limitation is that the person authenticating the document must not be the employee's immediate supervisor.<sup>9</sup> **FN.** If you have any reason to doubt the authenticity of a medical certification, don't hesitate to check it. **See Form Letter C.**

#### B. Clarify the medical certification

Doctors have messy handwriting. They use abbreviations and symbols that a lot of us don't understand. If you're faced with a certification you can't read or understand, the FMLA allows the employer to clarify the certification.<sup>10</sup> Like the authentication process, someone other than the employee's immediate supervisor has to handle this. **See Form Letter D.** Additionally, you have to have the employee's permission to clarify the document. If the employee won't give permission, that would raise a reasonable concern about the document's authenticity. Note, too, that the doctor will need the employee to sign a HIPAA release. While that's actually the doctor's burden, you're more likely to get a quicker response from the doctor if you send it with your letter. **See HIPAA Release.**

### IV. Re-certification

Some employers will leave an employee on FMLA forever without ever asking for re-certification. That's not a wise practice. The re-certification rules are valuable tools for employers to prevent FMLA abuse. Whether to ask for re-certification depends upon all of the facts and circumstances surrounding the situation.

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<sup>7</sup> I suppose if the employee's spouse or parent also works for your organization and is on FMLA, you might waive the certification requirement.

<sup>8</sup> 29 C.F.R. § 825.307(a).

<sup>9</sup> 29 C.F.R. § 825.307(a).

<sup>10</sup> 29 C.F.R. § 825.307(a).

A. When the original certification expires

An FMLA certification is never good forever. If the certification has an ending date, then the employer is entitled to ask for a new certification for any absences after that date.<sup>11</sup> For instance, if an employee's FMLA certification indicates that he will be off work from January 30<sup>th</sup> to March 30<sup>th</sup> to recover from an appendectomy, then the FMLA certification expires on March 30<sup>th</sup>. If the employee does not return to work or returns to work and then goes back out, the employer is entitled to ask for a new certification. Again, that doesn't mean you have to ask. Consider this: if the employee calls in on March 30<sup>th</sup> and says he needs just two or three more days off, it might be very reasonable to continue designating the extra days as FMLA based on the original certification. But if he keeps calling and extending the leave, at some point you're probably going to want to ask for a new certification.

Further, if the certification has a specific ending date that is more than six months out, the employer can ask for re-certification every six months in connection with an FMLA-protected absence.<sup>12</sup> **See Form Letter E.**

B. When the certification has no ending date

Most certifications for intermittent leave, though, do not have a specific ending date. In that situation, the employer *may* have the employee re-certify no more often than every 30 days, as long as the employee had an FMLA-protected absence during that 30-day period.<sup>13</sup> Whether to have the employee re-certify every 30 days depends upon the totality of the circumstances.

C. When circumstances change or new information casts doubt

Supervisor should ask for re-certification *any time* circumstances change.<sup>14</sup> For instance, if an employee on intermittent FMLA seems to call in around regular days off or is certified for 1-2 days per month and is calling in 4-5 days per month, make her re-certify. The employer can also require re-certification *any time* information arises that casts doubt on the validity of the certification (e.g., the employee is supposed to be out for four weeks after knee surgery and is seen on the television news trying out for a professional basketball team).<sup>15</sup> **See Form Letter F.**

Just calling the employee in to discuss the situation lets him know you're watching him and may deter less-than-genuine absences. Even if the doctor gives a new certification consistent with the use pattern, at least you can be confident you've done everything you can to prevent abuse. Plus, the FMLA requires the employee to bear the expense of getting re-certified.<sup>16</sup>

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<sup>11</sup> 29 C.F.R. § 825.308(b).

<sup>12</sup> 29 C.F.R. § 825.308(b).

<sup>13</sup> 29 C.F.R. § 825.308(a).

<sup>14</sup> 29 C.F.R. § 825.308(c)(2).

<sup>15</sup> Yes, that happened to one of my clients.

<sup>16</sup> 29 C.F.R. § 825.308(f).

## V. A Note on “Similarly Situated”

Some HR professionals are completely convinced that the employer must treat all employees the same. If after reading this you have concerns that if you ask for re-certification on one employee, you’ll have to ask for re-certification on every employee who is on FMLA, let me assure you that that’s just not the case.

It is true that when an employer treats people differently, it can lead to a discrimination claim. Susie, who is African American and has taken all her intermittent leave on Mondays or Fridays, may allege discrimination if you send a letter to her doctor indicating that pattern and asking for re-certification. After all, claims Susie, you didn’t ask John, who is white, to re-certify. As long as the reason that we treat people differently is not because of their race, color, sex, national origin, religion, age or disability, it’s okay. In that hypothetical situation, John didn’t have a suspicious pattern of FMLA leave like Susie did. That is a legitimate, non-discriminatory reason to treat Susie differently from John.

Courts use a stringent standard to establish that particular co-workers are “similarly situated.” The circumstances surrounding the comparator employees must be “nearly identical.” Employees who have different supervisors, different job duties, different capabilities, and different disciplinary records are not similarly situated.<sup>17</sup>

## VI. Conclusion

As difficult as it is to administer, the FMLA is a good law. It’s not perfect. But neither are we. If you have a situation where an employee may be taking advantage of your organization, consider using some of these strategies. If you’re not sure whether an employee is really taking advantage of it, do a little research. Your payroll system will tell you whether the absences show a suspicious pattern. Is the employee calling in around days off? Is she leaving early every time a difficult task gets assigned to her? That’s when it is time to be proactive.

If you’re not already doing it, it’s a good idea to keep track of when each FMLA certification expires. If you’re a supervisor and only have two employees certified for FMLA, just mark on your calendar the day those certificates expire. If they don’t expire, consider your options described above. If you’re an HR director, develop a spreadsheet or calendar system for keeping track of it.

Hopefully, all of your employees use FMLA for legitimate reasons. But if you have a few who don’t, keep these tools in mind. Remember, the employer has rights under the FMLA, too!

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<sup>17</sup> *Wyvill v. United Cos. Life Ins. Co.*, 212 F.3d 296, 304-05 (5th Cir. 2000); *Coleman v. Exxon Chem. Corp.*, 162 F. Supp. 2d 593, 608 (S.D. Tex. 2001) (Employees with different disciplinary records are not considered “nearly identical.”); *Nieto v. L&H Packing Co.*, 108 F.3d 621, 623-24 (5th Cir. 1997) (plaintiff was not similarly situated with other employees who did not have prior disciplinary record).

## Form Letter A

Employer has sufficient knowledge that the employee is pregnant or going to adopt a child.

Dear *Employee*:

Congratulations! We understand that you are expecting a baby soon. We hope everything goes smoothly for you and your family.

Because your absences related to *childbirth/adoption* are eligible for certain legal protection, we will designate your absences from *starting date/date of birth or adoption* to *ending date* as FMLA leave.

If we can do anything to assist you while you are on leave, please let us know.

Employer has sufficient knowledge of the employee's own serious health condition, i.e., the employee has revealed that he has cancer, was hospitalized for depression or some other serious health condition, or even a workers comp situation.

Dear *Employee*:

We are saddened to learn of your serious health condition. As we understand it, you told *Supervisor Sally* that *you were recently hospitalized, you recently had surgery, you are receiving chemotherapy/radiation treatments, you have cancer*. Based on the information, it appears your absences are eligible for certain legal protection. Therefore, we will designate your absences related to this condition as FMLA. If you believe this designation is incorrect, please contact *insert name* immediately to discuss it. In the meantime, a certification of health care provider is attached. Please have your doctor complete it and return it to us within fifteen days.

We wish you a speedy recovery. If we can do anything to assist you during this time or if you have any questions about the FMLA process, please let us know.

## Form Letter B

Dear *Employee*:

You have been approved for intermittent FMLA for *your serious health condition, your spouse/parent/child's serious health condition*. It is your responsibility to tell us which of your future absences are related to this FMLA-qualifying event. Therefore, from now until your FMLA expires, each time you arrive late, leave early, or are absent altogether you must notify *name of specific person* of your absence and state whether it is related to your FMLA-qualifying event. If you do not tell *name of person* that the absence is because of your qualifying event, we will not designate the absence as FMLA leave and it will not be protected under the law. Unprotected absences can lead to disciplinary action up to and including termination. Further, you may not use intermittent FMLA leave for any absence other than those caused by the FMLA-qualifying event.

Additionally, if your intermittent absences are for scheduled medical appointments, you must try to schedule those appointments so that they are the least disruptive to your office hours and you must notify *name someone here* as soon as you learn of the appointment so that we can plan the work around your protected absence.

If you have any questions, please contact *insert name*.



## Form Letter C

Dear Dr. *insert name*:

Our employee, *insert name*, presented the attached FMLA form to us. Would you please confirm the authenticity of this form by initialing one of the following lines and returning it to me?

\_\_\_\_\_ I completed (or authorized to be completed) all of the information contained on the form.

\_\_\_\_\_ I did not complete (or authorize to be completed) the information contained on the form.

\_\_\_\_\_ I completed (or authorized to be completed) only part of the information contained on the form. The part I did not complete or authorize is \_\_\_\_\_.

If you need to discuss this matter, please call me at *insert number*.

Sincerely,

*Someone other than the employee's direct supervisor*  
*Insert fax number*

## Form Letter D

Dear Dr. *insert name*,

We received the attached FMLA form from our employee, *insert name*. Would you please clarify the following information?

*Insert location on the form for the words that you can't read or type in the phrase that you don't understand.*

*EX:* In Section III. Part A: Medical Facts (page 1 of the form), we cannot read what is written beside "probable duration of condition:"

*EX:* In Section III. Part B: Amount of Leave Needed (page 2 of the form), you estimated the beginning and ending dates for the incapacity as: "2-3 days x 2". Please clarify what that means.

A HIPAA release form executed by your patient is also attached. Please note that we are not asking for any additional information beyond that required by the certification form.

We would appreciate receiving your response as soon as possible. If you have any questions, please feel free to contact *insert name of someone other than employee's direct supervisor at insert phone number*.

Sincerely,

*Someone other than the employee's direct supervisor*

**HIPAA RELEASE**  
**Authorization Form for Release of Records and Information**

**COMPLETE SECTION A**

**A. Identification:**

This document authorizes the use and/or disclosure of confidential protected health information about the following person:

Patient Name: \_\_\_\_\_

Patient Address: \_\_\_\_\_

Patient Date of Birth: \_\_\_\_\_

Daytime Phone Number: (    ) \_\_\_\_\_

Patient Social Security Number: \_\_\_\_\_

**COMPLETE SECTION B**

**B. Directions for Release:**

This authorization applies in accordance with my directions below. I authorize the individual or company identified below in § B. 2. to release and/or use protected health information pertaining to the Patient listed in § A to the individual or Department identified in § B. 1. I understand that the information to be disclosed and/or used may include diagnosis, whether the patient is incapacitated (as defined under the Family & Medical Leave Act), the estimated length of the period of incapacity, and any physical restrictions that may apply as well as any other information necessary to complete the FMLA form for certification by a health care provider.

**1. I authorize the disclosure of information to:**

\_\_\_\_\_  
*Name of Department Representative (other than employee's direct supervisor)*

**2. I authorize the obtaining of information from:**

\_\_\_\_\_  
*Name of Health Care Provider*

\_\_\_\_\_  
*Address and Phone Number of Health Care Provider*

**Authorization Form for Release of Records and Information** (page 2)

**READ SECTION C**

**C. Right to Revoke:**

I understand that I may revoke this Authorization at any time except to the extent that action has already been taken in reliance upon it. If I do not revoke it, this Authorization will expire one year after the date on which the Authorization is signed. To revoke the Authorization, I understand I must contact the following person in writing:

\_\_\_\_\_   
*Name of Department Representative (other than employee's direct supervisor)*

**READ AND SIGN IN SECTION D**

**D. Authorization and Signature:**

I authorize the release of my confidential protected health information as described in my directions in § B. I understand that this authorization is voluntary, that the information to be disclosed is protected by law, and the use/disclosure is to be made to conform to my directions. The information that is used and/or disclosed pursuant to this authorization may be re-disclosed by the recipient.

I, \_\_\_\_\_, have read the contents of this Authorization. I confirm that the contents are consistent with my directions. I understand that by signing this form, I am authorizing the use and/or disclosure of my confidential protected health information.

\_\_\_\_\_   
*Patient's Signature*

\_\_\_\_\_   
*Date*

**COMPLETE SECTION E, IF NECESSARY**

**E. Legal Representative:**

If a legal representative (or Parent, Guardian, Conservator, or Authorized Representative) signs this authorization on behalf of the patient, complete the following:

Legal Representative's Name (PRINTED): \_\_\_\_\_

Legal Representative's Signature: \_\_\_\_\_

Date: \_\_\_\_\_ Daytime Phone Number: ( ) \_\_\_\_\_

1. If this authorization is being signed by the patient's Legal Representative, attach a copy of the Power of Attorney or other relevant documents designating the signer as the representative.
2. Please provide a copy of this form to the patient if not the person who signed it in § D.

## Form Letter E

Dear *Employee*,

The FMLA certification your doctor signed on *insert date* expired on *insert date*. If you believe you will continue to have FMLA-protected absences, please get an updated certification. The form is attached for your convenience.

If you have any questions, please let me know.

## Form Letter F

Dear Dr. *Insert Name*:

Your patient, *insert name of employee*, is our employee. *Mr./Ms. Name's* work schedule is *insert schedule, such as Monday through Friday from 8 AM to 5 PM*. We received the attached FMLA certification from you on *insert date*. Since then, *Mr./Ms. Name* has been absent on the following dates:

*Insert here a list of the dates and the number of hours missed*

*Note if any dates fall immediately before or after regular day off or vacation days or holidays*

EX:

Monday	March 30	left at 3 PM
Friday	April 3	called in sick
Thursday	April 9	called in sick
<b>Friday, April 10<sup>th</sup>, Holiday</b>		
<b>Sunday, April, 12, Easter</b>		
Monday	April 13	arrived 3 hours late

*Put in as much as you have. You might also have some document that shows "at a glance" the absence pattern. You can attach that instead of delineating the absences in the body of the letter.*

We have asked *Insert Name* to re-certify his/her need for leave. A form for that is attached. Please indicate on the new certification whether *Employee Name's* serious health condition and need for leave is consistent with this pattern of attendance.

Sincerely,

*Someone other than the employee's direct supervisor*

\_\_\_\_\_  
*Employee Name*

\_\_\_\_\_  
Date