

# ESSENTIALS OF FMLA

Covers the complete **FMLA**  
process from **employee notice**  
to **return to work!**

Your Guide to Administering Federal and State FMLA Leave



An Essential Building Block of a Human Resources Library



**J. J. Keller**  
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# Essentials of FMLA

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# Essentials of FMLA

## Introduction

The Family and Medical Leave Act of 1993 was enacted by Congress to balance the workplace and personal needs of employees. It includes job protection provisions allowing an employee to take time off of work to deal with personal issues such as a personal illness, taking care of a new baby, or taking care of a family member with a serious health condition.

The law requires employers to not only allow employees time off, it also requires that most employees be returned to their positions and that health care benefits be maintained during leave. Administering FMLA leave can be a challenging endeavor.

This manual covers all the provisions of the FMLA, along with explanatory stories to illustrate concepts as well as court case summaries. It also includes state family and medical leave information.

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# Minimizing Abuse

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## Court Case

### **Employees are to provide appropriate certifications when requested.**

After missing a few days of work and leaving early on some occasions, an employee explained to his supervisors that his prostate cancer had returned and that he was receiving radiation treatment. Later, the employee was admitted for seven days to a clinic with symptoms of depression and suicidal thoughts. Upon release, he contacted his supervisor explaining that his absence was due to bipolar disorder. The supervisor told the employee that a release from his doctors both for the bipolar disorder and the prostate cancer would be needed before he would be allowed to return to work.

The employee came clean and told his supervisor that he had not actually been treated for prostate cancer. The requirement for doctors' notes from both health care providers remained. The employee complied, and the certifications from the employee's urologist indicated that the employee, indeed, did not have a serious health condition — prostate cancer.

The employee was terminated for failing to provide certifications excusing him from all his absences. In response, the employee sued, claiming the employer violated the FMLA.

The court found in favor of the employer, first on the basis that the employee did not provide the supporting certification for all his absences — including the ones for the prostate cancer he did not have — and because the employer would have terminated the employee for lying had it known at the time that the employee did not suffer from prostate cancer.

*Prigge v. Sears Holding Corp.*, 3<sup>rd</sup> Circuit Court of Appeals, No. 10-3397, June 23, 2011.

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You may not always be able to tell whether an employee is being honest about a given reason for an absence, which is one reason a certification can be very useful in undermining abuse.

Don't forget to enforce your company's notice requirements and call-in procedures. When employees call in, you can remind them of the requirements and procedures, along with the potential consequences for not complying with them, and that you will be enforcing the provisions. Such reminders may make employees think twice about abusing the provisions.

### **Certification**

One of the more useful tools in undermining FMLA abuse is the certification. Requiring this to be completed puts some of the burden of the absence on the employee. You are not required to ask for certifications, but the law does allow you to, and taking advantage of this can go a long way.

## Minimizing Abuse



Not every reason for leave will warrant a certification. For example, if an employee is requesting time off to bond with his newly adopted healthy child, there would be no one to complete a certification as there are no medical concerns and the reason does not involve a qualifying exigency due to a family member's military duty. However, when the reason calls for a certification, it helps to request and obtain one.

Once requested, the employee has 15 calendar days to return it. Failure to do so can risk a delay in the employee's taking of leave. It may help to point this out to employees, even though it's indicated in the Rights and Responsibilities notice.

Certifications are designed to provide you with information so you can properly designate leave. The information should indicate whether the employee or family member has a serious health condition, whether the leave is for a qualifying exigency, or whether a family member has a serious injury or illness related to military duty.

In order to provide the appropriate information, the returned certification should be complete and sufficient. To verify this, you would need to review it. You may want to let the employee know that you will need to review it to ensure that it provides the information you need to make a designation decision, and that you will get back to him or her.

Returned certifications should not go immediately into a file without being looked at. A cursory check should indicate whether the form has addressed the particulars of the leave request. If leave is for a qualifying exigency, there may be additional supporting documents included, such as a copy of active duty orders.

Part of a review should ensure certifications are complete and sufficient. All applicable blanks should be filled in for the form to be considered complete. The information should provide adequate responses, as well. Just what is "sufficient" will depend upon some specifics involved. A certification, in particular a medical certification, should include the clearest information that is practicable for the health care provider to provide. However, precise responses are not always possible, particularly regarding the frequency and duration of incapacity due to chronic conditions. Over time, health care providers should be able to provide more detailed responses to these questions based on their knowledge of the employee's or family member's condition.



## Minimizing Abuse

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### To Illustrate

*Jill was happy to have received Carl's certification for his requested time off, but while reviewing it, she was less than happy to see that the doctor had indicated "un-  
sure at this time" for the frequency of Carl's incapacity. She noted, however, that Carl told her he had been only recently diagnosed with hypertension and that he and the doctor needed to figure out the best medication and dosage. Until they got that straight, he may have times when he couldn't work. Jill thought about being hard-nosed about it, and remembered what her mother went through after she had been diagnosed with the same condition.*

Jill determined that, while the initial certification for this newly diagnosed chronic serious health condition may provide a relatively larger range of expected incapacity, subsequent certification in new leave years should be able to provide more specific information regarding the anticipated frequency and duration of incapacity based on Carl's actual experience during the intervening period. Because she had seen her share of FMLA abuse, Jill would continue to press Carl for clearer information, but at this early point in his treatment, she would accept the initial certification as it was.

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If the certification is missing some information, or the information does not answer the questions, you don't need to accept it as is. You can return it to the employee to have it "cured." To do so, however, you need to include — in writing — what is needed to make it complete and sufficient. The employee then has seven calendar days to get it back to you.

Beyond ensuring the certification is complete and sufficient, you should be assured that it is valid — that the employee's reason is legitimate. Some employees have friends or relatives who are health care providers, or are on friendly enough terms with a health care provider, that they can have such providers fill out a certification, even when the employees don't have a serious health condition. If you have reason to doubt the validity of a certification, you may request a second opinion. Some potential reasons that may give you cause to doubt the validity of a certification may include a general practitioner providing information only a specialist should, the requested time off seems overly extensive for the condition, or the particular health care provider has provided invalid certifications in the past.

Asking for a second opinion would put employees on alert that you are serious about reviewing the information and taking steps to avoid FMLA abuse. However, you may want to reserve making such a request for only those cases where you have a legitimate doubt. The employer is on the hook regarding paying for the second (or third) opinion, as well as the employee's out-of-pocket expenses.

After you have a complete and sufficient certification, you still have steps you can take to make sure the leave is on the up-and-up.



# Minimizing Abuse

## Recertification

Request a recertification when you can, particularly if the leave gives you reason to suspect potential abuse. You may request a recertification every 30 days or when the minimum duration of the condition expires, whichever is later. A review of the certification should tell you whether there is a minimum duration of the condition. Despite these restrictions, you may request a recertification every six months in connection with an absence.

There are situations in which you may request a recertification in fewer than 30 days. These include the following:

- The employee requests an extension of leave,
- Circumstances described in the previous certification have changed significantly, or
- You receive information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification.



## To Illustrate

*Sharon reviewed Steve's absences and noticed that he was gone on every Monday and Friday for the last three weeks. These absences were noted as being for an FMLA-qualifying reason. Sharon then looked over the certification form, which indicated that Steve would need to be absent only about three days per month for his serious health condition. Sharon had seen this type of activity in the past, and wanted to ensure that Steve wasn't taking advantage of his FMLA protections, so she considered her options.*

Sharon saw the difference between the frequency indicated on the certification and the frequency Steve was actually absent as a significant change in circumstances and decided to request a recertification. Along with the certification form, she included a record of Steve's absence pattern and asked the health care provider if the condition and the need for leave were consistent with such a pattern.

The health care provider supported Sharon's suspicions and stuck to the original frequency. Without any further actions on Sharon's part, Steve's absences diminished to only twice per month.

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Employers may ask for the same information when obtaining a recertification as they do with an original certification. This can include information on an employee's pattern of absence so the health care provider can indicate whether the pattern is consistent with the condition. Such requests often are a subtle notice that potential abuse is being scrutinized.

You may run into situations in which you have reason to suspect an employee's reason for leave really doesn't qualify for FMLA protections — even after the reason has been supported by a certification. For example, if an employee is out for six weeks because of ankle surgery and the employee plays football during the fifth week, such information may be sufficient to cast doubt upon the continuing validity of the certification.

# Minimizing Abuse

## Surveillance

Employers have, in the past, engaged the services of professional surveillance providers to determine whether employees are engaging in activities that would indicate FMLA abuse. Courts have accepted such tactics, as long as the employer has an honest belief supporting the use of surveillance. Courts have also indicated that surveillance should be an action of last resort, after exhausting second or third opinions and recertifications.



### Court Case

#### **Have an honest suspicion based on some evidence before using surveillance on an employee.**

An employee took FMLA leave when her condition flared up, requiring about three days per week of leave. Her complaints included trouble standing and walking, and prolonged sitting. The company did not question her FMLA leave until the employee's supervisor became suspicious after learning that the employee asked when her annual FMLA allotment would replenish.

The supervisor asked the company's HR department what was needed to request an investigation of the employee's FMLA leave use. The supervisor was told to track the employee's FMLA leave use to determine whether any suspicious patterns emerged. The supervisor did so, and saw a pattern of requesting FMLA leave on Saturdays when the employee was scheduled to work, as well as days immediately before or after her scheduled days off, all of which was indicative of the employee's efforts to maximize her days off. The supervisor also noted that the employee did not call in sick on days she was scheduled to work a shift that paid a premium wage differential.

Based on this pattern, the supervisor subsequently asked that the employee's leave use be investigated.

On two particular days, the employee requested FMLA leave. Consistent with the identified pattern, the employee was scheduled to be off work the day before and after the FMLA leave days, appearing to extend those periods of time off.

The employer had the employee put under surveillance. On one such absence, the employee and her husband drove to a church. During the other absence, the employee was seen traveling for two hours, subsequently entering a private residence for the remainder of the day.

An outside company from whom the company requested medical opinions reviewed the surveillance and concluded that the employee could have performed her work duties on the days for which she requested FMLA leave. The supervisor also discovered a blog posting stating that the employee was taking classes at the church on Saturdays.

During a meeting, the employee denied affiliation with the church and that she took a two-hour road trip. The employee was suspended pending further investigations. The FMLA protections were denied for the two days in question, based on the employee's denial, the blog posting, the surveillance video, and the church's pastor, who confirmed that the employee had been attending Saturday classes. The Saturdays coincided with many of the employee's requests for FMLA leave. The employee was terminated due to a lack of an explanation regarding the days in question. In response, she sued.

In large part because the employer had an honest suspicion that the employee was misusing her FMLA leave, the court granted the employer summary judgment.

*Williams-Grant v. Wisconsin Bell, Inc.*, U.S. District Court for the Eastern District of Wisconsin, No. 11-C-1051, September 30, 2013.

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## Minimizing Abuse

You also don't want to go too far in your surveillance efforts. For example, if you think it might be a good idea to place a GPS or other location tracking device on an employee's vehicle to track his or her movements, you may want to think again. The Supreme Court ruled that information related to an individual's movements could entail protected private activities. This view could risk a privacy violation claim from employees. There may, however, be leeway for tracking an employee's movements while he or she is on the clock, particularly if the employee is using a company vehicle.

Resorting to such tactics for reasons other than substantiating the need for FMLA leave also helps avoid a disparate impact claim. Using trained professionals to perform the surveillance is also suggested. That way, the information obtained is impartial.



### Cross Reference

For another court case involving surveillance, see *Crouch v. Whirlpool*, 7<sup>th</sup> Circuit Court of Appeals, No. 05-3105, in the Reasons for Leave chapter.

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