

Why the “Epidemic” of FMLA Lawsuits?

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The Administrative Office of the US Courts just reported a 26.3% jump in Family Medical Leave Act (“FMLA”) lawsuits in 2014. These numbers are a bit startling. In 2012, there were 291 FMLA lawsuits. In 2013, there were 877 FMLA lawsuits. In 2014, there were 1108 FMLA lawsuits.

It is not just the number of lawsuits. In my practice many clients are experiencing an epidemic of FMLA claims, especially claims by employees that they need intermittent FMLA leave. This often is a contagious illness which will infect an entire department or a group, as it seems that once one employee finds out about and is certified for FMLA, other co-workers will follow, resulting in multiple employees in one department who are all certified for FMLA leave.

Why this steady increase in claims and lawsuits? There are many reasons.

First, the FMLA statute has become more widely known, as the Department of Labor (“DOL”) expands its reach and publicizes the law, so more people know about it. For instance, the [DOL just recently expanded the law to apply to same sex couples](#). As the FMLA becomes more widely known, more employees are invoking the law.

Second, the FMLA definition of a “serious health condition” is, unfortunately, very broad and very easy for employees to satisfy. Thus, many employees who have chronic conditions find it convenient to use that condition to become certified for FMLA leave, especially for intermittent leave. It also seems that many doctors seem willing to certify that an employee needs FMLA intermittent leave, even when that need is not totally clear.

Third, once they are certified, employees can take a FMLA day and cannot be disciplined for poor attendance, making it a very convenient way for employees who want to take more time off to get that time off, without fear of discipline. In other words, once certified, employees will take a “FMLA day” when they need a day off. Since the law does not allow employers to require a doctor’s note, it is very easy then for the untruthful employee to “abuse” FMLA time (take a FMLA day when they are not truly sick). It is often impossible for the employer to detect such abuse. Adding to the frustration, an employer generally cannot deny intermittent leave based on a burden on the business, making it difficult to tolerate an employee who is absent for intermittent FMLA days.

Lastly, many lawsuits are the result of ignorance of the law or frustration by employers (or both). The FMLA is complicated, with many dozens of regulations which are not all intuitive. Your Human Resources Department needs to take the time to learn it, or have legal counsel who know the statute. Also, a lawsuit may arise because a manager who is not aware of the FMLA will inadvertently violate the law, by either not recognizing that an employee may have a serious health condition or not alerting the employee to their FMLA rights. There are also cases where employees who are certified for FMLA leave are retaliated against after requesting it, again by managers who may not be

educated as to the requirements of the law.

So what should employers do?

Do not throw up your hands or ignore your obligations under the law. If you do the latter, you will find yourself on the receiving end of one of the many FMLA lawsuits. The answer is to know the law, and work with Human Resources or outside counsel to understand your rights, and to monitor your employees' behavior:

- Be as aggressive as the law allows when certifying leave. Many companies make the mistake of automatically saying yes and certifying a leave as soon as the employee submits a FMLA form. That may not be the right course. The FMLA does allow an employer to request more information from an employee and the employee's physician, if the original FMLA application is not "sufficient." 29 C.F.R. §825.307. Scrutinize an application and the doctor's note when you receive it and make sure that it supports the leave request. If it does not, push back. The employee has an obligation to follow up and respond. 29 C.F.R. §825.305 and §825.313.
- Once leave is certified, monitor the use. Make sure managers require the employees to tell them when they are using a FMLA day. If the number of days used are more than was originally requested or predicted, you may then have the right to go back and request re-certification. 29 C.F.R. §825.308.
- If you suspect abuse of intermittent or other FMLA leave, you may have the right to investigate and discipline the employees. This is a tricky area, as you need some good faith basis for the belief. You would be well advised to ask outside counsel before taking action. 29 C.F.R. §825.216(d).
- Last but not least, educate your managers. Make sure that those who directly supervise employees are generally aware of the FMLA, know how to recognize a possible serious health condition, and know that they need to involve Human Resources when a possible FMLA issue arises.

Employers must be careful to balance any push back against employees who have applied for FMLA leave so that they are not accused of interference or retaliation. Thus, it is important to remind managers that they must treat employees who have applied for or used FMLA leave in the same manner as they treat other employees.

The FMLA is a challenging statute for employers to comply with. That said, if an employer is aware of its obligations, gets good legal counsel and is diligent in complying with those obligations – it is certainly a manageable obligation.