

FAMILY MEDICAL LEAVE ACT NOTICE REQUIREMENTS

By Karen Sutherland and Bio Park

LEGAL BACKGROUND

Employers whose employees are eligible for Family and Medical Leave Act (“FMLA”) leave need to promptly notify them when an absence is being counted as FMLA leave. This is easy for employers to remember when the employee specifically requests FMLA leave. It is harder for employers to remember when the employee does not ask for FMLA leave, or if the employer is not initially aware of the reason for the employee’s absence, or if the employee is absent longer than expected. For example, employers may not think about an absence being FMLA-qualified when the employee takes vacation time to care for a sick family member or takes intermittent leave (including partial-day absences) for an FMLA-qualified reason. However, it is the employer’s responsibility to give the employee notice if the employer is going to count an absence as FMLA leave.

Under the Department of Labor (“DOL”) regulations, an employer is supposed to give notice that an absence is being counted as FMLA leave within a reasonable time after notice of the need for leave is given by the employee--within one or two business days if feasible. If leave has already begun, the notice should be mailed to the employee's address of record. 29 CFR 825.301. If the notice is given orally, it must be confirmed in writing. Under the DOL regulations, retroactive designation of FMLA leave is allowed only when the leave was taken for an FMLA reason but the employer was initially unaware of the reason, or when the employer knows the reason for the leave, but needs time to confirm that the leave qualifies under the FMLA.

The DOL has taken the position that employers who fail to give the required notice cannot count the absence as FMLA leave, and must provide the employee with the full 12 weeks of FMLA leave in addition to whatever leave the employee already used before notice was given. 29 CFR 825.700(a). In a case called *Ragsdale v. Wolverine World Wide, Inc.*, the U.S. Supreme Court held that the DOL overstepped its authority by adopting this regulation, and held that the employer did not need to re-start the clock on FMLA leave if the employee was not prejudiced by the lack of notice.

In addition to giving notice to individual employees when they take FMLA leave, the DOL requires every employer covered by the FMLA to post a notice in the workplace explaining the FMLA’s provisions and providing information concerning the procedures for filing complaints of violations of the Act with the DOL’s Wage and Hour Division. 29 CFR 825.300.

One other form of general notice is required for FMLA-covered employers who have employee handbooks or manuals or other written guidance concerning employee benefits or leave rights. These written materials must include information concerning FMLA entitlements and employee obligations under the FMLA. For example, if an employer provides an employee handbook to all employees that describes the employer's policies regarding leave, wages, attendance, and similar matters, the handbook must incorporate information on FMLA rights and responsibilities and the employer's policies regarding the FMLA. 29 CFR 825.301.

PRACTICAL GUIDELINES

- An employee's request for leave does not need to mention the FMLA to trigger the FMLA. The employee needs merely to explain the reasons for the needed leave, and if those reasons qualify under the FMLA, then the leave should be designated as FMLA leave by the employer. Most employers classify leave as FMLA leave if it qualifies as such, rather than letting an employee choose to use some other form of leave prior to using FMLA leave. Employers who designate other forms of leave as being concurrent with FMLA leave should have policies that expressly explain this, such as if an employee is required to use available sick leave and/or vacation leave for all or part of his or her FMLA leave.
- Be proactive. Designating a leave as FMLA-qualifying is your responsibility as an employer. If you do not know, inquire further. The DOL has forms available for obtaining the information you need, or you can obtain the forms from our office.
- Do not base your decision on "water cooler gossip." In forming your decision to designate a leave as FMLA-qualifying, you must rely only on information provided by the employee or the employee's spokesperson (*e.g.* the employee's spouse, adult child, parent, or doctor).
- Notify an employee that the leave is counting towards the employee's FMLA leave as soon as possible so that you do not end up in a dispute with the employee about whether the employee has been prejudiced by your failure to give timely notice.
- Give notice in writing, and keep a record of the notice. In case of oral notice, document when the oral notice was given and make certain to follow up with a written notice by the following payday. A notation on the employee's pay stub is usually sufficient.
- If you count leave taken under your leave policy towards the employee's 12-week FMLA entitlement, make certain that your policy provides equal or better benefits to the employee than those guaranteed under FMLA. The following are some of the benefits guaranteed under FMLA: continued access to the employer's group health insurance while on leave, the choice to take the leave all at once, intermittently or on a part-time basis, and a guaranteed return to the same or comparable position as the employee held before taking FMLA leave in most circumstances.
- Be sure your handbook or other policies that discuss benefits or absences include a description of FMLA leave.

The information set forth in this notebook is a broad and general overview of a complex topic and is not legal advice, nor does it create an attorney-client relationship. If you wish to retain Ogden Murphy Wallace, P.L.L.C. to assist you with an employment law issue, please do not hesitate to contact us for more information. Karen Sutherland is the Chair of the Employment and Labor Law Practice Group. Karen can be reached at ksutherland@omwlaw.com or 206-447-7000. Bio Park is an associate in the Municipal Department at Ogden Murphy Wallace, P.L.L.C. Bio can be reached at bparks@omwlaw.com or (206) 447-7000.