

*Call 1.888.HREXPRT for
an answer today!*

JILL E. SCHULTZ
MPA, SPHR
HR ADVISOR

2900 Highwoods Blvd
Raleigh, NC 27604

Phone: 888.473.9778 or
919.431.6096

Fax: 919.431.6094

E-mail:

jill.schultz@callhrexper.com

HR | Experts is provided as a benefit
To Members of Medical Mutual.

HR | Experts is not designed or
intended to render legal
advice to its members.

FMLA: Action Required By Employers Part 3 of 3

The Family and Medical Leave Act of 1993 (FMLA) entitles eligible employees to take up to 12 or 26 weeks of unpaid leave of absence in a 12-month period for certain medical and family reasons. To comply with the FMLA, a covered employer must take the following actions.

1. BEFORE AN EMPLOYEE REQUESTS FMLA LEAVE

- a. Adopt a family and medical leave policy that coordinates with existing leave policies.
- b. Post required poster in conspicuous places where it can be seen by employees and applicants for employment.
- c. Include an explanation of the FMLA and all FMLA leave policies in the employee handbook.

2. WHEN AN EMPLOYEE REQUESTS LEAVE

- a. Determine whether the employee is "eligible" for FMLA leave.
- b. When an employee requests any type of leave, a determination should be made whether the leave is FMLA leave. If the leave is FMLA leave, that fact together with the start and end dates of the leave should be recorded.
- c. Provide the employee with the Notice of Eligibility and Rights & Responsibilities within five business days after the employee gives notice of the need for leave. If leave has already begun, this notice should be mailed to the employee's address of record.
- d. If the leave involves the serious health condition of the employee or a family member, require certification of the condition by the employee's or family member's health care provider on a "certification form" (such as the DOL certification forms). Employers may also require certification for military caregiver and exigency leave.
- e. Decide whether you will require the employee to take paid vacation, sick days, personal days, etc. as part of the FMLA and inform the employee of your decision. Consistently apply this policy and supply an explanation of it in the employee handbook.
- f. Inform the employee of the right to continue medical insurance and, if applicable, arrange for payment of the employee's portion of the premium during leave.
- g. If the employee requests intermittent or reduced schedule leave:
 - Require the employee to provide certification from a health care provider of the medical need for the intermittent or reduced schedule leave.
 - Require the employee to schedule the leave so as to minimize disruption to operations.
 - If the leave is for foreseeable medical treatment, decide whether to temporarily transfer the employee to another job with equivalent pay and benefits that better suits the employee's intermittent or reduced leave schedule.

— Continued on next page

3. DURING FMLA LEAVE

- a. Temporarily fill the job of the employee on FMLA leave, if necessary.
- b. Collect employee's portion of health insurance premiums, if applicable.
- c. Require recertification of the serious medical condition or the medical necessity for intermittent or reduced leave at reasonable intervals, but not more often than every 30 days (unless the original certification was for a longer period) unless:
 - The employee requests an extension of the leave;
 - Circumstances described in the original certification have changed significantly;
 - The company receives information that casts doubt on the need for leave.

In all cases, the employer may request a recertification of a medical condition every six months in connection with an absence by the employee.

4. WHEN LEAVE ENDS

- a. An employer may request that the employee provide a certification of fitness to return to work if the leave was taken because of the employee's serious health condition that made the employee unable to perform the employee's job and if the employer has a uniformly applied policy of requiring such certifications on all leaves involving certain illnesses or of a certain duration (i.e., more than 7 days).
- b. Reinstatement employee to the same position held before leave or to another job that is truly equivalent in pay, benefits, and terms and conditions of employment.
- c. Record exact time spent on FMLA and deduct from employee's 12-week or 26-week entitlement.
- d. Do not take adverse action against employee for taking FMLA leave, and do not count FMLA leave time (whether hours, days or weeks) against the employee's attendance record. The FMLA regulations allow employers to deny certain awards or bonuses to employees despite FMLA leave under certain conditions. Employers should seek assistance prior to doing so.

TIPS FOR EMPLOYERS

- Abuse of intermittent and reduced leave schedule can be controlled by requiring an employee to use paid vacation days when taking these types of leave. Abuse can also be controlled by temporarily transferring an employee to a job with equivalent pay and benefits that would better accommodate the employer, and meet the employee's need for time off.
- Absences which qualify as FMLA leave cannot be counted as absences under a "no fault" absentee policy. Nor can these absences be used to impact negatively an employee's performance evaluation or merit pay increase.
- If an employer uses temporary employees from a temporary employment agency, the temporary agency is responsible for compliance with the FMLA. The temporary agency must provide the required FMLA notices and grant leave to the temporary employee. However, the company at which the temporary employee is working must cooperate in reinstating the temporary employee if the company continues to use the same temporary agency. [Note: This requirement applies even if the company is not a covered employer.]
- Employers can request a second or third opinion prior to designating leave. Employers can require recertifications (no more often than every 30 days, unless the original certification was for a longer period) during leave. Employers (but not direct supervisors) can contact the employee's physician directly under limited circumstances but should first ask the employee to have the physician clarify medical certifications when necessary.
- Employers cannot terminate/discipline in retaliation for taking leave. The types of conduct relevant to this decision include but are not limited to knowledge of the leave by decision makers; negative attitude toward employee's condition; treatment of other employees on leave; failure to adhere to company policies; and progressive discipline not applied/followed. The closer disciplinary action is to leave claim, the stronger the circumstantial evidence of retaliation.
- The FMLA regulations are complex. Employers should seek assistance until they become familiar with these regulations.