

## 7-D | WHAT ARE THE EMPLOYER'S OBLIGATIONS UNDER THE FMLA?

### 1) Notifying Employees of FMLA Rights and Obligations

- a) Notice of rights and obligations must be posted in the workplace.
- b) Willful violations of posting requirements may subject an employer to civil penalty of \$100 for each separate offense.
- c) An employer who fails to post required notice cannot take any adverse action against an employee, including denying FMLA leave, for failing to furnish the employer with advance notice of a need to take FMLA leave.

### 2) Employee manuals and handbooks, if provided by employer, must contain rights and obligations such as:

- a) providing advance notice for foreseeable leave; or
- b) providing a medical certification<sup>14</sup> of the need for the leave; or
- c) providing a return to work certification; or
- d) using accrued paid time off as a part of the leave.

### 3) If an employer has no written handbooks or policies, written guidance must be given to the employee setting out all rights and obligations whenever a request for FMLA leave is made.

### 4) Notice, however imparted to the employee, should include:

- a) that leave will be counted against the employee's annual FMLA leave entitlement;
- b) any requirements regarding medical certification and failure to do so;
- c) employee's right to substitute paid leave and whether the employer will require substitution of paid leave, and conditions regarding substitution;
- d) any required premium payments to maintain health benefits and arrangement for payments;
- e) any requirement for fitness-for-return-to-duty;
- f) employee's status as a "key employee" and potential consequences;



- g) right to restoration to same or equivalent position upon return; and
  - h) employee's potential obligation for health premiums paid by employer during leave.
- 5) Keeping employee medical records separate and confidential and limiting who may access records.
- 6) FMLA leave may not be counted against the employee in any manner under "no-fault" attendance policies.
- 7) An employer cannot enforce the employee's obligation to obtain a medical certification of the need for the leave unless the employer complied with its notification obligations. An employer must give the employee a "reasonable time" (at least 15 days) to obtain the certification.
- 8) An employer cannot discipline or terminate employees for taking FMLA leave.
- 9) Granting the returning employee the same job or equivalent job<sup>15</sup> with same pay, benefits<sup>16</sup> and terms and conditions of employment. If the employee fails to return at the end of the period, the right to the job expires.
- a) Key employee exception/if reinstatement would cause "substantial and grievous harm"
  - b) Employee entitled to no greater right to restoration/benefits than if he/she had been continuously employed
  - c) No restoration is required if leave fraudulently obtained

*(American Bar Association // Section of Labor and Employment Law  
Equal Employment Opportunity Committee // EEO Law Basics // Spring 2006)*

#### **Footnotes**

<sup>14</sup> When the employer disputes the medical certification, the FMLA permits second and third medical opinions at the employer's request by health care providers selected by the employer. Such opinions must come from health care providers who do not regularly contract with the employer. The employer may also require periodic recertification no more often than every 30 days, unless there is a requested extension of the leave, a significant change in the circumstances involved in the original certification, or the employer receives information which casts doubt on the continuing validity of the original certification.



The employer must notify the employee if the employer suspects that the medical certification is incomplete, and must give the employee the opportunity to correct the deficiencies. The employer may not directly request additional information from the employee's health care provider. However, a health care provider representing the employer may contact the employee's health care provider, with the employee's permission, to clarify and authenticate the certification.

<sup>15</sup> Equivalent position must have the same pay, benefits and working conditions, including privileges and status. It must also involve the same or substantially similar duties and responsibilities.

<sup>16</sup> Employer is required to maintain any pre-existing health coverage during the leave and, once leave period has concluded, to reinstate the employee to the same or equivalent position.

