

# Unscrambling the FMLA

Melanie Ault, DDA-HR  
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# Fun with Anagrams

- ▶ Cinematically defamed lava?
- ▶ Inflected macadamia valley?
- ▶ Cavalcade flan immediately?
  
- ▶ **FAMILY AND MEDICAL LEAVE ACT**

# Foundations

- ▶ **Communication is key**
- ▶ **Don't deprive the employee of their federal, job-protection rights - even if the employee doesn't like it**
- ▶ **Start with FMLA, but Minnesota's requirements might give the employee even greater benefits**
- ▶ **Articulate the reasons for your decisions**

# Topics Today

## ▶ Family Matters

- ▶ New Baby
- ▶ New Father
- ▶ Employee/Grandma

## ▶ Refusal to Return Certification Until Accruals Run Out

## ▶ Ongoing, Intermittent FMLA – When It Starts to Become a Burden

# Family Matters - New Baby

- ▶ FMLA & MN leaves run concurrently, not strung together
- ▶ FMLA says so, [29 CFR 825.701\(a\)](#):  
"... If leave qualifies for FMLA leave and leave under State law, the leave used counts against the employee's entitlement under **both** laws."
- ▶ Even if the employee doesn't want it to,
- ▶ Even if the employee doesn't like it

# Family Matters - New Baby

- ▶ FMLA requires 12 months of employment
- ▶ Leave portion MN Pregnancy & Parenting Act requires 12 months worked
- ▶ Therefore, both sets of leave run at the same time

# Family Matters - New Baby

## Sidebar on MN Pregnancy & Parenting Act

- ▶ 3 main areas:
  1. Accommodations for pregnancy at work (e.g., seating, lifting, breaks)
  2. Expressing milk at work without losing compensation
  3. Pregnancy or parental leave from work
- ▶ #1 and #2 apply on **Day 1** of employment for pregnant employees/mothers
- ▶ #3 leave of absence can still require a “worked **12-months** requirement”
- ▶ #3 leave must “begin” within 12 months of birth/adoption vs. Similar to, but different than, FMLA’s “conclude” within 12 months

# Family Matters - New Father

- ▶ Leave for bonding starts whenever the father requests it
- ▶ Intermittent leave for bonding is at employer discretion (unless child has serious health condition)
- ▶ Concludes within 12 months of the birth or placement

# Family Matters - New Father

- ▶ Q: What if Employer does not know Employee will be a new father?
- ▶ Q: What if Employee asks for 2 weeks of vacation time, but the Employer later finds out the 2 weeks began at the time of birth?
- ▶ Q: At the end of the 2-week vacation, what if the Employee requests 12 weeks off for bonding under FMLA?
- ▶ Q: Does the new father wind up getting 14 weeks off?

# Family Matters - New Father

- ▶ When Employer has enough information to make a determination, and the Employer determines that the leave is for an FMLA-qualifying reason,
- ▶ Then the FMLA, [29 CFR 825.120 \(a\)\(2\)](#), says he is entitled to 12 - not 14 - weeks off during the 12-month period beginning on the date of birth.
- ▶ The employer must designate the first 2 weeks in this instance as FMLA.

# Family Matters - New Father

- ▶ If father did not want his absence to be considered FMLA right away, he should have either:
  - ▶ Not asked for the time off, or
  - ▶ He should have made it very clear what the non-FMLA reason was for the requested 2-week vacation leave absence.
- ▶ The Dept. of Labor says it is up to the employee to disprove the employer's determination.
- ▶ When Employer has enough information to make a determination, and the Employer determines that the leave is for an FMLA-qualifying reason, the Employer must designate the leave as FMLA

# Family Matters - New Father

- ▶ U.S. DOL WHD [Opinion Letter FMLA2019-1-A](#)
- ▶ Leave for father starts when the employer has enough information to determine the leave is for an FMLA reason
- ▶ “[E]mployer may not delay designating leave as FMLA-qualifying”
- ▶ “[E]ven if the employee would prefer that the employer delay the designation”
  
- ▶ Even if the employee doesn’t want retroactivity
- ▶ Even if the employee doesn’t like it
- ▶ Even if it shortens the employee’s planned 14 weeks to 12 weeks

# Family Matters - Employee/Grandma

- ▶ Employee requesting to use FMLA leave to babysit grandchildren as her son and daughter-in-law had medical appointments out of town.
- ▶ FMLA-eligible?

# Family Matters - Employee/Grandma

- ▶ No, not FMLA. FMLA can be used to care for “immediate family”
  - ▶ Does not include grandchildren
  - ▶ Does include: spouse, child, or parent
- ▶ But what about MN Sick Leave?

# Family Matters - Employee/Grandma

- ▶ If employer offers sick leave, it must be used in conformance with Minnesota's Sick and Safe Leave Law, Minnesota Statutes, [Section 181.9413](#)
- ▶ On list: grandchild, adult child
- ▶ Not on list: Spouse of adult child
- ▶ But grandchildren are not sick and adult child is not needing care

# Refusal to Return Certification Until Accruals Run Out

- ▶ Employer knows of Employee's serious health condition
- ▶ Employee drags feet in returning the health care certification
- ▶ Is using accrued leave
- ▶ Eventually, Employee thinks they can obtain the certification on [DATE]
- ▶ [DATE] happens to be when Employee will be out of accrued leave
- ▶ Must Employer wait to receive the medical certification before starting the 12 weeks of FMLA?

# Refusal to Return Certification Until Accruals Run Out

- ▶ When you know the reason for the absence is covered by the FMLA - go with it and designate it as FMLA, certification or not
- ▶ Employee withholding a certification or information does not negate the reason for the earlier absence, and Employee does not, therefore, get "extra" time away
- ▶ U.S. DOL WHD [Opinion Letter FMLA2019-1-A](#)
- ▶ Otherwise, if fail to designate as FMLA, it “may constitute an interference with, restraint on, or denial of the exercise of an employee’s FMLA rights.”
- ▶ “The employer may not delay designating leave as FMLA-qualifying, even if the employee would prefer that the employer delay the designation.”
- ▶ “[I]f an employee substitutes paid leave for unpaid FMLA leave, the employee’s paid leave counts toward his or her 12-week (or 26-week) FMLA entitlement and does not expand that entitlement.”

# Ongoing, Intermittent FMLA – When It Starts to Become a Burden

- ▶ Employee has had approved intermittent FMLA for years
  - ▶ Sometimes flexed time to make up for coming in late on FMLA days
  - ▶ Texting Supervisor in middle of night that Employee will be late
  - ▶ No show, texting throughout morning, pushing out reporting to work time
- ▶ Supervisor now finding this difficult, unmanageable - can anything be done?

# Ongoing, Intermittent FMLA – Definitions

- ▶ Look to the FMLA regulations for definitions, [29 CFR 825.202](#)
  - ▶ Intermittent leave: taking off full FMLA days here and there
  - ▶ Reduced leave: a change to the work schedule, normally from full-time to part-time; working partial days, using FMLA for remainder of day/week
- ▶ Medical necessity, either self or family member
- ▶ Can be either planned, or unanticipated

# Ongoing, Intermittent FMLA – Planned Absence

- ▶ The next FMLA regulation, [29 CFR 825.203](#)
- ▶ Planned medical treatment
  - ▶ Employee to make “reasonable effort”
  - ▶ Schedule the treatments so as “not to unduly disrupt the employer’s operations”

# Ongoing, Intermittent FMLA – Unforeseeable Absences

- ▶ Absences are not-preplanned
- ▶ [29 CFR 825.303](#) - Employee notice requirements for unforeseeable FMLA leave
- ▶ DOL WHD FMLA [Fact Sheet #28E](#)

“It should generally be practicable for the employee to provide notice of leave that is unforeseeable within the time required by the employer’s usual and customary notice requirements.”
- ▶ Check the [FMLA FAQs](#) - Call-in procedures
- ▶ Otherwise, FMLA delayed or denied

# Ongoing, Intermittent FMLA – Follow Normal Call-In Procedures

**(Q) Is an employee required to follow an employer's normal call-in procedures when taking FMLA leave?**

Yes. Under the regulations, an employee must comply with an employer's call-in procedures unless unusual circumstances prevent the employee from doing so (in which case the employee must provide notice as soon as he or she can practicably do so). The regulations make clear that, if the employee fails to provide timely notice, he or she may have the FMLA leave request **delayed or denied** and may be subject to whatever **discipline** the employer's rules provide.

# Ongoing, Intermittent FMLA – What's No Longer OK?

- ▶ Do normal call-in procedures have Employee:
  - ▶ Texting Supervisor at 3:00 AM?
  - ▶ Updating Supervisor when Employee knows previously stated report time will no longer be viable?
- ▶ Is there some aspect of the call-in procedures that Employee is not following? Articulate it.
- ▶ What can be done to correct the non-conforming behavior?

# Ongoing, Intermittent FMLA – Transfer to Alternative Position

- ▶ Employer's call-in procedures not followed?
- ▶ What can be done?
- ▶ The next FMLA regulation, [29 CFR 825.204](#) , allows for a Transfer to an Alternative Position

# Ongoing, Intermittent FMLA – Transfer to Alternative Position

- ▶ Less disruptive to operations
- ▶ But not to dissuade Employee from using FMLA
- ▶ Only for the time being - reinstate
- ▶ Equivalent pay and benefits

# Ongoing, Intermittent FMLA – Employee's Recertification

- ▶ No Alternative Position?
- ▶ If Employee's serious health condition, check Employee's Re-Certification Report
  - ▶ General rule is annual [29 CFR 825.305, Subpart \(e\)](#)
  - ▶ Recertification for own medical condition [29 CFR 825.308, Subpart \(e\)](#)
- ▶ Ask for re-certification every 6-12 months for intermittent
  - ▶ Put a reminder on your calendar
  - ▶ Send a new [Notice of Eligibility & Rights and Responsibilities](#)

# Ongoing, Intermittent FMLA – Employee's Recertification

- ▶ Employee's Re-Certification Report
- ▶ OK to ask health care provider if pattern of past absences were consistent with the serious health condition, [29 CFR 825.308 \(e\)](#), last sentence
- ▶ Has anything changed to Employee's
  - ▶ Need for
  - ▶ Frequency of
  - ▶ Duration of episodic FMLA leaves?

# Ongoing, Intermittent FMLA – Family Member's Recertification

- ▶ Family Member's Re-Certification Report
- ▶ Certification of Health Care Provider for Family Member's Serious Health Condition
- ▶ Health Care Provider completes especially Part B, Amount of Leave Needed, #7, 8, 9, 10

# Ongoing, Intermittent FMLA – What Has Changed?

- ▶ Something has changed?
- ▶ Articulate it
- ▶ Should FMLA be delayed or denied?
- ▶ Look at beginning ADA Interactive Process

## Ongoing, Intermittent FMLA – Working Additional Hours?

- ▶ Remember, the Employee sometimes “flexed” their hours, working extra hours after needing to be FMLA absent? The absence is still designated as FMLA, [29 CFR 825.301\(a\)](#)
- ▶ Employer must designate absence as FMLA
  - ▶ Even if Employee doesn’t want it designated so
  - ▶ Even if Employee has to use accrued leave (overtime?)
  - ▶ Even if Employee earnestly wants to make up the time/work

## Ongoing, Intermittent FMLA – Working Additional Hours?

- ▶ Working additional hours later does not negate or un-do the FMLA designation for the hours missed
- ▶ Manage the Employee's work hours
- ▶ May need to deny the Employee's preference to work extra hours to “make up for” the FMLA time

# REMEMBER THE FOUNDATIONS

- ▶ **Communication is key**
- ▶ **Don't deprive the employee of their federal, job-protection rights - even if the employee doesn't like it**
- ▶ **Start with FMLA, but Minnesota's requirements might give the employee even greater benefits**
- ▶ **Articulate the reasons for your decisions**

*Questions?*

**Melanie Ault, DDA Human Resources, Inc.**

**[Melanie@daviddrown.com](mailto:Melanie@daviddrown.com) | [www.DDAHumanResources.com](http://www.DDAHumanResources.com)**

**612-920-3320, ext 112**



**DDA**

**Human Resources, Inc.**

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