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We Goofed; Now What? An FMLA Tale

Lynne Sousa
Senior Leave Management Legal & Compliance Counsel
Voya Financial

Susan Woods
Senior Counsel
FullscopeRMS

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Speakers



Lynne Sousa
Senior Leave Management
Legal & Compliance Counsel
Voya Financial



Susan Woods
Senior Counsel
FullscopeRMS

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Agenda

- FMLA Overview
- Notifications Issues
- Eligibility Issues
- Certification Issues
- Designation Issues
- Takeaways

FMLA Overview

The Family and Medical Leave Act (FMLA) provides eligible employees of covered employers with 12 workweeks* of unpaid, job-protected leave in a 12-month period to be used for specified reasons.

Eligible employees may take leave for the following reasons:

- Their own serious health condition
- To care for a spouse, child, or parent who has a serious health condition
- To bond with a newborn child, or for the placement of a child for adoption or foster care
- Qualifying exigency

*Employee may also take up to 26 workweeks of leave to care for a covered servicemember.

FMLA Overview

Who is a covered employer?

- Private employers with 50 or more employees
- Public agencies
- Public or private elementary and secondary schools

Who is an eligible employee?

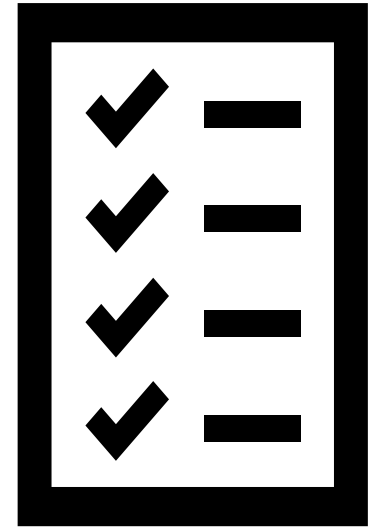
An employee who has worked for the covered employer for at least 12 months and who has worked at least 1,250 hours in the 12 months immediately preceding the leave* at a location where the covered employer has at least 50 employees within 75 miles.

*Special rules apply to flight crews

FMLA Overview

What other benefits does the FMLA provide to covered employees?

- Continuation of group health benefits under the same conditions as if the employee did not use leave
- Return to work at the same or virtually identical job at the end of the leave period
- Protection from interference and retaliation



FMLA Notice Requirements

1. Post FMLA Poster in workplace(s) – can be electronic
2. If you have eligible employees, must include FMLA notice/policy in employee handbook – can be electronic
3. Eligibility Notice – w/in 5 business days of leave request
4. Rights and Responsibilities Notice – provide with Eligibility Notice
5. Designation Notice – w/in 5 business days after enough information to determine if FMLA qualifying

Notification Goofs

Once upon a time ...



- Jill is having a baby! Her supervisor, Mary, organizes a baby shower at work and everyone is thrilled for Jill.
- At the shower, Jill mentions that she would like to take her 12 weeks of FMLA leave after the baby is born.
- Mary tells Jill not to worry - she will get her FMLA leave!
- In her excitement, however, Mary forgets to follow up on Jill's FMLA request. She doesn't think of it again a few weeks after Jill has the baby and hasn't been at work.

Mary failed to provide Jill with the Eligibility Notice and FMLA Notice of Rights and Responsibilities.
What should Mary do?

- A. Forget about sending it out. The company plans to approve her FMLA leave no matter what.
- B. Send it to Jill as soon as possible – it informs Jill of how FMLA will work.
- C. Give it to Jill when Jill returns to work. She will be too busy with the baby to read it while she is on FMLA leave.

Answer

B. Send it to Jill as soon as possible – it informs Jill of how FMLA will work.

Why?

The Eligibility notice and R&R notice informs Jill of:

- Her eligibility for job-protected FMLA
- Leave allotment and applicable 12-month period
- Any certification requirements
- Right to substitute paid leave
- Continuation of health care and premium payments
- Key employee status
- Maintenance of benefits and right to same or equivalent job upon return

The plot thickens . . .

While Jill has been out on unpaid FMLA bonding leave, she hasn't made any payments towards her share of her health insurance premiums. Mary doesn't want to tell their benefits director that she forgot to send Jill the FMLA rights & responsibilities notice so the director proceeds to initiate dropping Jill's health care coverage for lack of payment.

When Jill gets notice that her coverage is due to be dropped, she calls Mary and states that she didn't know that she was supposed to be paying her share of her premiums while on FMLA leave. She starts crying because she can't come up with 3 months of premiums in such a short period of time.

Mary is sympathetic but says her hands are tied. Does Jill have any recourse?

- A. Jill should reach out directly to her company's benefits director, explain her circumstances, and ask for a payment plan to catch up on the premium payments.
- B. If her coverage is dropped, file a complaint against her employer for interference with, and denial of, her FMLA rights for not being notified of the need to pay her share of the premiums while out on FMLA leave.
- C. Both A and B.

Answer

C. Both A and B.

WHY?

Jill can try to avoid losing her insurance coverage by working with her employer to pay her share of the premiums when she returns to work. In addition, Jill could file a complaint because she wasn't informed of her need to pay those premiums as she was not provided a rights & responsibilities notice. She may be able to get her coverage reinstated and recover any monetary losses that were a direct result of her employer's violation of the notice provisions.

Can this goof be rectified?

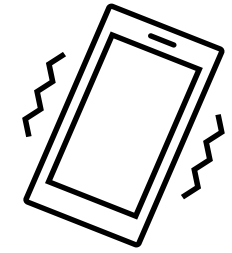
Probably, yes. Mary should own up to her error and work with her company's benefits director to allow Jill to keep her insurance coverage.



Eligibility

When an employee requests FMLA leave or when the employer acquires knowledge that an employee's leave may be for an FMLA qualifying reason, the employer must notify the employee of their eligibility to take FMLA leave within five business days. 29 C.F.R. § 825.300(b)

What happens if the employer goofs and doesn't notify the employee of their eligibility within five business days or gives the employee incorrect information?



Once upon a time ...

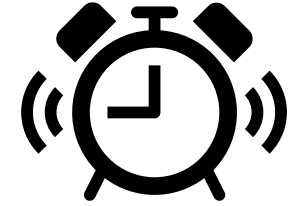
There was an employee named Andy who worked full time for Weir Widgets, an employer covered by FMLA.

One day Andy called Nancy in Human Resources to ask if he could take FMLA leave to cover the time he needs to take off for surgery.

Nancy said that she would look into it but that she did not see any issues with him taking FMLA leave for the surgery.

Based on what Nancy told him, Andy scheduled the surgery.

The plot thickens ...



Later, Nancy realizes that she never followed up with Andy about his leave.

She knows that Weir Widgets is a covered employer under the FMLA but is Andy eligible for FMLA leave?

He works full time at headquarters and has been with the company almost a year, and he also worked for Weir previously.

Nancy decides he is likely eligible and instructs the HR team to send out an FMLA approval to Andy for the time that he has requested.

Shortly before Andy begins leave for his surgery and recovery, Nancy learns that he is short of the required 1,250 hours worked and he is not eligible for FMLA leave.

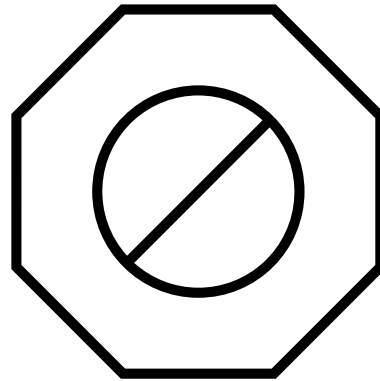
What should Nancy do?

Nancy did not give Andy information about his eligibility within five business days of his request as required and he was given incorrect information when an FMLA leave approval was sent to him.

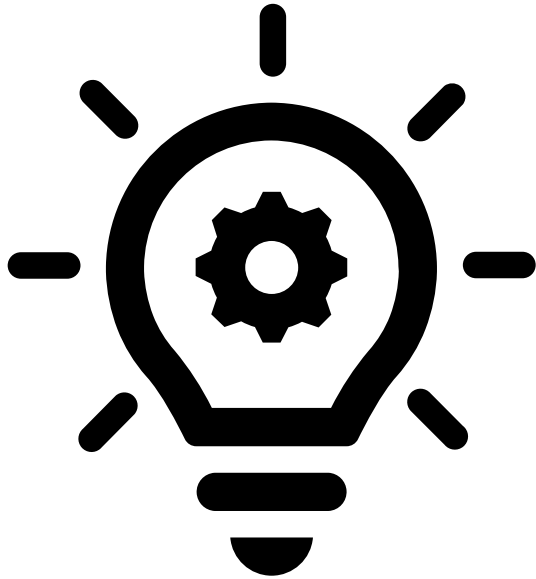
- A. Nancy should contact Andy and tell him he is not eligible so his request for FMLA leave is denied.
- B. Nancy should contact Andy and tell him that he is not eligible but because she did not properly advise him of his ineligibility in a timely manner, he will be granted FMLA leave for the absence.
- C. Nancy should contact Andy and tell him he not eligible for FMLA leave but because she did not properly advise him of his ineligibility in a timely manner, he will be granted a job protected company leave for the absence.

Answer

A. Nancy should contact Andy and tell him he does not meet the hours worked requirement for FMLA leave so his request for FMLA leave is denied.



Why?



Although Nancy failed to notify Andy that he was not eligible for FMLA leave for his absence due to hours worked and she caused an incorrect FMLA leave approval to be sent to him, Andy did not suffer any harm as a result.

- He had not yet taken any leave and he is able to reschedule his surgery to a date when he meets the 1,250 hours worked requirement.

What if Andy is already out on leave?

- A. Nancy should contact Andy and tell him he does not meet the hours worked requirement for FMLA leave so his request for FMLA leave is denied.
- B. Nancy should contact Andy and tell him that he is not eligible for FMLA leave but because she did not properly advise him of his ineligibility in a timely manner, he will be granted FMLA leave for the absence.
- C. Nancy should contact Andy and tell him he not eligible for FMLA leave but because she did not properly advise him of his ineligibility in a timely manner, he will be granted a job protected company leave for the absence.

Answer

C. Nancy should contact Andy and tell him he not eligible for FMLA leave but because she did not properly advise him of his ineligibility in a timely manner, he will be granted a job protected company leave for the absence.

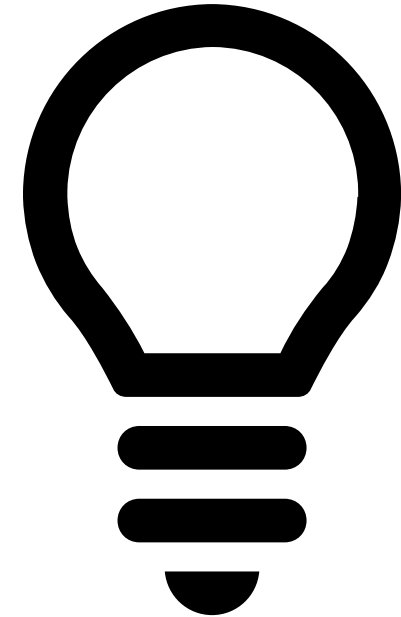


Why?

Denying Andy job protected leave at this point – when he is unable to return to work – would result in harm to Andy.

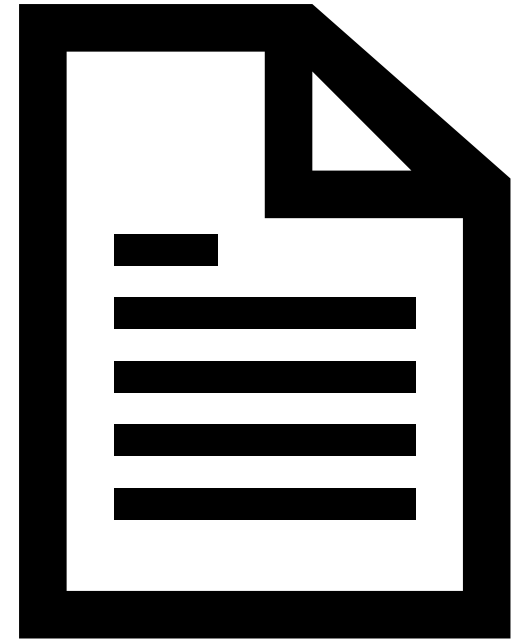
However, that does not change the fact that he is ineligible for FMLA leave due to his hours worked.

As a result, Weir Widgets must treat the absence as job protected but cannot decrement Andy's FMLA leave allotment.



But all is not lost ...

Andy may become FMLA eligible during his leave so Weir Widgets should continue to check his eligibility periodically during his absence and count the leave as FMLA if he becomes eligible ... and of course advise him if that happens.



Certification Goofs

Once upon a time . . .



Roger asks for time off to care for his wife who has ovarian cancer. Cindy in HR gives him his eligibility notice and rights & responsibilities notice and asks him to return a medical certification from his wife's doctor. He returns a certification form that states that his wife has cancer but the certification form does not provide information about what type of care she will need or how frequently.

Cindy doesn't have enough information about when Roger will miss work so she denies his FMLA request.

Did Cindy do the right thing?

- A. Yes, an employer has the right to know the doctor's best estimate of necessary absences.
- B. Not yet. Cindy needs to give Roger 7 calendar days to cure any deficiencies in the medical certification form.
- C. No, if the doctor certified that his wife has cancer, Cindy cannot deny FMLA leave so that Roger can care for her.

Answer

B. Not yet. Cindy needs to give Roger 7 calendar days to cure any deficiencies in the medical certification form.

Why?

Although a medical certification for care of a family member with a serious health condition needs to be complete and sufficient, employers must allow the employee 7 calendar days to cure any deficiencies. Only after the deficiencies are not cured, may the employer deny FMLA leave.

Can Cindy correct this?

Yes, Cindy may revoke the denial and inform Roger in writing what additional information is needed to make the certification complete and sufficient. Cindy needs to provide him at least 7 calendar days to cure the described deficiencies before making an approval/denial decision.

Once upon a time . . .



Jackie suffered from migraine headaches. She requested intermittent FMLA so that she could stay home when her migraines flare up. She provided the necessary medical certification from her doctor and her employer, Must Bill Law Firm, approved her intermittent leave request.

After Jackie reported 3 intermittent migraines in the first month, always on a Friday, Must Bill Law Firm became suspicious and sent Jackie for a second opinion at a doctor of its choice.

Did the law firm correctly use the FMLA second opinion process?

- A. Yes, when an employer has reason to doubt the validity of a medical certification, it may require a second opinion from a doctor of its choosing.
- B. No, the employer should have recertified instead of asking for a second opinion.
- C. Yes and no. The employer was correct in using the second opinion process but should have waited at least another month to see if Jackie's use of intermittent leave continued on the Friday pattern.

Answer

- B. No, the employer should have recertified instead of asking for a second opinion.

Why?

A second opinion may be sought only before approving leave. Once leave has been approved, if the employer doubts the stated reason for the absences or the continuing validity of the certification, the employer may request a recertification.

Can this goof be corrected?

In most cases, yes.

- If the second opinion appointment has not yet occurred, revoke the second opinion request and send the recertification, asking about the pattern of use.
- If the employer already acted on the second opinion, consider options:
 - Was there a denial after a third (tie-breaking) opinion?
 - If still approved, could a recertification be appropriate in the future?



Designation

When an employer has the information necessary to determine if a leave is FMLA protected, it must notify the employee whether the leave will be designated as FMLA leave and, if possible, how much leave will be counted against the employee's FMLA entitlement.

If the employer determines that the employee's leave is not covered by FMLA, the employer must notify the employee of that determination.

29 C.F.R. § 825.300(d)



Back at Weir Widgets...



Andy learns that his father has been diagnosed with a serious health condition and that he will need to take time off to care for him.

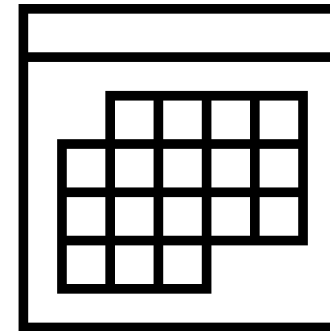
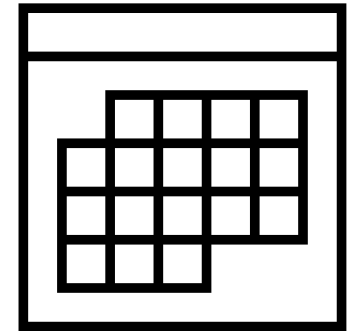
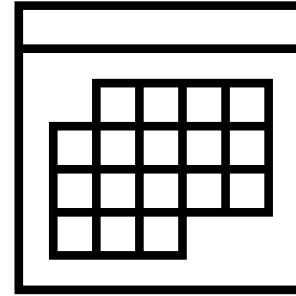
Andy once again advises HR that he will need time off.

When Nancy checks Andy's FMLA eligibility she finds that he is eligible, and he has FMLA leave time left in his allotment.

Nancy tells him he can take time off to care for his father for as long as he needs it.

Three months later ...

- Andy has missed six weeks of work as he takes weekly turns with his sister caring for his father.
- Andy's manager has asked to meet with him.
- He notifies Andy that he is subject to discipline for the time he has been missing from work.
- Andy objects and tells him that Nancy told him to take all the time he needed to care for his father.



Is Andy's time off to care for his father FMLA leave?

- A. Yes, Nancy told him he could take FMLA leave to care for his father.
- B. No, Nancy did not provide a designation notice to Andy once she knew the leave was being taken for an FMLA-qualifying reason.
- C. It depends.

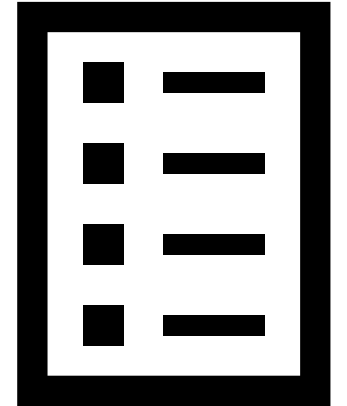
Answer

C. It depends.



What factors do we need to review?

- Nancy did not provide the required designation notice.
- Andy thought that he could take FMLA leave to care for his father and believed the time was job protected.
- Andy may not have taken the time if he had known it was not job protected.
- Is there an option that would resolve the failure to designate and the potential discipline issues?



Retroactive designation – the answer?

Employers may retroactively designate qualifying absence as FMLA leave if:

- Employer provides appropriate notice to the employee and
- Retroactive designation does not cause harm or injury to the employee, or
- Employee and employer mutually agree that the leave may be retroactively designated
- See 29 C.F.R. § 825.301 (d)

Andy and Nancy agree that the six weeks of leave he has taken for care of his father will be retroactively designated as FMLA leave so that the time is job protected and Andy will not suffer any other harm because of Nancy's failure to properly designate the leave as FMLA.

Takeaways/Lessons Learned

- Employers can correct errors in administration if an employee was not harmed by the error or any harm can be corrected.
- Employees must show that they suffered harm because of an employer's actions to receive remedies under the FMLA regulations.
- If there was no harm, then there is no right to a remedy.



Questions?

Speaker Contact Information

Lynne Sousa

Senior Leave Management Legal & Compliance Counsel

Voya Financial

Lynne.Sousa@Voya.com

Susan Woods

Senior Counsel

FullscopeRMS

susan.woods@fullscoperms.com

Appendix – Recent Cases

***Carey v. Baltimore City Bd. of Sch. Commissioners*, 2022 WL 17254067 (D. Md. Nov. 28, 2022)**

In addition to the five basic elements for a claim of FMLA interference, an employee must also show that they were prejudiced by the violation. Prejudice can be established by showing (1) lost compensation or benefits by reason of the violation; (2) other monetary losses sustained as a direct result of the violation; or (3) some other loss in employment status remediable through appropriate equitable relief, such as employment, reinstatement, or promotion.

***Owens v. Northwood Ravin*, 2022 WL 17970211 (W.D.N.C. 2023)**

Plaintiff was not prejudiced by any lack of notice from defendant because he could not show that the notice would have caused him to make different decisions regarding use of the FMLA leave.

***Webb v. Daymark Recovery Services, Inc.*, 646 F. Supp. 3d 675 (M.D.N.C. Dec. 20, 2022)**

An FMLA notice violation is only actionable if the employee was prejudiced by the failure of the employer to provide notice. Because plaintiff testified that he would have taken additional time if he had been advised by defendants that he could take up to 12 weeks of unpaid leave, a genuine dispute of material facts existed and the motion for summary judgment was denied on the claim.