Concurrent Session – Tuesday, 4:15-5:15 pm

Sticky Situations: Building a Process to Handle Complex FMLA Requests

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Agenda and Objective

- Presentation objective
- The FMLA evaluation roadmap
- Reviewing Sticky Situations
  - Adult Child
  - 50/75
  - Open & Continuous
  - Fraud
  - Elective Procedures
  - Joint Employers
  - Designating leave

Presentation Objective

You will be able to apply a FMLA roadmap to support consistent, compliant and correct absence determinations.

The map can be applied to the majority of claims, even the stickier ones, to keep your evaluation on track.
FMLA Request – Evaluation Roadmap

- Determine if eligible for FMLA leave
- Determine if a qualified leave reason and/or relationship
- Determine if certification is complete and supports leave request

How to evaluate an FMLA request — eligibility

- Worked for their employer for a minimum of 12 months (need not be consecutive) before start of the leave
- Worked for their employer for at least 1,250 hours in the 12 months immediately preceding the start of the leave
- Worked at a location where at least 50 employees are employed within 75 miles when the leave is requested

Qualifying leave reasons

- An employee’s own serious health condition that prevents him/her from working
- To care for a family member with a serious health condition (spouse, child, parent)
- For the birth or care of a newborn child within the first year of the child’s birth
- Placement of a child for adoption or foster care
- Qualifying exigency for employee’s parent, child, or spouse called to active duty
- Care for an injured service member
Qualifying family member

Parent
- A biological, adoptive, step or foster father or mother.
- Someone who stood in loco parentis to the employee when the employee was a son or daughter.
- Parent for FMLA purposes does not include in-laws.

Spouse
- A husband or wife as defined or recognized in the state where the individual was married and includes individuals in a same-sex marriage or common-law marriage.
- It also includes a marriage that was validly entered into outside of the U.S. if the marriage could have been entered into in at least one state.

Son or daughter
- A biological, adopted, or foster child, a stepchild, a legal ward.
- A child of a person standing in loco parentis who is either under 18 years of age, or 18 or older and incapable of self care because of a mental or physical disability.

Sticky Situation #1

Sally's situation
Sally's 17 year old daughter was recently diagnosed with cancer and will be treated with chemotherapy. The treatment will stretch over the course of several weeks and span the daughter's 18th birthday.

Can Sally take FMLA before her daughter's 18th birthday? Can Sally take FMLA after her daughter's 18th birthday?

Sticky Situation 1: Leave Evaluation

Yes – Sally has met the FMLA requirements.
Yes – Sally is requesting time to care for a qualifying family member due to a serious health condition.
Yes – however additional validation should be considered when Sally's daughter turns 18.
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Adult Child: Four Part test

- Person for whom the employee wants to take leave to care for is:
  - The employee's child over age 18,
  - Has a mental or physical disability at the time the leave is to commence,
  - Is incapable of self-care, and
  - Has a serious health condition and needs care because of it.

Sticky Situation #1b

Sally's extended situation

Sally has contacted our leave administrator to request an extension to her leave and to change the leave intermittent status.

How do we pay Sally?

Sticky Situation #2

Jose's situation

Jose requests time off to care for his 8 year old daughter who is currently undergoing chemotherapy.

Jose works in the Albany office location for his company. The Albany office employs 40 people.

Is Jose eligible for leave?
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Sticky Situation 2: Evaluation

No – Jose is not eligible for FMLA due to there being less than 50 employees in a 75 mile radius.

Should you designate his leave, regardless of eligibility?

Sticky Situation #3

Tom’s situation
Tom requests time off to undergo knee surgery.

His provider certifies his absences “as needed” rather than on a finite schedule.

Should you certify Tom’s leave?
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Sticky Situation 3: Evaluation

- Is it an eligible FMLA leave?
  - Yes – Tom has met the FMLA requirements.

- Is it a qualifying leave reason and/or relationship?
  - Yes – Tom is requesting time due to a serious health condition.

- Is the certification complete and accurate?
  - Yes – Typically, the provider would certify a finite period of time for a routine surgery.

Open Ended and Continuous Leaves

- Some absence certifications allow for absence “as needed” or on an “unlimited” basis and those may not align with a medical condition that appears finite.
- In these situations, the employer can seek clarification on the certificate with the provider on the initial certification or pursue the second/third opinion process.
- Pursuing a second opinion is within the employer’s rights on the initial certification. If the second opinion differs from the original certification, a third opinion may be sought and will be considered binding.
  - The employer bears the burden of the cost of 2nd and 3rd opinions.

Sticky Situation #4

Tom is out on his leave after his knee surgery when someone on his team brings Facebook photos of Tom vacationing into HR, casting doubt on his stated reason for leave.

What steps can you take?
Recertification

- If duration on the cert is < 30 days, an employer typically must wait until that minimum duration expires before requesting a recertification.
- If duration on the cert is > 30 days, an employer can recertify every six months.
- An employer may request recertification in < 30 days if:
  1) The employee requests an extension;
  2) Circumstances described on the previous certification have changed significantly; or
  3) The employer receives information that casts doubt upon the employee’s stated reason for the absence or the continuing validity of the certification.

Beth’s situation

Last year Beth was diagnosed with breast cancer and underwent a mastectomy. She missed 8 weeks total of work which was designated as FMLA.

Beth is now scheduled to undergo outpatient surgery for breast enhancement and is expected to miss an additional 3 weeks of work.

Is this additional leave request for a qualifying leave reason?

Sticky Situation 5: Evaluation

- Is it an eligible FMLA leave?
  - Yes – since Beth has already been out for the qualifying leave reason (care of her own serious health condition) within the last 12 months, eligibility has already been determined.
- Is it a qualifying leave reason and/or relationship?
  - Yes – Beth is requesting time for a serious health condition involving continuing treatment by a health care provider.
- Is the certification complete and accurate?
  - Yes – Beth has 4 weeks of leave remaining within the rolling back calendar year.
Cosmetic and Elective Procedures

- Cosmetic treatments or elective procedures are not serious health conditions unless inpatient hospital care is required or unless complications develop.
- Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met.

Mary’s situation

Mary’s mother has recently been diagnosed with a serious illness and is in need of a full-time caretaker. Mary is requesting time off to care for her seriously ill mother.

Is Mary eligible for leave?

Sticky Situation 6: Evaluation

- Is it an eligible FMLA leave? Yes – Mary has met the FMLA requirements.
- Is it a qualifying leave reason and/or relationship? Yes – Mary is requesting time for a serious health condition involving continuing treatment by a health care provider.
- Is the certification complete and accurate? Yes – Mary meets the requirements.
Joint Employers

- Joint employment will ordinarily be found to exist when a temporary placement agency supplies employees to a second employer. Joint employment relationships are determined by viewing the entire relationship in its totality and not a singular factor.
- In joint employment relationships, only the primary employer is responsible for giving required notices, providing FMLA leave, and maintaining health benefits.

Claudia's situation
Claudia has a heart attack at work. She is taken by ambulance to the hospital. She does not return to work the next day. You hear from her co-worker and close friend that she has been admitted to hospital and is still unresponsive.

Sticky Situation 7: Evaluation

- Is it an eligible FMLA leave?
  - Yes – Claudia has met the FMLA requirements.

- Is it a qualifying leave reason and/or relationship?
  - Yes – Claudia is afflicted with a qualifying serious health condition.

- Is the certification complete and accurate?
  - No – there is no certification at this time.
At the end of the road

99% of requests can be resolved using the roadmap

1% do not fit within the roadmap or any offshoots thereof and it is recommended you engage counsel for guidance with a focus on meeting compliance requirements and mitigating risk

Layering leaves

Company Leaves: tailored to achieve company-specific goals, including recruiting, talent retention, and overall absence management. Do not limit federal and state leave law responsibilities.

State Leaves: typically lower thresholds than federal leave and expanded definitions of covered relationships.

FMLA: 1250 hours 32 months 50/75

Questions?
Appendix

Companies A & B have common ownership and management. They share equipment, an HR team, and use the same employer policies.

Company A
- 35 employees
- Boston

Company B
- 30 employees
- Framingham

Are these companies subject to the FMLA because they are actually a single integrated employer?

Single Integrated Employers
- Separate entities will be deemed to be parts of a single employer (and have their employee counts aggregated) for purposes of FMLA if they meet the integrated employer test. Where this test is met, the employees of all entities making up the integrated employer will be counted in determining employer coverage and employee eligibility.
- Factors considered in determining whether two or more entities are an integrated employer include:
  - Common management,
  - Interrelation between operations,
  - Centralized control of labor relations; and
  - Degree of common ownership/financial control.