

FMMLA: How to Build an Effective (and Compliant) Process



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April 14, 2026

April 13-16 | St. Louis, MO

AGENDA

- FMLA Refresher
The Basics
- Scenarios & Discussions
Scenarios Based on Real Cases
- Questions



FMLA Basics

Eligibility	Entitlement	Certification	Administrative Highlights
<ul style="list-style-type: none">❑ Employees are eligible IF they:<ul style="list-style-type: none">✓ worked at least 12 months (need not be consecutive) <i>and</i>✓ have at least 1,250 hours <u>actually worked</u> during the 12 months before leave begins <i>and</i>✓ are employed at a work site with 50 employees within 75 miles ❑ Employers are covered IF they are:<ul style="list-style-type: none">▪ private-sector employers with 50 or more employees▪ public-sector employers (all)▪ public and private elementary and secondary elementary schools (all)	<ul style="list-style-type: none">❑ Time Available 12 workweeks in a 12-month period (and up to a combined total of up to 26 workweeks in a single 12-month period for military caregiver leave). ❑ Qualifying Absence Reasons:<ul style="list-style-type: none">• Child bonding (birth, adoption, foster care)• Care of a family member (child, spouse, or parent) with a serious health condition,• Employee's serious health condition (includes pre-natal care and pregnancy)• Qualifying military exigency• Covered servicemember care	<ul style="list-style-type: none">❑ May require certification to support leave for:<ul style="list-style-type: none">• Employee's Serious Health Condition• Care of a Family Member• Qualifying Exigency• Covered Servicemember ❑ Time to provide certification Minimally 15 calendar days unless it is not practicable under certain circumstances.	<ul style="list-style-type: none">❑ Job Protection Unpaid, job-protected leave ❑ Leave Frequency (can be taken) Continuously, Intermittently or Reduced Schedule ❑ Concurrent Rule May run concurrent with disability, statutory paid/unpaid leave or employer leave of absence policy. ❑ Minimum Increment of Time Smallest increment of time used for other forms of leave (e.g., sick or vacation), provided it is no greater than one hour. ❑ Use of Paid Time Off Employees may choose or employers may require the substitution of accrued paid time off for unpaid FMLA. ❑ Fitness for Duty Employers may require employees returning from leave for their own serious health condition to submit a fitness-for-duty certification.



ELIGIBILITY SCENARIOS & DISCUSSIONS



FMLA: Administrative Scenarios & Process

Eligibility

SCENARIO

- Shelby's date of hire is 2/1/25
- As of 1/15/26 she has worked 1,400 hours in the past 12 months
- 1/15/26 she notifies Human Resources of her need for leave due to her serious health condition (surgery to repair a prior Achilles Tendon injury)
- Absence start date is 1/15/26
- Absence end date is 2/25/26



FMLA: Administrative Scenarios & Process

Eligibility

PROCESS

Initial Eligibility Check

No later than 1/20/26 HR notifies Shelby she is not eligible because she has not worked at least 12 months (length of service)
She only has 11 months of service

Despite the FMLA eligibility, Shelby proceeds with her leave of absence from work as a Short-Term Disability claim beginning 1/15/26 and ending 2/25/26. Because Shelby will be out of work for a reason that qualifies for FMLA.

Eligibility Recheck

On or before 2/1/26 HR rechecks Shelby's eligibility

As of 2/1/26 Shelby has 12 months of service and 1,264 hours worked

Eligibility Decision

Shelby is eligible for the period 2/1/26 – 2/25/26



Shelby has only met the FMLA eligibility requirements

She still must be entitled and certified for FMLA



FMLA: Employee Notice

- ✓ Notice sufficient to make the employer aware: no magic words are needed for first instance of FMLA
- ✓ Foreseeable Leave – Employee must provide 30 days notice if need for leave is foreseeable OR “as soon as practicable”
- ✓ Unforeseeable Leave – As soon as “practicable”: same or next business day
- ✓ Employees must comply with usual and customary notice and procedural requirements for asking for time off leave (*unless there are unusual circumstances*)
- ✓ Once employers know leave may be FMLA qualifying MUST designate it as such NO one can “choose”



FMLA: Eligibility Check

Employee eligibility is determined (and notice must be provided) “at the commencement of the first instance of leave for each FMLA-qualifying reason in the applicable 12-month period.” 29 CFR 825.300(b)

- ✓ First instance of leave
- ✓ Each qualifying reason
- ✓ Within the applicable FMLA 12-month period
- ✓ Notice of Eligibility issued one time per FMLA year
- ✓ Once employee establishes eligibility for the qualifying reason, the employee remains eligible for FMLA leave for that reason the remainder of the FMLA year



ENTITLEMENT SCENARIOS & DISCUSSIONS



FMLA: Administrative Scenarios & Process

Establishing the Need for FMLA

SCENARIO



- Rita is eligible for and entitled to FMLA
- She requests medical leave due to head injuries sustained in a car accident
- Rita advises she wants to use PTO or vacation before using FMLA



FMLA: Administrative Scenarios & Process

Establishing the Need for FMLA

PROCESS

Decision



Because the reason for leave is FMLA qualifying (own serious health condition),
Rita's leave must be considered under the FMLA





FMLA: Does the Reason Qualify? Yes, Then You Cannot Choose

Once the employer has knowledge that an employee's leave is for an FMLA-qualifying reason, the employer must designate the absence as FMLA leave (*provided the employee is eligible, entitled and certified for leave*).

Employees cannot choose or influence this process [29 C.F.R. 825.301\(a\)](#)

DOL March 14, 2019 Opinion Letter:

[2019_03_14_1A FMLA.pdf \(dol.gov\)](#)



- **BUT LOOK AT:**

Escriba v. Foster Poultry Farms, Inc., 743 F.3d 1236, 1244 (9th Cir. 2014)

- The 9th Circuit includes Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington
- The DOL disagrees with this decision
- Consult with counsel if the employee is in the 9th Circuit



FMLA: Administrative Scenarios & Process

Qualified Family Member



SCENARIO

2/2/26 Armando requests leave to care for his uncle who has a serious health condition



FMLA: Administrative Scenarios & Process

Qualified Family Member

PROCESS

Entitlement Evaluation

At the time Armando provides notice, he is asked to confirm if:

- a. He (Armando's) uncle stood in loco parentis to him (Armando) when he (Armando) was a child
("Armando's parent").
- b. He (Armando) stands in loco parentis to his uncle.
("Armando's child").

Entitlement Decision

Armando's leave is not FMLA qualifying because his uncle is not a qualifying family member.

Armando answers no to both inquiries.



THINGS TO KNOW FMLA: Who is a Family Member?

Spouse

Defined in accordance with applicable state law, including common-law marriage in states where recognized, but generally does not include unmarried domestic partners.

Child

Biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is either under 18 years of age or 18+ and incapable of self-care due to a disability.

Next of Kin (Military Leave Only)

For up to 26 weeks of military caregiver leave, this includes the nearest blood relative of the service member.

Parent

Biological, adoptive, step, or foster father/mother, or an individual who stood *in loco parentis* (provided day-to-day care and financial support) to the employee when they were a child

In Loco Parentis (meaning in place of a parent)

An eligible employee can take FMLA to care for an individual who:

- a) stood in loco parentis to the employee when they were a child (“care of parent relationship”).
- b) the employee stands in loco parentis (“care of child relationship”).
 - A loco parentis relationship is one where the individual is responsible for day-to-day care or financial support of an individual.
 - A biological relationship is not required.
 - Does not necessarily require a court or assignment by a similar legal entity.
 - Loco parentis is common in sibling situations.



FMLA: Administrative Scenarios & Process

Partial Leave Time Available

SCENARIO



- 2/4/26 Jane requests leave to care for her wife who has a serious health condition
- Absence start date is 2/4/26
- Absence end date is 3/2/26



FMLA: Administrative Scenarios & Process

Partial Leave Time Available

PROCESS

Entitlement Evaluation

As of 2/4/26 Jane has 1 work week of FMLA time available.

Decision

Jane:

is entitled to leave for the period 2/4/26 – 2/10/26.

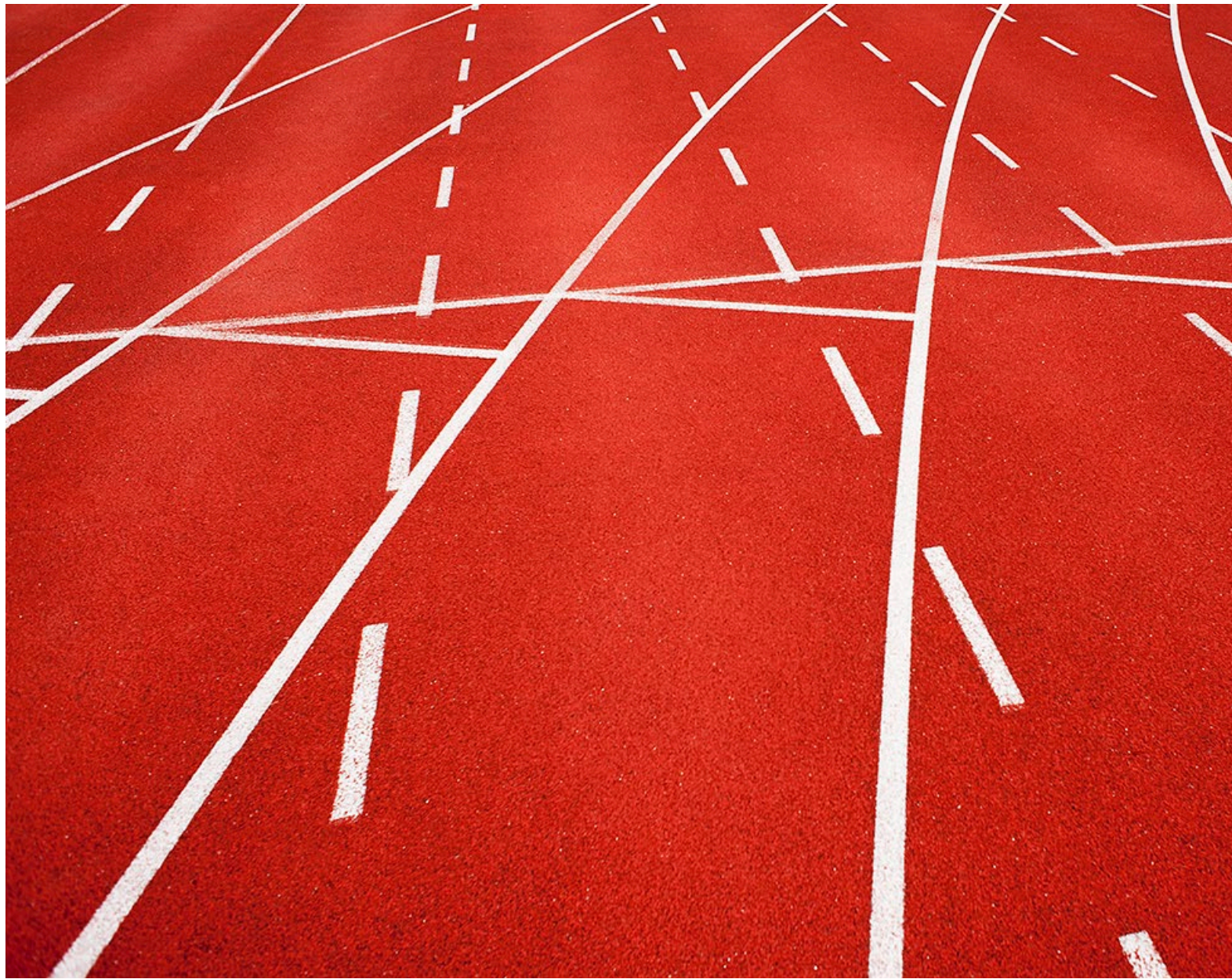
is not entitled to leave for the period 2/11/26 – 3/2/26 because she has used the maximum amount of leave time available

Jane has only met the FMLA entitlement requirement

She still must be certified for FMLA



CERTIFICATION SCENARIOS & DISCUSSIONS



FMLA: Administrative Scenarios & Process

Certification Not Received

SCENARIO



- 2/2/26 Kellie provides notice of her need for leave
- Absence start date is 2/2/26
- Absence end date is 3/12/26
- 2/3/26 Notification of Rights package ("Rights Package") is sent to Kellie
- The Rights Package includes a request for certification information
- Certification is due by 2/23/26 (15 calendar days plus 5 calendar days for mailing)
- Kellie is eligible and entitled to leave



FMLA: Administrative Scenarios & Process

Certification Not Received

PROCESS

Certification Evaluation

As of 2/24/23, certification is not received

Decision

Kellie's leave is not FMLA qualifying because certification information was not provided within the time allowed



FMLA: Administrative Scenarios & Process

Certification Received Late

SCENARIO



- 2/24/26 Kellie's absences are not designated as FMLA leave
- 2/24/26 Kellie is notified of this decision via telephone call & written correspondence
- 3/3/26 Kellie provides a complete and sufficient certification



FMLA: Administrative Scenarios & Process

Certification Received Late

PROCESS

Extenuating Circumstances Evaluation

Kellie is asked to provide a reason why the certification was provided after the due date

Extenuating Circumstances Determination

Kellie advises she forgot about the due date

This is not considered an extenuating circumstance (reasonable excuse for the delay)

Decision

Kellie's leave for the period of

- 2/2/26 – 2/23/26 **is** FMLA qualifying
- 2/24/26 – 3/2/26 **is not** FMLA qualifying
- 3/3/26 – 3/12/26 **is** FMLA qualifying



FMLA: Administrative Scenarios & Process

Incomplete / Insufficient Certification

SCENARIO

- 1/5/26 Nell provides notice of her need for leave
- Absence start date is 1/5/26
- Absence end date is 2/17/26
- 1/5/26 Notification of Rights package ("Rights Package") is sent to Nell
- The Rights Package includes a request for certification information
- Certification is due by 1/25/26 (15 calendar days plus 5 calendar days for mailing)
- Certification is received 1/10/26
- Nell is eligible and entitled to leave



FMLA: Administrative Scenarios & Process

Incomplete / Insufficient Certification

PROCESS

Certification Review

Certification is incomplete/insufficient

Employee Notification

Nett is:

- notified via telephone call and in writing of the information needed to make the certification complete / sufficient.
- given the remaining time (until 1/25/26) to submit the additional information

Completed and Sufficient

Complete means all applicable entries on the form are filled in. **Sufficient** means the information provided is enough to determine if a serious health condition exists and supports the need for leave

Timing

Employee is given the greater of the time remaining to initially provide certification **or** 10 days whichever is greater.

Contacting a Health Care Provider (HCP)

The employee may grant permission to contact their HCP directly. No additional information (outside of certification contents) may be asked.



FMLA: Incomplete Certification

Ahmed v. Salvation Army, (D. Md. 2012):

- Employee terminated after 23-days of unapproved absences
- FMLA Certification form was incomplete
- Case dismissed!



FMLA: Administrative Scenarios & Process

Reason to Doubt the Validity of a Certification

SCENARIO



- 3/24/26 Eric provides a certification to support his need for leave due to his serious health condition
- Eric's employer believes the certification was completed by a health care provider known for "writing employees out of work"



FMLA: Administrative Scenarios & Process

Reason to Doubt the Validity of a Certification

PROCESS

Certification Evaluation

Based on the medical facts, information on the certification form and the essential functions of Eric's job, there is reason to doubt the validity of the certification

Decision

BEFORE Eric's need for leave is designated as FMLA, the employer may request:

1. a second medical opinion.
2. clarification / authentication.

Second Medical Opinions

Obtained at the employer's (ER's) expense. The ER may choose the health care provider (HCP) but the selected HCP may not be employed on a regular basis by the ER.

Third Medical Opinions

If the opinions of the first and second HCPs' differ, the ER may require the employee (EE) to obtain a third opinion at the ER's expense.

Clarification / Authentication

If an employee submits a complete and sufficient certification the employer may not request additional information. However, the employer may contact the health care provider for purposes of clarification and authentication.

Reference: For additional information refer to FMLA Regulation 825.307.



FMLA: Second and/or Third Medical Opinions

- *Muns v. Camden Cnty. Bd. of Soc. Servs.*, (D.N.J. 2019)
- Employee had her SHC (rheumatoid arthritis) since 2012 and made a FMLA request right after being denied FMLA leave to attend to her mother's estate
- Employer obtained a second opinion supporting the employer
- FMLA denied
- Court dismissed case



FMLA: Administrative Scenarios & Process

Certification Timeframes

SCENARIO



- April is eligible, entitled and certified for intermittent leave as follows:
 - Two times per week with each time lasting up to 8 hours
 - Certification start date is 1/1/26
 - Certification end date is 12/31/26



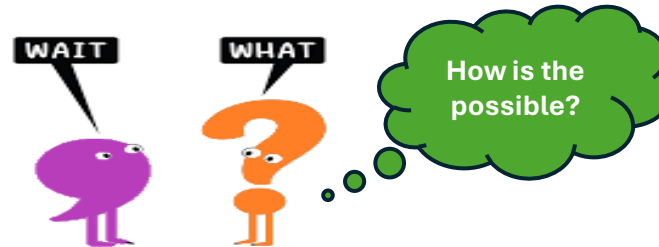
FMLA: Administrative Scenarios & Process

Certification Timeframes

PROCESS

Decision

April's leave is certified 1/1/26 – 12/31/26



CERTIFICATION DOES NOT MEAN APPROVED

Certified simply means that during the certified period April may need an absence. Each time April reports an absence, that absence will be evaluated to ensure:

1. FMLA time is available
2. The absence is within the certified period
3. The absence is for the stated reason for leave



FMLA: Administrative Scenarios & Process

Dual Certifications

SCENARIO

- Marc is certified for intermittent leave as follows:
 - Two times per week (*physical therapy – broken leg*) with each time lasting up to 2 hours.
 - Certification start date is 1/1/26
 - Certification end date is 7/30/26
 - Up to ten days per month (*recovery from broken leg*) with each day lasting up to 8 hours
 - Certification start date is 1/1/26
 - Certification end date is 12/31/26
- He submits an intermittent absence for 2/25/26 1 hour & 2/27/26 4 hours



FMLA: Administrative Scenarios & Process

Dual Certifications

PROCESS

Absence Evaluation

BEFORE an absence decision is made, an evaluation of the absences is conducted to determine if the absences are for physical therapy or recovery

Note: This evaluation is solely for determining if the absence is within the certified period. If approved, the amount of time is deducted from the total leave allotment, NOT a separate allotment of time

Marc's:

- 2/25/26 absence is for physical therapy
- 2/27/26 absence is for recovery

Decision

Marc's absences are within the certified periods and are designated as FMLA





FMLA: Administrative Scenarios & Process

Needed to Care for a Family Member

SCENARIO

- Valerie's parent is diagnosed with end-stage congestive heart failure and was not expected to live
- Valerie is eligible, entitled and certified for FMLA leave
- Valerie learns that a local charitable organization has granted her parent a "make a wish" cruise because they are terminally ill
- This six-day trip requires Valerie to be absent from work because she is needed to care for her parent during the

cruise



Needed to Care:

To care for a spouse, child (under 18 or incapable of self-care), or parent with a serious health condition. The employee must be needed to provide physical or psychological care, including assistance with daily needs, transportation, or arranging care.

FMLA: Administrative Scenarios & Process Needed to Care for a Family Member

PROCESS

Absence Evaluation

Based on the medical facts & information on the certification form the absence request meets the criteria for leave

Decision

Valerie's request is approved.



Ballard v. Chicago Park Dist. (7th Cir., 2014)

- Employee's mother was diagnosed with end-stage congestive heart failure and was not expected to live and employee was the primary caregiver
- Local charitable organization had granted her mother a "make a wish" trip to Las Vegas because she was terminally ill
- Employer denied employee's request to travel with mom but employee went anyway and was terminated
- Court: "the FMLA's text does not restrict care to a particular place or geographic location . . . For instance, it does not say that an employee is entitled to time off "to care at home for" a family member. The only limitation it places on care is that the family member must have a serious health condition"





FMLA: Administrative Scenarios & Process

Intermittent Absence Reporting Methods

SCENARIO

- Wadell Management Inc. requires employees to notify their supervisor of absences or late arrivals through a call-in line at least 30 minutes prior to a shift **and** report to their third-party administrator (TPA)
- Failure to call in for three consecutive shifts is considered job abandonment
- April does not call the TPA or use the call-in line. Instead, she communicates with her supervisor through Facebook messenger
- April and her supervisor engaged in multiple communications over the Facebook messenger about her serious health condition and she was previously approved for FMLA after communicating in this fashion
- After April returns to work, she has complications and she needs more time off
- April again does not follow the official call in policy but communicates with her supervisor on Facebook messenger
- Wadell Management wants to terminate April for job abandonment, since she failed to comply with the employer's call-in procedures



FMLA: Administrative Scenarios & Process

Intermittent Absence Reporting Methods

PROCESS

Decision

While April's Facebook messages did not follow Wadell Management Inc.'s policy, it may be determined that this is an acceptable notification method because the manager previously accepted this form of communication





Roberts v. Gestamp W. Virginia, LLC,
(4th Cir. 2022)

- Employee's Facebook IMs did not follow policy but the court said they may still be acceptable since the manager previously accepted this form of communication



FMLA: Administrative Scenarios & Process

Individual Intermittent Absence Reporting

SCENARIO

- Cheryl is certified and approved for intermittent FMLA
- Cheryl notifies her supervisor that she will not come in to work 2/24/26 and will use intermittent FMLA to cover the absence because she is taking care of her mother
- Cheryl's supervisor also reminded her that per the internal absence reporting procedures, she must also report each FMLA absence to the employer's third-party administrator (TPA) directly within 2 business days beginning with the date of the absence



FMLA: Administrative Scenarios & Process

Individual Intermittent Absence Reporting

PROCESS

Absence Validation - Employer

02/27/26 Cheryl's employer checks with the TPA to confirm if the absence has been reported

As of 02/27/26 Cheryl has not reported her absence to the TPA.

Employer Decision

- The absence is counted as unexcused (this is the 5th unexcused absence)
- Cheryl's employment is terminated due to the unexcused absence



FMLA: Administrative Scenarios & Process

Individual Intermittent Absence Reporting Cont....

SCENARIO



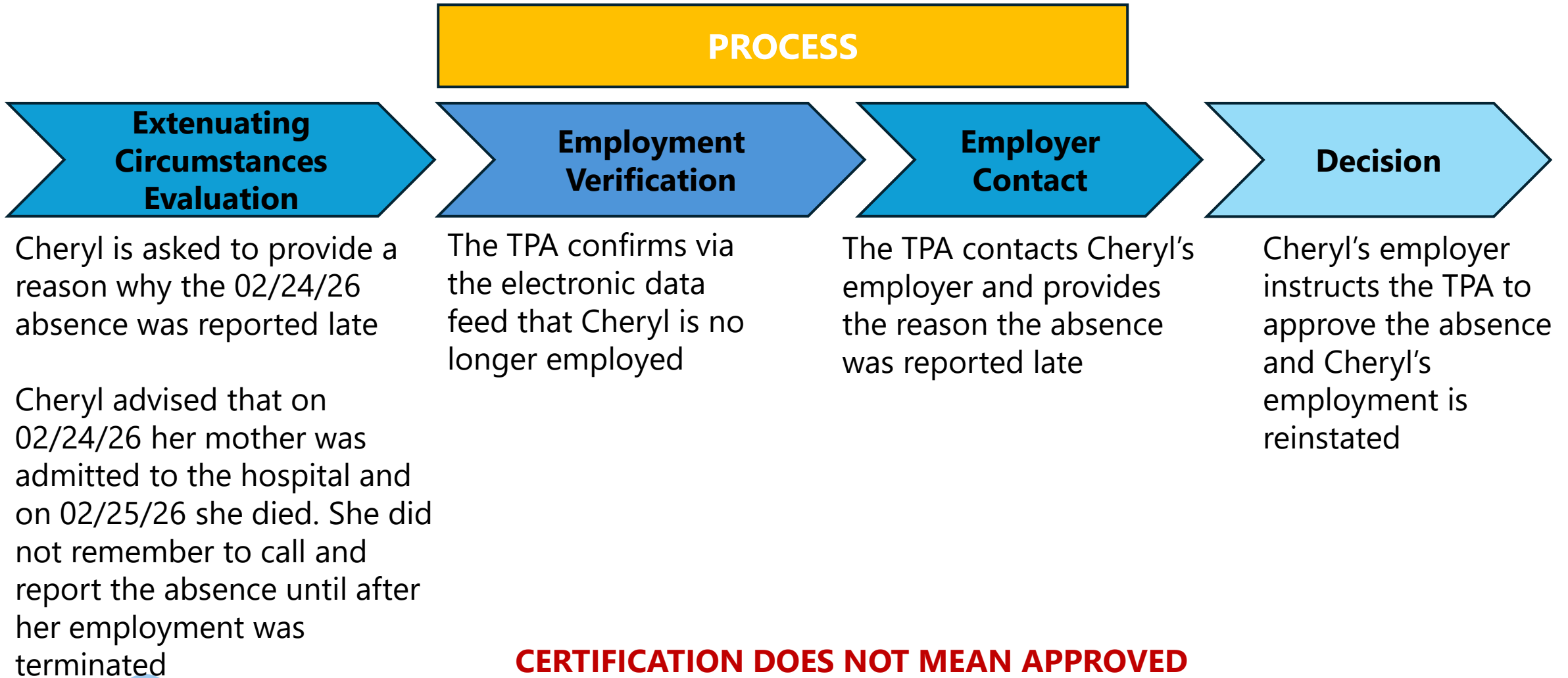
- Cheryl's employment is terminated due to unexcused absences
- 03/02/26 Cheryl reports the 2/24/26 absence to the TPA

CERTIFICATION DOES NOT MEAN APPROVED



FMLA: Administrative Scenarios & Process

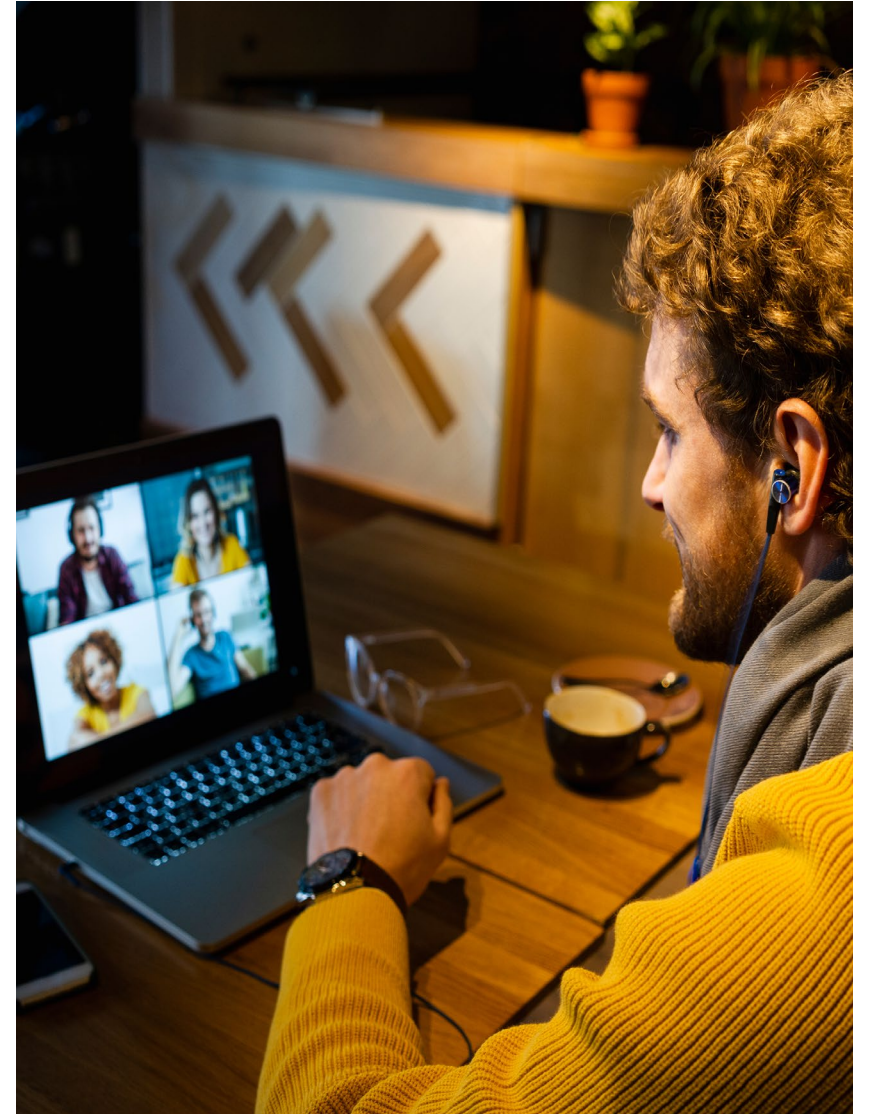
Individual Intermittent Absence Reporting Cont....



FMLA: Employer Notice Requirement

Szostek v. Drexel University, (3d Cir. 2015)

- The employer ultimately denied FMLA-protected leave for the absences from late October to late November because it had not been timely notified
- Requirement that the employee notify both the TPA and the employer of any absences for which he was claiming FMLA coverage did not interfere with plaintiff's FMLA rights
- Court dismissed the case



FMLA: Administrative Scenarios & Process

Reason to Doubt the Validity of an Absence(s)

SCENARIO

- Derek is certified and approved for intermittent leave (Migraines)
- On 02/23/26 Derek requested PTO 02/27/26 & 3/2/26
- Derek's PTO request was denied
- 02/27/26 Derek calls out of work due to a Migraine and advises he will return to work 03/02/26
- 03/02/26 Derek calls out again due to Migraines and advises he will return to work 03/03/26
- Derek's employer receives information that he attended a concert over the weekend and posted it on social media sites
- Derek returns to work 03/03/26



FMLA: Administrative Scenarios & Process

Reason to Doubt the Validity of an Absence(s)

PROCESS

Absence Evaluation

Derek's employer notifies their Leave Administrator that they doubt the validity of the absences and want to request recertification.

Recertification

The Leave Administrator requests recertification including providing the health care provider (HCP) provider with a record of the employee's absence pattern and asking them if the serious health condition and need for leave is consistent with such a pattern.

The HCP provides an updated certification (essentially providing the same certification information) and advises the absence pattern is consistent.

Decision

The Leave Administrator notifies the employer of the HCP information.

The employer chooses to discuss the situation with Human Resources / their internal legal department.



FMLA: Administrative Scenarios & Process

Recertification at 6 Months

SCENARIO

- Rhonda is certified and approved for intermittent leave (Chemotherapy) as follows:
 - Up to three times per week with each time lasting up to two hours
 - Certification start date 02/01/26
 - Certification end date 10/01/26
- 09/14/26 Rhonda submits an absence for 09/14/2026
- 09/14/26 is the first absence following the six-month
- Rhonda does not plan to request an extension of leave beyond 10/1/2026



FMLA: Administrative Scenarios & Process

Recertification at 6 Months

PROCESS

Although the certification indicates the need for intermittent leave is certified for a period more than six months, the employer is permitted to request recertification every six months **in connection with an absence**.

Recertification Evaluation

Based on the facts and circumstances of the leave is it prudent to request recertification?

(What is the probability that the same certification information will be provided?)

Decision

YES

Employee is notified via telephone call and in writing of the recertification request.

NO

Management continues based on the facts and circumstances of the leave.





FMLA: Administrative Scenarios & Process

Intermittent Absence(s) in Excess of a Certified Period

SCENARIO

Gary is certified one to two days per week with each day lasting eight (8) hours
(Care of a Family Member)

Gary takes intermittent absences as follows:

Week 1: one (1) day per week with each day lasting eight (8) hours

Week 2: two (2) days per week with each day lasting eight (8) hours

Week 3: four (4) days per week with each day lasting eight (8) hours

Week 4: four (4) days per week with each day lasting eight (8) hours

CERTIFICATION DOES NOT MEAN APPROVED



FMLA: Administrative Scenarios & Process

Intermittent Absence(s) in Excess of a Certified Period

PROCESS

The increased duration of absences for weeks 3-4 constitute a significant change in circumstances.

Recertification Evaluation

Based on the facts and circumstances of the leave is it prudent to request recertification?

(What is the probability that the same certification information will be provided?)

Decision

YES

Employee is notified via telephone call and in writing of the recertification request

NO

Management continues based on the facts and circumstances of the leave

CERTIFICATION DOES NOT MEAN APPROVED



Questions?

