



Tracking FMLA

How the Department of Labor's New Lawyer Referral Program Will Increase Your Risk of FMLA Lawsuits—and What You Can Do About It

Executive Summary

The Wage and Hour Division (WHD) of the U.S. Department of Labor reports they received 40,000 FMLA- and FLSA-related complaints in FY 2010 and estimate that about 10% go uninvestigated by the division due to lack of capacity. Consequently, at the end of 2010, WHD announced its new partnership with the American Bar Association (ABA) to actively refer workers with unaddressed claims to local ABA-approved litigators specializing in FMLA and FLSA cases.

WHD has stated they may decline to investigate a case if it doesn't align with the division's priorities, most of which fall under FLSA governance. This increases the likelihood that FMLA cases will be referred to private litigators in the ABA network. This also means employers face a greater chance of FMLA litigation as workers—whose claims might not have been prioritized by WHD—are encouraged to exercise their "private right to action."

One way to avoid FMLA litigation is through accurate time tracking. Typical time tracking-related complaints include: delayed responses to FMLA requests, failure to designate leave as FMLA, inaccurately tracking FMLA leave balances, or changing worker benefits (such as vacation accrual, work schedule and pay) during employment reinstatement. Careful time tracking is the only way to counter these types of FMLA claims and reduce overall risk of litigation by ensuring an employer can accurately respond, record and report FMLA activity.



FMLA at a Glance

Enacted in 1993, the Family and Medical Leave Act (FMLA) offers employees three types of job-protected leave during a 12-month period: (1) up to 12 weeks of leave for family or personal medical reasons,ⁱ (2) up to 12 weeks of leave for hardships caused by a family member's military active duty (or call to active duty), and (3) up to 26 weeks of leave to care for a seriously ill or injured family servicemember.ⁱⁱ

Am I a Covered Employer?

Workers are only eligible for FMLA leave if their employer meets qualification for FMLA coverage. FMLA-covered employers include public agencies (such as state, federal and local governments and local schools) and private sector businesses employing 50 or more workers for at least 20 workweeks in the current (or preceding) calendar year.ⁱⁱⁱ

Are My Employees Eligible?

Workers employed by a FMLA-covered employer must meet two criteria to be eligible for FMLA leave: (1) they worked at least 1,250 hours for the employer during the previous 12 months, and (2) they work at a location where 50 or more workers are employed on-site or within 75 miles. If employees meet the criteria and their reasons for taking leave are considered FMLA-qualified, employers are obligated to grant leave.

A New Unprecedented Partnership—WHD and ABA

WHD states it received 35,000 FMLA- and FLSA (Fair Labor Standards Act)-related complaints in FY 2009, and 40,000 complaints in FY 2010. Despite the fact that the agency has steadily increased its staff over the past two years, it still estimates that 10% of complaints go uninvestigated due to lack of capacity.^v

Consequently, a new partnership between WHD and the American Bar Association (ABA) was announced at the end of 2010 that allows WHD to notify workers with unaddressed complaints of their "private right of action" and actively refer them to a network of local litigators vetted by the ABA for their expertise in FMLA or FLSA claims.

Litigator Referrals—When and Why?

WHD identifies four points in their investigative process when they may refer a complainant to an ABA litigator:

1. Complaint Intake – If a worker decides not to file or wants to pursue private litigation
2. Complaint Review – If the WHD decides the claim doesn't align with its priorities
3. Failed Employer Conciliation – If an employer refuses to resolve the violation and WHD chooses to no longer pursue the complaint
4. Failed Settlement – If the case is not settled and, after investigation, WHD chooses to no longer pursue the claim^{vi}



So, what types of cases will be referred to private litigators? WHD says it will decline investigating complaints that do not align with the division's priorities. Generally, the WHD prioritizes minimum wage and overtime violations, criminal violations, discrimination, retaliation and child labor.^{vi} More recently, the division announced its "Misclassification Initiative" to investigate employers who incorrectly classify independent contractors in targeted industries such as agriculture, construction, janitorial, hospitality and business services.^{viii}

Because the majority of WHD-prioritized claims fall under FLSA governance, it increases the chance that more FMLA cases will be referred to private litigators. Additionally, this also signals a potential increase in overall FMLA litigation since workers whose claims might have fallen outside WHD priorities are actively encouraged to exercise their right to private action.

The Rising Cost of FMLA Litigation

Employers facing FMLA litigation find it comes at an increasing cost. Workers filing complaints often seek back wages, employment benefits or other compensation, or actual monetary loss including the cost of providing care for a family member, liquidated damages and interest. According to *The FMLA Blog*, high damage awards are a contributing factor to increased FMLA litigation, estimating that an employer facing an FMLA claim that sees a jury trial should anticipate damages in the high six or low seven figures.^{ix}

FMLA Time-Tracking Complaints

Tracking FMLA leave trips up many organizations, causing workers to file complaints when they feel employers have infringed on their FMLA entitlements. Common time-tracking related complaints include:

- *Delay responses to FMLA requests.*^x When an employee requests FMLA leave, the employer must notify the worker of his or her eligibility (or reasons for non-eligibility) within five business days of the request.^{xi} A delay could be shown as an employer's attempt to discourage FMLA leave.
- *Failure to designate FMLA leave.*^{xii} When an employer determines the employee's reason for taking leave is FMLA-qualified, the employer is obligated to notify the worker (within five business days of the determination) that leave will be FMLA designated. It is an employer's responsibility—not an employee's—to categorize leave as FMLA.^{xiii}
- *Inaccurate tracking of FMLA leave balances.*^{xiv} Failure to keep detailed, accurate record of FMLA time may shortchange employee of FMLA leave or cause an employer to terminate them wrongfully (if the employer believes leave is exhausted yet the employee has not returned to work).



- *Changing worker benefits (such as vacation accrual, work schedule and pay) during employment reinstatement.*^{xv} When a leave-taking employee returns to work, the employer must place them in their previous position or in a new position with equivalent job benefits and work schedule.

Any of these infractions could lead a worker to file a complaint with WHD. Whether the complaint results in a government inquiry or a private litigation claim, the employer now faces the significant costs and risks of an FMLA investigation.

Get on Track: Stopping FMLA Litigation with Time Tracking

Many employers don't realize their timekeeping system holds a key to lessening the risk of FMLA litigation. Careful and accurate time tracking combats time-related FMLA complaints, potentially stopping them before they start. The benefits of time tracking include:

1. **Timely responses to FMLA requests.** An effective timekeeping system allows employees to submit their leave requests directly through the system. Supervisors are immediately notified of any leave requests and, once leave has been approved, employees are immediately informed of the approval. As a failsafe feature, the system notifies supervisors of any unaddressed absences that require manager attention.
2. **Ensuring correct leave time designation.** If no advance notice can be given before an employee takes leave (e.g., a sudden debilitation caused by chronic illness that makes the employee unable to work) or if a supervisor needs to confirm an employee's FMLA eligibility, the timekeeping system will provide a "pending FMLA approval" designation to the leave until approval is determined.
3. **Accurately recording FMLA leave time.** A litigation-resistant timekeeping system will capture employee work schedules and leave requests, manage leave time balances and generate report on leave taken. Importantly, a timekeeping system also needs the ability to adjust attendance history in instances where leave is requested after-the-fact. Pay rules can be difficult to manage manually—a reliable time-keeping system automates this process to eliminate inaccuracies, especially when leave occurs across multiple pay periods.
4. **Correctly reinstating employment benefits.** A timekeeping system will accurately calculate and apply balances of previously-accrued vacation or personal leave (while ensuring vacation is not being incorrectly accrued during FMLA leave). Supervisors must be able to access an employee's previous work schedule and work history through the timekeeping system and manage the worker's reinstatement into the department with no difficulty. Additionally, the timekeeping system will confirm an employee's regular pay designation and pay history upon reinstatement to ensure pay is not inaccurately calculated.



Using a reliable, accurate timekeeping system to track and confirm FMLA activity is crucial in helping employers avoid time tracking-related FMLA litigation.

Decreasing Your Risk of FMLA Claims

The new partnership between Wage and Hour Division and the American Bar Association, which actively refers workers with unaddressed FMLA claims to local litigators, means employers can expect FMLA claims to increase whether through government or private litigation. However, employers can take their own action to decrease the likelihood of time tracking-related FMLA complaints by implementing an accurate timekeeping system that helps them manage FMLA leave requests, leave time designation and balances, and employment benefits of reinstated workers. Employers who ensure their timekeeping system is up to the task of FMLA recording and reporting can decrease the ever-growing risk of costly FMLA litigation.

To find out how Attendance on Demand can help your organization, call 1-800-465-9980 or visit www.attendanceondemand.com.

Legal disclaimer: This document simplifies a complex Act as it is understood by Attendance on Demand, Inc. It is not to be taken as legal advice. For further information about FMLA compliance, please contact the U.S. Department of Labor at www.dol.gov or 1-866-4-USWAGE.



- ⁱ U.S. Department of Labor. “Fact Sheet 28: The Family and Medical Leave Act.” Feb 2010. Web. 4 April 2011. <<http://www.dol.gov/whd/regs/compliance/whdfs28.pdf>>
- ⁱⁱ U.S. Department of Labor. “Fact Sheet 28A: The Family and Medical Leave Act Military Family Leave Entitlements.” Feb 2010. Web. 4 April 2011. <<http://www.dol.gov/whd/regs/compliance/whdfs28a.pdf>>
- ⁱⁱⁱ U.S. Department of Labor. “Fact Sheet 28: The Family and Medical Leave Act.” Feb 2010. Web. 4 April 2011. <<http://www.dol.gov/whd/regs/compliance/whdfs28.pdf>>
- ^{iv} Ibid.
- ^v U.S. Department of Labor. “Bridge to Justice: Wage and Hour Connects Workers to New ABA-Approved Attorney Referral System.” Web. 20 Apr 2010. <<http://www.dol.gov/whd/resources/ABAReferralPolicy.htm>>
- ^{vi} Ibid.
- ^{vii} Ibid.
- ^{viii} U.S. Department of Labor. “Leveraging Limited Resources to Increase Compliance: Plan/Prevent/Protect.” Spring 2010. Web. 13 Mar 2011. <<http://www.dol.gov/regulations/2010RegNarrative.htm>>
- ^{ix} “FMLA Verdict Could Cost Chase Manhattan Over \$8 Million.” 3 Apr 2008. Web. The FMLA Blog. 21 Apr 2011. <http://federal FMLA.typepad.com/fmla_blog/2008/04/fmla-verdict-co.html>
- ^x Narisi, Sam. “Managers’ Five Most Common FMLA Mistakes.” 10 Feb 2009. Web. HR Legal News. 23 Apr 2011. <<http://www.hrlegalnews.com/managers-5-most-common-fmla-mistakes/>>
- ^{xi} U.S. Department of Labor. “Fact Sheet 28: The Family and Medical Leave Act.” Feb 2010. Web. 4 April 2011. <<http://www.dol.gov/whd/regs/compliance/whdfs28.pdf>>
- ^{xii} Fleischer, Melissa. “Top FLMA Mistakes Managers Make.” 14 Mar 2011. Web. HR Learning Center. 23 Apr 2011. <<http://hrlearningcenter.wordpress.com/2011/03/14/top-fmla-mistakes-that-managers-make/>>
- ^{xiii} U.S. Department of Labor. “Fact Sheet 28: The Family and Medical Leave Act.” Feb 2010. Web. 4 April 2011. <<http://www.dol.gov/whd/regs/compliance/whdfs28.pdf>>
- ^{xiv} “The Ten Biggest FMLA Mistakes and How to Avoid Them.” 23 Jun 2000. Web. Law.com. 21 Apr 2011. <<http://www.law.com/jsp/article.jsp?id=900005517434&slreturn=1&hbxlogin=1>>
- ^{xv} “Family Medical Leave of Absence.” Web. Employment Law Information Network. 19 Apr 2011. <<http://www.elinfont.com/pickedpol/64>>

About Attendance on Demand, Inc.

Attendance on Demand employee time and attendance service supports the labor management needs of thousands of companies and a quarter of a million employees across North America. Launched in 2006, Attendance on Demand is a rapidly deployed, cloud-based solution that minimizes a company’s risk and technology investment while providing advanced features for securely managing labor data — calculating pay rules, scheduling employees, budgeting labor, and automating record keeping for labor law compliance. With standard uptime over the industry average of 99.995% and above average customer retention rates, Attendance on Demand removes the worry of maintaining expensive infrastructure. An extensive North American distribution network helps organizations use Attendance on Demand to reduce labor expenses and improve decision making.

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