

# The Top Challenges in Managing FMLA

And How to Solve Them

ESIS<sup>®</sup>

In the last 10 years, the number of regulations governing FMLA has increased almost 10-fold. Compounding the problem is the increasing number of requests for FMLA leave. At any given point, more than 10% of the U.S. employee population is out on FMLA leave.

Throughout an employee's FMLA leave – from the initial request or notice from the employee to his or her return to work – multiple issues can give rise to errors that result in too much leave being given, compliance issues that can lead to EEOC lawsuits and fines, and administrative burdens that can drive up costs and complicate efficient management of a company's leave program.

FMLA leave can also be combined with other leave programs, such as workers compensation and short term disability (STD). The Americans with Disabilities Act (ADA) and ADA Administrative Amendments (ADAAA) also affect a leave program. If leaves are not managed properly from the outset, employees can tap multiple leave programs to extend their time out of the office – and magnify the impact of that absence on productivity and the bottom line.

***No wonder employers are looking for a better understanding of and more effective ways to manage the increasingly complex issues surrounding FMLA.***

# Here are some of the top challenges in managing FMLA – and how to solve them.

## Understanding the Challenges.

As you look for an effective solution for managing FMLA, a good place to start is understanding the challenges that must be addressed.

### Multiple Laws

---

There are more than 450 FMLA-related regulations, including federal and state versions of the same law. Some of those regulations have contradictory terms. Companies that operate in multiple states must comply not only with the federal FMLA but also with all the differing state statutes that apply to them. This issue can be so complicated that many employers choose to offer leave programs that were more generous than the laws require as a way to avoid compliance issues.

### Multiple Participants

---

FMLA leave doesn't just involve employees. Managing your FMLA leave program means bringing many different parties into alignment and compliance. The right Absence Management partner will serve as a single resource for working with all participants, which include:



**Employees** – who may not state clearly that they are applying for FMLA or may not know they are eligible. Employees may also abuse the FMLA process.

---



**Managers** – who typically receive an employee's request for time off or notice of absence. If managers don't recognize when FMLA applies, the absence will not be handled properly from the outset. Employees may receive more FMLA leave than they should or compliance issues may arise.

---



**Human Resources** – who are responsible for administering or overseeing absence management programs. In a recent survey, 55% of HR professionals said that it was "somewhat difficult" or "very difficult" to determine whether an employee's health condition qualified as a serious health condition.

---



**Providers** – who provide certification of a "serious health condition" in order for the employee to be eligible for FMLA. This certification can be incomplete, insufficient or unclear, which complicates leave management and adds to the administrative burden for staff managing the absence program.

---

The average cost to defend an FMLA lawsuit is \$80,000.

The average cost of a single mismanaged case involving ADA noncompliance is \$500,000.

### **Limited Resources, High Stakes**

---

The list of responsibilities involved in successfully managing FMLA is daunting and the demands of complex FMLA regulations can strain the resources of any company. In addition, the stakes are high. The average cost to defend an FMLA lawsuit is \$80,000. The average cost of a single mismanaged case involving ADA noncompliance is \$500,000.

#### **Top Responsibilities of the Team Managing FMLA**

- Managing FMLA consistently across multiple states and/or locations
- Delivering a good experience for employees
- Keeping up with ever changing and new regulations
- Complying with processes and deadlines prescribed by federal and state leave laws
- Tracking absence – including time taken and time remaining – for an average of 11% of your workforce
- Ensuring employees understand their rights and responsibilities under FMLA
- Training managers in how to recognize and respond to FMLA requests

## **What You Can Do to Manage FMLA More Effectively.**

Fortunately, employers can take several steps to help them manage absence, and FMLA leave in particular, more effectively. On the following pages are our **top 10 recommendations**.

# 1

## Have a Clear Leave Management Policy

FMLA is governed largely by federal – and in some cases, state – statutes. That doesn't mean that employers can't control some of the ways that FMLA works in their organization. Having a clear FMLA policy as part of your overall Leave Management Guide for employees can help avoid some of the most common mistakes that can be made in administering FMLA.

### The FMLA Section of Your Leave Policy Should Clearly Define:

#### How FMLA works

- What it provides (duration, terms, benefits)
- Who is eligible
- What options are available for taking FMLA (e.g., intermittent leave, continuous leave, and reduce leave schedule)
- How time used for FMLA is counted (e.g., from the start of the 12-month period during which an employee must take his or her 12 weeks of leave, such as:
  - Calendar year
  - Fiscal year
  - Rolling 12-month period beginning with service anniversary

#### Definitions of key terms

- Serious health condition
- Incapacity
- Treatment
- Chronic condition
- Same or equivalent job
- Certification
- Reduced leave schedule
- ADA
- Return-to-work
- 12-month period

#### Responsibilities of the employer – including timeframes

- Job reinstatement
- Continuity of benefits
- Verifying medical certification
- Notifying employee when time is used towards FMLA/out of time notifications
- If FMLA leave is denied, providing information about why that decision was made

#### Responsibilities of the employee – including timeframes

- Proper notification to manager/employer within a specified timeframe and following mandated company procedures
  - 30 days advance notice for planned leave
  - As soon as possible and practical for unplanned/unexpected leave
- Prompt communication of any change in status or return-to-work date
- Proper certification of leave (e.g., appropriate and complete documentation from the provider within 15 days of a request by the employer)
- Scheduling intermittent time off to minimize the impact on the employer whenever possible

# 2

## Train Managers to Recognize FMLA Requests

Problems in managing FMLA leave can start with the request for leave. The employee may not realize he or she is eligible for FMLA. Even when they understand their eligibility, employees may not use the term “FMLA” when requesting time off - nor are they required to under the law. Without proper training, managers may not realize that an employee is eligible for FMLA leave and may not notify the leave administrator promptly. If the leave administrator isn’t aware of the request, it’s all too easy to miss some of the deadlines for mandated actions.

# 3

## Train Managers to Respond Appropriately to FMLA Requests

Managers must also know what are – and are not – acceptable responses to a request for FMLA leave and what questions they can – and cannot – ask. Inappropriate responses can trigger costly lawsuits.

HR professionals indicate that lack of manager interest in understanding or handling their part in administering FMLA leave is a significant challenge. The right approach to training can help overcome this obstacle.

Different people have different learning styles and preferences. Consider providing training and information through multiple channels to allow managers to access information they need when they need it and in a way that works for them:

- In-person/class room training
- Online webinars
- On-demand tutorials
- Online job aides or guides

### Managers Must Know How to Respond Appropriately to Requests for FMLA Leave

Inappropriate responses to employee requests for FMLA leave can themselves lead to complaints and lawsuits. You would be surprised at some of the ways managers react... or would you?

*Some examples of inappropriate responses include:*

- Denying leave when the employee is entitled to FMLA
- Telling the employee they don’t need as much time off as he or she is requesting
- Insisting that the employee work at home, perform light duty work or “work through the pain” instead of taking leave
- Requesting information about the employee or the family member’s medical condition beyond what must be submitted to the FMLA administrator for medical certification
- Demoting or firing the employee for taking FMLA leave, or making FMLA a reason for a poor performance review
- Not providing the employee with information about his or her rights and responsibilities under FMLA leave

# 4

## Ensure Everyone in the Process Understands Mandated Timeframes and Their Impact

The employer has only five business days from the employee's initial request for leave to communicate the employee's rights and responsibilities under FMLA. Waiting until the employee actually takes a day off of work to begin the communication process often means that the employer is in violation of federal regulations.

The employee's initial request for leave – whether it's a request for planned leave or a call saying back pain will keep them out of work for several days – can be considered notice of the qualifying medical condition that triggers FMLA. Why is that important? Because that initial notice – and not the actual request for leave – triggers requirements for the employer and the employee.

### Notice Triggers Certain Actions

Under FMLA regulations, the employer has five business days to notify the employee about whether they are eligible for FMLA leave. Not recognizing an FMLA request can delay an appropriate response, and that can lead to a complaint being filed with the EEOC. In addition, unplanned or intermittent FMLA leave starts when the employee's absence begins, not when notice is given or when the employer officially certifies the leave as FMLA.

Understanding this rule can help employers manage the leave time that must be granted under FMLA. In addition, misunderstandings about when FMLA leave begins have led to lawsuits, so clear communication and managing employee expectations can reduce the risk of litigation.

### Notice to the Employee Starts the Clock

Many employers think that the 12 weeks of unpaid leave starts on the first day of the leave. Department of Labor (DOL) regulations, however, state that leave does not start until the employer notifies the employee that his or her absence will be counted as part of the 12 weeks of FMLA leave to which he or she is entitled. **Until that notice is given, the employee's absence can't be counted as part of the 12 weeks.**

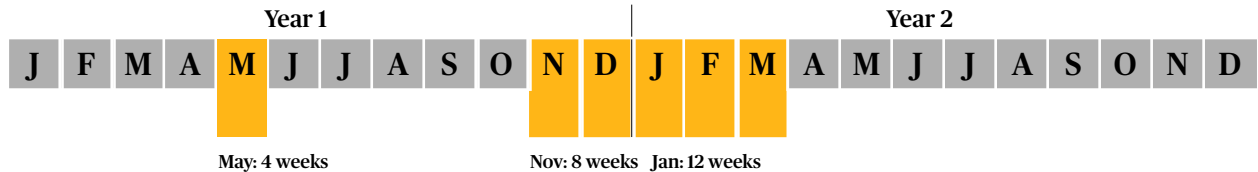
## Two Ways of Calculating the 12-Month Period for FMLA

### Timing of Notice Can Affect Eligibility

The timing is also important because an eligible employee is entitled to 12 weeks of unpaid FMLA leave during a 12-month period that the employer can define. Depending on how the employer defines that 12-month period, when the employee requests leave and what leave has already been taken, an employee might be requesting more leave than he or she is entitled to at that point in time.

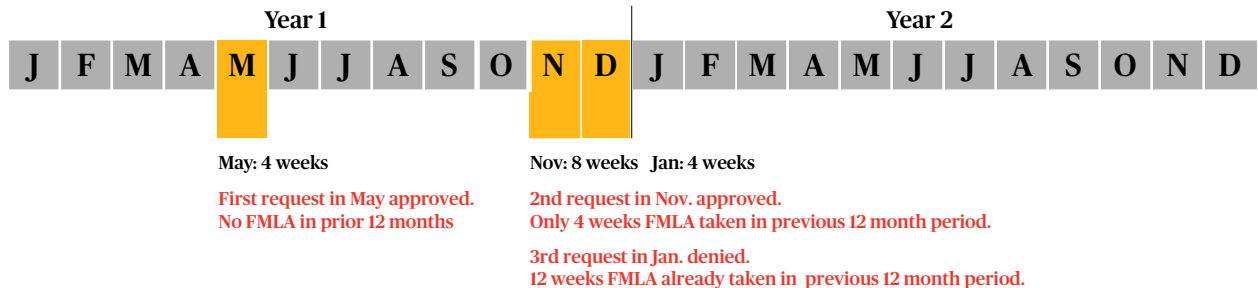
#### Total Consecutive FMLA Leave: 20 weeks

##### Calendar Year Method / Fixed 12-Month Period



#### Total Consecutive FMLA Leave: No more than 12 weeks

##### Rolling 12-Month Period / Backward-Looking 12-Month Method



### Timeliness of Certification Can Affect Eligibility

If an employee requests FMLA leave to deal with his or her own or a family member's serious medical condition or military family leave, the employer has 5 days to request that the employee provide appropriate certification from a medical provider.

Employees have 15 days from the time of the request to provide the information. If the certification is incomplete or insufficient (e.g., missing required information) the employer must notify the employee in writing. The employee then has 7 calendar days to correct any deficiency in the certification. **If proper certification is not provided within these timeframes, the employer may deny the request for FMLA leave.**

### DOL Paperwork has Deadlines

Another thing to consider is the paperwork required by FMLA – and the deadlines for filing various forms and notices with the Department of Labor (DOL) and providing various required notices to employees. For example, the employer has only five business days from the employee's initial request for leave to communicate the employee's rights and responsibilities under FMLA. Waiting until the employee actually takes a day off of work to begin the communication process often means that the employer is in violation of federal regulations.



# 5

## Make Sure Employees Know Their Rights and Responsibilities

Employers bear most of the burden for ensuring that FMLA is administered properly. But there are things that employees must do. It is, however, the employers' job to make sure that all employees – not just those who apply for leave – are made aware of their rights and responsibilities under FMLA. There are a number of posters and notices that the DOL offers to assist with this.

The DOL provides an employee guide to FMLA [www.dol.gov/whd/fmla/employeeguide.htm](http://www.dol.gov/whd/fmla/employeeguide.htm) process that explains eligibility, the application process, medical certification requirements and the return to work process. If your organization does not have an FMLA guide for employees, consider sharing this booklet from the DOL.

### Some Key Employee Responsibilities Under FMLA Include:

- Understanding how to apply for FMLA
- Knowing what information must be provided
- Knowing how to provide appropriate and complete certification from a medical provider

# 6

## Have and Enforce Reporting Rules

Having clear rules and processes for reporting absence and applying them consistently will help your organization capture and manage leave more effectively. One option to consider is a centralized reporting process which can be managed by an FMLA vendor-partner. The approach ensures that an FMLA professional evaluates and approves all requests for leave applying the appropriate regulations and corporate policies.

Centralized reporting can help employers track and manage planned absences to minimize disruption to operations.

FMLA rules allow employers to require that employees taking intermittent FMLA for planned absences (e.g., scheduled doctor's appointments, planned treatments) to schedule those absences to minimize disruption to the employer's operations.

# 7

## Partner with Providers

Another critical component of an effective FMLA program is having absence management team members, such as case managers, who can work with providers.

Case managers can:

- Verify that the employee's health condition does indeed prevent them from performing essential job functions,
- Share functional job descriptions,
- Help providers understand job and/or light duty requirements to facilitate releasing an employee back to work, and
- Oversee the certification and re-certification process

# 8

## Understand and Have a Process for Tracking and Managing Intermittent FMLA and “Reduced Leave Schedule” FMLA

To learn more about managing intermittent FMLA, read our article, *The Keys to Managing Intermittent FMLA*

Continuous FMLA leave is leave that is taken over consecutive business days, often in blocks of several weeks up to the full 12 weeks. Intermittent leave, on the other hand, allows employees who are eligible for FMLA to take his or her 12 weeks of leave associated with a single qualifying condition in separate, shorter blocks of time. For example, an employee may regularly need to take a few hours to take a chronically sick child to a doctor’s appointment. An employee receiving chemotherapy may need a few days of leave every two weeks to receive treatment and deal with the side effects

before feeling well enough to return to work. Chronic migraines may unexpectedly incapacitate an employee several times a month, necessitating the use of intermittent FMLA.

The cornerstone of your solution for managing intermittent FMLA should be an absence management system that can track absence down to the minute to prevent inaccuracies - either counting more time than the employee actually took as leave or not tracking all the time taken.

### Why Intermittent FMLA is So Hard to Manage

Tracking intermittent FMLA is one of the most difficult FMLA activities for employers. In a recent DMEC survey, 40% of employers ranked it as “difficult” or “extremely difficult.”

#### The main factors accounting for this include:

- Unpredictability of many intermittent FMLA absences
- Not knowing when an employee is taking intermittent leave under FMLA rather than a sick day under another company leave program.
- Difficulty in recognizing when an employee’s intermittent absence is tied to a qualifying “serious health condition” and when the intermittent leave is medically necessary
- Difficulty in tracking shorter intervals of absence, which may be taken in minutes rather than hours or days for things like doctor’s appointments
- Challenges in ensuring proper medical certification – and as necessary periodic recertification of the intermittent leave – and tracking actual time off against the number of days certified (e.g., three days per month). If the employee is taking intermittent leave for his or her own health condition, the provider must certify that the employee cannot perform the job’s essential functions.

# 9

## Ensure You Have a Sophisticated, Comprehensive Reporting and Tracking Solution

Tracking leave accurately and consistently across the organization is critical. Failure to track leave accurately can result in too much leave being granted – which places an additional burden on the organization. It can also relate to compliance issues – which can result in EEOC complaints and fines.

Your system should offer multiple channels for employees to report absence – telephone, mobile device, and web portal. Employees should be able to report any and all absence – including FMLA, STD and workers compensation – through a single system.

### What to Look for in a Leave Management System

#### A good leave management system should be able to:

- Integrate all your absence data (e.g., STD, FLMA, Workers compensation, PTO, state-mandated leaves, leaves granted by company policy) to give you a holistic view of absence across your organization
- Provide sophisticated analytics to identify absence patterns (e.g., by location, position, shift, day of the week)
- Help you proactively identify and manage the drivers of absence
- Interface with your HR system and access employee demographic data, including tenure with the company and leave already taken for immediate verification of eligibility for leave
- Be and remain jurisdictionally compliant (e.g., use sophisticated rules-based assessments that factor in evolving federal and state leave regulations)
- Factor in company leave policies
- Track time off by the minute, not just the day or hour
- Track cumulative leave and remaining leave for each employee and each type of leave granted
- Support ease of communication with employees (e.g., custom letters, texts)

# 10

## Consider Outsourcing FMLA Leave Administration

Outsourcing FMLA management to a partner can help with those issues and many more, including coordinating FMLA with other leave programs.

The key is finding the right FMLA administration partner.

Interested in finding more informative articles about Integrated Absence Management?

Check out our resource library.

More and more organizations are choosing to outsource leave administration.

**The top four reasons are to:**

- Understand and manage direct and indirect costs more effectively
- Reduce the administrative burden and resource strain that leave administration can put on their HR team
- Ensure consistency and objectivity in how absence is managed across the organization
- Reduce the compliance exposure created by the growing number of FMLA and other leave regulations.

Outsourcing FMLA management to a partner can help with those issues and many more, including coordinating FMLA with other leave programs. The key is finding the right FMLA administration partner

### What to Look for When You Outsource FMLA Administration

**More and more, companies are outsourcing FMLA administration. The key is finding the right partner for your company. Here are some important things to look for when selecting a vendor:**

- Expertise in the current regulations and an efficient mechanism for tracking the increasing number of new laws or modifications to current laws
- Multiple reporting channels (phone, app, portal) to make it easy for employees to report absence and to support appropriate recognition and management of FMLA and other leave programs
- Sophisticated tracking and reporting tools to help you understand and manage absence across your organization
- Appropriate evaluation of eligibility to limit or prevent employee abuse of FMLA
- Approval/denial of leave requests
- Accurate tracking of leave to ensure employees receive the leave to which they are entitled and that they don't abuse the system
- Effective, compliant communication with employees throughout their leave
- Objective investigation of questionable leaves
- Ability to coordinate seamlessly with other leaves/leave administrators
- Assistance to employees in providing required documentation
- Training and online tools and resources to help managers understand how to recognize and manage FMLA leave
- Documentation, notices, posters and other materials for informing employees about FMLA
- Appropriate follow up, including working with the employee to gather information and certification, to ensure the employee receives required forms and notices in a timely fashion
- Fitness for duty certification, light duty, and return to work programs that ensure compliance with regulations and help reduce overall absence.
- Ability to customize their process, communications and documentation to meet your company's specific culture, systems, structure and needs

# ESIS®

## Connect With Us

---

If you would like to meet with one of ESIS' team of leave management experts to discuss how we can partner with you to build an effective, integrated leave management solution for your organization, please contact:

Sonja Teague  
Vice President  
Integrated Absence Management  
O 678.795.4534  
E [Sonja.teague@esis.com](mailto:Sonja.teague@esis.com)

ESIS®, Inc., a Chubb company, provides claim and risk management services to a wide variety of commercial clients. ESIS' innovative best-in-class approach to program design, integration, and achievement of results aligns with the needs and expectations of our clients' unique risk management needs. With more than 60 years of experience, and offerings in both the US and globally, ESIS provides one of the industry's broadest selections of risk management solutions covering both pre and post-loss services. Chubb is the marketing name used to refer to subsidiaries of Chubb Limited providing insurance and related services.

For more information, visit us at [www.esis.com](http://www.esis.com).

5/2019