

The New Age of Department of Labor FMLA Audits:

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**February 4, 2013
Marked The
Twenty Year
Anniversary
Of The Family
And Medical
Leave Act**



Scream – The Movie



Road Map

- **Family Medical Leave Act Audit**
 - What is it?
 - Why am I being audited?
 - What do I do to prepare for the audit?
 - What do I during the audit?
 - What is my exposure?
 - What can I do proactively?

Record Number of FMLA Suits

- 2012 - 291
- 2013 - 877
- 2014 – 1,108

Why am I getting audited?

- Employee Complained to the DOL
- Competitor Complained to the DOL?

Top 5 Common Mistakes that Lead to an Audit

1. Failing to deem a person eligible

Bad math? 1250 hours

Unable to care for *an immediate family member* (spouse, child, or parent — but not a parent "in-law") with a serious health condition.



2. Failing to Provide FMLA Notices

- Eligibility notice and rights and responsibilities.
- Designation of leave.

FMLA Administration

- Employee need not mention FMLA. Management must determine if FMLA applies to a full or partial day absence.
- Employer provides eligibility notice. (WH-381).
- Employer provides certification form, if applicable.
- Employer provides designation notice (WH-382).

3. Failing to examine the medical certification form to determine when the employee's serious medical condition began.

Hypothetical

- Employee goes to the company nurse complaining of chest pains. The nurse sends the employee to the hospital.
- The employee calls in the next day and informs HR she was treated for a heart attack. She will be in later to fill out the FMLA forms.
- When the employee returns to work a few days later, she returns the forms. She receives unexcused absences for two of the days she was out.
- On the returned FMLA form, the employee's physician designated the date the serious health condition commenced as the date of the hospital visit.
- The employee is absent for a non-medical, unexcused reason which causes the employee to exceed the number of absences.
- The employer terminates the employee because she has been absent too many days. Problem?

4. Not waiting the 15 days for the employee to return his certification before termination.

Remember

An employer may require that the need for leave for a serious health condition of the employee or the employee's immediate family member be supported by a certification issued by a health care provider. The employer must allow the employee at least **15 calendar days** to obtain the medical certification.

5. Terminating an employee while on FMLA leave.

When you get “the letter,”



Introductory call

- Clarify scope.
- Ask for more time, if necessary.
- Ask who will be interviewed.
- Ask which documents needed.
- Ask the particulars of the complaint.
- Establish a reasonable time to meet.

What do I do before the DOL arrives?

- Designate a point person.
- Familiarize yourself with the policy/DOL forms.
- Make sure your postings are current.
- Investigate.
- Meet with witnesses.

Gathering and Producing Documents

- Respond only to the requests.
- Review all documents prior to production.
- Make copies for you and the investigator.
- Designate documents as confidential or proprietary.
- Protect trade secrets.
- Ask for more time, if necessary.

When the Investigator Arrives...

- The investigator should show his/her badge.
- Escort the investigator throughout the visit.
- Choose an appropriate location for the interviews.
- Cooperate.

Interviewing Witnesses

- Management v. non-management
- Answer honestly.
- Take notes or record the interview.
- Statement will be signed at the end.
- **READ IT CAREFULLY AND MAKE SURE IT IS WHAT THE WITNESS SAID.**

Commonly Asked Questions During the Interview

- What are your duties?
- How many employees do you supervise?
- Can you hire and fire employees?
- How much are you paid?
- Do you have to wear a uniform? Do you have to pay for your uniform?
- Do you have any employees who are working under the age of 18?
- Whom do you directly supervise?

Commonly Asked *FMLA* Questions During the Interview

- Who is in charge of implementing the FMLA?
- What training have you had on the FMLA?
- Does the company have a policy for notifying the employee when FMLA is approved?
- What is the average work week for the employee?
- Did you offer to rehire the employee?

- They will ask questions specific to the complaint. For example, how did you determine the common law wife was not a “spouse?”

Closing Conference

- Weeks or months later
 - Findings
 - Negotiate
-
- REMEMBER: DO NOT RETALIATE!!!!!!

Penalties

- Back Wages
 - Did the employee receive unemployment compensation?
- Penalties
- Reinstatement
- You will receive a form WH-58 (Receipt for Payment of Back Wages, Liquidated Damages, Employment Benefits or Other Compensation.)

Can You Prevent a DOL FMLA Audit?

FMLA Action Plan

- Designate a person(s) in HR/Benefits to administer FMLA and train that person or use a third party administrator.
- Develop a flow chart or checklist for FMLA administration working in other laws and policies.
- Update/Revise your employee handbook for compliance and to take advantage of all available opportunities to streamline administration and enforcement.

FMLA Action Plan

- Use FMLA forms.
- Develop draft letters to use for various situations such as a reminder letter when an employee fails to timely return a medical certification or when a medical certification is incomplete.

FMLA Action Plan

- Train managers and supervisors to recognize and report potential FMLA covered absences.
- Train managers and supervisors on the retaliation/interference obligations of the FMLA.
- Train managers and supervisors on the interplay between FMLA, ADA, and workers compensation.



Questions?

