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DEFINING SUCCESS TOGETHER

The New FMLA: One Year Later

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Segment #1:
What Has Not Changed
FMLA Basics

The FMLA Basics

- **Federal law that generally provides unpaid leave of up to 12 weeks in a 12-month period to eligible employees.**
- **Prevents absences from counting against employee on attendance policy.**
- **Requires continuation of group health insurance during the protected leave time.**
- **Requires reinstatement to an equivalent position.**
- **Prohibits retaliation for requesting the leave.**

The FMLA Basics

A covered employer has:

- At least 50 employees for each working day;
- During each of 20 or more calendar workweeks; and
- In the current or preceding calendar year.

The FMLA Basics

An eligible employee has:

- Been employed at least 12 months;
- Worked at least 1,250 hours during the 12 months immediately preceding start of leave; and
- Works at a worksite with 50 or more employees within 75 miles.

The FMLA Basics

Qualifying events:

- Employee's own "serious health condition";
- Care of spouse, child, or parent with "serious health condition";
- Care of newborn, newly adopted or foster child;
- Qualifying exigencies related to spouse, child or parent's call to active military service; or
- Care of family member with military-related serious injury/illness (allows for 26 weeks of leave).

The FMLA Basics

Intermittent and Part-Time Leave:

- Allowed for Serious Health Condition:
 - If health care provider certifies intermittent leave or a reduced work schedule is medically necessary.
- Allowed for Birth or Adoption of Child:
 - Only if the employer agrees.
 - However, the employer's agreement is not required when the mother has a serious health condition in connection with the birth of a child or the newborn child has a serious health condition.
- Leave increments have not changed.

The FMLA Basics

Employee “notice” to employer:

- Required to provide at least 30 days’ notice when need is **foreseeable**
- If need is **not foreseeable**, must give notice “as soon as practicable”

The FMLA Basics

Employer “notices” to employee:

- General Notice must be posted
- Notice of Eligibility and Rights & Responsibilities form must be provided
- New = forms + timing

The FMLA Basics

Medical Certifications

- Employer can require certification
- Employer can require re-certification and/or verification in some instances
- Employer seek clarification/authentication from employee's health care provider
- New = forms + greater access

The FMLA Basics


Status of Group Health Insurance Benefits:

- Group health insurance plan coverage must continue during FMLA leave.
- Other group insurance (like life or long term disability) need not continue.
- However, such coverage must be reinstated without waiting periods or pre-existing condition limitations upon reinstatement from an FMLA leave.

The FMLA Basics

Reinstatement:

- Upon returning from FMLA leave, the employee is entitled to an equivalent position with the same pay, benefits and working conditions as the position the employee held prior to leave.
- Reinstatement exceptions for some key employees, provided appropriate notice was given upon commencement of leave.



Segment #2:
What Has Not Changed
Washington State Leave Law Basics

Washington Maternity Disability

- Provides a female employee the right to take an unpaid leave of absence for the entire period of time that she is sick or temporarily disabled because of pregnancy or childbirth.
- Applies to employers with 8 or more employees.
- All employees eligible: No length of service requirement.
- No maximum leave: As long as a medical provider certifies the employee as temporarily disabled, she is entitled to leave.

Washington Maternity Disability

- Paid or Unpaid?
 - Typically unpaid unless the employer provides employees of similar length of service or status sick leave, vacation or other paid time off during periods of temporary disability.
- Benefits?
 - No requirement that an employer provide benefits specifically for maternity disability leaves. However, an employer must treat a woman on a pregnancy-related leave the same as it treats other employees on leave for other temporary disability.
- Reinstatement?
 - The employee is entitled to reinstatement to same or equivalent position.

Washington Family Leave Act (WFLA)

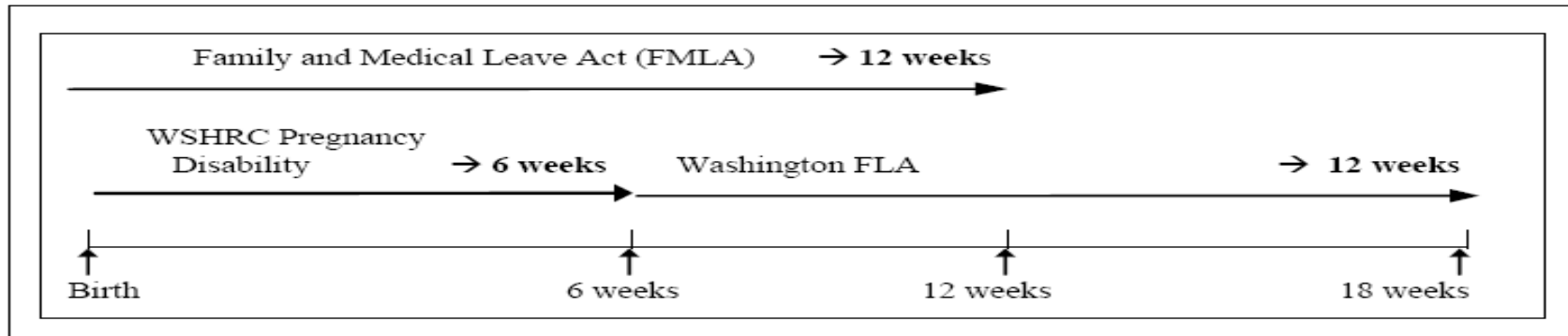
- Applies to employers with 50 or more WA employees.
- As of 2006, WFLA generally tracks the FMLA.
- Same eligibility requirements as FMLA.
- Same leave reasons as FMLA.
- Same leave protection as FMLA EXCEPT:
 - No requirement that the employer continue to pay for the employee's group health coverage. But if eligible, the employee must be allowed to elect COBRA benefits.

Washington Family Leave Act (WFLA)

- WFLA in addition to WA Maternity Disability Leave
 - Must analyze when employee is using FMLA/WFLA for pregnancy and childbirth.
 - FMLA “Concurrent” vs. WFLA “Stacking”:
 - Concurrent: the FMLA runs concurrently with an employee’s leave rights under other WA leave laws.
 - Stacking: under the WFLA, a female employee’s rights to protected leave for disability due to pregnancy or childbirth is in addition to her right to protected leave under Washington Maternity Disability Regulation.

Washington Family Leave Act (WFLA)

“Stacking” -- Typical Leave Example



Washington Family Care Act (WFCA)

- Applies to employers with one or more WA employees.
- No length of service or minimum hours worked, except as provided in paid leave policies.
- Employee may use accrued **paid** time off:
 - To care for minor child with a health condition.
 - To care for disabled adult child with a health condition.
 - To care for spouse, parent, parent-in-law or grandparent with serious health/emergency condition.
- Employee can choose the source of paid leave.
- Does not provide right to time off if employee does not have accrued paid leave.



Segment #3:
Key FMLA Changes and Practical Tips

Key FMLA Changes and Practical Tips

General Employee Notice Requirements:

- Foreseeable absences:
 - Employees may be required to provide at least 30 days notice.
- Unforeseeable absences:
 - “As soon as possible” which generally means same or next business day.
- For all absences:
 - Absent unusual circumstances, employee may be required to comply with usual and customary notice and procedure requirements, such as requiring an employee to call-in or provide written notice. However, no written notice may be required in emergency situations or for unforeseeable FMLA leaves.
 - Unusual circumstances may include unavailability of specific individual, over-loaded voice mail boxes, etc.

Key FMLA Changes and Practical Tips

General Employee Notice Requirements (cont.):

- Failure to comply with the company's usual and customary notice requirements allows the employer to count these absences as non-FMLA, and apply the employer's attendance policy to such absences.
- A request for FMLA needs to be at least verbal and sufficient to make the employer aware that the employee needs an FMLA leave, such as the anticipated timing and duration of the leave.
- Employee need not mention the term "FMLA".
- However, subsequent requests for leave for the same FMLA qualifying reason must mention the reason or the need for FMLA leave.

Key FMLA Changes and Practical Tips

Intermittent Leave Employee Notice Requirements:

- Employees must follow workplace call-in procedures
- To substitute paid leave, employee may be required to comply with employer's policies related to use of paid leave
- When due to planned treatment, must make reasonable effort to schedule so as to not disrupt operations

Key FMLA Changes and Practical Tips

Practical Tips

- Formalize talking points or “script” for managers. Managers should know when to get HR help.
- Have call-in procedures and enforce them.
- Though the FMLA may allow an employer to count absences where the employee failed to comply with the company’s usual and customary notice requirements, the reasonable accommodation principles under federal or state leave laws may not.

Key FMLA Changes and Practical Tips

New **General Notice** form – WHD-1420

- Employer must post in conspicuous places where readily seen by applicants and employees
 - Electric posting allowed if all employees can access
- Must distribute to new hires and employees
 - Distribution to employees may be electronic
 - May also reproduce in handbooks, policy manuals
- If significant portion of work-force not English-literate, General Notice needs to be translated

Key FMLA Changes and Practical Tips

Practical Tips

- Update your posters.
- Review new hire procedures.
- Confirm distribution practices.
- Consider electronic distribution.

Key FMLA Changes and Practical Tips

New Notice of Eligibility and Rights & Responsibilities form – Revised WHD-381

- Must be provided whenever employer receives request for FMLA leave
- If employee not eligible, must give at least one reason why ineligible
- Also must advise if will require certification or other verification before employer can determine if absence qualifies for FMLA
- Summarizes rights and must explain employee responsibilities.
- Must be provided within 5 business days after first time requests leave for particular qualifying reason in employee's "FMLA year"
- During same "FMLA year" new Eligibility Notice only required if eligibility status changes

Key FMLA Changes and Practical Tips

Practical Tips

- Note the new timing.
- This is distributed before you receive medical certification from health care provider.
- Form can be a tool – use as a checklist and communication device.

Key FMLA Changes and Practical Tips

New **Designation Notice** form WH-382

- Can be used to inform of incomplete or insufficient HCP certification
- If no certification requested, provide with Eligibility/Rights & Responsibilities Notice
- If certification required, provide within 5 business days after determine leave is FMLA-qualifying
- Must specify (if known) what time off will be counted against entitlement
- If exact amount which will be used is unknown (e.g. intermittent leave), employee has right to request accounting once every 30 days
- Must inform if “fitness-for-duty” certification will be required
- May inform whether second/third HCP certification required

Key FMLA Changes and Practical Tips

Practical Tips

- Note the new timing.
- Do not skip step, even if not requesting a medical certification.
- Use form to notify employee of incomplete certification.
- Think ahead – do you want health care provider to release to duty at end of leave?

Key FMLA Changes and Practical Tips

Medical Certifications

- **Revised HCP Certification forms for employee or family member**
- **Must submit complete and sufficient form within 15 days**
 - Or longer, if made good faith efforts to obtain it without success
 - No obligation to inform employee that was not received
- **If timely submitted but incomplete or insufficient, must give 7 days to “cure”**
 - Must detail deficiencies; list what is still needed
 - Failure to fix during “cure” period means leave can be denied
- **Employer may directly contact HCP to authenticate without employee’s consent**
- **May obtain clarification from HCP of vague/unresponsive information with employee’s consent**
- **Immediate supervisor prohibited from having contact with HCP**

Key FMLA Changes and Practical Tips

Re-certifications

- Re-certifications can be required every six months in all cases involving an on-going serious health condition.
- More frequent recertification may be allowed if:
 - circumstances since the last certification have changed significantly;
 - there is a pattern of suspicious behavior regarding the use of FMLA time;
 - the employer “receives information that casts doubt upon the continuing validity of the certification”; or
 - the employee seeks an extension of leave.
- Employer may request a new medical certification process with the first absence for each new 12-month FMLA year.

Key FMLA Changes and Practical Tips

Practical Tips

- Use recertification for intermittent leave or on-going conditions.
- Annual medical certification process allows you to get second and third opinions.
- Even if an employee fails to provide a medical certification, an employee's absence may remain protected under the ADA or other state leave laws.

Key FMLA Changes and Practical Tips

Military Leave

- Leave for Qualifying Exigency
- Leave to Care for a Covered Servicemember with Serious Injury or Illness

Key FMLA Changes and Practical Tips

For a “Qualifying Exigency”

- Who? = Employee whose spouse, child or parent is in reserves, national guard or active duty services members, on active duty or notified of call to duty, in support of contingency operation.
- Why? = “any qualifying exigency” arising out of active duty or impending order to active duty.

Key FMLA Changes and Practical Tips

“Qualifying Exigency” Includes:

- Short-notice deployment (leave permitted up to seven days if the military member receives seven or less days’ notice).
- Military events and related activities.
- Certain temporary childcare arrangements and school activities (but not ongoing childcare).
- Financial and legal arrangements.

Key FMLA Changes and Practical Tips

“Qualifying Exigency” Includes (cont.):

- Counseling by a non-medical counselor.
- Rest and recuperation (leave permitted up to five days when the military member is on temporary rest and recuperation leave).
- Post-deployment military activities.
- Additional activities if employer agrees.

Key FMLA Changes and Practical Tips

To Care for Injured Service Member:

- Care for injured spouse, child, parent, or person for whom employee is next of kin.
- Applies to all current Armed Forces, National Guard and Military Reservists.
- Servicemember undergoing treatment or recovery for injury or illness in active duty (includes veterans undergoing medical treatment, recuperation or therapy for serious injury or illness that occurred any time during the five years preceding the date of treatment).
- 26 weeks in a single 12-month period (includes leave for other purposes, not in addition to).
- Unpaid, except for use of accrued paid leave.

Key FMLA Changes and Practical Tips

Practical Tips:

- Anecdotal evidence suggests employees not utilizing this leave.
- Apply these provisions with employee's family member is in the military.
- If employee is in the military, remember leave for a serious health condition.
- When this arises, check the regs.



Segment #4:
Recent FMLA Case Law Developments

Recent Case Law Developments

- It will be a number of years before we see published decisions regarding the new FMLA.
- Very few Washington decisions regarding state leave laws.
- Discussion of selected cases with interesting lessons for employers.

Recent Case Law Developments

Peters v. Gilead Sciences Inc.,
533 F.3d 594 (7th Cir. 2008)

- FMLA policy in handbook did not include certain eligibility restrictions. Court held employer had created a less restrictive policy and could not deny employee's leave request even though not FMLA eligible.

Recent Case Law Developments

Martin v. Brevard County Public School,
543 F.3d 1261 (11th Cir. 2008)

- Termination for failing to make progress on PIP while on leave could be retaliatory.

Recent Case Law Developments

Diiorio v. Manor, 319 Fed.Appx 115
(3rd Cir. 2009)

- Loss of place on overtime rotation list upon return from leave could violate FMLA

- Thank you for coming.
- Questions?

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