

Presagia's FMLA Guide

How well do you understand the intricacies of compliance?

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Information provided by the author within this guide is not intended to be used as legal guidance. The author maintains that legal counsel should always be consulted when considering or implementing changes to leave processes and policies.



INTRODUCTION



About the author: Mr. Compagnon is the Compliance Officer for Presagia's leave management solutions. Since coming to Presagia in 2008, he has worked closely with leave and disability industry experts, customers, and the development team to enhance Presagia's solutions while addressing employers' leave management, return to work, and accommodation needs. In his current role, he is responsible for implementing the complex rules and workflows surrounding FMLA and state leave regulations which support employers' compliance efforts.

Since the Family and Medical Leave Act (FMLA) was introduced by Congress in 1993, employers have struggled to identify what is and is not a qualifying FMLA absence. While the act provides very detailed descriptions of the provisions, it is often difficult for employers to recognize and appropriately respond to FMLA events. Due to these challenges, employers routinely ignore, misconstrue, incorrectly modify, or otherwise fail to understand and implement the legislation and its protections. Employers who fail to recognize or address FMLA events correctly often fall victim to its enforcement provisions. Since the cost of non-compliance can be staggering, not only in terms of litigation costs and penalties, but also in terms of lost productivity and revenue, it is becoming more important than ever for employers to recognize where FMLA applies and where it does not. Employers often struggle with interpreting what is and is not a qualifying FMLA absence, in part because many employers must also contend with overlapping state leave legislation and their own company policies.

“The DOL has estimated the average cost of defending an FMLA lawsuit for employers is \$78,000 regardless of the outcome.”

Recently, there have been several high profile cases in which the Department of Labor (DOL) and the Equal Employment Opportunity Commission (EEOC) have litigated against employers for leave and disability compliance violations and won multi-million dollar settlements. According to the EEOC, employees who successfully sue for wrongful termination based on FMLA typically receive between \$87,500 and \$450,000 in damages. In addition, the DOL has estimated that the average cost of defending an FMLA lawsuit is \$78,000, regardless of the outcome. For this reason alone, employers should increase their efforts to understand the FMLA and be able to accurately determine when it applies. The objective of this guide is to help employers better understand and administer the FMLA by:

- Over viewing the definitions of the FMLA
- Identifying common mistakes and misconceptions made when administering FMLA
- Providing employers with a structured approach to address FMLA compliance

Through a better understanding of the law's definitions, the ability to recognize common mistakes, and a structured framework, employers will be armed with the knowledge and tools to properly manage FMLA compliance.

What is FMLA?

Introduced by Congress in 1993, the FMLA was designed to provide job security while offering employees up to 12 work weeks of unpaid excused absence annually. As a series of benefits to protect public service and private sector employees who work for larger employers, FMLA's goal is to enable employees to balance work and personal obligations in a manner that also accommodates the interests and needs of the employer. Benefits range from job protection to extension of health benefits for qualifying employees on qualified leaves.

One of the reasons many employers face challenges when managing FMLA is that they do not fully understand the definitions set forth by the Act. In this section, we clarify the following terms:

- Qualifying Employer
- Qualifying Employee
- Qualifying Leave Reason
- Entitlement
- Notice Requirements



Who Qualifies?

Around **62%** of all workers qualify to take an FMLA leave

Over **50 million** Americans have taken an FMLA leave since the Act was introduced

Qualifying Employer

- While the requirements may seem simple enough at first glance, employers must be absolutely sure where they fit, and be aware of their responsibilities. Organization size is one of the most basic



requirements needed to obtain qualification. A qualifying employer is one that has at least 50 employees. Employers with less than 50 employees are not required to provide FMLA benefits, nor do their employees qualify. If you are not large enough but voluntarily provide FMLA-like benefits to your employees anyway, the benefits are not in fact FMLA. Should you then become large enough to qualify under the law, all employees must still be afforded their full FMLA entitlement, as though they had not previously taken any leave.

Tip: *The FMLA only applies to locations where there are at least 50 employees within a 75-mile radius. This is called the 'Small Worksite Exception' (or the '50/75 Rule').*

Qualifying Employee

In addition to working for a qualified employer, a qualifying employee must have worked for the employer for 12 months, have worked 1,250 hours in the last year, and currently work at a qualified location. While 12 months is a necessary component of what determines eligibility, the Act states that it does not have to happen consecutively – service can be accumulated over a seven year period.

Qualifying Leave Reason

The Act is very specific in regards to the nature and types of reasons that qualify for FMLA:

- Birth and bonding of the employee's child, within one year of birth
- Placement with the employee of a child for adoption or foster care, within the last 12 months
- Care of an immediate family member (spouse, child or parent) who has a 'serious health condition'
- For the employee's own 'serious health condition'
- A military 'qualifying exigency'
- To care for an injured service member

If you extend coverage to your employees beyond the guidelines, you are extending benefits to non-FMLA qualifying events which cannot then be designated as FMLA absences and therefore do not use any of the employee's entitlement.

Entitlement

Employee entitlement refers to the period of time an employee is protected under the Act. The general FMLA entitlement for an employee is 12 work weeks per year or up to 26 work weeks per 12 month period to care for an injured service member. Once an employer designates an absence as FMLA, it must be honored even if the employer, whether knowingly or not, has breached the actual terms of an eligible FMLA absence. While the employer is then bound to extend the protections provided by FMLA, they are not allowed to deduct the given absence from an employee's legitimate entitlement, regardless of how much time has been afforded to that employee.



Notice Requirements

FMLA requires that an employee be informed of their rights and responsibilities under the Act, both in general employee communications and more specifically in response to a request for leave. An employer who meets all other requirements of the Act, but fails to provide proper and timely notice of eligibility or entitlement deductions, may still be in violation of the Act. The same employer, however, may still be bound to extend FMLA protections to the employee for qualifying events.

Common Mistakes

Even when a company feels comfortable handling the basics, it is not surprising that the complexities of the Act mean mistakes are not only easy to make, but are also quite common. Errors can range in severity from simply asking for too much or improper medical documentation to taking adverse action against employees either on or returning from leave. Understanding and avoiding the following common mistakes can protect both you and your organization:

1. Providing more generous FMLA-like benefits and calling them FMLA

One of the most common mistakes employers make when managing FMLA is to provide benefits that are more generous than FMLA, while continuing to call them FMLA. While there is nothing in the FMLA legislation to limit the provision of protections beyond what the law requires, employers need to be aware that additional benefits must be treated as organization-specific leave policies, not as extensions of FMLA. Employers often make the incorrect assumption that because the benefits are more generous, FMLA compliance is assured. However, the reality is that if an employer designates absences as FMLA for these more generous benefits and then at a later date does not provide full FMLA entitlement to the employee when they actually become eligible, the employer is violating the law. Research has clearly shown that companies with a decentralized FMLA management system are more at risk of over-entitling employees.

“ FMLA costs, personally and financially”

- According to the Department of Labor, managers and supervisors can be individually sued and held personally liable for paying damages
 - *Narodetsky v. Cardone Industries Inc.*
- **\$11.65 million** awarded in *Schultz v. Advocate Health & Hospitals Corp.*, for being unfairly penalized for taking time off to care for aging parents
- More than **\$6.2 million** awarded to current and former SBC employees in *Dudley v. SBC Communications* for being subjected to illegal leave policies
- **\$6,011,190** in a class complaint against Verizon for denying or failing to approve leave requests on time and unlawful termination of employees
- **\$722,000** awarded in *Dotson v. Pfizer, Inc.*, for violating FMLA's intermittent adoption leave and being wrongfully terminated during such leave
- **\$665,000** awarded to *Knussman v. Maryland* for being denied FMLA leave for the birth of a child

The kind of company policies that may be based on good intentions but can put an employer at risk include:

- *"We provide FMLA to everyone"*
Only qualifying events provided by qualified employers to qualified employees count as FMLA, and all other occurrences should not be identified or designated as such.
- *"We do not share spousal time for birth and bonding or parental care"*
Spouses employed by the same company are typically required to share entitlement for bonding and care. If you allow more than the 12 weeks between the spouses, the extended benefit is not FMLA.
- *"We do not include the Small Worksite Exception (50/75) rule in our communications to employees, or administer it"*
If you grant FMLA to employees who report to or work at sites that do not qualify under 50/75, those benefits are not FMLA.
- *"We do not care about eligibility hours (we give everybody FMLA regardless of how many hours they've worked)"*
While salaried employees are treated somewhat differently under the law (an employer must prove that a salaried employee did not work 1,250 hours), the requirement remains the same. FMLA still requires an employee to have worked for 1,250 hours, and if the employer can show that an employee has not met the 1,250 hour requirement, extending benefits to that employee is not FMLA.
- *"We provide our employees with more than just 12 weeks of FMLA leave time"*
While companies may provide extended leave times, benefits that reach beyond the legislated entitlements (allowing more than the required 12/26 weeks) may no longer be classified as FMLA and must be accounted for as company-specific benefits.
- *"We extend the next of kin servicemember relationship definition to non-military leaves"*
The Act allows an employee to take leave to care for an injured servicemember who is a 'Next of Kin,' which includes more relationships than that used for 'immediate family member' for regular FMLA purposes. For example, an employee would qualify for leave to care for an uncle who is an injured servicemember, but not to care for the same uncle who has a serious health condition not related to military service.

Tip: *If an employer has a policy in place for advance notice and an employee is requesting a leave that is deemed foreseeable, but had not provided sufficient advance notice, the company may have the right to deny the leave. However, it is often safer to explain the situation to the employee and offer them the option to postpone the start of their requested leave to meet the notice requirement rather than simply issuing a denial.*



2. Poorly communicating documentation and notice requirements

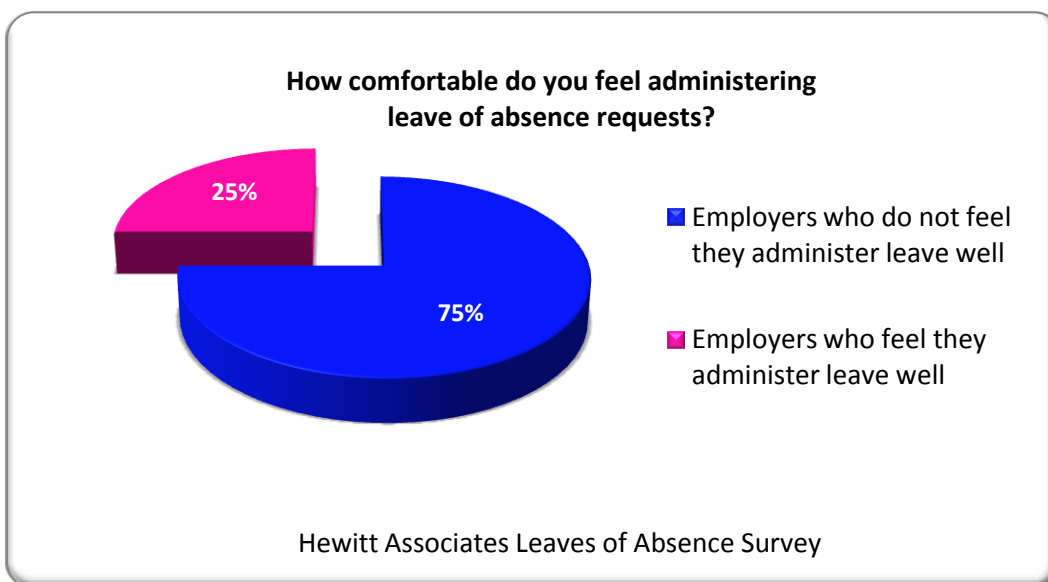
FMLA protection is an employee right, yet the employee is only required to provide sufficient information to allow their employer to determine the applicability. The evaluation and delivery of FMLA is entirely an employer's responsibility. The FMLA provides strict notification requirements for the employer. The Act also stipulates guidelines for advance notice and supporting documentation requirements. Employers must clearly communicate their policies to employees and provide guidance on reasonable or expected timelines for such communication.

When employers adhere to proper and fair documentation and notice policies, the FMLA provides them the option of denying a request for leave if sufficient notice or complete documentation is not provided within the pre-established timeline. An essential piece of this is that employers put in place a transparent policy for these communications, apply them consistently across their workforce, and track each point of contact.

3. Failing to identify a request for leave as FMLA

FMLA qualifying leave reasons must be considered for all leave requests, even if the employee does not specifically ask for FMLA. There are many cases in which an employee will request a leave under other leave policies, such as workers' compensation, short-term disability, or a state family and medical leave. In these cases, if the qualifying events meet the FMLA criteria of a 'serious health condition,' that leave is usually FMLA qualifying and should be managed as such. In this situation, the FMLA leave should be tracked concurrently with the other leaves that have been requested and are approved.

Complying with this requirement is difficult, as employers need to be able to identify FMLA qualifying leave reasons and events even if they are outside the normal FMLA reporting process. Critical to achieving this is better integration and awareness between the disability, workers' compensation, and other leave teams.

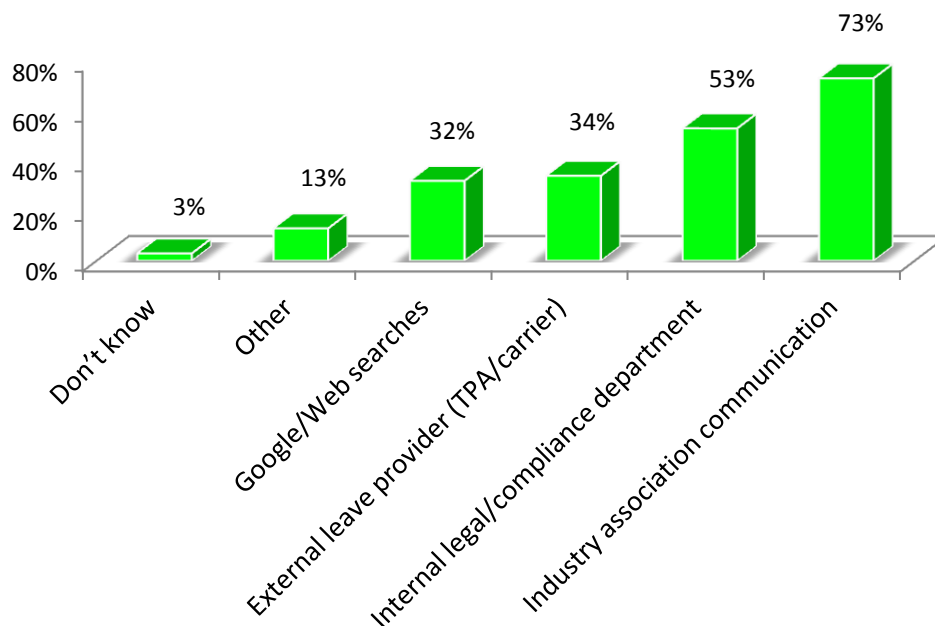


4. Counting FMLA time for an employee in a voluntary light duty assignment

This final mistake is a trap that employers can fall into when they offer reduced schedule and light duty work to employees returning from a FMLA leave as part of a Stay at Work or Return to Work plan. Employees who are placed on a reduced schedule, and thereby continue to miss part of their normal work hours, should have those missed hours counted as FMLA leave. On the other hand, employees who accept a voluntary light duty assignment are working their normal hours, and therefore FMLA must not be deducted.

The direct outcome of the mistakes described above is that non-FMLA absences are used to draw down employees' FMLA entitlements. This often leads to employers denying employees their FMLA when there is a legitimate qualifying reason, and when the employee should have FMLA entitlement under the law. As a result, employers hurt employee morale and put themselves at significant legal risk should an employee choose to challenge the decision.

How do organizations stay up to date on federal and state leave regulations?



Liberty Mutual Survey

The Missing Piece of Absence Management: Turning Data into Dollars

Implementing FMLA for Compliance

FMLA compliance requires careful documentation of every step of the leave process along with a consistent approach to leave management across the organization. It is important to keep in mind that most FMLA requests are based upon a life changing circumstance, whether it is an illness, new child, injury, or a mental or physical condition. Whether you are approving or denying a claim, following a consistent and compliant process will help prevent company problems and possible legal implications. Implementing an effective program often requires:

- Consulting with legal counsel and HR to evaluate current company policies.
- Updating leave policies and procedures so that FMLA criteria are systematically assessed for all leave requests.
- Properly identifying and implementing more generous FMLA-like benefits as organization-specific policies and tracking them separately from FMLA. Following this step minimizes over-allotment of leave entitlements to employees.
- Providing clear, accessible guidelines and procedures for employees and HR managers to help them correctly identify FMLA events. Once in place, these must be regularly reviewed and tested to ensure their effectiveness.
- Implementing assessment and reporting tools to audit programs for compliance and abuse. This can include tracking tools that enable you to better monitor employees' leaves and recognize patterns of abuse.
- Sharing information with payroll, disability and benefits teams to properly identify FMLA qualifying absences when they are requested under a different policy (e.g. workers' compensation).
- Above all, when making changes to leave policies and procedures, it is important to communicate them to employees in a manner that clearly and transparently outlines employee and employer responsibilities.



Learning the law and how to manage FMLA in a compliant manner is a huge undertaking, especially when overlapping state laws and existing company policies are introduced into the mix. However, employers who understand the common mistakes and who can apply a consistent, structured framework are better positioned to ensure their compliance.

While this may seem to be a daunting endeavor, new technology can greatly simplify it. A software solution like the Presagia Enterprise Leave Module is designed to ensure all factors are considered when managing an FMLA leave. It also provides decision support throughout the leave process to help administrators manage their compliance efforts. This is made possible through the use of a leave rules engine that includes FMLA, 400+ state leave laws, and support for employer-specific policies. The rules engine drives best-practice leave processes with the help of wizards, automated tasks and alerts, and auto-filling leave letter templates, ensuring all steps in a leave case are completed on-time, accurately and with proper documentation.



For more information about the Presagia Enterprise Leave Module or the best-practices described in this guide, please contact info@presagia.com or visit our website at www.presagia.com.

