

FIVE COMMON FMLA MISSTEPS

WHITEPAPER





5 COMMON FMLA MISSTEPS

In 2022, the U.S. Department of Labor recovered over **\$870,000** in back wages under the FMLA.



The Family and Medical Leave Act (FMLA) is often cited as one of the most challenging laws employers face, and errors can be costly. In 2022, the U.S. Department of Labor recovered over \$870,000 in back wages under the FMLA. Add to that the cost of potential damages, fees, and resources you'd need to defend an FMLA claim and you have the makings of a serious headache. Despite the considerable motivation to avoid FMLA claims, few employers have the time or desire to plow through pages of statutes, regulations, opinion letters, and court cases to help them avoid mistakes. But everyone can learn at least a few best practices by examining common missteps in the FMLA process.

While no one ever said administering leave under the FMLA was easy, it doesn't need to be that hard, either. The information in this whitepaper is designed to help you steer clear of the most common oversights.

1. NOT RECOGNIZING LEAVE REQUESTS

Your FMLA obligations are triggered when an employee puts you on notice of the need for leave. But what does this notice look like? The law does not limit the manner in which employees can provide an employer with notice; employees need not even mention the FMLA or otherwise assert their rights. As a result, "notice" can run the gamut from specifically asking for FMLA leave, to behaving erratically, to simply needing time off due to a workplace injury.

Typically, employees call in to work or somehow inform their supervisor that they will miss work. Therefore, supervisors play an important role in FMLA administration as they are the first link in the FMLA communication chain. Unfortunately, too often, they are the weakest link, as they might not be well versed in recognizing a leave request.

Both you and your supervisors/managers could benefit from getting familiar with the basic reasons that qualify for FMLA leave:

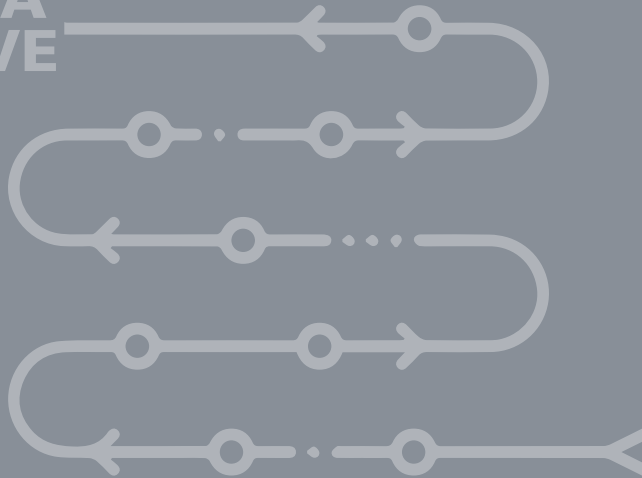
- Birth and bonding
- Adoption/foster care and bonding
- Care for a family member with a serious health condition
- Employee's own serious health condition
- A family member's military duty causing an urgent demand
- Caring for a family member's military-related injury or illness

Anyone at your company who takes calls or notices from employees regarding absences



Trusted by HR professionals across the country, the J. J. Keller® **FMLA Manager** provides a simple, step-by-step process for entering employee leave requests without the hassle of paper files and spreadsheets. It also offers a wide range of expert resources to help streamline tracking and ensure ongoing compliance.

FMLA
LEAVE



Employers and employees can set up automatic notifications for FMLA-related deadlines in the J. J. Keller® **FMLA Manager's Employee Center**. These include timely alerts for eligibility notices, certification/recertification deadlines, and other important dates.



ACCESS FMLA MANAGER FOR FREE

should be at least rudimentarily trained in what might be a potential FMLA situation, and what to do about it, as they could be on the hook for an FMLA violation. The training could be very basic, indicating that employees need not (and might not) use any special words or processes to have the FMLA's protections.

In one court case, an employee's excessive crying on the job was seen as providing notice of the need for leave. Notice can even come from someone other than the employee. If an employee's spouse called to inform the supervisor of the employee's accident, that would be notice of the need for leave.

Because the FMLA includes provisions for individual liability, anyone acting on behalf of the employer, including managers, supervisors, and HR professionals, could be named in a claim. This can include someone receiving a notice that an employee will be absent.

Training anyone who might receive an employee's call or notice should help eliminate some issues regarding identifying employee notices.

2. NOT PROVIDING TIMELY NOTICES TO EMPLOYEES

If you're covered by the FMLA, you need to provide employees with information, in part via the FMLA poster. It needs to be posted where both employees and applicants will see it.

Once an employee puts you on notice of the need for leave, your FMLA obligations are triggered. The first obligation is to provide the employee with an eligibility/rights and responsibilities notice within five business days. The Department of Labor and the courts are taking this time frame seriously, and failing to meet this deadline can be a technical violation even if you do everything else correctly. You might include this notice in an FMLA "packet," which could include a certification form.

Do not ask for a certification if the leave is for bonding with a healthy child.

You may request a certification to support most FMLA-qualifying reasons. You may not, however, request one if leave is solely for bonding.

If you have an inkling that an employee's absence is due to an FMLA-qualifying reason, you might want to act as you would for any request for FMLA leave and send an eligibility/rights and responsibilities notice. If later you learn that the absence was not FMLA leave, you have risked little, but a bit of time. If, however, you overlook an absence that should have been treated as FMLA leave, you need to act fast and accurately to avoid any claims of wrongdoing.

Once you have enough information to designate the leave (perhaps from a certification), you have five business days to give the employee a designation notice. Only one designation notice per qualifying reason is needed.



*With **FMLA Manager**, you can import all of your employee data at once or add team members individually as leave is requested. In addition, you can separately manage federal-, state-, and company-specific leave parameters for all of your locations using a single, cloud-based platform.*

ACCESS FMLA MANAGER FOR FREE

3. NOT DETERMINING WHAT CONSTITUTES A SERIOUS HEALTH CONDITION

Employees may take FMLA leave for various reasons, including for their own or a family member's serious health condition. When it comes to figuring out whether an employee or family member has a serious health condition, do not go by the name of the condition. Two people could have the same condition, but respond very differently. You need to review the information in a certification (or other source) and compare it to the FMLA's definition of a serious health condition.



A serious health condition is an illness, injury, impairment, or physical or mental condition that involves inpatient care, or continuing treatment by a health care provider.

Inpatient care is generally an overnight stay in a health care facility.

Continuing treatment is a bit more involved, however. “Treatment” can include exams to determine if a serious health condition exists and evaluations of the condition. Continuing treatment might include a period of incapacity of more than three days, or any period of incapacity for pregnancy, chronic conditions, long-term conditions, or conditions requiring multiple treatments.

Elective procedures can also be serious health conditions. An employee might, for example, voluntarily elect to donate a kidney, which would result in a serious health condition. The information you need is often found in the certification.



Use the certification to determine if an employee or family member has a serious health condition.



*Every **FMLA Manager** subscriber enjoys free, unlimited access to our team of in-house regulatory experts — trusted leaders in the safety and compliance fields who are standing by to help answer your toughest compliance questions in a private, secure manner.*

ACCESS FMLA MANAGER FOR FREE

4. NOT APPROPRIATELY DESIGNATING FMLA LEAVE

If the employee meets the eligibility criteria and the reason for leave qualifies for FMLA protections, the employee is entitled to the leave, and you are to designate it as such.

It is always your responsibility to designate an absence as FMLA leave — this is not the employee’s responsibility. This is the case even if an employee would rather not “use” FMLA leave for a particular absence. Failing to provide the law’s protections when they are called for can risk an interference claim. In short, employees may not waive their prospective rights under the FMLA, and it’s your job to determine whether a leave qualifies and to designate it appropriately.

Sometimes, an employee might be on vacation and during that vacation he or she receives treatment for a serious health condition. If the reason qualifies for FMLA protection, even if the employee is using vacation, you would still be obligated to designate it as FMLA leave.

Employees don't always, however, give employers enough information to know that the FMLA applies. If the employee did not provide you with enough information regarding the potential need for FMLA leave, your FMLA obligations are generally not triggered.

On the other side of the coin, some employers find it easier to designate leave as FMLA leave, even when the reason doesn't qualify or the employee is not eligible. This type of action can actually risk an interference claim, as well.

If the employee did not provide you with enough information regarding the potential need for FMLA leave, your FMLA obligations are generally not triggered.

If, for example, an employee took four days off because of a simple case of the flu, but never received treatment, the absence would not qualify for FMLA protections. Were you to designate those four days as FMLA leave, and the employee needed a full 12 weeks of FMLA leave for a qualifying reason later in the year, the employee could claim you interfered with his rights.

Then there are also situations where an employer doesn't designate leave when it should have. Say, for example, you felt that an employee didn't need leave to care for his mother because he had five siblings providing care. Here, you would also risk an interference claim (it doesn't matter how many people are providing care).

An employee might be receiving benefits under workers' compensation or short-term disability for certain conditions. The receipt of these benefits does not remove the employee's right to FMLA protections. While workers' compensation and short-term disability provide for income replacement, they generally do not provide job protection. That's where the FMLA comes in.



***FMLA Manager** offers a full suite of robust reporting tools to help you stay on top of usage, status, time available, and much more.*

ACCESS FMLA MANAGER FOR FREE





FMLA Manager delivers articles and best practices regarding pertinent industry developments — such as court cases — to help illustrate a variety of unique situations and scenarios.

ACCESS FMLA MANAGER FOR FREE

5. NOT PROPERLY REINSTATING EMPLOYEES

One of the cornerstones of the FMLA entitles employees to return to their jobs at the end of leave. The position to which they return is to be the one they had before leave began, or an equivalent one. Equivalent does not mean “similar.” The position needs to have the same pay, duties, shift, location, perks, benefits, responsibilities, status, schedule, and so on.

Employees, however, have no greater right to return to their positions than if they had not taken FMLA leave. If, for example, while an employee is on FMLA leave, business fell off to the point where the employee’s entire department was shut down, the employee would not have the right to return to his or her position. You would need to be able to show that the employee would not otherwise have been reinstated.

The reason for such a decision should have nothing to do with the employee’s taking of FMLA leave. If, for example, you need to cut one person from a department, selecting an employee because “she’s out for leave anyway” could risk a claim.

SUMMARY

From employee notice to return to work, the FMLA can be fraught with potential pitfalls, but keeping a few thoughts in mind can help you steer clear of the most frequent missteps. You don’t need to be an expert on the FMLA statute and regulations to help avoid the most common errors. Ensuring that your employees receive the full protections of the law with a few simple considerations can not only help avoid costly litigation, but can help ensure that your employees have some balance between their personal lives and work.



WE'RE HERE TO HELP

J. J. Keller®
FMLAManager



Developed by J. J. Keller's trusted team of in-house experts, the J. J. Keller® **FMLA Manager** streamlines FMLA tracking while ensuring ongoing compliance with the latest federal and state FMLA requirements.

With **FMLA Manager**, you can:

- Schedule and track continuous, intermittent, and reduced schedule leave
- Manage unique FMLA leave parameters across multiple locations
- Utilize a consolidated forms library
- Set notifications and reminders for certification requests, eligibility notices, and more
- Ask our subject-matter experts your toughest FMLA questions
- And more!

Plus, save even more time with **Employee Center**. Included with **FMLA Manager**, this self-service portal allows employees to securely log in and complete leave-related tasks with administrative oversight.

FMLAmanager.com • 855-206-2983

**SIMPLIFY LEAVE
TRACKING TODAY!**

ABOUT THE AUTHOR

DARLENE M. CLABAULT, EDITOR SHRM-CP, PHR, CLMS J. J. KELLER & ASSOCIATES, INC.

Darlene M. Clabault, is an editor on the Human Resources Publishing Team. She has written manuals on the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), and the Fair Labor Standards Act (FLSA). She researches and assists HR professionals in their understanding of their statutory and regulatory requirements. Darlene has authored articles for industry publications and speaks at SHRM and other events. She holds a SHRM-CP, PHR, and CLMS certification, is a member of the Society for Human Resource Management (SHRM), and of the local SHRM chapter.



ABOUT J. J. KELLER & ASSOCIATES, INC.

Since we began as a family-owned company in 1953, our purpose at J. J. Keller & Associates, Inc. has been to protect people and the businesses they run. Today, serving 500,000+ companies across North America, our associates are proud to make a larger impact than ever. Transportation, construction and industrial organizations of all sizes rely on our expert insights to help create safe, respectful work environments and simplify complex government regulations. They trust in our comprehensive portfolio of solutions, including cloud-based management tools, training, consulting, professional services, publications, forms, PPE and safety supplies.

HR professionals rely on J. J. Keller's experts, products and services to reduce risk and improve regulatory compliance, performance management, and operational efficiency. Learn more at jjkeller.com, and follow us on [LinkedIn](#), [X](#), and [Facebook](#).