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THE FAMILY AND MEDICAL LEAVE ACT (FMLA)

BASIC REQUIREMENTS

AND

COMMON QUESTIONS

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I. BASIC REQUIREMENTS

A. ELIGIBILITY

1. To be eligible for FMLA leave, an employee must meet three requirements:
 - a. The employee must work for a covered employer. The FMLA only covers employers with 50 or more employees.
 - b. The employee must have worked for his or her current employer for at least 12 months. The 12 months do not have to be consecutive.
 - c. The employee must have worked for his or her current employer for at least 1,250 hours in the previous 12 months.

B. LEAVE ENTITLEMENT

1. The FMLA allows eligible employees to take up to 12 weeks of unpaid, job-protected leave within a 12-month period for one of three reasons:
 - a. To care for a newborn or newly adopted child.
 - i. This leave must be taken within 12 months of the birth or adoption of the child. Both mothers and fathers are entitled to this type of FMLA leave, but if both parents work for the same employer, special limits may apply.
 - b. To care for a family member with a serious health condition.
 - i. Family members include an employee's spouse, minor children and parents. In-laws, and more distant relatives are not immediate family members for FMLA purposes. Employees may, however, take FMLA leave to care for adult children who are incapable of self-care due to a mental or physical disability or to care for a relative or other individual who acted as a parent to the employee in the employee's childhood.
 - c. Because of the employee's own serious health condition that makes the employee unable to perform the functions of the employee's job.
2. Definition of "serious health condition" for FMLA purposes.

- a. Any period of incapacity or treatment in connection with inpatient care. Thus, if the condition requires a stay in the hospital, it's FMLA-qualifying.
 - b. Any period of incapacity requiring absence from work for more than 3 days and involving continuing treatment by a health care provider.
 - 1. Common colds, flu, routine dental work, etc. are normally not serious health conditions, but similar conditions could be if the person has to go to the doctor and is prescribed medicine or other follow-up care and is in fact incapacitated for at least three days.
 - c. Continuing treatment for chronic conditions with episodic occurrences like asthma, epilepsy, diabetes, or cancer. Even if an incident or incapacity in connection with these types of chronic illnesses is less than three days, it is still FMLA-qualifying on the theory that treatment is required or the result could be an even greater period of incapacity.
 - d. Pregnancy or prenatal care absences qualify.
3. FMLA leave may be taken intermittently.
- a. FMLA leave need not be taken all at once. An employee may take leave intermittently in order to care for a family member with a serious health condition or due to the employee's own serious health condition.
 - i. An employee is not entitled to take intermittent FMLA leave to care for a newborn or newly adopted child. However, the FMLA does not prevent employers from allowing employees to take intermittent leave for this purpose.
 - ii. Examples of intermittent FMLA leave include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of several months for care of a chronic health condition.
 - b. An employee may take intermittent leave in days, hours or even partial hours. An employer should credit an employee on an intermittent leave schedule only with the actual amount of leave required. For example, if an employee needs two hours of FMLA leave in order to receive treatment for a chronic condition, the employer cannot force the employee to take an entire day of FMLA leave for that purpose; the employer should only count the time actually needed.

C. EMPLOYEE'S RESPONSIBILITIES UNDER THE FMLA

1. Give notice of the need for FMLA leave.
 - a. Employees do not have to specifically request "FMLA leave" or even mention the FMLA. Employees must simply give enough information to put the employer on notice that the reason the employee is requesting leave may be FMLA-qualifying.
 - b. Employers can ask employees to provide "written notice" of need for leave, but employers cannot deny FMLA leave if the employee fails to comply with a written request requirement as long as the employee has given timely verbal or other notice.
 - c. Amount of notice required.
 - i. When the need for leave is foreseeable, employees must give 30 days notice.
 - ii. When the need for leave is not foreseeable, employees must give notice "as soon as practicable" but usually within one or two days of the need for leave arising.
2. Provide certification of the medical need for leave.
 - a. The FMLA allows employers to require employees to provide medical certification of the need for leave for the employee's own serious health condition or for a family member's serious health condition.
 - b. Employers may not seek more information from the employee in the medical certification than what is allowed on the DOL's model certification form.

QUESTIONS AND ANSWERS: ELIGIBILITY

1. 1,250-hour test

Q. I have worked for my employer for nine years. Last year, I was laid off for 10 months. I have been back to work full-time (40 hours per week) for four months. Am I protected if I need an FMLA leave?

A. No. You have only worked approximately 700 hours over the past 12 months. This is less than the 1,250 hours necessary to take FMLA leave.

2. Laid-off employee

Q. I have been on layoff for three months. Can I apply for FMLA leave to obtain health insurance coverage?

A. No. A laid-off employee is not eligible for FMLA leave.

3. Independent contractor

A. I work for the Commonwealth of Pennsylvania. I am paid as a “contract employee,” meaning the state considers me to be an independent contractor and does not withhold taxes from my pay. Can independent contractors take FMLA leave?

Q. No. Independent contractors are not eligible for FMLA leave.

Note: Employers often incorrectly classify employees as independent contractors. The following factors support a claim to employee status.

- Your employer asserts a significant amount of control over your work
- Your hours are regular
- Your tools or equipment are supplied by your employer

4. “Temp” work

Q. I work for a temporary placement agency which seeks me out to different employers. I have been assigned to my current location for three months. Can I take an FMLA-protected leave?

- A. Possibly. The placement agency is your primary employer. The company you are placed at is your secondary employer. You are eligible for FMLA leave if the placement agency has 50 or more workers, including 1,250 hours over the past year, and 50 or more employees of the placement agency are working within 75 miles of the placement agency office.

It is also necessary that the secondary employer accept a replacement for you from the placement agency during your leave. In this case, you would have FMLA job restoration rights when your leave is completed. It is illegal for the secondary employer to put pressure on the placement agency to prevent you from taking leave.

5. Busy period

- Q. I asked for FMLA leave to care for my seriously ill mother. My boss said that work was too busy for me to leave. Can my request be denied for this reason?

- A. No. FMLA leave is not discretionary. If you meet the eligibility and notice requirements, your request for leave must be approved without delay.

Note: An eligible employee who gives proper notice of a need for FMLA leave is protected whether or not the leave is approved by the employer and cannot be disciplined or denied reinstatement for taking leave without permission.

QUESTIONS AND ANSWERS: THE LEAVE YEAR

1. Combining leave over two years

Q. My employer calculates the FMLA leave year on a calendar year basis. I need to take a five-month medical leave on November 4, 1996. Can I be out November and December of 1996 the first 12 weeks of 1997?

A. Yes. The calendar leave year method permits employees to combine leaves consecutively over two calendar years.

2. Plant shutdown

Q. I started a nine-week FMLA leave on August 1, 2000. On August 15, the plant shut down for repairs for two weeks. Do these weeks count as FMLA weeks?

A. No. Plant shutdowns are not counted against an employee's 12-week FMLA entitlement.

3. Partial-week leave

Q. I have chronic asthma. If I lose two days from work because of the condition, how is this calculated against my FMLA entitlement?

A. If you normally work a five-day week, your absence is equal of 2/5 of a week of FMLA leave. If you normally work a six-day week, your absence counts as 1/3 of an FMLA week. Your normal workweek is measured by the average of your hours worked over the 12 weeks prior to your leave.

4. Partial-day leave

Q. I had to leave work two hours early because of a chronic back condition. How is my absence counted under the FMLA?

A. If your regular workweek is 40 hours, your absence counts as 1/20 of an FMLA week.

5. Part-time schedule

Q. If I drop down to a 20-hour schedule for one week because of a serious health condition, how much time is subtracted from my FMLA entitlement?

A. If you normally work a 40-hour week, you will use up 1/2 of an FMLA week. If your normal hours are 50 hours a week, you will use up 3/5 of an FMLA week.

6. Eligibility in middle of year

Q. I will have been employed for one year on August 30, 2001. My employer uses the calendar year method. How much FMLA leave could I take over the rest of 2001?

A. 12 weeks.

7. No more leave than is necessary

A. I need to leave work for three hours for a medical appointment. My supervisor says that he cannot use me for the remaining hours and that I should take the entire day off. I need the pay. Can the company make me stay home?

Q. Not legally. Your employer may not force you to use more FMLA time than you need. If you are not allowed to work, you would have a strong FMLA claim to be paid for the time.

QUESTIONS AND ANSWERS: MEDICAL LEAVE

1. **Incomplete certification**

Q. I was denied FMLA status because my doctor forgot to check off the box on the medical certification form stating that my illness was a serious medical condition. Can I be punished because my doctor screwed up?

A. No necessarily. When a medical certification lacks sufficient information to verify a need for FMLA leave, the employer must inform the employee of the problem and allow a reasonable amount of time for the submission of a corrected certification.

2. **Physical therapy**

Q. I need to attend physical therapy three times a week because of surgery. If the treatments are scheduled during working hours, does my employer have to allow me time off from work?

A. It depends. An employee who needs medical treatment should try to arrange for appointments outside of working hours. If this cannot be accomplished, the employer is obligated to allow time off during work.

3. **Migraine headaches**

Q. Migraine headaches sometimes cause me to miss work. Am I protected by the FMLA?

A. Yes. Migraine headaches qualify for medical leave if the condition has occurred over an extended period of time and involves periodic medical treatment.

4. **Stress attack**

Q. I am under treatment by a psychiatrist for an anxiety disorder, and I take medications. Does the FMLA protect me if a stress attack prevents me from working?

A. Yes. Employees who have mental illnesses are protected by the FMLA if they are unable to work.

5. **Intermittent leave**

Q. I have lupus. Sometimes I cannot come to work until noon because of the pain and sometimes I need to stop work early. Can I be discharged for missing too much work?

- A. No. Lupus is a chronic serious health condition. When medically necessary, you may take time off. Each hour you take is subtracted from your FMLA entitlement. If you work a forty-hour-per-week schedule, your yearly entitlement of 12 weeks equals 480 hours.

6. Medical certification dispute

- Q. After I submitted a medical certification for time off because of injury, my employer scheduled me to see a physician for a second opinion. If this doctor says I can work, can my FMLA leave be canceled?

- A. No. An FMLA leave may not be canceled solely on the basis of a second opinion. A third health care provider must be retained to “break the tie.”

7. Medical certification – delay by provider

- Q. Our company requires us to submit medical certification within three days of an absence. If my physician fails to fill out the form by that does, will I lose my FMLA protections?

- A. No. You must be allowed a minimum of 15 days to produce a medical certification for an FMLA absence. The time period begins when your employer makes a request for the report.

8. Call-in rule

- Q. I am on FMLA leave to have major surgery. Can I be ordered to call the personnel office on a daily basis?

- A. No. Although employees on FMLA leave may be required to call in periodically to report their status, call-in rules must be applied in a reasonable manner and must take into account the individual employee’s leave situation. It is not reasonable to require an employee who is undergoing major surgery to call in daily.

9. Fraudulent leave

- Q. An employee I work with was granted two weeks’ leave for a back injury. A few days later, his supervisor saw him doing heavy lifting for another employer. Can the company fire him?

- A. Yes. An employer which has proof of fraud can take disciplinary action during an FMLA leave.

QUESTIONS AND ANSWERS: FAMILY LEAVE

1. Leave restrictions

- Q. A company rule states that only two employees in one department can go on leave at the same time. Can this rule be used to deny me an FMLA family leave?
- A. No. The number of employees allowed to take FMLA leave at one time may not be limited by a company rule or policy.

2. Proof of relationship

- Q. When I asked for time off to care for my stepchild, my supervisor asked me to supply proof that I am the child's parent. Do I have to comply?
- A. Yes. Employers may require reasonable documentation to confirm a family relationship. You can satisfy the request by writing a letter describing your parental status.

3. Ear infection

- Q. My two-year-old child gets ear infections. If I stay home with her on these occasions, can these absences be counted against me?
- A. Yes. Ear infections are generally not serious health conditions.

4. Family crisis

- Q. My wife is going to the hospital for three days for an operation. Can I take FMLA leave to care for our two young children?
- A. No. FMLA family leave can only be taken to care for family members with a serious health condition. If your children are healthy, you cannot qualify for FMLA leave to take care of them.

Note: You may, however, be able to qualify for FMLA leave to care for your wife. Speak with her doctor. If he or she will certify that your presence at the hospital will assist your wife's recovery, your request for FMLA leave must be granted.

5. Nervous breakdown

- Q. My teenage son had a nervous breakdown. He cannot go to school and is being treated by a psychiatrist. I feel I should stay home with him to provide support. Am I covered by the FMLA?

A. Yes. The FMLA applies when an employee is needed to provide emotional care for a family member with a serious medical illness.

6. Intermittent leave

Q. My child has leukemia and frequently is too ill to attend school. How many days a year can I stay home with her?

A. If you work five days a week, you will have 60 FMLA days available. If your normal workweek is six days, you will have 72 days available.

7. Part-time schedule

Q. My 80-year-old mother is unable to care for herself. I can find someone to stay with her mornings but not afternoons. Does my employer have to allow me a half-time schedule?

A. Yes. You can go on a mornings-only schedule for up to 24 weeks.

8. Spouse works for same employer

Q. My wife and I work for the same company. Our daughter has cancer. Can we each take a 12-week FMLA leave to care for her?

A. Yes.

9. Key employee

Q. I am a cutter in a women's wear factory. My mother, who lives in Italy, is quite ill. When I requested leave to care for her, the company president said that I was a "key employee" and could not go. Is he right?

A. No. The "key employee" exception in the FMLA is exceedingly narrow. You are not a key employee unless you are salaried and highly compensated, and your reinstatement would cause your employer substantial and grievous economic injury.

10. Moonlighting

Q. I am on FMLA leave to care for my child. Can I take an outside job in the evening hours when my wife is home from work?

A. This depends on whether your employer has a uniformly-applied policy restricting outside employment for employees on leave. If your employer does not have such a policy, you may work during your family leave.

11. Filling in for others

Q. My father has Alzheimer's disease. My sister, who regularly cares for him, needs a vacation. Can I use FMLA time to fill in for her?

A. Yes. Employees can take family leave to fill in for regular caregivers.

12. Recertifications

Q. My mother has a serious heart condition and has frequent spells where she needs care. I submitted a medical certification from her doctor saying I would be needed to care for her on an intermittent basis for the next three months. My employer accepted the certification, but every time I stay home with her my supervisor says I need a note from her physician. Do I?

A. No. When a health provider certifies a need for intermittent leave for a specific period of time, an employer may not require additional certification over that period unless circumstances have changed significantly or the employer receives information that casts doubt on the need for leave.

QUESTIONS AND ANSWERS: CHILDCARE

1. State maternity leave law

Q. A law in my state allows mothers eight weeks of maternity leave. Does this mean I can take eight weeks of state-law leave and then 12 weeks of FMLA leave?

A. No. The first eight weeks of your leave counts under both your state maternity leave law and FMLA, leaving you with only four FMLA weeks remaining.

Note: Your state law can be helpful if you use up FMLA weeks prior to childbirth. For example, if you used six FMLA weeks for medical reasons during your pregnancy, you may still be able to take eight weeks of leave under your state law.

2. Same-sex relationship

Q. I live with a woman in a long-term same-sex relationship. My partner has conceived a child through artificial insemination. Can I take FMLA leave to care for the baby?

A. Yes. Since you almost certainly stand in loco parentis, you can take newborn care leave as if you were a biological parent.

3. Unmarried father

Q. My girlfriend (and co-employee) is having our child. Can I take FMLA leave when the baby is born?

A. Yes. A father does not have to be married to take newborn care leave.

Note: Unmarried parents are not subject to the 12-week combined leave limitation which applies when spouses work for the same employer.

4. Contract rights

Q. Our union contract allows 10 weeks off for maternity leave. If I use six weeks of FMLA medical leave prior to giving birth, can I still take my 10-week contract leave?

A. Yes. A contract provision which provides leave in excess of what is available under the FMLA is enforceable.

QUESTIONS AND ANSWERS: NOTIFICATION TO EMPLOYER

1. Spouse calls in

Q. My husband is sick and heavily medicated. Can I provide FMLA notice for him?

A. Yes. When employees are incapacitated, spokespersons, such as spouses, adult family members, friends, or health care providers can provide FMLA notice.

2. Nature of condition learned later

Q. When I first called in, I just told my boss that I was sick. Now my doctor says I have pneumonia. Is it too late to give FMLA notice?

A. No. If you inform your employer promptly of your condition, you will gain FMLA protection for your absence.

3. Written application rule

Q. Our company wants to adopt a rule requiring written application to request FMLA leave. Is this legal?

A. Yes. An employer may adopt a written application rule if it gives prior notice and affords the union an opportunity to bargain. Importantly, although the rule may impose discipline, it may not deny or delay FMLA leave to employees who provide verbal notice.

QUESTIONS AND ANSWERS: HEALTH BENEFITS

1. Workers' compensation

- Q. I am on workers' compensation. My family medical coverage is provided by a multi-employer health and welfare plan. My employer contributes \$2.00 to the plan for each hour that I work. Does it have to contribute for me while I am on workers' compensation?
- A. Yes. Workers' compensation qualifies as FMLA leave if a serious health condition is involved. Employers must continue payments to health and welfare plans as though the employee were still working.

2. Employer cancels insurance

- Q. If my company fails to maintain my health insurance during my FMLA leave and I incur a large medical expenses, can I sue my employer for the bill?
- A. Yes. An employer that fails to maintain health benefits can be held liable for medical expenses that would have been covered by the health insurance plans.

3. Layoff

- Q. If I am laid off during an FMLA leave, can my employer stop paying for my health insurance?
- A. Yes. FMLA benefits expire when an employee's position is eliminated because of a layoff, a closing, or the completion of a work project.

4. Paid leave

- Q. I have been on a paid FMLA leave for six weeks. If I quit and take another job, must I reimburse my employer for my health insurance?
- A. No. Employers may not recover insurance premiums for periods covered by paid leave.

5. Retirement

- Q. I am on unpaid FMLA medical leave. If I decide to retire, can I be charged for my FMLA health insurance expenses?
- A. No. An employee who transfers from FMLA leave to retirement cannot be charged for health insurance expenses.

6. Heart attack

Q. I had a heart attack and may not be able to return to work. How long am I entitled to health insurance?

A. 12 weeks under the FMLA. You should then be eligible for coverage under COBRA, a federal law that continues group health insurance for up to 18 months if employees pay the full cost. If you qualify for Social Security disability benefits, you can use COBRA for 29 months (when Medicare usually begins).

Tip: An employee who gives unequivocal notice that he or she will not be returning to work forfeits FMLA rights to employer-paid health insurance. Wait 12 weeks before conveying such news.

QUESTIONS AND ANSWERS: LIGHT DUTY

1. Workers' compensation canceled

Q. If an employee refuses light duty and is taken off of workers' compensation, does he lose his FMLA reinstatement rights?

A. No. The loss of workers' compensation benefits does not affect an employee's FMLA status, including the right to return to an original or equivalent position when FMLA leave is completed.

2. Sick leave

Q. If an employee refuses light duty and loses workers' compensation, can she claim accrued sick leave during the remainder of her FMLA absence?

A. Yes.

QUESTIONS AND ANSWERS: PAID LEAVE

1. Compensatory time off

- Q. I have earned 140 hours of compensatory time as a result of overtime work. If I take an FMLA leave, can my employer compel me to use up this time?
- A. No. Employers may not substitute compensatory time.

2. Vacations restricted to summer months

- Q. Each year we earn two vacation weeks which must be taken in July or August. If I take FMLA leave in February, can I be forced to use up vacation time?
- A. No. Vacation leave is not accrued until it is available to be used. Since your vacation leave can only be used in July or August, it cannot be substituted for leave in February.

3. Paid leave procedures

- Q. Our contract allows employees to take 10 sick days a year. It does not require any type of advance notice. If I ask to use five sick days for an operation, can my request be denied because I did not give 30 days' advance notice?
- A. No. When an employer's paid leave plan has less stringent procedural requirements than the FMLA, an employer may not delay or deny paid leave because an employee has failed to meet FMLA requirements.

4. S&A benefits in a union contract

- Q. Our contract has a sickness and accident policy which allows up to 26 weeks paid S&A leave. Can my employer count such leave against the 12 week FMLA leave?
- A. Yes. The employer may count sick leave against FMLA leave unless your contract provides otherwise.

QUESTIONS AND ANSWERS: RETURNING TO WORK

1. New owner

- Q. While I was on FMLA leave, my company was sold. Does the new owner have to accept me back?
- A. Yes. An owner which substantially continues operations (known as a “successor in interest”) must respect the FMLA rights of persons employed by the previous administration.

2. Company exam

- Q. I am on FMLA leave because of a back injury. Can I be required to pass a company medical examination before returning to work?
- A. Only if your collective bargaining agreement specifically mandates or allows a pre-return employer examination. Otherwise, the only permitted condition for return from FMLA leave is a fitness for duty report from your health care provider.

3. Service credit

- Q. Under our union contract, after 12 months of service without incident, prior disciplinary action is deleted from an employee’s record. Does unpaid FMLA leave count towards the year?
- A. No. Unless the contract says otherwise, unpaid FMLA leave does not have to be counted as service time.

4. Pension rights

- Q. I took nine weeks of unpaid FMLA leave. Is this time counted when determining whether my pension rights have vested?
- A. No. Unpaid FMLA leave does not have to be treated as credited service for purposes of pension benefit accrual, vesting, or eligibility.

5. New worksite

- Q. After returning from FMLA leave, I was assigned to a worksite 20 miles further away from my house. Does this violate the FMLA?

A. Yes. You must be reinstated to the same worksite or an equally close worksite unless your original position was eliminated by a layoff, closing, or bumping process.

6. Change in shift

Q. Can I lose my day-shift position when I return from FMLA leave?

A. No. Unless your position in the day shift was eliminated by a layoff, closing, or bumping process, you must be returned to your original shift and work schedule.

7. More than 12-week absence

Q. I was disabled for five months due to a workers' compensation accident. The company wants to assign me to a different position. Do I have any FMLA rights?

A. Possibly. FMLA reinstatement rights usually end after 12 weeks. However, an employer must promptly designate paid leave absences under the FMLA. If none of your leave was properly designated, your entire absence may be FMLA-protected, giving you a right to your original position or an equivalent one.

8. Position eliminated

Q. During my FMLA leave, my employer distributed my job duties to other employees. When I was ready to come back to work, my supervisor said that my job had been eliminated and I would have to transfer to a lower-ranking position. Doesn't this violate my FMLA rights?

A. Yes. An employee is entitled to reinstatement to the same or any equivalent job even if the employee has been replaced or his or her position has been restructured or eliminated. You must be offered at least an equivalent position with equal pay and working conditions. If no such position is available, your employer must create one or restore your original position.

9. Unable to return to work

Q. I ruptured a disc in my back and cannot return to my regular work. Does the FMLA require the company to offer me a light-duty position?

A. No. The FMLA cannot be used to restore you to work because you are unable to perform your regular duties. Your union contract, however, may allow you to bump into a light-duty slot. If not, you may be able to use a federal or state disability law to compel your employer to modify your job or transfer you to another position.

QUESTIONS AND ANSWERS: EMPLOYER NOTIFICATION DUTIES

1. Unwanted designation

Q. After a job injury, I collected workers' compensation for six weeks. I did not want this time counted as FMLA leave because my wife is pregnant and I wanted to save my FMLA weeks for a newborn care leave. Nevertheless, the company sent me a letter "designating" the absence under the FMLA. Is this allowed?

A. Yes. When an employer learns that an employee is out of work for purposes which qualify under the FMLA, it can designate the absence as FMLA leave, whether or not this is requested by the employee. If the designation is issued beyond two days, however, it is only effective from the date it is received.

2. Section 301 notice not provided

Q. I have been out of work for five weeks because of a heart attack. I have not received a Section 301 or any other FMLA notice. Is my leave protected by the FMLA?

A. Yes. Your employer's failure to issue a Section 301 notice does not deprive you of FMLA protections.

3. Contract designation

Q. A clause in our contract says that all medical absences over three days are designated as FMLA leave. Does this eliminate the employer's obligation to send out FMLA notices?

A.. No. FMLA designation notices must be given directly to employees on a case-by-case basis. A contract provision cannot relieve an employer of its FMLA responsibilities.

4. Failure to explain difference between FMLA and company leave

Q. Our company allows employees 16 weeks of maternity leave. But when an employee returned from this leave, she was given a lesser paying position. The company says the FMLA does not apply because the FMLA leave was over and the employee was on company maternity leave. The employee says that she thought FMLA rights applied to the entire leave and the company never explained that company leave was less protected than FMLA leave. Who is right?

- A. This is unclear, but possibly the employee. If there are any differences between FMLA leave and company leave, they should be explained in the company handbook or in the Section 301 notice given to the employee when her leave began. The company's lack of adequate notice interfered with the employee's FMLA rights and the employee can file a claim for reinstatement to her original position or an equivalent one.

5. Failure to designate unpaid leave

- Q. I took a three-week unpaid leave to care for my ill child. My employer never sent me an FMLA notice. Can these weeks be deducted from my FMLA entitlement?

- A. No. According to the DOL regulations: "If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave does not count against an employee's FMLA entitlement."

Note: A related question concerns an employee who takes an unpaid leave for FMLA reasons which lasts for more than 12 weeks. If the employer fails to designate, is the entire leave protected, giving the employee a right to reinstate?

The answer here is not certain. Section 208 of the DOL regulations extends the 12-week protected period when a paid leave is undesignated. But it is not clear whether this rule also applies to unpaid leave. It is also not clear whether the courts will uphold this regulation.

QUESTIONS AND ANSWERS: GRIEVANCE AND ARBITRATION

1. Filing lawsuit after arbitration

- Q. Our union is defending an employee who was discharged for excessive absenteeism. If the union loses at arbitration, can the employee file an FMLA lawsuit?
- A. Yes. But the lawsuit must be filed within two years of the discharge or three years if the violation was willful.

2. Promotion grievance

- Q. We filed a grievance for a union member who should have received a promotion. At the arbitration hearing, the company listed six reasons for bypassing the grievant. The fifth reason was the employee's "spotty attendance record." Almost all of the grievant's absences were to care for his diabetic wife. Does this give us enough ammunition to win the grievance?
- A. Perhaps. In this kind of case, the "but for" test is usually applied. The union must show that but for the attendance record, the employee would have received the promotion. Since the employer has listed five other reasons, the union needs to provide that the non-FMLA reasons are bogus or that the employee's absence record was the crucial factor.

3. Last chance agreement

- Q. As part of a grievance settlement, an employee with a poor attendance record was put on final warning and told that any further absences in the next six months would result in discharge. If the employee misses work because her child is seriously ill, can she be fired because she signed the last chance agreement?
- A. No. Employees cannot waive their FMLA rights. Nor can FMLA protections be restricted by a union grievance settlement.

4. Progressive discipline

- Q. An employee was discharged for horseplay. At the grievance hearing, the company said its decision was based on progressive discipline and cited a suspension one year ago for absenteeism. Can the union fight the discharge by arguing that the prior suspension violated the FMLA?
- A. Yes. An employer may not base a discharge on progressive discipline if the previous discipline is unlawful under the FMLA.

QUESTIONS AND ANSWERS: UNION CONTRACT

1. Lesser benefits in the contract

- Q. Our contract says that the FMLA leave year is the calendar year but that no employee shall take successive leaves at the end of one calendar year and the beginning of the next. How does this fit with the FMLA?
- A. It doesn't. When the calendar year is selected, employees must be permitted to use FMLA leave at any time during the year, even if this creates 24 weeks of consecutive leave. Contract clauses which restrict FMLA rights cannot be enforced.

2. Greater benefits in the contract

- Q. The union contract says that the employees can take childbirth leaves for 16 weeks. The FMLA period is 12 weeks. Which rule applies?
- A. The contract rule, because it is more favorable.

3. Reducing benefits to FMLA levels

- Q. Our contract guarantees jobs for 12 months after a disability, injury or illness. In negotiations for a new contract, the company has proposed to reduce this to the 12-week FMLA level. How can we respond?
- A. The Union should bargain to preserve its 12-month benefit. Nothing in the FMLA requires employers to eliminate or reduce benefits which are more generous than FMLA provisions.

Note: If your employer admits that it is seeking to reduce contract benefits because employees have used the FMLA, the union may have a legal case. Employers are not allowed to retaliate against employees or to take actions which discourage employees from using the FMLA.

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¹ Many of these questions and answers are taken in part from a much more detailed and excellent handbook written by Labor Attorney Robert Schwartz of Boston, Massachusetts and available from Work Rights Press in Cambridge, Massachusetts.

INTRODUCTION

The purpose of this paper is to give union representatives and members the basic information and outline concerning rights and responsibilities under the Family and Medical Leave Act. This paper outlines the basic requirements of the Act and then addresses most of the common questions we have received from union members and representatives.

We have one piece of practical advice. The FMLA can be enforced through the Department of Labor and through suits filed in federal court. However, we generally urge unions to enforce these rights through the grievance and arbitration procedures of union collective bargaining agreements. Such a procedure is much quicker, cheaper, and just as effective as the alternatives. How and whether to pursue this option may depend on the facts of a specific case or language of a specific collective bargaining agreement.

(i)