Are you asking the right questions about your FMLA policy?

10 questions that can reveal the gaps in your Family and Medical Leave Act policy.

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10 Is your individual FMLA notice form incomplete?

If an employer fails to give eligible employees written notice of both the deadline for returning the completed medical certification form (within 15 calendar days) AND the consequences of failing to meet the 15-day deadline, the employer is at serious risk of liability. Should an employee be terminated for not returning his or her completed medical certification form by the established deadline, the employer must have convincing evidence that it gave the employee timely written notice of both the15-day deadline and the consequences of failing to comply.

Protect Your Company: Make sure to include all details concerning your company's medical certification requirements in the individual written notice form, which should be given to eligible employees either at the time the employee first gives notice of his or her need for leave or within two business days thereafter. To download sample FMLA medical certification forms as well as forms that address an employer's response to requests for FMLA leave, go to http://www.dol.gov/esa/whd/fmla/#form

9 Are there legal requirements surrounding intermittent and reduced hours FMLA leave that you are unaware of?

If intermittent or reduced hours leave is needed, an employer may transfer the employee to an equivalent job that, for the employer, better accommodates intermittent leave or reduced hours. If, however, that move creates a hardship for the employee, that would be a violation of the FMLA. In addition, employees are not permitted to take intermittent or reduced hours FMLA leave due to childbirth, adoption, or placement of a child for foster care. Finally, employees on approved intermittent or reduced hours FMLA leave may be required to submit medical recertification of their continuing serious health condition only when: (1) the initial period of leave expires and the employee requests an extension, (2) either the duration or frequency of intermittent absences or the severity of the condition changes significantly, or (3) the employer receives information that casts doubt on the employee's stated reason for needing intermittent or reduced hours leave.

Protect Your Company: When transferring an employee on intermittent or reduced hours leave to a different shift, keep in mind that this alternate position cannot be a burden to the employee even if it is more convenient for the company. Also, be certain that you request recertification of an employee's serious health condition only under the proper circumstances.

8 Do you wrongly assume that your company is not covered by the FMLA?

Many small businesses wrongly assume that they're not covered by the FMLA because they employ less than 50 full-time employees. They may not realize that part-timers, temporary employees, and even day laborers all count toward the FMLA threshold (50 employees within a 75-mile radius during all or part of 20 or more workweeks in the current or preceding calendar year). Every individual who is on your payroll for income tax purposes during all or any part of a workweek counts toward the 50-employee threshold for FMLA coverage.

Protect Your Company: Make sure you count every individual who was on your payroll for income tax purposes before assuming that your company is not covered by the FMLA.

7 Are there legal requirements surrounding fitness-for-duty certifications that you are unaware of?

If an employer requires a fitness-for-duty certification before an employee can return to work following FMLA leave, notice of this requirement must be included in the individual employee notice form that employees are given whenever they miss work due to an FMLA-qualifying reason, and this requirement must also be included in the employer's written FMLA policy. In order to lawfully enforce a fitness-for-duty certification requirement, the employer must have a uniformly applied policy or practice that requires fitness-for-duty certification from all similarly situated employees. Employers must accept fitness-for-duty certification from the employee's own health care provider and cannot require a second or third opinion. In addition, the certification need only be a simple statement of the employee's ability to return to work; the employer cannot insist on a particular fitness for duty certification form. Employers may seek fitness-for-duty certification only for the particular health condition that caused the employee's need for FMLA leave, and employers cannot demand fitness-for-duty certification when an employee takes intermittent FMLA leave.

Protect Your Company: Know the legal requirements associated with fitness-for-duty certifications under the FMLA.

6 Are you maintaining FMLA records for the proper length of time?

Employers must keep the records specified by the Family and Medical Leave Act for at least three years, and they must be available for inspection, copying, and transcription by the Department of Labor, if requested.

Protect Your Company: FMLA records and documents relating to medical certifications, recertifications, or medical histories of employees or employees' family members created for purposes of the FMLA are confidential and must be kept in separate files from the usual personnel files.

5 Does your company properly credit employees on FMLA leave toward their length of service, benefit accrual, and eligibility for pay raises, bonuses, and incentive compensation?

Employers cannot use FMLA leave as a break in seniority or length of service or to deny employees unconditional pay raises, bonuses, or incentive compensation (e.g., perfect attendance or safety bonus). "Unconditional" raises, bonuses, or incentives are those that are not tied to either the quality or the quantity of work performed by the employee, and cannot be lawfully denied to employees on FMLA leave. Any benefits, however, that accrue based on hours worked, like vacation, sick time, or personal leave, *can* stop accruing while an employee is out on FMLA leave, provided those benefit accruals resume at the same rate when the employee returns to work from FMLA leave.

Protect Your Company: Ensure that supervisors do not reduce or penalize employees on FMLA leave in terms of their length of service, seniority status, wage or salary rate, or eligibility for any unconditional bonuses or incentive compensation.

4 Are you familiar with all the medical conditions covered by the FMLA?

Employers tend to underestimate what FMLA considers a "serious health condition," which can include severe flu, depression, all pregnancies, all inpatient treatment in a hospital, all complications related to childbirth, most forms of surgery, and most traumatic injuries.

Protect Your Company: Before you deny FMLA leave on the grounds that a serious health condition is not involved, be sure to double-check the law to see whether the condition qualifies as a "serious health condition" under the FMLA.

3 Is your company failing to capture all FMLA leave time?

Some employees receive more FMLA leave than they are legally entitled to (12 weeks during a 12-month period) because employers fail to track smaller leave increments or don't realize what the law/courts consider FMLA leave time. Even small increments of time can and should be tracked, down to the smallest time increment accounted for by your company's payroll system. FMLA leave can be counted down to 6-minute intervals for hourly workers and 15-minute increments for exempt salaried employees. Another common mistake: when injured employees work in an alternate light-duty position, courts have ruled that all time worked in an alternate light-duty position may be counted against the employee's annual 12-week FMLA leave entitlement.

Protect Your Company: Be certain that you are not granting far more time off than you realize by documenting and counting all FMLA leave time, including smaller time increments and all time worked in an alternate light-duty position.

2 Does your company obtain legal advice BEFORE taking any adverse employment action against an FMLA-eligible employee?

Employers that take adverse action against employees who may be FMLA-protected without first getting at least an informal legal opinion risk being held liable for double damages. In the event that an employer violates the FMLA, the affected employee(s) will be awarded double damages unless the employer carries the burden of convincing the court that despite the FMLA violation, the employer acted in good faith and had objectively reasonable grounds for believing that its actions did not violate the FMLA.

Protect Your Company: The best evidence you can present as to your "objectively reasonable grounds" for believing you did not violate the FMLA is that before you took action you obtained a formal or at least informal legal opinion from an attorney knowledgeable about the FMLA.

1 Have you failed to ask (and record) the MOST important question?

While certain absences are legally excluded from FMLA protection, employers still lose costly court battles when they fail to: (1) ask WHY employees were absent from work and (2) properly DOCUMENT the answers given. Legally, employees can say very little about their reason for missing work and yet the burden is still on their employer to comply with detailed FMLA rules and regulations.

Protect Your Company: Ensure that every supervisor understands the importance of (1) asking employees why they are not at work as scheduled AND (2) documenting the precise answer given. This creates a record that can be used later in the event absences are unexcused and FMLA litigation results.

NEED TO KNOW MORE ABOUT FMLA AND OTHER EMPLOYMENT LAWS?

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