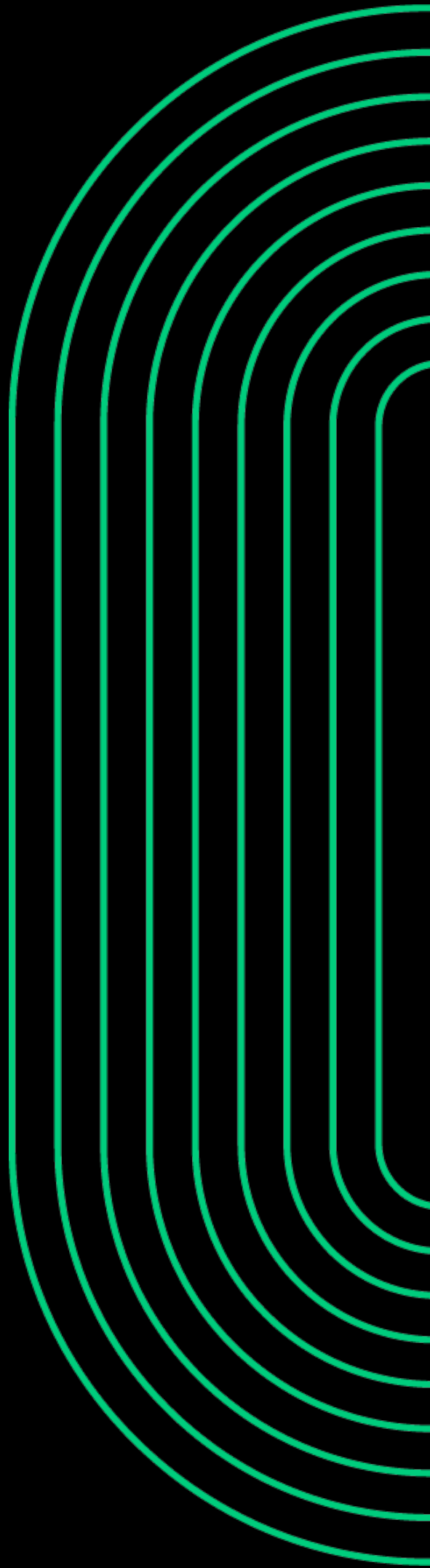


130c: Highlights on FMLA

Michigan School Business Officials

Marshall W. Grate
+1 616.608.1103
mgrate@clarkhill.com

April 21, 2026





“Of all the laws enforced by the Department of Labor, the FMLA is the easiest for employers to administer.”

Former U.S. Secretary of Labor Alexis Herman



The Realities of Life for Human Resources

- The FMLA was created to help employees, but some take advantage of it
- The FMLA is a strict-liability law: *honest mistakes still result in liability*
- Even worse? The regulations don't take into account the real-world



FMLA Basics: Entitlement

- Up to 12 weeks of unpaid leave for eligible employees – each “year”
- Up to 26 weeks of unpaid leave in one 12-month period – military caregiver



FMLA Basics: Eligibility



- Who is Eligible for Leave?
 - Worked at least 1250 hours during last 12 months
 - Employed for a total of 12 months within the last 7 years (consecutive not required)
 - Works at location with at least 50 employees within 75-mile radius

FMLA Basics: Qualifying Reasons

- An eligible employee is entitled to FMLA leave for:
 - The birth of a child and to care for newborn;
 - The placement of a child for adoption or foster care;
 - To care for the employee's spouse, child or parent who has a serious health condition;
 - Because of an employee's own serious health condition;
 - Because of a qualifying exigency; or
 - To care for a covered service member



FMLA Basics: Serious Health Condition

- An illness, injury, or condition that requires:
 - Any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay)
 - A period of incapacity requiring absence of more than three calendar days that also involves continuing treatment (or supervision of) a health care provider
 - Any period of incapacity due to pregnancy, including for prenatal care
 - Any period of incapacity (or treatment) due to a chronic health condition (e.g., asthma, diabetes, epilepsy, etc.)
 - Any period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (e.g., Alzheimer's, stroke, terminal disease, etc.)
 - Any absences to receive multiple treatments (including a period of recovery) by, or on referral by, a health care provider for a condition that likely would result in incapacity of more than three consecutive days if left untreated (e.g. chemotherapy, physical therapy, etc.)

FMLA Basics: What is *NOT* a Serious Health Condition?

- Common cold
- Earaches
- Routine dental problems
- Upset stomach
- Headaches, other than migraines



FMLA Basics: Pregnancy, Birth, Adoption

- Generally, applies to both mother and father
- Includes bonding time
- May begin before birth if medically necessary
- May also be taken for mother's pregnancy-related disability



FMLA Basics: Care for Others

- Spouse
 - Husband or wife as recognized under state law
 - Includes individuals in a same-sex marriage or common law marriage
- Parent
 - Biological, adoptive, step or foster or any individual who stood in loco parentis



FMLA Basics: Care for Others

- Son or Daughter
 - Biological, adoptive, step, or foster
 - Legal ward
 - Child of person standing in loco parentis
 - Must be under the age of 18

OR

- Is 18 or older and incapable of self-care at the time leave is sought because of a serious physical or mental condition



FMLA Basics: Care for Others



- Do not need to be only person available to provide care
- “Care” includes psychological care and comfort
- Care requires that employee be physically with the ill family member – not to perform ill person’s other duties
- Leave ends if family member recovers or dies

FMLA Basics: Employee Notice

- Foreseeable Leaves
 - 30-days notice, except where impracticable
 - Must include timing and duration
 - If requested, employee must explain why could not give 30-days notice
 - Employee must consult with you before scheduling leave and must schedule at your convenience, subject to review by healthcare provider
- Unforeseeable Leave
 - Must provide notice as soon as practicable, usually same or next business day
 - Must comply with regular call-in procedures



FMLA Basics: Employer Notice Obligations

- Eligibility Notice
 - Must be provided with 5 business days
 - Must state:
 - Whether the employee is eligible for FMLA
 - If employee is not eligible, at least one reason why the employee is not eligible
- Rights and Responsibilities Notice
 - Must be included with the Eligibility Notice
 - Must detail specific expectations and obligations
 - Must explain any consequences for failing to meet expectations and obligations



FMLA Basics: Employer Notice Obligations

- Designation Notice
 - Must be sent within 5 business days after receiving enough information to determine leave is FMLA-qualifying (i.e. – CHP)
 - Must state any fitness-for-duty certification requirements
- Use the DOL Forms!
 - Ensures compliance
 - Ensures employer receives all information it is legally entitled to



FMLA Basics: Certification of Healthcare Provider

- Must return with 15 calendar days after employee written notice of need to return form
- Must be complete and sufficient
- You must inform employee in writing of consequences for returning late or failing to turn in
- If employee submits a complete and sufficient certification signed by physician, you cannot request additional medical information



FMLA Basics: Certification of Healthcare Provider

- Incomplete or Insufficient CHP
 - **Incomplete:** one or more of the entries have not been completed
 - **Insufficient:** information is vague, ambiguous, or non-responsive
 - You must advise employee and state, in writing, what additional information is necessary
 - Employee must be given 7 calendar days to cure deficiency
 - Exercise your rights – once the CHP is approved, you cannot seek additional information

FMLA Basics: Certification of Healthcare Provider

- An employer may contact the employee's physician for purposes of "authentication" and "clarification."
- **Authentication**
 - Providing the physician with the certification and requesting verification that that information was completed and/or authorized by the physician who signed the document
- **Clarification**
 - Contacting the physician to understand the handwriting or understand the meaning of a response



FMLA Basics: Benefits

- Must maintain group health insurance coverage on same terms as if employee continued to work (including family coverage)



FMLA Basics: Return to Work

- Return must be to same or equivalent position (same pay, benefits, etc.)
- No right to transfer to a different position if cannot perform essential functions of original job
- No right to job restoration where termination/lay-off would have occurred
- Watch out for ADA issues
- Employee entitled to any unconditional pay increases during FMLA period
- Pay increases conditioned on seniority, length of service, or work performed must be granted in accordance with your policy for non-FMLA leaves
- Employee can be denied bonuses that require the achievement of a specific goal, so long as employees on non-FMLA leaves are treated the same

FMLA Basics: Intermittent Leave

- Must be a medical need for leave that can best be accommodated through intermittent leave or reduced schedule
- Applies to employee's own serious health condition and care for an eligible family member with a serious health condition
- Intermittent – weeks, days, hours
 - Must permit smallest increment of time otherwise allowed for other forms of leave
 - Can require employee to comply with call-in policy
 - Can require HCP to certify the “medical necessity”
 - For planned treatments, can ask for schedule and cooperation



Ways to Combat Intermittent Leave Abuse

- The FMLA policy statement should require an employee notice to be in writing and addressed to human resources, and that notice requirement should be enforced. Requiring an employee to actually write out their request tends to deter them from gaming the system.
- Have and enforce call-in procedures. Require employees to report any absence, even one hour.
- Be prepared and ask questions when an employee requests time off. Employers are entitled to information on why employees are unable to work. Samples of questions that an employer may use include:
 - What is the reason for the absence?
 - What essential functions of the job they cannot perform?
 - Will the employee see a health care provider?
 - Have they previously taken leave for this condition?
 - Always ask, when do they expect to return to work?



Ways to Combat Intermittent Leave Abuse

- Check in on the employee. An employer has the right to call an employee to check in on them when they are absent. Periodically calling an employee who is absent can go a long way to curbing FMLA abuse.
- Require medical certifications. Do periodic updates for medical certification to ensure that intermittent leave is medically justified.
- Require a doctor's note for paid sick day when it is substituted for FMLA leave – CAUTION – must comply with ESTA, which requires an employer to wait the fourth consecutive day before requiring medical documentation.
- Consider a temporary transfer of an employee to a position with equivalent pay and benefits that better accommodates recurring periods of intermittent leave.
- Consider a personal certification signed by the employee that the employee took the day off for FMLA or other medical reason and consider disciplining the employee if they fail to submit certification. FMLA regulations require an employee to follow the employer's procedural requirements with respect to leaves. If an employee takes a leave inconsistent with the stated reason, then the employee is exposed to discipline for falsifying an employment record.

Investigating Potentially Fraudulent Use of Leave

- Employers have the right to investigate and address plausible allegations that employees have been dishonest or committed fraud in their medical leave claims. *Adkins v CSX Transp., Inc.*, 70 F 4th 785 (4th Circuit 2023).
- It is always important to consider the medical certification and restrictions when investigating an FMLA fraud claim. In *Follen v Genesys Regional Medical Center*, Civil Action No. 20-CV-10450, 2021 WLO 1424493 (ED MI April 15, 2021) (unpublished), a plaintiff's physician certified the employee for flare ups of rheumatoid arthritis that could last anywhere from 15 minutes to 7 days.
 - One day, the plaintiff called off work in the morning but attended the school field trip with their daughter later that day. The court found that the plaintiff's attendance at the daughter's field trip was not necessarily evidence of fraud because they could have been experiencing a flare up of RA in the morning but well enough to attend the field trip several hours later.

Investigating Potentially Fraudulent Use of Leave

- In contrast, in *Haley v Town of Wake Forest*, 2018 WL 4689445 (ED NC September 28, 2018) (unpublished), the plaintiff was seen at a county fair on the day that had taken a sick day from work claiming to be caring for their close family member.
 - The plaintiff only spent 40 minutes visiting his mother who was recovering from surgery before going to the fair.
 - The leisure activities attending a fair were unconnected with the care he was allegedly providing and therefore the employer properly terminated his employment.
- In contrast, *Smith v Yelp, Inc.*, 2021 WL 1192576 (ND IL March 30, 2021) (unpublished), a plaintiff employee requested a vacation leave to take a trip to Thailand. The employer denied the request, and the plaintiff then took FMLA leave after being diagnosed with sciatica and a herniated disc, which prevented her from being able to sit for long periods of time.
 - Nonetheless, while on FMLA leave, the employee took the trip to Thailand. After returning, the employer terminated the plaintiff's employment.
 - The court granted the employer's motion to dismiss agreeing with the argument the plaintiff was dishonest about her medical condition, giving that flying to Thailand would involve sitting and bending for a long period of time.

Investigating Potentially Fraudulent Use of Leave

- *Porter v Jackson Township Highway Department*, 2025 U.S. App Lexis 15766, 2025 WL 1742934 (6th Circuit 2025) (unpublished), the plaintiff sustained a shoulder injury outside work and took FMLA leave.
 - Upon returning, he requested light duty work under the FMLA leave, but instead, took vacation leave followed by unpaid leave.
 - The employer received reports that the plaintiff employee was engaging in manual labor inconsistent with his stated medical restrictions.
 - The employer hired an investigator who captured video footage of the plaintiff lifting and carrying items and instructing another person on how to cut a sidewalk.
 - The employer terminated the employee's employment.
 - The 6th Circuit affirmed the decision to dismiss the case, concluding the plaintiff failed to demonstrate that the employer's stated reason for terminating was pretextual.

Investigating Potentially Fraudulent Use of Leave

- An employer may terminate an employee for fraudulent use of leave if it conducts a thorough investigation and has an honest, reasonable basis to believe misuse occurred.

Danger v Union Pacific RR Company,
2019 WL 3249606 (CD California June 3,
2019).



FMLA Basics: Attendance

- Employee need not expressly assert rights under FMLA or even mention FMLA when calling in for the first time
- Burden and duty to identify the absence as FMLA-qualifying is on the employer (usually supervisor)
- Employee must specifically reference the qualifying reason for the FMLA when employee is already certified and seeking additional time off



FMLA Basics: Recertification



- When the certification expires by its terms, employee must provide updated CHP for future absences to be covered
- May request recertification every six months in connection with an absence by the employee

Complex Issues: Recertification

- **Exceptions:**
 - May request recertification no more often than time stated on form or 30 days, unless:
 - Circumstances have changed significantly; or
 - You receive information casting doubt on the reason for absence



Complex Issues: Recertification

- “Change in Circumstances”
 - Items in CHP changed significantly
 - Duration/frequency
 - Nature or severity of illness
 - Pattern of FMLA leave used suspiciously or in conjunction with other days off
 - Other suspicious circumstances
 - You may provide health care provider absence patten and ask if need for leave consistent with pattern of absences
- “Casts Doubt”
 - Example – CHP states 4 weeks of leave needed for knee surgery and recuperation, employee is seen playing softball in company league in 3rd week

FMLA Basics: Light Duty

- No obligation to offer light duty under FMLA (but consider ADA)
- Cannot require early return by offering light duty
- Time voluntarily spent on light duty does not count against FMLA



FMLA Basics: Supervisors

- Individual liability
- Usually first line of interaction with employee
- Need to document reasons stated by employee for absence (verbatim)
- Need to notify HR



FMLA Basics: Failure to Return

- Communicate with the employee before expiration
- Send a “best evidence” letter
- Engage in the “interactive process”
- Consider all ADA/STD/LTD issues



QUESTIONS?



Thank You



Marshall W. Grate
mgrate@clarkhill.com
616-608-1103

Legal Disclaimer

This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.