

# The Second Wave of FMLA Challenges Faced by Employers



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# Agenda

- Geared for the FMLA professional (or those with the duty to administer the FMLA)
- Will cover the background & impact of the FMLA
- Will explain 90% of the new amendments in 45 minutes
- You will leave with what you need to know to comply in most situations in light of the amendments

# Background to the FMLA

- Early stage Clinton Administration law
- Adopted on anecdotal testimony
- Mixed business community reaction
- Recent amendments, regulations and proposed regulations

# Impact of the FMLA on Employers

- FTE increase
- \$4.8 billion in lost productivity
- \$10.3 billion in temporary replacements
- \$5.9 billion in increased healthcare costs
- Increased HR staff

## Is this your mindset?

- Tempting HR professional logic:
  - I give FMLA anytime someone asks
  - This liberal give away prevents trouble
  - So far so good

## Potential Impact of the New Regulations

- FMLA interference claims will rise
- Waiver of certain defenses tied to notification
- If you did not write it down, it didn't happen?

# Tennis – a useful analogy

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# The employer serves

- Who has the obligation?
  - The ball is almost never on both sides of the court.
- The employer serves – give notice
- If employer does not serve, the employee never has to return the serve

# The employee returns serve

- Providing notice of the need for leave
  - Who – an employee must call
  - What – the employee must say
  - When – the employee must call in
  - Where – the employee must call
  - How - the employee must call
  - Why – the employee must follow these rules

# Employer's volley

- Consequence of late notice
- Approve leave or assess eligibility and inform within 5 business days
- Who is eligible?
- Employer provides information to employee
  - Eligibility; Exhaustion of PTO; Terms/Conditions
  - Request verification of FMLA coverage

## The ball goes back and forth

- At least 15 days to return paperwork
- Absent excuse, begin counting absences thereafter
- 6 Basic types of leave:
  1. EE's serious health condition
  2. 1<sup>st</sup> degree relative with serious health condition
  3. Birth and bonding leave
  4. Adoption/foster care
  5. Qualifying exigency leave
  6. Leave to care for injured service member

## Employer returns the ball

- Assess the returned certification form
- Send “determination notice” to employee
- If incomplete, return it to employee for another 7 day period to cure problem
- If still defective, contact health care provider after obtaining HIPPA release
- FMLA may be denied

## The volley continues

- While the employee is out, track the leave
- Upon return, employer may require return to work statement some of the time
- What if the employee does not return at expiration of leave, or 12 weeks?
  - Extension?
  - Comparable leave?
  - ADA?

Until finally . . . . the point ends!



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# Summary

- We have covered 90% of the more than 70,000 words in the new regulations in 45 minutes
- You need to focus on the details of the new FMLA
- Even your first-line managers need to know about FMLA and should receive some training to recognize the “return of serve”
- Complying with these tips will put you in much better position than those who are not trying to comply