TEXAS YOUNG LAWYERS ASSOCIATION

FMLA

GUIDE FOR EMPLOYERS

THE FAMILY AND MEDICAL LEAVE ACT

FMLA Guide for Employers

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FMLA Guide for Employers

Introduction

The Family and Medical Leave Act ("FMLA") raises challenges for human resource professionals. The statute is complex and vulnerable to several problems, including misuse by employees and misunderstanding by employers. Failure to properly follow FMLA procedures can subject employers to thousands of dollars in lawsuits. This guide discusses the substantive requirements of the FMLA. The information in this guide, and the information in the resources referenced in this guide, is provided as a resource of general information and is not intended to replace legal advice. If you need legal assistance related to any of the topics discussed in this guide, you should consult an attorney.

What Is the Family and Medical Leave Act (FMLA)?

Congress enacted the FMLA in 1993 to assist employees with balancing work and personal obligations. Under the FMLA, employees need not choose between the two during times of crisis. This law allows eligible employees to take unpaid job-protected leave for certain family and medical reasons. During the leave the employee is also entitled to continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave.

The statute outlines the following purposes:

1. Balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

2. Entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;

3. Accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;

4. Accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, minimizes the potential for employment discrimination on the basis of sex by ensuring that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and

5. Promote the goal of equal employment opportunity for women and men, pursuant to such clause.

Am I a Covered Employer?

The FMLA only applies to the following categories of employers:

- **Private-sector employers** who employ fifty (50) or more employees for each working day during each of twenty (20) or more calendar workweeks in the current or preceding calendar year are covered employers.

- **Public agencies** are covered employers without regard to the number of employees employed. Public agencies include the federal government, the government of a state or political subdivision of a state, and an agency of the United States, a state, or a political subdivision of a state, including counties, cities and towns, or any interstate governmental agency.
- **Public elementary and secondary schools** are covered employers without regard to the number of employees employed. (Public school boards are included.)
- **Private elementary and secondary schools** are covered employers without regard to the number of employees employed.

Employers may be covered under the FMLA if they are **Integrated Employers** (e.g., a single corporation comprising several divisions, locations, or establishments). Thus, all employees of an integrated employer, regardless of location, are counted as employees for the purpose of coverage under the FMLA. In determining whether your business may be considered an integrated employer, the following factors should be considered:

- Is there common ownership and/or financial control between two or more related entities?
- Do the entities have common management?
- Are operations interrelated?
- Are labor relations centralized?

In some instances, there may be **Joint Employers** covered under the FMLA Joint Employers occur when two or more business entities exercise some level of control over the working conditions or work of an employee (e.g., a temporary employment agency supplying an employee to an employer). In determining coverage under the FMLA, the Joint Employers must count the employee even if the employee is only maintained under one of the payrolls.

If you are a **Successor Employer** (i.e., a successor-in-interest that takes over the business operations of a covered employer) you may be covered under the FMLA if some of the following factors apply:

- You are providing similar jobs and working conditions.
- You are continuing the same business operations.
- You are providing similar products or services.

- You are using the same location and similar equipment and production methods.
- You are continuing the same work force and supervisor structure.

Determining whether you are a covered employer is crucial. It is prudent to make this determination at the outset as covered employers have numerous obligations under the FMLA.

What Are My General Obligations and Responsibilities Regarding Notice Under the FMLA?

General Notice

All covered employers must provide a general notice of FMLA rights to their employees, namely:

- Employers must display or post a general notice (referred to as the "Poster"). The Poster must provide employees information about the FMLA with the general notice.
- Employers must provide the general notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring. In either case, distribution may be accomplished electronically.

The Poster

The poster must be displayed in plain view in an area where all employees and applicants can readily see the poster (e.g., a break room). The text must also be large enough so that it can easily be read. The poster must explain the FMLA provisions and provide information on how to file a complaint with the Wage and Hour Division of the Department of Labor. Even if you do not have any employees that are currently eligible for FMLA leave, you must still display the poster.

If a significant portion of your workforce does not read or write English, you must provide the general notice in a language that the employees can read and write. The Wage and Hour Division has posters in Spanish available at the Wage and Hour Division closest to your office or online at the Department of Labor website.

Eligibility Notices

After an employer determines an employee's FMLA eligibility, the employer must provide an **Eligibility Notice** to the employee. This notice may be provided orally or in writing, but at a minimum must inform the employee whether he or she is eligible for FMLA leave. If the employee is not eligible, the employer's notice must provide at least one reason why the employee is not eligible, such as the employee has not met the hours of service with the employer during the 12-month period. Employers may use the optional Form WH-381 (**Notice of Eligibility and Rights and Responsibility**) to provide such notification to employees. Examples are available from the nearest office of the Wage and Hour Division or on the Internet at **www.dol.gov/whd**. If an employee needs a translated version of this Notice, the employer must provide it.

Absent extenuating circumstances, the employer must provide this notice to the employee within five (5) business days of the initial request for leave or learning of an employee's potentially FMLA-qualifying leave. An employer should act diligently and timely provide the employee with this notice. Failure to do so could lead to an employee's legal claim that the employer interfered with the employee's exercise of FMLA rights.

Subsequent Need for FMLA Leave or Changed Status in Eligibility

If an employee provides notice of a subsequent need for FMLA leave during the applicable twelve (12) month period due to a different FMLA-qualifying reason, and the employees eligibility status has not changed, no additional eligibility notice is required.

If, however, the employee's eligibility status has *changed* (e.g., if the employee has not met the hours of service requirement in the twelve (12) months preceding the commencement of leave for the subsequent qualifying reason or the size of the workforce at the worksite has dropped below 50 employees), the employer must notify the employee of the change in eligibility status within five business days, absent extenuating circumstances.

Rights and Responsibilities Notice

Employers must provide written notice detailing the specific expectations and obligations of the employee and explaining any consequences for the failure to meet these obligations. The employer is generally obligated to translate this

notice if needed. The employer must provide this notice to the employee each time the eligibility notice is provided to the employee, within five (5) business days of having notice of the employee's need for leave. If leave has already begun, the notice should be mailed to the employee's address of record. Such specific notice must include, as appropriate:

1. That the leave may be designated and counted against the employee's annual FMLA leave if qualifying and the applicable twelve (12) month period for FMLA entitlement;

2. Any requirements for the employee to furnish certification of a serious health condition, serious injury or illness, or qualifying exigency arising out of covered active duty or call to covered active duty status, and the consequences of failing to do so;

3. The employee's right to substitute paid leave, whether the employer will require the substitution of paid leave, the conditions related to any substitution, and the employee's entitlement to take unpaid FMLA leave if the employee does not meet the conditions for paid leave;

4. Any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments, and the possible consequences of failure to make such payments on a timely basis (i.e., the circumstances under which coverage may lapse);

5. The employee's status as a key employee and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial;

6. The employee's rights to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave; and

7. The employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave.

An example notice of rights and responsibilities may be obtained from local offices of the Wage and Hour Division or from the Internet at **www.dol.gov/whd**. Employers may adapt the example notice as appropriate to meet these notice requirements. The notice of rights and responsibilities may be distributed electronically so long as it otherwise meets the requirements of section 825.300 of the FMLA. *See* 29 C.F.R. 825.300. Employers must also responsively answer questions from employees concerning their rights and responsibilities under the FMLA.

Optional Additional Information May Be Included with the Rights and Responsibilities

The notice of rights and responsibilities may (but the employer is NOT required to) include other information, such as whether the employer will require periodic reports of the employee's status and intent to return to work. The notice of rights and responsibilities may be accompanied by any required certification form.

Notification of Changes to Previous Notice of Rights and Responsibilities

If the specific information provided by the notice of rights and responsibilities changes, the employer shall, within five (5) business days of receipt of the employee's first notice of need for leave subsequent to any change, provide written notice referencing the prior notice and setting forth any of the information in the notice of rights and responsibilities that has changed. For example, if the initial leave period was paid leave and the subsequent leave period would be unpaid leave, notice of new arrangements for making health insurance premium payments may be required.

What Employees Are Eligible for FMLA Leave?

An employee qualifies for FMLA leave if the employee:

- works for a covered employer (discussed above);
- has maintained employment with the employer for at least twelve (12) months;
- has worked for at least 1250 hours for the employer during the previous twelve (12) months; and
- has worked at a worksite where that employer has fifty (50) or more employees within seventy-five (75) miles of that site.

Maintained Twelve (12) Months of Employment

It is important to note that the twelve months of employment need not be consecutive. Full-time, part-time, and seasonal work will generally count towards the twelve months of employment. If the employer maintains the employee on its payroll for any portion of a week, that week counts as a week of employment. Any combination of fifty-two (52) weeks satisfies the twelve (12) months of employment.

Worked 1250 Hours for the Employer/Hours of Service

The employee satisfies this requirement if the employee has worked a total of 1,250 hours in the twelve months immediately preceding the start of leave. For reference, 1,250 hours is about twenty-four (24) hours a week for a twelve-month period.

Workforce of 50 or More Employees within 75 miles of the Employee's Worksite

The employee count includes part-time, temporary, and seasonal employees in addition to the full-time employees. The seventy-five (75) mile requirement is determined by measuring the surface miles, using surface transportation over public streets, highways, and waterways by the shortest route possible. The "worksite" is generally the location the employee reports to, or where the employee is assigned. Worksites can be a single location, a group of buildings, or separate facilities in reasonable geographic proximity to each other.

If a person works from home, the employee's residence is not considered the worksite. The worksite will generally be the office to which they report or from which they receive work assignments. Similarly, for employees with no fixed worksite, such as construction workers, transportation workers, salespersons, etc., the worksite is the site to which they are assigned as their home base, from which their work is assigned, or to which they report.

Special Rules for Airline Flight Crew Employees on Hours of Service

The FMLA does provide special eligibility for airline flight crew employees, including pilots, co-pilots, and flight attendants. An airline flight crew employee's eligibility for FMLA leave is generally the same as other employees except for the hours of service requirement. Whether an airline flight crew employee meets the hours of service requirement is determined by assessing the

number of hours the employee has worked or been paid over the previous twelve (12) months. An airline flight crew employee will meet the hours of service requirement during the previous twelve (12) month period if he or she has worked or been paid for not less than 60% of the employee's applicable monthly guarantee and has worked or been paid for not less than 504 hours. The hours an airline flight crew employee has worked for purposes of the hours of service requirement is the employee's duty hours during the previous 12-month period. The hours an airline flight crew employee has been paid is the number of hours for which an employee received wages during the previous 12-month period. The 504 hours do not include personal commute time or time spent on vacation, medical, or sick leave.

What Are the Qualifying Reasons for FMLA Leave?

The FMLA permits eligible employees to take up to twelve (12) weeks of unpaid leave when one or more "qualifying reasons" exist (e.g., the birth of a child). Covered employers must grant leave to eligible employees for the following qualifying reasons:

1. For the birth of a son or daughter, and to care for the newborn child;

2. For placement with the employee of a son or daughter for adoption or foster care;

3. To care for the employee's immediate family members, which are the spouse, son, daughter, or parent with a serious health condition;

4. Because of a **serious health condition** that makes the employee unable to perform the functions of the employee's job;

5. Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty (or has been notified of an impending call or order to covered active duty status); and

6. To care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the covered servicemember.

Important Terminology

Covered Family Members:

- **"Spouse"** means a husband or wife as defined or recognized in the state where the individual was married, including common law marriage. Spouse also includes a husband or wife in a marriage that was validly entered into outside of the United States, if the marriage could have been entered into in at least one state.

- **"Parent"** means a biological, adoptive, step, or foster father or mother, or any other individual who stood in *in loco parentis* to the employee when the employee was a child. This term does not include "parents-in-law."

- **"Son or Daughter"** means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is under 18 years of age or who is 18 years of age or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence. The onset of a disability may occur at any age for purposes of the definition of an adult "son or daughter" under the FMLA.

- ***"In Loco Parentis"*** An individual stands in loco parentis to a child if he or she has day-to-day responsibilities to care for or financially support the child. The person standing in loco parentis is **not** required to have a biological or legal relationship with the child. Although no legal or biological relationship is necessary, grandparents or other relatives, such as siblings, may stand *in loco parentis* to a child under the FMLA where all other requirements are met. The *in loco parentis* relationship exists when an individual intends to take on the role of a parent. Similarly, an individual may have stood *in loco parentis* to an employee when the employee was a child even if the individual has no legal or biological relationship to the employee.

"Incapacity" means inability to work, attend school or perform other regular daily activities due to the existence of, treatment for, or recovery from a serious health condition. This term is discussed below.

"Inpatient care" means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity, or any subsequent treatment in connection with such inpatient care.

"Serious health condition" means an illness, injury, impairment, or physical or mental condition that involves inpatient or continuing treatment by a healthcare provider. Examples of serious health conditions under the FMLA include:

- Pregnancy;
- Overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity or any subsequent treatment in connection with the overnight stay;
- Incapacity plus a subsequent treatment or period of incapacity relating to the same condition;
- Some chronic conditions; and
- Some permanent or long-term conditions.

Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) **are not** serious health conditions unless inpatient hospital care is required or complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness or allergies may be serious health conditions, but only if all the conditions of this section are met.

For a more information regarding qualifying conditions under the FMLA, please see the Department of Labor Fact Sheet available at: **https://www.dol.gov/whd/regs/compliance/whdfs28f.pdf**; see also **https://www.dol.gov/whd/fmla/employerguide.pdf**.

"Treatment" includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. **Treatment does not** include routine physical examinations, eye examinations, or dental examinations. A regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a healthcare provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

Is There a Medical Certification Involved?

When leave is taken due to the health condition of the employee or his/her family member, an employer may require the employee to obtain a medical certification from a healthcare provider that sets forth the following information:

1. The name, address, telephone number, and fax number of the healthcare provider and type of medical practice/specialization;

2. The approximate date on which the serious health condition started, and its likely duration;

3. A statement or description of appropriate medical facts regarding the patient's health condition for which FMLA leave is requested. The medical facts must be sufficient to support the need for leave. Such medical facts may include information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation or treatment (e.g., physical therapy), or any other regimen of continuing treatment;

4. If the employee is the patient, information sufficient to establish that the employee cannot perform the essential functions of the employee's job as well as the nature of any other work restrictions, and the likely duration;

5. If the patient is a covered family member with a serious health condition, information sufficient to establish that the family member is in need of care, and an estimate of the frequency and duration of the leave required to care for the family member;

6. If an employee requests leave on an intermittent or reduced schedule basis for planned medical treatment of the employee's or a covered family member's serious health condition, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the dates and duration of such treatments and any periods of recovery;

7. If an employee requests leave on an intermittent or reduced schedule basis for the employee's serious health condition, including pregnancy, that may result in unforeseeable episodes of incapacity, information sufficient to establish the

medical necessity for such intermittent or reduced schedule leave and an estimate of the frequency and duration of the episodes of incapacity; and

8. If an employee requests leave on an intermittent or reduced schedule basis to care for a covered family member with a serious health condition, a statement that such leave is medically necessary to care for the family member, which can include assisting in the family member's recovery, and an estimate of the frequency and duration of the required leave.

The Wage and Hour Division provides optional forms for certification when the employee's need for leave is due to the employee's own serious health condition (WH-380E) and when the employee needs leave to care for a family member with a serious health condition (WH-380F). These forms are available online at **www.dol.gov/whd**.

The Certification Process

If required, the employer should follow these steps for certification:

1. Employer notifies employee of the need for a certification;
2. Employee then provides a completed certification within fifteen (15) calendar days, absent extenuating circumstances; and
3. Employer notifies the employee in writing whether the leave will or will not be protected under the FMLA.

If the certificate is incomplete or insufficient, the employer must provide the employee with at least seven (7) calendar days to correct any deficiency in the certification. If it is not practicable under the particular circumstances for the employee to correct any deficiency in the seven-day period despite the employee's diligent good faith efforts, the employer should provide additional time. If an employee wholly fails to provide the requested certification, an employer may deny FMLA.

Though not required, an employer may identify in writing to the employee the deficiencies in the medical certification and request that the employee provide corrected information to the employer within a certain amount of time. Employers doubting the validity of a medical certification may require the employee to obtain a second or third opinion (if the first and second opinions differ) at the employer's

expense. Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits under the FMLA, including maintenance of group health benefits. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave and may be treated as paid or unpaid leave under the employer's established leave policies.

What Are the Employee Leave Entitlements Under the FMLA?

The FMLA entitles eligible employees up to twelve weeks of unpaid, job-protected leave per year. The FMLA also requires that the employer maintain the employee's group health benefits during the leave.

Intermittent Leave or Reduced Schedule Leave

Intermittent leave occurs when an employee takes leave in separate periods of time or reduces his or her scheduled work day or week for a single qualifying reason. Employees using intermittent leave receive the same protections as employees taking leave all at once. The leave cannot exceed twelve (12) weeks. If leave is for a planned medical treatment, the employee must make reasonable efforts to schedule the procedure so as to not unduly disrupt the employer's business operations.

Military Leave (Exigency Leave)

Covered employers must grant up to twelve (12) weeks of unpaid, job-protected leave during any twelve (12) month period for a qualifying exigency arising from the employee's spouse, son, daughter, or parent being on covered active duty or having received notification of an impending call or order to covered active duty.

Covered active duty means duty during deployment of a member of the Regular Armed Forces to a foreign country or duty during deployment of the member with the Armed Forces to a foreign country under a call or order to active duty in support of a contingency operation for members of the Reserve components of the Armed Forces (e.g., National Guard).

Qualifying exigencies under this type of leave include making alternative childcare arrangements for children of a deployed military member, making financial or legal arrangements to address the absence of the military member, as well as attending certain military ceremonies.

Military Caregiver Leave

An eligible employee may take up to twenty-six (26) weeks of leave during a single twelve (12) month period to care for a covered servicemember with a serious injury or illness, when the employee is the spouse, son, daughter, parent, or next of kin of the servicemember. Covered servicemembers under this provision include current members of the Armed Forces undergoing medical treatment or therapy, in outpatient status, or on the temporary disabled list for a serious injury or illness. The term also includes Veterans of the Armed Forces discharged within the five-year period before the family member first takes military caregiver leave and the servicemember is undergoing medical treatment, recuperation, or therapy for a qualifying serious injury or illness. Dishonorably discharged veterans do not qualify as a covered servicemember for purposes of the FMLA.

What Is Required When the Employee Returns from Leave?

The employer must restore the employee to his or her original job or an equivalent position with equivalent pay after returning from FMLA leave. Though the employee is not guaranteed the actual job held prior to leave, the equivalent job must be virtually identical in terms of pay, benefits, and other terms and conditions of employment, including shift and location. The employer may not count the employee's use of FMLA leave against the employee under a "no-fault" attendance policy.

There are some limitations to FMLA protections for employees. The employee taking leave is not protected from certain actions that would have affected the employee regardless of whether the employee was on leave or not. For example, if an employee worked the third shift and the employer completely eliminated the third shift, the employee would not be entitled to return to that same shift. An employer may also deny job restoration to a "key employee." A **"key employee"** is a salaried FMLA-eligible employee who is among the highest paid 10% of the employer's employees within 75 miles of the worksite. The employer may deny job restoration if it is necessary to prevent "substantial and grievous economic injury" to the business operations, not whether the absence of the employee will cause such substantial and grievous injury. This standard is different and more stringent on employers than the undue hardship test under the Americans with Disabilities Act.

What Is the General Procedure When an Employee Notifies the Employer of the Need for FMLA Leave?

Before an employee may take FMLA leave, he or she must notify the employer of the need for leave, identify a qualifying reason under the FMLA, and state the duration of the leave. If an employee seeks leave for a serious health reason or to care of a family member's serious medical condition, the employer may require that a healthcare provider certify the need for leave. If the reason for leave is foreseeable, the employee must give the employer thirty (30) days' notice.

Employers may require that an employee exhaust vacation time, personal time, sick time, or any other accrued paid leave before using FMLA time. The use of the accrued paid time does not extend the twelve (12) week leave period. During the employee's leave, employers must maintain the employee's health benefits on the same terms as they existed before the employee took leave and employees must pay their portion of the benefits.

At the end of the twelve (12) weeks, the employee may return to work in the same or equivalent position with equivalent benefits and pay as before the employee took leave. On the other hand, if an employee does not return to work or is unable to perform his job functions when his leave expires, the employee's job is no longer protected.

Spouses who are employed by the same company are eligible for a combined twelve (12) weeks of leave for a single event. In other words, each employee is eligible for twelve (12) weeks of FMLA leave, but between the two of them, they may take only twelve (12) weeks of combined leave for a single event.

As an Employer, What Actions Am I Prohibited from Taking Under the FMLA ?

The FMLA and the FMLA regulations prohibit the following actions:

- Interfering with, restraining, or denying the exercise of, or the attempt to exercise, any FMLA right;
- Discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise any FMLA right;
- Discharging or in any other way discriminating against any person, whether or not an employee, for opposing or complaining about any unlawful practice under the FMLA; or

- Discharging or in any other way discriminating against any person, whether or not an employee, because that person has —
  - Filed any charge, instituted, or caused to be instituted, any proceeding under or related to the FMLA;
  - Given, or is about to give, any information regarding an inquiry or proceeding relating to any right under the FMLA; or
  - Testified, or is about to testify, in any inquiry or proceeding relating to a right under the FMLA.

Violations of the FMLA or the Department of Labor regulations constitute interfering with, restraining, or denying the exercise of rights provided by the FMLA. The Wage and Hour Division administers and enforces the FMLA for the majority of workers. The Division investigates complaints. If the Division determines there has been a violation that cannot be satisfactorily resolved, the Department of Labor may bring an action in court to compel compliance. Employees may also bring private civil suits against an employer for violating the employee's FMLA rights. Generally, any allegation of a violation of the FMLA must be brought within two (2) years from the date of the violation.

What Are the Damages and/or Penalties an Employee May Seek for an Employer's Violation of the FMLA?

Under the FMLA, an employee may seek damages for the following:

1. The amount of any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation, such as back pay; or

2. In a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks (or 26 weeks, in a case involving military leave) of wages or salary for the employee.

In addition, an employee may also recover:

- Interest on the amount described in 1 or 2 above at the prevailing rate;
- Equitable relief including reinstatement or promotion; or
- Attorneys' fees and costs, including reasonable expert witness fees and other costs of the action.

If the employee successfully establishes the employer violated the FMLA, the court will award liquidated damages. Liquidated damages are in essence a penalty and are in addition to actual damages. They are calculated as an amount equal to the amount of damages awarded for the violation, plus interest at the prevailing rate. If an employer can demonstrate that the act or omission constituting the violation under the FMLA was in good faith and that the employer had objectively reasonable grounds to believe that the act or omission did not violate the FMLA, the court may decide not to award liquidated damages.

Given the potential exposure to employers for violating the FMLA for actual damages and the potential for double recovery to the employee through liquidated damages, employers should take precautions to ensure compliance, before denying an employee's request for FMLA leave. Even when the circumstances may seem like the employee is obviously not eligible, it is prudent to seek advice from legal cousel prior to denying the leave.

Additional Resources:

- **Wage and Hour Division Website:**
  http://www.wagehour.dol.gov

- **Wage and Hour toll-free information and helpline:**
  1-866-4USWAGE (1-866-487-9243)

- **Employer Posters:**
  https://www.dol.gov/WHD/foremployers.htm#posters

- **Prototype Forms:**
  https://www.dol.gov/WHD/forms/index.htm

- **Texas Workforce Commission's FMLA Fact Sheet:**
  http://www.twc.state.tx.us/news/efte/family_and_medical_leave_act_fmla_.html

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