

# FMLA TRAINING

FOR MANAGERS  
AND SUPERVISORS



WHITEPAPER

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# FMLA TRAINING for Managers and Supervisors

April had been working for years as a 911 emergency operator when she was diagnosed with cancer, for which she took leave under the federal Family and Medical Leave Act (FMLA). April was also dealing with bipolar disorder, post-traumatic stress disorder, anxiety, depression, and migraines, all which worsened after the cancer diagnosis.

At one point, she had a particularly severe migraine that required her to leave work. She missed three days of work during which she visited a doctor and received medication. Despite the FMLA protections for the absence, April was given a verbal warning for excessive absenteeism.

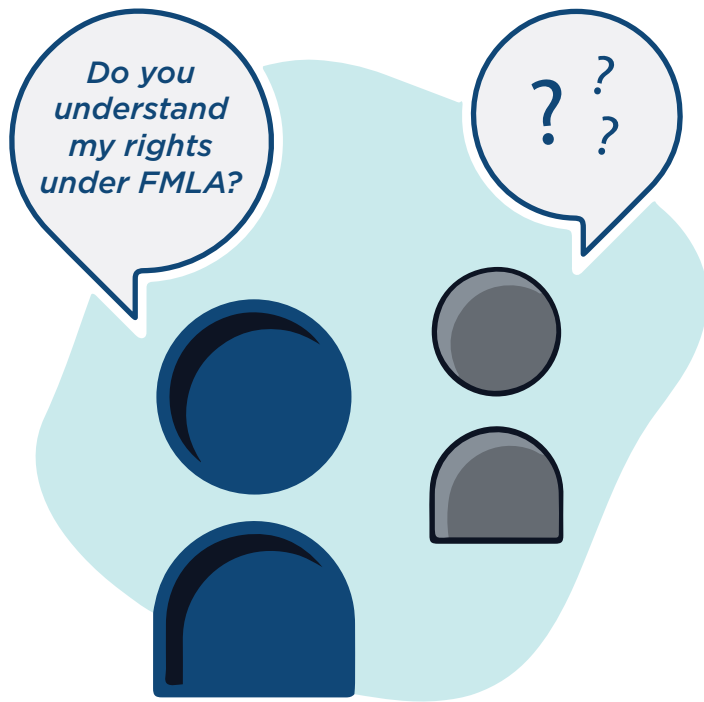
April, however, continued to take leave as needed, including when a severe anxiety attack required her to be hospitalized. During this leave, Debbie, April's supervisor, told several of April's coworkers that she was having mental health issues, was committed to a psychiatric hospital, had attempted suicide, and that she was going to be fired.

April did return to work but asked that, because of her medication's side effects, she be allowed to answer telephone calls instead of working on the radio and dispatch. Debbie denied the request. A few days later, April had another severe episode of anxiety and depression, for which she was taken to the emergency room. There, it was determined that the episode was caused by one of her medications.

A few days later, April explained to her employer that she no longer took the medication that was causing the issues, so she was ready to return to work. Instead, she was fired.

April sued, claiming that the employer both interfered with her FMLA rights and retaliated against her for exercising those rights.

In court, the employer tried to argue that April had declined to take FMLA leave, and as such, she was terminated because she had no



*If you were to ask your supervisors and managers how comfortable they are with carrying out their FMLA obligations, how would they answer?*

other leave that would protect her job. The employer also felt that April could not be allowed to handle life and death emergency calls in her condition.

Not only did the court reject the employer's argument, it also ordered that the employer pay \$81,056 in lost wages and \$100,000 for emotional pain and anguish, plus another \$81,056 in liquidated damages and \$360,491 for attorneys' fees, for a total of \$622,603.

Unfortunately, this case is one of many that illustrate how supervisors can expose an employer to expensive claims. April was entitled to FMLA leave for her qualifying reasons and terminating her close on the heels of her exercising her FMLA rights increased the risks. Since employees have a right to have their medical information kept confidential, the supervisor also violated the FMLA when she told April's coworkers about her condition.

Not to be overlooked, the employer also failed to consider its obligations under the Americans with Disabilities Act when April requested a workplace change (alternative work) because of her medical condition.

A little manager training could have gone a long way in avoiding this claim.

*- Allen v. Banks County, No. 2:16-cv-0076, Georgia Northern District Court, December 13, 2018.*

While the names of the players in this case are fictionalized, the facts of the case are not.

A good place to start thinking of manager training is to answer the usual questions of why, who, what, when, and how. Training can take place almost anywhere, so the "where" is limited only by the imagination.

*Note: For purposes of this whitepaper, the term "manager" will be used to include supervisors as well.*

## WHY

Training has many benefits. Ultimately, it is often cheaper than dealing with a court case, not to mention the negative impact a court case could have on a company's brand.

Employers are not required by law to train managers on the FMLA. Doing so, however, could help avoid issues and, in a way, it could also help employees, as training could help reduce the risk of having their FMLA rights violated.

### YOU TRAIN YOUR MANAGERS ON THE FMLA TO AVOID MISSTEPS BECAUSE:

Missteps lead to claims.



Claims lead to expenses and time lost.



Claims can negatively impact your brand.

Compared to these potential consequences,  
**TRAINING IS CHEAPER.**

All too often, employers wind up defending their actions in court because a manager made some missteps in regard to the FMLA. Even if a situation does not end up in court, employers can reduce their risks, and maybe even lighten a leave administrator's workload when it comes to administering FMLA leave with a little manager training.

Employers can take heed of some practical tips on what managers need to know to help their company as a whole correctly handle FMLA leave.

## INDIVIDUAL LIABILITY

Another reason to train managers is because the FMLA includes a provision whereby individuals who have a hand in violating it can be named individually in a suit. This can include not only a company's leave administrator, but also managers. So, not only can a plaintiff (a.k.a. an irate employee) go after the company, they can go after individuals who violated the law.



*"Employers covered by FMLA also include any person acting, directly or indirectly, in the interest of a covered employer to any of the employees of the employer..." 29 CFR 825.104(a)*

According to at least one court, where a manager has sufficient control over the conditions and terms of the employee's employment, there is greater risk of that manager being individually named for FMLA missteps. *Narodetsky v. Cardone Industries, Inc.*, E.D. Penny, No. 09-4734, February 24, 2010.

So, to help pique their interest, it can help to inform managers that their FMLA missteps could result in them being involved in a court case. Even if your company has an employer practices liability insurance (EPLI) policy, every manager might not be individually named in it, and quite a few cases had individuals — HR folks and managers — individually named.

## WHO

Because they are on the front lines with employees and are often an employee's first contact regarding time off, it's only logical to train managers. If there is anyone else, however, to whom employees might turn to ask for time off, they should also be trained.

Even if you have a third-party leave administrator (TPA) handling employee leave, some situations might sneak past the TPA, such as when an employee gets an emergency call indicating that a family member has been in an accident. The employee tells his manager and rushes out of the workplace. Did the employee contact the TPA? Probably not. Could the absence still be FMLA leave? Yes. The employee might contact the TPA eventually, but you might want to be aware of the situation, since, once the employee told his manager, the FMLA clock began ticking.

In some organizations, employees are to call a specific company number or person (not a TPA) to report FMLA leave. But what if employees don't know what reasons qualify for FMLA leave? Likely they will simply ask their managers for time off.



*Use the certification to determine if an employee or family member has a serious health condition.*

## WHAT

Managers don't need to be intimately familiar with the FMLA but should know enough to steer clear of trouble.

What you will specifically include in training will be based on your needs, your workplace, your culture, your goals, location, and so on.

## FMLA BASICS

Managers don't need to know the history of the FMLA. Training should, however, stress that the FMLA is an employee entitlement law. Employers (or managers) can't simply "offer" FMLA leave, and even if an employee's leave poses hardship to the manager, the department, or the company, the employee is still entitled to it. The FMLA does not have a hardship defense. Therefore, denying the entitled leave would be a violation.

### *Employee eligibility*

Training might, however, indicate that not all employees are *eligible* to take FMLA leave. They first need to meet the eligibility criteria. They need to have worked for the company for at least 12 months, worked at least 1,250 hours in the 12 months before leave is to begin, and work at a site with at least 50 company employees within 75 miles.

### *Qualifying reasons*

Managers benefit from having an idea of what reasons qualify for FMLA leave so they don't think "FMLA" if an employee has a dead car battery or was invited to a family bar mitzvah. If they come across situations where the line is pretty fine between whether the reason qualifies or not, it's best for managers to err on the side of caution.

## FMLA training could include the following:

- ✓ FMLA basics,
- ✓ Recognizing leave notice,
- ✓ Responding appropriately,
- ✓ Knowing when to involve HR,
- ✓ Applying policies,
- ✓ Understanding confidentiality,
- ✓ Knowing limits on contacting FMLA employees on leave, and
- ✓ Avoiding retaliation.

Managers should remember this basic list of qualifying reasons:

- ✓ Birth of child
- ✓ Adoption or foster placement of child
- ✓ Employee's own serious health condition
- ✓ Family member's serious health condition
- ✓ Qualifying exigency caused by family member's military duty
- ✓ To care for a family member with serious military-related condition

Perhaps it would help to give this list to all managers to pin up on their wall for reference. Providing some basic facts, such as situations in which an employee or family member is hospitalized or incapacitated for three days, is absent for any period for pregnancy, chronic conditions, or long-term conditions, can give some context as to what constitutes serious health conditions. Employees often call their managers with this type of information, and managers should listen carefully and apply what they learn from training.

#### *How much leave*

Managers should also have an idea of how much FMLA leave to which an eligible employee is entitled. Some may be surprised that it's 12 weeks (or 26 weeks for military caregiver leave).

Those 12 weeks fall within 12 months; it's not a once and done deal; it's 12 weeks in each 12-month period. Managers would, therefore, benefit from knowing which method you use to calculate the 12-month leave year period.

If, for example, you use the calendar year method, they will know that come January 1, the FMLA leave year resets. If you use a different method, such as the rolling backward method, the training likely doesn't have to go into detail, but if a manager is wondering how much FMLA leave an employee might have left, they can ask you.

#### *Types of leave*

Managers can also benefit from knowing that the FMLA has three general types of leave:

- ✓ Continuous,
- ✓ Intermittent, and
- ✓ Reduced schedule.



*Managers should also have an idea of how much FMLA leave to which an eligible employee is entitled.*

The law allows employees to take time off in big chunks or in little pieces, such as an hour, or even to reduce their regular work schedule. Managers should know that an employee might never even exhaust the 12 weeks of leave. So, even if an employee needs to be late or leave early for an FMLA-qualifying reason, managers should be aware of this. It could very well irritate managers that employees have these rights, so it's best to stop any unwanted responses from managers before they happen.

## RECOGNIZING LEAVE NOTICE

A common way managers trip up in relation to the FMLA is they fail to recognize when an employee puts them on notice of the need for leave. All too often, leave administrators face situations where an employee was out for two weeks for an FMLA-qualifying reason before the manager made the leave administrator aware of it.

An employee's manager could have acted very kindly and told the employee to take whatever time he or she needed. The manager, however, didn't tell you (the leave administrator) right away. Maybe you saw it in the payroll records or absence tracker. In any case, if the leave would qualify for FMLA protections, your company is technically in violation because you didn't give the employee an eligibility/rights & responsibilities notice within five days of the employee putting the employer (the manager) on notice of the need for the leave.

This area is likely where you might get your best bang for the buck with training. Employees don't need to even mention the FMLA or otherwise assert their FMLA rights. The notice of the need for leave can be provided in many ways. In one case, an employee's sleeping on the job was seen as notice. In another, an employee's crying was. Therefore, if managers have an inkling that an absence might be FMLA leave, they should act accordingly.

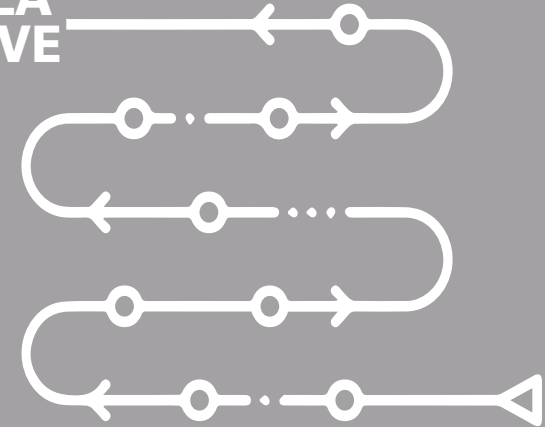
Managers might need to put aside what they would consider notice of the need for leave.

## RESPONDING APPROPRIATELY

Sometimes, managers won't be sure whether an employee is putting them on notice of the need for FMLA leave or not. In such situations, they may (and should) ask the employee some questions to help clarify. None of these ask for actual medical information but refer to the reasons that qualify for FMLA leave.

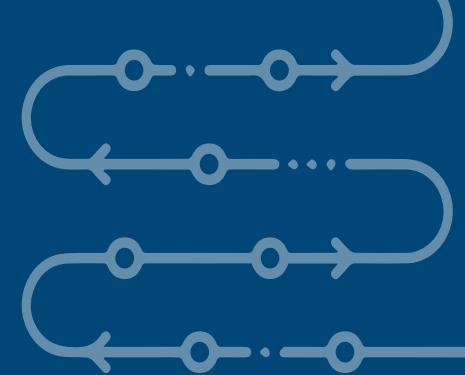
- ✓ When did the leave begin?
- ✓ How long do you expect to be out?
- ✓ Does the reason for the absence involve an overnight stay in a health care facility (for employee or family member)?

## FMLA LEAVE



*Employees don't need to even mention the FMLA or otherwise assert their FMLA rights.*





- ✓ Are you unable to perform job functions (if leave is for the employee's own condition)?
- ✓ Can your family member perform usual activities (if leave is for a family member's condition)?
- ✓ Is treatment involved?
- ✓ Is pregnancy involved?
- ✓ Is family military involved?

Managers should not ask employees for medical information, nor should they get angry or upset when employees need leave.

Some managers might want to deny the leave because it would cause hardship for the department or company. Unfortunately, the FMLA does not have a hardship defense. Even if an employee's leave causes problems, it may not be denied on that basis.

Showing animosity because an employee needs leave can be used against the company, should an employee sue. Such behavior isn't usually the only thing that drives employees to sue, but it can become part of the fact pattern of the case. Discouraging an employee from taking leave has also been seen as a violation.

In one court case, a VP terminated an employee because the employee was not "dependable," because she took FMLA leave (*Hall v. Life Care Centers*). In another case, an employee was hospitalized for a mental health condition, and she asked her son to notify her work. The son told his mom's boss about the situation since his mom could not speak at that time. The boss, however, demanded that the mom do the calling in, not the son. The mom didn't call in — she was unable to do so — and she was terminated as a no-call/no-show (*Boadi v. Center for Human Development*). The employers lost in these cases.

## KNOWING WHEN TO INVOLVE HR

You might want your managers to contact you with any suspicious absence, and that's fine, as long as managers can identify "suspicious." Otherwise, you might want managers to take on some of the work of leave administration by tackling the first part of the leave process — when employees provide notice of the need for leave. Remember, once an employee puts the company on such notice, the FMLA clock begins ticking, including the five days to get the employee an eligibility/rights & responsibilities notice.

So, if your managers can recognize a real or potential notice of the need for leave, and understand that the FMLA clock has started ticking, they will likely be fine with getting you in the loop about the absence when you want them to.

## APPLYING POLICIES

While the FMLA has enough details all by itself, managers might also need to be familiar with how your company's policies apply and interact with the FMLA leave. These could include paid time off policies since employees may choose to use (or you may require the use of) such paid time during otherwise unpaid FMLA leave.

Another policy that could apply is one that allows employees to take bonding leave on an intermittent basis, as managers usually want to know when to expect employees to be at work.

Other related policies might include when and how employees are to call in, how and when to report in while on leave, working a second job, how holiday pay is handled, fitness-for-duty certifications, and so on.

## UNDERSTANDING CONFIDENTIALITY

Managers need to understand the importance of keeping FMLA-related information, particularly medical information, confidential.

### CASE IN POINT:

Fred, an employee, developed a chronic and serious health condition with his genito-urinary system. As a result, he applied for FMLA leave. The certification included sensitive and detailed medical information. Fred's FMLA leave was approved. Unbeknownst to Fred, however, Mr. Slate, a manager, allegedly disclosed Fred's condition to Fred's coworkers and subordinates at a staff meeting at which Fred was not in attendance. Subsequently, when Fred was at work, these coworkers and subordinates began making fun about Fred's condition, complete with jokes and obscene gestures.

Fred complained about the activity, but the employer did not remedy the situation. This didn't sit well with Fred, so he sued.

The employer tried to get the case thrown out by arguing that Fred was given all the FMLA leave he requested.

Hold on there, said the court. Fred adequately argued his right to confidentiality and the employer breached that right when it (the manager) disclosed Fred's protected medical information during the staff meeting without his permission.



*Once an employee provides notice of the need for leave, the FMLA clock begins ticking, including the five days to get the employee an eligibility/rights & responsibilities notice.*



**Confidentiality** is a **right** in and of itself.

Confidentiality is a right in and of itself, so Fred won his argument.

- *Holtrey v. Collier Cty Bd of Commissioners*, M.D. Fla, 2:16-cv-00034, 1/12/17.

The manager in this case should have known better. Training could have helped avoid the whole court obligation. Of course, another issue in this story was why the sensitive information was shared with the manager in the first place. The leave administrator at this particular company might have benefited from some training, as well.

Since medical information needs to be kept separate from the general personnel file, if managers have their own satellite personnel files, they, too, will need to keep the medical information separate.

Speaking of medical information, one thing managers should never do is contact the employee's doctor directly regarding an FMLA situation. This is restricted to a health care provider, a human resource professional, a leave administrator, or a management official.

Employees may file claims solely based on the confidentiality provisions, and irritated employees are more prone to filing claims in general.

## **KNOWING LIMITS ON CONTACTING EMPLOYEES ON LEAVE**

Many employers and managers believe that they may not contact employees who are on FMLA leave at all. This is not true. You and managers may contact employees — even if it's about work — as long as the employee isn't asked to actually perform work. Asking an employee on leave where a particular file can be found is a lot different than asking the employee to work on the file.

Managers might also contact an employee to see how the employee is doing. Such contact should not be over-invasive, though. Employees shouldn't be bothered every day. You need to look at the facts of each employee leave situation.

## **AVOIDING RETALIATION**

Employees may file claims that their FMLA rights were interfered with, or that they were retaliated against for exercising those rights. If an employee takes FMLA leave, they should not be treated in such a way that they feel they are punished for taking the leave.

If managers have a negative knee-jerk reaction to an employee's leave, employees can have an easier time winning in court. If an employee is fired while on FMLA leave or soon after returning to work, the company is somewhat assumed to be at least a little guilty and needs to prove that the leave was not the reason for the action.

The action doesn't have to be termination. It could simply be treating the employee less favorably than before leave. This could be a demotion, removal from a project, pay decrease, a lesser title, fewer responsibilities, a reduction in authority, and so on.

## WHEN

When you hire or move individuals into management positions, you likely provide them with a variety of training. Hopefully, this training includes the FMLA. But ask yourself: If someone were to walk into your organization and ask any manager the following question, how would the manager respond? Here's the question:

"What would you do if Jane Employee called in during your busiest season and indicated that she had a migraine and would not be in today?"

To help fill in some blanks, here are some facts about this fictitious situation:

- ✓ The manager has been there for a few years.
- ✓ Jane has a deadline today which, if missed, would cause business delays.
- ✓ Part of the manager's performance evaluations stem from meeting productivity quotas.
- ✓ With Jane's absence, meeting this week's quota could be challenging.

Would the manager focus only on meeting production and perhaps deny the leave?  
Would he inform the company's leave administrator of Jane's absence?

The manager might have been trained on FMLA years ago but might not remember what he learned. Maybe his department is a small one and he's never actually had an employee use FMLA leave (that he knows of).

Therefore, you can probably guess that the next question is "how often do your managers have refresher FMLA training?"



*Retaliation is a hot item in employment law. The U.S. Department of Labor offers employees who exercise their legal rights resources to help combat employer retaliation.*

If you train once and think you're done, you might be in for an unhappy surprise if a manager were to not consider the FMLA in the scenario with Jane and ends up being named in a suit that he and your company interfered with Jane's FMLA rights.

## HOW

Training is application-based. If you want the training to stick, learners have to physically or mentally do something with the information learned. As humans, we retain 90% of what we say as we act. Therefore, simply *telling* managers all this stuff might not be as effective as having them put the learning into action. Maybe some role-playing scenarios would help. If you have high-tech professionals where you work, maybe they could come up with some gamification ways of having managers apply what they learned.

The average time an adult can sit, listen, and *understand* what is being said is 90 minutes. They can sit and listen with *retention*, however, for only 20 minutes. The average amount of time an adult can sit without any interaction is eight minutes.

Injecting a little fun or other emotion that makes it memorable can also help with training.

Understanding how adults prefer to learn will help to create an engaging learning environment that has the greatest impact on your audience — your managers. Think about when you discover an exciting new hobby and you want your friend, spouse, or child to share that hobby with you. How do you get them excited about it? You have to understand what it takes to get that person excited as well. Some people will want to simply hear about your new-found hobby, some will want to see you do it, and some will need to give it a try before getting excited about it. You get them excited by engaging them the way they like to learn and absorb information.

Most people enjoy all three learning styles: visual, auditory, and kinesthetic. It is important that you incorporate a variety of ways to learn to ensure a successful learning experience for your participants. Individuals retain most what they **say and do** during the training session, so you need to keep the sessions very interactive and engaging for adult learners and incorporate the various learning styles.

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Here's an idea: As a follow-up to initial training, every now and then send managers a series of brief scenarios with subsequent FMLA-related questions that capture how they would respond to the scenarios. This method would allow you to avoid having to get directly involved in training as you would if you were presenting to a room of people, but the training would require managers to think about how they would act.

## **SUMMARY**

Training managers and supervisors about the FMLA and their particular roles in helping your company comply can go a long way in keeping your employees happy and you and your company out of the courts. Managers don't need to become FMLA experts but should have a level of understanding commensurate with how much you want them to be involved.

## **TAKEAWAYS**

Now might be a good time to review your FMLA training to see who it is given to, how often, how it is delivered, and what it includes, particularly if the company has seen some related changes. Also, see if any refresher training is involved. If not, consider adding it and holding managers accountable for receiving it.

*"What I hear I forget, what I see I remember, what I do I understand."*

*~Confucius*



# FMLA Onsite Training Services

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- Who a family member is for the purposes of FMLA
- Specifics relating to military family leave under FMLA
- What qualifies as a "serious health condition"
- The three bases on which eligible employees may take FMLA leave
- The importance of the supervisor's role in following FMLA
- What questions can be asked to determine whether someone is eligible for FMLA leave

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