

# HR COMPLIANCE OVERVIEW

## Retaliation Under the FMLA

The federal Family and Medical Leave Act (FMLA), which generally applies to (among other entities) private-sector employers with 50 or more employees, provides eligible employees up to 12 workweeks of unpaid leave per year for family and medical reasons. To be eligible for leave, an employee generally must work for a covered employer; have worked 1,250 hours during the 12 months prior to the start of leave; work at a location where the employer has 50 or more employees within 75 miles; and have worked for the employer for 12 months.

The FMLA prohibits employers from retaliating against employees for exercising their rights or participating in matters protected under the FMLA. Retaliating against employees for exercising their rights can result in costly consequences for employers. Employees are also entitled to return to their same or an equivalent job at the end of their FMLA leave. This Compliance Overview provides employers with a summary of the FMLA's retaliation provisions.

### LINKS AND RESOURCES

- [The Employer's Guide to The Family and Medical Leave Act](#), a publication of the U.S. Department of Labor's Wage and Hour Division (WHD)
- [Fact Sheet # 77B: Protection for Individuals under the FMLA](#), a fact sheet from WHD
- WHD's [Field Assistance Bulletin No. 2022-02](#) on "Protecting Workers from Retaliation"

## Highlights

Key employee protections under the FMLA include the following:

- Employers are prohibited from retaliating against employees for exercising their rights or participating in matters protected under the FMLA; and
- Employees are entitled to return to their same or an equivalent job at the end of their FMLA leave.

If an employee's FMLA rights have been violated, the employee may be entitled to remedies such as compensation and benefits lost as a result of the violation.

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## Employer Prohibitions

Under the FMLA and its regulations, employers are prohibited from:

- 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; and
- 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.

In addition, all persons, whether or not employers, are prohibited from 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 in connection with 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.

Unlawful discharge under the FMLA includes constructive discharge. Constructive discharge occurs when an employer's actions in response to an employee's exercising their FMLA rights make the employee's work situation so intolerable that a reasonable person would quit or resign.

Additional examples of prohibited conduct include:

- Refusing to authorize FMLA leave for an eligible employee;
- Discouraging an employee from using FMLA leave;
- Using an employee's request for or use of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions;
- Counting FMLA leave under "no fault" attendance policies; and
- Failing to provide benefits to an employee on unpaid FMLA leave if the employer provides those benefits to employees who use other types of unpaid leave.

The following scenario provides an example of a worker penalized for using FMLA leave to care for a child.

Jaime takes approved FMLA leave to care for his seven-year-old daughter when she is in the hospital overnight and recovering from surgery. Jaime returns to work as scheduled but receives three negative attendance points for the days he used FMLA leave. Under his employer's no fault attendance plan, employees are allocated points for every absence from work, regardless of the reason for the absence. Employees are disciplined when they accrue a set number of points, and employees who accrue more than 10 points in a calendar year may be terminated.

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In the scenario above, assigning attendance points to Jaime’s FMLA-protected leave days would be prohibited. Under the FMLA’s anti-retaliation provisions, an employer may not use the taking of FMLA leave as a negative factor in employment actions and may not count FMLA leave days under no fault attendance policies. In an investigation, WHD would require that the employer remove the attendance points from Jaime’s employment record for the days he used FMLA leave to care for his daughter.

Any violations of the FMLA or its regulations constitute interfering with, restraining or denying the exercise of rights provided by the FMLA. For example, if an employer’s failure to timely designate FMLA leave as required by the regulations causes the employee to suffer harm, it may constitute interference with, restraint of or denial of the exercise of an employee’s FMLA rights.

Interference also includes manipulation to avoid responsibilities under the FMLA. Examples include:

- Transferring employees from one worksite to another for the purpose of keeping a worksite below the 50-employee threshold for employee eligibility under the FMLA;
- Changing the essential functions of the job in order to preclude the taking of leave; and
- Manipulating an employee’s work hours to avoid employee eligibility under the FMLA.

## REMEDIES

If an employee’s FMLA rights have been violated, available remedies include, but are not limited to:

- Compensation and benefits lost by reason of the violation;
- Other actual monetary losses sustained as a direct result of the violation; and
- Appropriate equitable or other relief, including employment, reinstatement, promotion or any other relief tailored to the harm suffered.

Additionally, WHD may, in some circumstances, assess liquidated damages.

## Employee Reinstatement Rights

After using FMLA leave, an employee must be able to return to the same job or to an equivalent job. An equivalent job means a job that is virtually identical to the employee’s original job in terms of pay, benefits and other employment terms and conditions. An employee should usually be able to return from FMLA leave to their original schedule and work location. The following scenario provides an example of an employee returning to work and having her hours cut in half.

Deborah used FMLA leave from her job as a front desk clerk at a hotel when she suffered from migraine headaches that made it impossible for her to work. She was approved for FMLA leave and used it for three days in January and one day in February. In April, she had another episode and used FMLA leave for two days. When she returned to work, her new manager reduced her schedule from 40 hours to 20 hours a week, saying they need workers who will show up every day. WHD completes an investigation and requires the hotel to return Deborah to her previous schedule and pay her for an additional 20 hours a week in wages for the duration of the period she worked the reduced schedule. WHD also requires the employer to pay Deborah an amount equivalent to her lost wages in liquidated damages.

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It is important to remember that an employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. For example, if an employee is laid off while taking FMLA leave and employment is terminated, the employer's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee cease at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise.

## Employer Takeaways

Taking an adverse action against an employee, even for legitimate reasons such as operational or performance reasons, when FMLA leave is involved may carry the risk of a retaliation claim. To potentially defend against such claims, employers should follow all FMLA provisions and ensure they make employment decisions for legitimate reasons. Given the risks involved, employers are strongly advised to consult with local counsel for specific legal advice before taking an adverse action against an employee when FMLA leave is involved.