According to the **FMLA** regulation 825.308, an **employer** may **request recertification** no more **often** than every 30 days and only in connection with an absence by the employee, unless the medical certification indicates that the minimum duration of the condition is more than 30 days. Nov 29, 2018

**Intermittent FMLA: Everything You Need to Know**

*Intermittent FMLA is leave taken pursuant to the Family Medical Leave Act for taken in separate, non-consecutive time periods rather than a single span of time.8 min read*

**Intermittent FMLA**

Intermittent FMLA is leave taken pursuant to the Family Medical Leave Act (FMLA) for a single injury, taken in separate, non-consecutive time periods rather than a single span of time.

**FMLA Intermittent Leave**

The FMLA is an act of Congress, enacted in 1993 which provides protections for employees who must be away from work due to injury or illness of the employee or to give care to a family member during a period of injury or illness.

January 2009 and February 2013 saw the institution of new FMLA regulations which made important changes in how employers must administer the legalities of the FMLA.

Leave under the FMLA in certain situations may be intermittent or taken pursuant to a “reduced leave schedule” which shortens an employee’s normal daily or weekly work schedule. This leave is available for a defined period of time upon submission by the employee of documentation that intermittent or reduced leave schedule is medically required.

**When Is Intermittent** [**FMLA Leave**](https://www.upcounsel.com/fmla-leave) **Available?**

Intermittent FMLA is available to employees when he or she has a serious health condition which prevents the employee from doing his or her job or for employees with family members requiring care for a serious health condition. Family members include spouse, child, and parent. The caregiving services can be either physical or emotional or both and include transportation services.

Employees may use any accrued sick or vacation leave benefits concurrently with FMLA leave. However, employers should never encourage employees to exhaust other leave prior to electing FMLA leave. Employees cannot be required to use accrued sick or vacation leave during his or her time off. Absences due to a workers' compensation claim or short–term disability may also be counted along with FMLA leave.

Employers may retroactively adjust leave and reclassify leave as FMLA leave in order to make sure an employee’s allotted FMLA leave is extinguished.

If an employee schedules treatment without first discussing this with the employer, the employer may legally require the employee to consult with the medical provider about other treatment schedules.

**Can An Employee Be Fired During FMLA Leave?**

Yes. Contrary to popular belief, the FMLA does not bestow some extraordinary job protections for employees. An employee who is out on FMLA leave can be disciplined or have his or her employment terminated so long as the employer can show that the discipline or termination was not related to the employee taking leave and that it would have happened absent the FMLA leave.

A key question asked by the Department of Labor in response to a terminated employee’s complaint would be why the employee was not terminated prior to taking leave. However, employers have been able to successfully defend their post leave termination decisions.

**May An Employer Voluntarily Allow Intermittent FMLA Leave?**

An employer may voluntarily allow intermittent leave whenever the employer agrees but is not always required to offer leave. New mother may work a reduced schedule for a time after giving birth or adopting a child if the employer consents.

An employee who desires to claim intermittent FMLA leave should make a reasonable attempt to accommodate the scheduling needs of employer so as to least hinder company operations. For doctor appointments or physical therapy, employers may inquire as to the possibility of these appointments being scheduled outside the employer’s normal working hours.

Unless the inability to work comes on suddenly, employees should request leave at least 30 days prior to the requested leave start date. In unforeseeable circumstance notice should be given with as much advance notice as possible, with the FMLA suggesting verbal notice no later than 1 or 2 business days after the event triggering the need for leave.

**How Much Leave Is Available Under The FMLA?**

Whether an employee takes FMLA leave intermittently or all at one time, the total amount of FMLA leave remains the same which is 12 weeks per 12-month timespan normally or for military caregivers, 26 weeks for one 12-month period.

Accounting for FMLA leave should be done in increments just as calculating other leave such as sick and vacation leave.

In addition to the FMLA, some states have labor laws that allow similar leave that may grant broader protections to employees.

**Alternative Jobs to Accommodate Intermittent FMLA Leave**

In order to facilitate the needs of the employer as a result of employees taking intermittent leave or a reduced leave schedule, the employee can be moved from his current position to another so long as:

* The new position is equivalent in pay and benefits to the old position
* The employee is qualified for the new position
* The position better fits the employees leave needs

These transfers are limited in time to only as the FMLA leave is needed and other laws may apply to this transfer. Also, employers have to be careful to not create an appearance of punishing the employee for taking leave.

**Return to Work**

At the end of an employee’s FMLA leave, the employee is entitled to return to work in his original job or substantially equivalent alternative right away.

An employee can be required to give notice of the date he intends to return to work, but an employer may not require an employee to extend his leave while waiting for a position to be available.

Policies requiring employees to return to work with medical documentation of their need for FMLA leave are allowed. The employer’s human resources department should notify employees in writing of any such policies with instructions on what is required, and that failure to provide documentation may result in not applying the absence to FMLA leave.

**Disadvantage of FMLA to Employers**

The efficient operation of the employer’s business and loss of productivity by employees often absent from work are the chief complaints employers have regarding the FMLA. Further employees who have chronic health conditions may manipulate the rules to take FMLA in periods of less than an hour.

**Department of Labor (DOL)Revised FMLA regulations**

In response to more than 20,000 suggestions and concerns from employers and employee organizations, the U.S. Department of Labor in 2009 [revised the FMLA regulations](http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=21763) to require employees to adhere to employer’s policies regarding scheduling leave and calling in to report needed leave times. A helpful report template has been developed by Business Management Daily to assist employers in managing and monitoring FMLA leave and insuring good policies are in place.

**Revised Definition of a “Serious Condition.”**

To qualify as a “serious condition,” the law requires that it involve at least two medical treatment visits within 30 days and cause the employee to be unable to work for more than three consecutive days.

**Certify and Schedule the Leave**

The FMLA gives employers rights to information regarding the employee’s health condition, including:

* Authority to require certification from a medical provider of the need to be absent from work which said certification may be required to be renewed at the beginning of each new annual FMLA period. A reasonable period to await certification is 15 calendar days from the request. If deficient, employer must explain to employee in writing as to how and allow a period of at least seven days to fix.
* Authorization to directly contact the employee’s doctors, but only in regards to [health information](https://www.upcounsel.com/blog/small-business-health-insurance-benefits-requirements) on the employee’s [FMLA certification](https://www.upcounsel.com/fmla-certification) form.
* The right to request a second opinion concerning employee’s condition from an independent health professional not employed by employer. If the second opinion differs from the first, the employer may request at its expense a third medical opinion which will be binding.
* The employee’s contact with employer concerning FMLA leave may not be the employee’s immediate supervisor.

**Employer's Effective Anti-Fraud Program for FMLA**

How can an employer effectively prevent fraud and abuse of FMLA protections?

* Obtain medical certifications and adopt and enforce a policy of refusing leave without certification and punishing absences from work without proper certification.
* Carefully review the certification for completeness and appropriateness
* After initial approval, especially with intermittent leave, conduct a plenary review of each subsequent request for leave to determine if leave is for the same condition or some new issue.
* Look for suspicious patterns of absences, every Friday or Monday for example to get a long weekend.
* Be diligent in classifying leave and keeping timely records so as to exhaust FMLA leave as soon as possible
* Require specific information as to health conditions instead of conclusions or general statements such as “FMLA leave recommended.”
* Monitor actual absences to insure the FMLA leave matches what was requested by the certification. If not, request a new certification.

**Use the Calendar-year Method to Tame the FMLA Intermittent-leave Beast**

Employers need to plan their operations to maximize efficiency and profits. Therefore, unexpected absences in the form of [FMLA intermittent leave](https://www.upcounsel.com/fmla-intermittent-leave) can greatly damage productivity and planning. To help alleviate this problem, use a calendar-year method to regulate FMLA leave. Require an employee with a chronic condition to take up to 12 weeks of leave by the end of the calendar year.

[**Oak Harbor Freight Lines, Inc. v. Antti**](http://www.fmlainsights.com/wp-content/uploads/sites/311/2014/05/Oak-Harbor-Freight-Lines-v.-Antti.pdf)

Employee Robert suffered from back problems. Upon requesting FMLA intermittent leave for treatment and inability to work during acute episodes, Robert submitted adequate medical certification of his need for leave. Upon monitoring his absences, Oak Harbor notice that almost 9 out of 10 absences during a six year timeframe fell next to a weekend of holiday. Employer requested proof of medical appointments on those days to which Robert refused and was disciplined.

Oak Harbor filed a court action for a declaratory judgment that requesting proof of the medical appointments were permissible under the FMLA. The court denied this request equating it to requiring a new certification for each absence. The FMLA has detailed rules for initial certification, second opinions, and recertification.

Once an initial certification is made, an employer may not require documentation for each absence thereafter.

[**Brown v. Eastern Maine Medical Center.**](http://www.med.uscourts.gov/Opinions/Hornby/2007/DBH_10152007_2-06cv60_BROWN_V_EMMC.pdf)

A chronically late employee was fired after many times of coming to work late and then refusing an offer of transfer to a different work shift. Employee blamed her inability to show up for work on time on a medical condition however, she had never been absent or late for work due to medical treatment or any flare-up of her medical condition which appeared to only hit her right before needing to be at work.

After being fired, she filed suit against her employer for failing to allow her tardies as FMLA intermittent leave. As you may imagine, the court ruled in favor of the employer stating that intermittent leave applies only to absences from work for medical treatment or due to incapacity from an acute attack of symptoms.

**FMLA Intermittent Leave: Why Bosses Must Be Observant**

Lackadaisical employers can easily be taken advantage of in the context of FMLA intermittent leave. Many employees seek to abuse the protections afforded by the FMLA and employers will have little recourse without keeping adequate records. Employers should remain involved in knowing what their employees are doing. This is easily accomplished by asking employees about their treatments or how their family member is feeling.

Employers can go a long way in preventing abuse of the FMLA leave by showing to employees that the employer takes the administration of FMLA leave seriously.

For assistance regarding the Family Medical Leave Act, [post your job](http://www.upcounsel.com/jobs/new) at UpCounsel’s marketplace. Only the top 5 percent of lawyers are accepted into our marketplace and are waiting to help you with your legal needs.

# The Family and Medical Leave Act – An Employee’s FMLA Right to Privacy

[August 11, 2017](http://stieglerlawfirm.com/2017/08/11/the-family-and-medical-leave-act-an-employees-fmla-right-to-privacy/)[employee files](http://stieglerlawfirm.com/tag/employee-files/), [fmla](http://stieglerlawfirm.com/tag/fmla/), [personnel file](http://stieglerlawfirm.com/tag/personnel-file/), [privacy](http://stieglerlawfirm.com/tag/privacy/), [recordkeeping](http://stieglerlawfirm.com/tag/recordkeeping/)[Family and Medical Leave Act](http://stieglerlawfirm.com/category/family-and-medical-leave-act/)[Charles Stiegler](http://stieglerlawfirm.com/author/charlesstiegler/)

The [FMLA](http://stieglerlawfirm.com/2017/07/28/fmla-basics-medical-leave/) is a complicated statute, in part because it attempts to balance competing rights.  The Act’s primary goal is guaranteeing the rights of employees who need time to care for serious health conditions.  At the same time, Congress did not wish to impose an overly onerous burden on employers who are just trying to run their business. The regulations regarding the employee’s FMLA right to privacy is a good example of how the Act tries to strike this balance – but they also show how striking that balance creates complexity. It is critical that both employees and employers carefully follow the FMLA’s regulations, particularly where the right to privacy to sensitive medical information is concerned.

An employee seeking FMLA leave must first put the employer on fair notice that he or she is seeking medical leave, as well as the expected timing and duration of the leave.  [29 C.F.R. 852.302](https://www.law.cornell.edu/cfr/text/29/825.302). (This rule is relaxed if the need for leave arises suddenly or unexpectedly). At this step, the employee is not required to disclose the reason for the leave request.  The employer may – but is not required to – request certification of the employee’s health condition within 15 days of the initial request for leave.  The FMLA certification must be provided by a qualified health care provider, who is usually, [but not always](https://www.law.cornell.edu/cfr/text/29/825.125), a doctor.  The Department of Labor has provided a [certification form](https://www.dol.gov/whd/forms/WH-380-E.pdf), although the use of this form is not mandatory. Once the employee has provided all information on the certification form, the employer may not request additional information — unless it decides to request a second opinion (which is another complicated process beyond the scope of this article).

As part of the certification process, the employer will almost certainly obtain sensitive medical information regarding the employee.  The FMLA right to privacy places strict limits on how the employer must treat this information.  [Federal regulations](https://www.law.cornell.edu/cfr/text/29/825.500) require that information related to an FMLA leave request must be treated as “confidential medical records” and kept in “separate files/records from the usual personnel files.”  This point is important, and bears repeating:  employee medical information should never be kept in the employee’s basic personnel file. Instead, the employer must keep a second, parallel personnel file which includes any information related to the FMLA request or other employee medical issues.  If a  supervisor – or anyone else – asks for a worker’s personnel file, the company should provide the file without the medical information.

In short, the FMLA requires that employers keep medical records and information private.  An employer should not tell a supervisors, co-workers, clients, or customers anything about an employee’s medical condition.  If the question comes up, “he is on leave” is a sufficient answer.  Providing any more information risks violating the FMLA right to privacy.  In one 2010 case, a plaintiff alleged that the employer disclosed his medical condition to co-workers, who [harassed him about it](http://law.justia.com/cases/federal/district-courts/new-york/nywdce/1:2010cv00715/80571/12/).  The court held that – assuming these allegations were true – the disclosure was a violation of the FMLA and a valid grounds for lawsuit.  A similar result was reached in a [more recent Mississippi case](https://scholar.google.com/scholar_case?case=12045335880840592453&q).

**Possible FMLA Violation When Employer Discloses Employee’s Medical Condition**

[Family Medical Leave and Other Leave Discrimination](https://www.spigglelaw.com/category/family-medical-leave-and-other-leave-discrimination)

[Facebook](https://www.spigglelaw.com/#facebook)

[Twitter](https://www.spigglelaw.com/#twitter)[Share](https://www.addtoany.com/share#url=https%3A%2F%2Fwww.spigglelaw.com%2Femployment-blog%2Fpossible-fmla-violation-employer-discloses-employees-medical-condition%2F&title=Possible%20FMLA%20Violation%20When%20Employer%20Discloses%20Employee%E2%80%99s%20Medical%20Condition)

Few of us are fortunate enough to have perfect health. Many of us will suffer from an illness or injury so severe that we are required to take a leave of absence from work. Luckily, the [Family and Medical Leave Act of 1993](http://www.dol.gov/whd/regs/statutes/fmla.htm) (FMLA) provides protected leave to eligible employees who suffer from a qualified medical condition.

To take FMLA leave, an employee will need to explain to his or her employer the medical issue that requires the leave of absence from work. Sometimes, the employee may be embarrassed by the medical reason for taking leave.

So what happens if the employer grants the employee FMLA leave but later reveals the medical issue to fellow employees, resulting in workplace ridicule and harassment? Short answer: the employee may have a case for a FMLA violation. This is exactly what happened in a recent case.

***Holtrey v. Collier County Board of County Commissioners***

Scott Holtrey had been working for the Collier County Board of County Commissioners for about nine years when he developed a serious medical condition involving his genitourinary system. Holtrey needed to take time off from work to treat this condition, so he requested FMLA leave.

The Board granted the leave. But during a subsequent staff meeting, the Board disclosed Holtrey’s medical condition to his co-workers, without his knowledge or consent and without any reason for doing so. After Holtrey returned to work, his co-workers began making fun of him. The bullying included obscene gestures and inappropriate jokes.

Holtrey asked the Board to help stop the harassing behavior, but it was unable to do so. As a result, Holtrey sued the Board, claiming interference and retaliation under the FMLA. The Board responded by filing a motion to dismiss Holtrey’s lawsuit.

**Rights Under the FMLA**

The FMLA requires covered employers to provide unpaid leave to their eligible employees and hold their jobs for them until they return from leave. To be eligible for FMLA leave, the employee must have a qualified medical or family reason to take time away from work.

In Holtrey’s case, he had a valid medical reason, and the Board granted his medical leave as requested. So how could Holtrey sue? Even though he received his medical leave, the Board’s divulging of private medical information violated FMLA’s confidentiality provisions.

Since Holtrey suffered ridicule from his co-workers that the Board was unable to stop, Holtrey alleged that this amounted to FMLA interference and retaliation, the two main causes of action an employee may have under the FMLA.

**Interference Claim Under the FMLA**

The legal claim of FMLA interference refers to an employer that interferes with, restricts, or prevents employees from exercising their legal rights under the FMLA.

In its defense, the Board argued that it could not be liable for interference since it allowed Holtrey to take all the FMLA leave he needed. However, the FMLA also states that medical records of employees and their family members shall remain confidential and separate from the employee’s personnel files.

The court concluded that the right to keep medical information private is protected under the FMLA and that the Board violated that right. Although the court recognized legal uncertainty as to whether this privacy violation allows an employee to sue an employer, the court denied the Board’s motion to dismiss Holtrey’s interference claim.

**Retaliation Claim Under the FMLA**

Retaliation refers to a materially adverse action that an employer takes against an employee because of the employee’s exercise of his or her FMLA rights. A materially adverse action refers to anything that an employer does that may persuade a reasonable employee not to exercise those rights. Classic materially adverse actions include firing, demotion, and transfer to a less desirable position.

The primary contention in Holtrey’s case was whether the Board’s disclosure of his medical information was a materially adverse action. The court ruled that revealing private and sensitive medical information to fellow employees could plausibly create a work environment that would persuade a reasonable employee not to request FMLA leave. As a result, the court also denied the Board’s request that the retaliation claim be dismissed.

For more information about interference and retaliation claims under the FMLA, as well as about how the FMLA works in general, check out “[The Employer’s Guide to the Family and Medical Leave Act](https://www.dol.gov/whd/fmla/employerguide.pdf)” from the U.S. Department of Labor.

**Summing It Up**

* The FMLA requires covered employers to provide their employees with unpaid, job-protected leave so that employees can take care of their own medical issues or take care of a close family member.
* An employer may not discourage an employee from exercising his or her rights under the FMLA through interference or retaliation.
* FMLA interference refers to an employer who prevents or restricts an employee from exercising FMLA rights.
* FMLA retaliation refers to an employer that takes a materially adverse employment action against an employee because the employee exercised his or her FMLA rights.
* Under the FMLA, an employer may not reveal confidential medical information about the employee taking the leave. However, the courts are split on whether an employee can sue an employer for this breach of confidentiality.

If you believe your employer has disclosed your confidential medical information to your co-workers, interfered with your right to seek FMLA leave, or retaliated against you for taking FMLA leave, please [contact our office](https://www.spigglelaw.com/contact/). We can talk about your situation, discuss how the law may apply to you, and advise you about your options.

## Are You Illegally Penalizing Employees For Taking Leave?

Posted on Sep 24, 2012 on [Family and Medical Leave Act](https://www.brodyandassociates.com/blog/category/family-and-medical-leave-act/), [Labor Management Issues](https://www.brodyandassociates.com/blog/category/labor-management-issues/), [Legal Updates](https://www.brodyandassociates.com/blog/category/legal-updates/), [News](https://www.brodyandassociates.com/blog/category/news/) by [Robert G. Brody](https://www.brodyandassociates.com/blog/author/robert/) and [Abby M. Warren](https://www.brodyandassociates.com/blog/author/abby-m-warren/)

Employers may be required to adjust their performance standards so an employee will not be penalized for taking qualified leave under the Family and Medical Leave Act (“FMLA”), according to the Seventh Circuit Court’s decision in Pagel v. TIN Inc.

In that case, the defendant, a manufacturer and supplier of containerboard, hired the plaintiff as an outside salesman.  The plaintiff then started having chest pain and labored breathing.  As a result, he was in and out of work for testing and surgery.  In between absences, the plaintiff was notified that his sales revenue and volume had declined over the past two years, and if he did not improve, he could be fired.  While the plaintiff was out on leave, the regional sales manager notified him that he would do a sales ride-along the following day to view the plaintiff’s performance; normally these are scheduled in advance.  The plaintiff conducted the sales ride-along with the manager and was subsequently terminated, in part for poor performance on the sales ride-along.

The plaintiff filed suit under the FMLA, which provides eligible employees suffering from serious medical conditions, up to twelve weeks of unpaid leave during a twelve-month period.  The plaintiff claimed interference and retaliation.  The Court reversed the lower court’s grant of summary judgment in favor of the employer on both claims, and remanded the case.

Referring to the interference claim, the Court explained that the FMLA does not require an employer to “adjust its performance standards for the time an employee is actually on the job, but it can require that performance standards be adjusted to avoid penalizing an employee for being absent during FMLA-protected leave.”  In this case, the employer did not adjust the performance requirements to take into account the FLMA leave.  With respect to the retaliation claim, the Court was persuaded there was a genuine issue of material fact primarily because the evidence showed that account managers need one week to schedule and prepare for customer visits, and in giving the plaintiff one day’s notice, it was possible the defendant was setting the plaintiff up to fail.

One key issue in this case was timing.  The plaintiff’s performance and sales figures had been declining for two years.  Had he been discharged prior to taking FMLA leave, the plaintiff’s termination would not have been in violation of his FMLA rights.  Further, the employer would have been able to prove a nexus between poor performance and disciplinary action.  Employers need to move swiftly to respond and correct performance issues because if the disciplinary action is too attenuated from the performance issue, the action may face more scrutiny and may be attributable to some other circumstance occurring during the delay.  Because the employer waited two years to address declining sales figures, the Court suggested that poor performance may have been a pretext for something else.  Employers – respond timely to correct performance issues!

**How Confidential is FMLA Information?**

*By* [*Kelly A. Hayden*](mailto:khayden@hrsource.org)*, JD, Chief Legal Counsel  
Published January 31, 2017*

With so many medical confidentiality laws, it can be difficult to understand which law applies under what circumstance. Additionally, the more people who are exposed to medical information, the more complications that can arise, as not everyone may have received the same training and instruction as human resource professionals concerning their obligations under the law. A recent case out of the United States District Court of Florida underscored this problem. (See *Holtrey v. Collier County Board of County Commissioners, Case 2:16-cv-00034-SPC-CM, Jan. 12, 2017.*)



In this case, the plaintiff had been working for the employer, a County Board of Commissioners, since 2006. In June of 2015, he developed a serious health condition (not in dispute) and applied for leave under the Family and Medical Leave Act (FMLA). His request was approved. Unfortunately, during a staff meeting, a manager disclosed Plaintiff’s condition to those in attendance at the meeting. (This amounted to approximately eight coworkers in attendance.) Various coworkers subsequently approached the plaintiff to inquire about his health.  Others made jokes about his condition, including obscene gestures. Plaintiff complained about the situation, but no steps were taken to resolve it, ultimately causing Plaintiff to file a suit under the FMLA.

In ruling that the plaintiff’s claim could move forward, the Court stated: “The Court is not persuaded by Defendant’s arugment that the interference claim fails because, by Plaintif’s own admission, it granted him FMLA leave. The issue in this case is whether confidentiality is a right under the FMLA and whether Defendant interfered with that right.  Although district courts conflict on whether a disclosure of an employee’s medical information constitutes an interference claim under FMLA, the Court finds that enforcing labor regulation makes clear that confidentiality of medical information is a right provided by and protected by the FMLA.” [Citations Omitted.]

What can employers learn from this case?

1. Make sure that your supervisors and managers understand their general obligations under federal and state laws.  As any employment lawyer will tell you, most litigation happens as a result of something a supervisor or manager has said or done, as these are the people within your organization who most frequently interact with the employees. They do not have to be experts at employment law, but they should understand the basic do’s and don’ts of the most common laws.
2. Understand that in most cases, there is no need for a supervisor or manager to know the ***reason*** that an employee is out on family medical leave. Human resources need only advise that the employee is out on an approved leave. This will help to reduce the chance that other employees are discussing the circumstances surrounding the leave. Of course, if the employee wishes to discuss his/her own medical information with others, that is not an employer violation.
3. This case is moving forward despite the fact that the employer granted the family medical leave. So, the court is stating that despite the fact that the employer provided the leave requested, confidentiality is a separate right that is enforceable under the FMLA.
4. Beware that other laws, such as the Americans with Disabilities Act (ADA), the Genetic Information Non Discrimination Act (GINA), the Health Insurance Portability and Accountability Act (HIPAA) and the Affordable Care Act (ACA) also have confidentiality provisions.

HIPAA PRIVACY REGULATIONS GOVERN FMLA CERTIFICATION PROCEDURES FOR ALL EMPLOYERS By Karen Sutherland The HIPAA Privacy Regulations govern the use and disclosure of confidential personal healthcare information (“PHI”). Many employers believe that they are “exempt” from HIPAA because they are not a “covered entity” under HIPAA, i.e. a healthcare provider, a healthcare insurer or a healthcare clearinghouse. While it is generally true that only covered entities must comply with HIPAA, all employers will be affected by HIPAA, especially in the human resources area. For example, most employers possess medical information for some employees related to the Americans with Disabilities Act (“ADA”) and the Family Medical Leave Act (“FMLA”). HIPAA does not regulate the employer’s use and disclosure of this medical information. HIPAA does come into play when an employer attempts to obtain PHI from an employee’s doctor to verify an FMLA claim. For example, the FMLA requires that employers permit employees to take leave from work for a serious health condition or to care for family members with a serious health condition. Under the FMLA, an employer can require that an employee provide verification of the serious health condition by a doctor. In fact, the Department of Labor has even created an FMLA certification form that many employers use to verify the existence of a serious health condition. The employer typically sends the FMLA certification to the doctor or asks the employer to bring it to the doctor personally. Some doctors have refused to complete the FMLA form on the grounds that HIPAA prohibits disclosure of PHI to a third party such as an employer. The doctors are usually correct. Under HIPAA, a doctor or other health care provider cannot disclose PHI to a patient’s employer to verify an FMLA claim unless the patient gives the doctor a written authorization that complies with HIPAA. The reason that employers need an authorization to get an FMLA certification from an employee’s doctor is because the doctor, not the employer, is covered by HIPAA. A doctor cannot disclose protected healthcare information to a patient’s employer without an authorization from the patient. As a result, the employer must now use a HIPAA authorization along with the FMLA certification unless the employer give the FMLA form to the employee and has the employee obtain the information from the care provider and then give it to the employer, in which case a release is not necessary.

This brief article is a broad summary only. It lacks specificity about the law and about the effects of different fact patterns, and thus shall not be applied without consulting an attorney. It also focuses on Washington State law and federal law, and the laws of other jurisdictions may vary materially. The information set forth in this article is a broad and general overview of complex topics, and is not legal advice. It also does not take into account any changes to the law or in interpretations of the law that may have occurred since it was written. For more information, contact Karen Sutherland at [ksutherland@omwlaw.com](mailto:ksutherland@omwlaw.com)

What You Should Know About FMLA Confidentiality



Employers covered by the Family and Medical Leave Act (FMLA) undoubtedly have access to their employees’ sensitive medical information. This is because it’s best practice for leave administrators to request medical certifications in order to determine the need for employees’ FMLA leaves. Additionally, medical information is often needed when engaging in the interactive process to determine reasonable accommodations under the Americans with Disabilities Act (ADA).

Understandably, this is sensitive information that you need to take strides to protect in order to remain compliant with various security and privacy regulations at the federal and state levels. Acquiring and storing this information carefully is essential in ensuring your organization is compliant with all regulations. By following some simple guidelines, you can strike the perfect balance of protecting your employees' FMLA confidentiality and gathering the information you need to manage leave!

Your Obligations As An Employer

If an employee needs FMLA leave for their own serious health condition, you may choose to [request certification of the condition](http://stieglerlawfirm.com/2017/08/11/the-family-and-medical-leave-act-an-employees-fmla-right-to-privacy/) in order to approve their case. A medical certification will include details pertaining to the employee’s condition. Take care to avoid requesting more information than required to process the leave, and consider any privacy legislation which impacts the information employers can request in support of a medical leave. Also, be aware that you generally may request recertification [no more than once every 30 days](https://www.ecfr.gov/cgi-bin/text-idx?SID=54877236c6193bf0d7d562d1ebc2c1b8&mc=true&node=pt29.3.825&rgn=div5#se29.3.825_1308), in connection to an absence.

You can mitigate the chance of missteps during the FMLA certification process by utilizing the [forms provided by the Department of Labor (DOL)](https://www.dol.gov/whd/fmla/2013rule/militaryForms.htm), or by modelling your own forms on them. You might also consider implementing a leave management solution which [automatically produces the correct forms](https://www.presagia.com/leave-management-fmla/) for each case and notifies you when it’s time to recertify.

When it comes to requesting documentation to support an employee’s need for reasonable accommodation under the ADA, bear in mind that you should only require [enough information to establish the employee’s disability](http://www.workforce.com/2018/03/29/dont-sleep-verifying-reasonable-accommodations/), current restrictions, and their need for an accommodation.

A good rule of thumb is that any solicitation of medical information must stick explicitly to the medical facts: medical impact on essential functions, onset, likely duration, medical necessity for intermittent leave, etc.

Additionally, be aware of the [Genetic Information Nondiscrimination Act (GINA)](https://www.littler.com/publication-press/publication/dol-issues-updated-fmla-notices-and-forms-addressing-gina-safe-harbor). This act prohibits employers from requesting any genetic information, such as genetic predisposition and family history.

Once you’ve collected the required information, it’s time to ensure the data is stored appropriately. Medical information disclosed for the purposes of certifying FMLA leave or providing reasonable accommodation under the ADA is to be kept confidential! These records [must be stored separately](http://hrdailyadvisor.blr.com/2011/05/11/who-gets-access-to-fmla-confidential-medical-records/) from an employee’s other personnel files. Only those who administer leave should have access to the information in these medical records, save for these instances outlined in the [FMLA recordkeeping requirements (§825.500)](https://www.gpo.gov/fdsys/pkg/CFR-2011-title29-vol3/xml/CFR-2011-title29-vol3-sec825-500.xml):

* Managers or supervisors who must be informed of work restrictions or accommodations
* First-aid and safety personnel providing emergency treatment
* Government officials performings audits

Remember, it’s advised that you do not disclose the medical reason for an employee’s leave or accommodation to their supervisor. Generally, explaining the length of their absence or the type of accommodations they need will suffice.

What Happens If You Fail To Comply?



Failure to ensure the security of employee medical information may lead to serious consequences… including a trip to court! The FMLA and the ADA provide employees with the right to the [confidentiality of their medical information](https://www.hrsource.org/maimis/Members/Articles/2017/01/January_31/How_Confidential_is_FMLA_Information_.aspx). Employees who find their rights infringed upon may choose to, and have the right to, pursue the matter in court.

Consider [*Holtrey v. Collier County Bd. of Commissioners*](https://www.fmlainsights.com/disclosing-an-employees-medical-condition-may-result-in-an-automatic-fmla-violation/). Holtrey’s genito-urinary disorder was disclosed by a manager to eight of his fellow employees during a meeting he was absent from. Following this meeting, Holtrey’s coworkers joked and made rude gestures regarding his condition. In response to the violation of his right to confidentiality under the FMLA, Holtrey asserted claims of interference and retaliation. His employer’s motion to dismiss the case was denied.

Another similar case is [*Doe v. United States Postal Service*](https://www.hivlawandpolicy.org/resources/doe-v-united-states-postal-service-317-f3d-339-dc-cir-2003). Doe disclosed his HIV status to support his need for FMLA leave. His supervisor shared this information with Doe’s colleagues, prompting him to take legal action. Though initially the district court had sided with the employer, the D.C. Circuit reversed the decision in Doe’s favor. This decision falls in line with the [confidentiality provisions outlined in the ADA](https://www.eeoc.gov/policy/docs/guidance-inquiries.html).

Not only are these types of acts insensitive, they are also violating your employees’ rights to privacy. These cases, and many others, may have been easily avoided if the employers had taken the necessary steps to protect confidential employee medical information.

How To Ensure The Security Of Confidential Medical Information

To minimize the risk of confidential employee information falling into the wrong hands, it’s imperative to provide thorough training. Ensure that all administrators of leave are aware of how the information is to be stored, and who it can be disclosed to. Management and supervisors who are made aware of confidential medical information must be trained on their obligations to keep it private. Consider providing this training during onboarding, and then annually, to keep everyone up to date!

If your organization utilizes a cloud based leave management solution, such as [Presagia](https://www.presagia.com/leave-management-fmla/), find out whether it offers secure document storage! This includes the ability to restrict down access based on user role. For instance, the leave team users will be granted access to medical certifications, but all other users, like HR or managers, will not be able to see medical certifications. Also, all of your case records may be stored electronically so long as they’re [kept for a minimum of three years](https://www.stoelrivesworldofemployment.com/2012/11/articles/labor/recordkeeping-the-often-overlooked-element-of-fmla-compliance/). At the end of the day, proper compliance with privacy and security regulations will reduce your organization’s liability, and will demonstrate your dedication to protecting your employees’ rights.

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[***About Presagia***](http://www.presagia.com/)

*Founded in 1987, Presagia has a long history of helping organizations solve complex business problems with easy-to-use solutions. Today, this means providing cloud-based absence management solutions that enable organizations to be more efficient, control lost time and risk, and strengthen compliance with federal, state and municipal leave and accommodation laws.*

# HIPAA's Potential Impact on FMLA Certification

Tuesday, December 28, 2010

The Family and Medical Leave Act ("FMLA") entitles eligible employees of covered employers to take unpaid, job-protected leave for certain family and medical reasons. These medical reasons include the "serious health condition" of an employee's spouse, child, or parent, or the "serious health condition" of the employee that prevents him/her from performing the essential functions of their job.

In order to assess whether a covered individual has a "serious health condition", an employer can require sufficient medical information to support an employee's request for FML. However, the Health Insurance Portability and Accountability Act ("HIPAA") generally restricts a healthcare provider from divulging protected health information ("PHI") of their patients to third-parties, including employers. This article provides tips for maneuvering through the potential conflicts between these two statutes.

The Department of Labor ("DOL") prescribes FMLA certification forms to verify the existence of a "serious health condition". To be sufficient, a medical certification should state the following: the date the condition commenced; the probable duration of the condition; appropriate medical facts regarding the condition; a statement that the employee is needed to care for a covered family member or a statement that the employee is unable to perform the essential functions of his or her position; dates and duration of any planned treatment; a statement of the medical necessity for intermittent leave or leave on a reduced schedule; and expected duration of such leave.

The employee can either personally deliver the completed FMLA certification form to his/her employer, or have his/her healthcare provider send the completed form directly to the employer. Either way, at the time the employee is given the FMLA certification forms, the employer should require the employee to complete a HIPAA-compliant authorization for the employee's healthcare provider to release the employee's PHI to the employer. The authorization must specify a number of elements, including a description of the PHI to be disclosed; the person authorized to make the disclosure; the person to whom the healthcare provider may make the disclosure; an expiration date; and in some cases, the purpose for which the information may be used or disclosed.

HIPAA privacy rules requires a healthcare provider to treat a "personal representative" the same as the individual, with respect to the use and disclosure of the individual's PHI. A personal representative is a person legally authorized to make healthcare decisions on an individual's behalf or to act for a deceased individual or the estate. In most cases parents are the personal representative for their minor children.

If an employee is unable or unwilling to return the completed FMLA certification, HIPAA prohibits a healthcare provider from sending the completed FMLA certification directly to the employer if the certification contains patient PHI. An exception to this general rule is disclosure pursuant to the above-referenced authorization executed by the individual who is the subject of the PHI.

On occasion, an employer may determine that the FMLA certification is incomplete or provides insufficient information to assess whether there exists a "serious heath condition". In such instance, the FMLA requires the employer to give the employee written notice as to what sections are incomplete and allow the employee seven days to obtain the missing information. If the employee refuses to cooperate, the employer may decline the FML.

Alternatively, after the aforementioned seven-day period, the employer may directly contact the healthcare provider to either clarify or authenticate the information in the FLMA certification. However, the DOL has specified that communications between employers and the employee's healthcare provider to clarify FMLA certifications must also comply with HIPAA privacy rules. Compliance with these privacy rules may entail the employer sending the healthcare provider the aforementioned authorization to release PHI as a precursor to discussing the FMLA certification. Furthermore, the employer's representative who contacts the employee's healthcare provider must either be a healthcare practitioner, an HR professional, a leave administrator or a management official. In no case may the employer's representative be the employee's direct supervisor.

An employer may request FMLA recertification every thirty days unless the medical certification indicates that the minimum duration of medical condition will exceed this period. In all cases, an employer may request recertification every six months, even where the certification states a longer period. Since an initial grant of FML may require recertification, an employer should set an expiration date on its employee's authorization to release PHI that allows it to be reused to authorize the release of medical information for purposes of recertifying this leave.

While HIPPA's privacy rules may restrict an employer's ability to confirm a serious health condition under the FMLA, such restrictions can easily be avoided by an employer receiving a HIPPA-compliant authorization to release PHI from its employees at the front-end of an FMLA request.

# Employer May Be Sued for Disclosing Contents of FMLA Request, D.C. Circuit Rules

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| **Summary:** An employee may sue his employer if the contents of his medical certification under the Family and Medical Leave Act (FMLA) are disclosed to his coworkers, a federal appeals court has ruled. The confidentiality provisions of the Americans With Disabilities Act could apply to medical information submitted for FMLA purposes, the court found. |

An employee may sue his employer if the contents of his medical certification under the Family and Medical Leave Act (FMLA) are disclosed to his coworkers, a federal appeals court ruled Feb. 7. The court overturned the trial court's ruling that the employer was entitled to summary judgment because of insufficient evidence that the coworkers' knowledge of the employee's health information stemmed from his FMLA submittal. The case is *Doe v. U.S. Postal Service*, No. 01-5395 (D.C. Cir., Feb. 7, 2003).

**Facts of the Case**

"John Doe," an HIV-positive postal worker, revealed his condition to the U.S. Postal Service (USPS) in an FMLA certification that he submitted to the USPS in response to a threat of disciplinary action for missing several weeks of work. Although Doe had never revealed his status at work beforehand, he alleged, it was "common knowledge" among his coworkers when he returned.

Several USPS employees would testify that they heard about Doe's HIV status from Melvin Tahir, his management-level supervisor. Tahir denied these accusations, insisting he was not even aware of Doe's HIV status before the lawsuit.

Doe sued the USPS under the Privacy Act and Rehabilitation Act, both of which restrict federal agencies' disclosure of personal information. The Privacy Act generally prohibits "nonconsensual disclosure of any information that has been retrieved from a protected record." The Rehabilitation Act applies the confidentiality requirements of the Americans With Disabilities Act (ADA) to federal agencies.

The USPS sought summary judgment in its favor, arguing that Doe had not offered sufficient evidence that one of its employees had disclosed medical information from his FMLA certification form. Regarding the Rehabilitation Act claim, the USPS contended that Doe's FMLA submittal was a voluntary disclosure, not an employer "inquiry" governed by the ADA.

The district court agreed with the USPS, but the U.S. Court of Appeals for the District of Columbia Circuit reversed this ruling and sent the case back to the lower court for trial.

**D.C. Circuit's Opinion**

Doe's circumstantial evidence that the disclosures occurred after his FMLA request and were attributed to a manager responsible for reviewing the request was sufficient to avoid summary judgment, the D.C. Circuit ruled. "Doe offered two pieces of evidence from which a reasonable jury could conclude that a Postal Service employee retrieved information about his HIV status from protected medical records," Judge David Tatel wrote for the three-judge panel.

"First, Doe's co-workers' deposition testimony indicates that the disclosures occurred *after* Doe submitted his FMLA form," Tatel wrote. "Second, deposition testimony indicates that in the normal course of business, Tahir obtained and reviewed leave requests."

Regarding the Rehabilitation Act claim, the court ruled that Doe's disclosure to the USPS was not truly voluntary because it was necessary to avoid disciplinary action and meet FMLA's requirements. "Doe revealed his medical diagnosis to the Postal Service only after the Service, through his direct supervisor, told him in writing that he would face disciplinary proceedings" otherwise, Tatel explained. The FMLA submittal therefore fell into the category of "inquiries into the ability of an employee to perform job-related functions," whose responses are protected by the ADA, the court concluded.

**Implications**

This case illustrates the types of disclosures that the ADA's confidentiality provisions (as included in the Rehabilitation Act) were designed to prevent. It shows the reach of the ADA's medical inquiry provisions, which could apply to medical information submitted for FMLA purposes.

The information in question would not be regulated by HIPAA when held by the employer, because it would be excluded as an "employment record" from the definition of PHI.

Although, in this case, Doe gave his health information not to his supervisor but to a separate employee in charge of handling FMLA requests, there was evidence that this information was shared with managers and supervisors. Problems could have been avoided by restricting managers' access to this information.

The ADA has an exception to its confidentiality provisions that allows managers to be informed about restrictions on work, but this exception is narrow. The manager here seemed to have access to more information than he needed. Just as HIPAA attempts to limit access to PHI to managers by requiring firewalls, the ADA also seeks to limit the flow of information where it is not needed.

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# Don’t Be Chatty about FMLA Leave

By [Mary Ann Couch](https://www.bradley.com/people/c/couch-mary-ann) on April 13, 2017

Posted in [FMLA](https://www.employmentlawinsights.com/fmla/), [Interference](https://www.employmentlawinsights.com/interference/), [Leave](https://www.employmentlawinsights.com/leave/)

If you’re not careful, a casual reference to an employee’s FMLA leave might give rise to an FMLA interference claim. A recent Florida case, [Holtrey v. Collier County Bd. of Commissioners](http://law.justia.com/cases/federal/district-courts/florida/flmdce/2:2016cv00034/319127/29/), reminds us that you can get into trouble—and violate an employee’s rights—despite proper record keeping if an employee with access to those records discloses sensitive medical information about another employee’s FMLA leave.

**Basic FMLA Rules**

Generally, eligible employees are entitled to up to 12 weeks of FMLA leave in a 12- month period and they get to return to their position at the end of the leave. There’s also no question that [FMLA regulations](https://www.ecfr.gov/cgi-bin/text-idx?rgn=div5;node=29:3.1.1.3.54#se29.3.825_1500) require an employer to keep confidential an employee’s medical records and information related to an employee’s FMLA leave. In fact, you must [maintain medical records separately](https://www.ecfr.gov/cgi-bin/text-idx?rgn=div5;node=29:3.1.1.3.54#se29.3.825_1500) from personnel records.

**So What Happened in Florida?**

Keep in mind that the facts as we know them are based almost entirely on the plaintiff’s version of events. With that caveat, Scott Holtrey applied for and received FMLA leave for a chronic and serious medical condition affecting his genito-urinary system. While he was out on leave, a manager apparently chatted with several of Holtrey’s coworkers about his medical condition. When Holtrey returned from leave, coworkers made jokes and obscene gestures about his medical condition in front of him. He complained and his employer (the Collier County Board of Commissioners) failed to remedy the situation, so he filed a lawsuit claiming the board violated the FMLA when his manager disclosed his medical condition and when his coworkers teased him about it. The board filed a motion to dismiss pointing out that Holtrey got all the leave he requested.

The court denied the board’s motion to dismiss, finding that Holtrey sufficiently pled an interference claim because he alleged that the board interfered with his FMLA rights by disclosing his confidential medical information resulting in a “work environment riddled with obscene gestures and jokes at his expense.” According to the court, the issue “is whether confidentiality is a right under the FMLA and whether Defendant interfered with that right.” The court noted that district courts conflict on whether disclosure of medical information constitutes an FMLA interference claim, but went on to note that the regulations make clear that “confidentiality of medical information is a right provided and protected under the FMLA.”

**Guarding Confidential Medical Information**

The court hasn’t said that Holtrey wins his FMLA interference lawsuit based entirely on the supervisor’s violation of his confidentiality. It has, however, found that Holtrey’s lawsuit to test that theory can continue. How could this be prevented? Maybe Holtrey’s manager didn’t need to know what was wrong with Holtrey—just that he was approved for leave. The Holtrey case is a good reminder to make sure that employees (especially managers) are thoroughly (and frequently) trained about their FMLA obligations.

Rule of thumb: Don’t chat about an employee’s medical condition — ever.

The HIPAA Privacy Rules and FMLA Administration

The U.S. Department of Health and Human Services recently issued new rules providing comprehensive federal protection for the privacy of health information. The Health Insurance Portability and Accountability Act (HIPAA) Privacy Rules create national standards to protect individuals' medical records and other personal health information. While the Privacy Rules do not regulate employers as such, they do regulate them in their role as sponsors of group health plans, as health insurers or HMOs, and as healthcare providers.

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How will the HIPAA Privacy Rules affect Family and Medical Leave Act (FMLA) compliance? The FMLA requires that employees provide their employer with a medical certification completed by the employee's healthcare provider to verify that the employee has a serious health condition. There is no HIPAA issue when this occurs because the information flows directly from the employee to the employer. However, note that providers will not disclose the information directly to employers without a HIPAA-compliant authorization. If the FMLA medical certification process includes a HIPAA authorization, then the employer is spared having to fill one out in the event it becomes necessary down the road, for example, if the employer seeks clarification or a second opinion. Employers may want to amend their FMLA policies to require that employees complete an authorization for disclosure of medical information on the FMLA medical certification form.

The HIPAA Privacy Rules require authorizations to be written in plain language and contain at least the following required elements:

* A specific and meaningful description of the information to be used or disclosed.
* The name or other specific identification of who is authorized to make the requested use or disclosure.
* The name or other specific identification of to whom the covered entity may make the disclosure.
* A description of each purpose of the requested use or disclosure. The statement "at the request of the individual" is a sufficient description of the purpose when an individual initiates the authorization.
* An expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure.
* Signature of the individual and dates.
* The right of the individual to revoke the authorization in writing.
* The exceptions to the right to revoke and a description of how the individual may revoke the authorization; or a reference to the covered entity's privacy notice that includes this information.
* Whether treatment, payment, enrollment, or eligibility for benefits may or may not be conditioned on the authorization, including the consequences of a refusal to sign the authorization when such a condition is allowed.
* The potential for information disclosed pursuant to the authorization to be redisclosed by the recipient and no longer be protected by the HIPAA Privacy Rule.

Want to learn more about the HIPAA Privacy Rules? See BLR's *HIPAA Privacy Guide for Employers*. It's a great desktop reference tool, providing a detailed explanation of the new rule's requirements.

**Features**

The *HIPAA Privacy Guide for Employers*:

* Covers key concepts of the new HIPAA privacy requirements (coverage, legally using health information, privacy notices).
* Contains a step-by-step guide to conduct a health information inventory and risk assessment, and adopt necessary policies and procedures.
* Includes Model Forms & Documents (including Privacy Notices, Required Plan Amendments, and Business Associate Contracts) to establish a legally compliant privacy program in the workplace.
* Includes full text of the new regulations.

The *HIPAA Privacy Guide for Employers*is available in both print and downloadable formats. To order, visit <http://www.blr.com>, or speak to a customer service representative by calling (800) 727-5257.