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General Counsel Employment Law Report

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Oh FMLA!

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What must I do today?

You mystify me everyday–

And never in a good way

Helen Applewhaite, branch chief, FMLA and other labor standards for the U.S. Department of Labor's (DOL) Wage and Hour Division, seems to be aware of the pain FMLA causes both employers and employees. Recently the agency made a [request for information](#) from stakeholders on the FMLA rules. The long-term goal is to: (1) "better protect and suit the needs of workers" and (2) "reduce administrative and compliance burdens on employers." How, you ask? We will find out in April 2020 but changes to the FMLA forms are the low hanging fruit.

In the meantime, Applewhaite gave sage advice on FMLA compliance: think like the DOL! Right. Because your business and workplace are just like a big federal agency. She did give tips, though:

1. **Analyze** medical certification information: You need to determine whether the medical information rises to the level of a serious medical condition. Does the information match with the FMLA criteria?
2. **Know** the [definition of a serious medical condition](#): One of the tricky parts about FMLA is that an employee need not be completely incapacitated to qualify. Rather, the employee has to be unable to do any of the work or to perform the essential functions.
3. **Understand who can be a healthcare provider**: Proper medical certification must be provided by a healthcare provider under the Act to meet the standard for FMLA. The FMLA considers podiatrists, dentists, clinical psychiatrists, psychologists, nurse practitioners and midwives to meet its definition of healthcare provider. While you cannot question the healthcare provider, if you are in doubt of the certification you can (at your expense) require a second or even a third opinion.
4. **Recent opinion letters matter**: This is a blog's money shot, because employers cannot keep up. Recent letters have stated that an organ donor employee can use FMLA. Also, 15 minute doctor requested breaks can qualify for intermittent FMLA leave. Finally, last summer, the U.S. Department of Labor (DOL) approved an employer's no-fault attendance policy that effectively freezes an employee's accrued points throughout the duration of his or her Family and Medical Leave Act (FMLA) leave.
5. **Timing is everything**: Who knew the FMLA was like dating? No, timing for the DOL refers to employer notice of FMLA eligibility within 5 days of the request. The notice is an area where employers sometimes trip up—not our clients of course. Also, Applewhaite used the timing reference to plug the [FMLA posting requirement](#)

Even if the DOL does manage to streamline the forms, the fact heavy FMLA leave can be a burden. We can help. Please call with any questions.

Burn Out: It's Legit

Are people at your workplace feeling tired? Negative? Inefficient? If you answered yes to all three, your employees or co-workers could be suffering from burn out syndrome. It is so serious, work-related [burn out](#) will be included in the 2022 edition of the International Classification of Diseases (ICD).

While not a medical condition, the World Health Organization (WHO) recently recognized burn out as an international "occupational phenomenon." Unlike depression or anxiety, burn out is directly tied to work and work culture. By defining and recognizing burn out in its disease handbook, the WHO hopes to target research and develop evidence-based guidelines for the workplace.

The takeaway for employers: Burn out is real and has a negative impact. Actual burn out is more than individual exhaustion and has a profound impact on workplace culture. After fatigue, the WHO lists cynicism and professional inefficiency as the other symptoms. Those qualities do not make for a healthy, productive workplace. The antidote to burn out, according to [Psychology Today](#), is meaningful work. For employers, taking the time to talk to employees about their job is an easy way to explore burn out in your workplace. An employee's perspective and ideas for change could benefit the organization. We see it often.

Somewhere Over the Rainbow: LGBT Rights

It is Pride Month and the EEOC is [here for it](#), waxing Walt Whitman and quoting *Leaves of Grass*. Huh?

Head scratching perhaps in light of the Executive Branch's [recent effort to roll back](#) transgender rights from the ACA. Also, as careful readers of this Report know, the Department of Justice (DOJ) has taken the position that federal law does not prohibit discrimination based on sexual orientation. [Three cases pending](#) before the Supreme Court should decide the conflict between the DOJ and well, everybody else (EEOC, OSHA, etc.) on protections based on sexual orientation and other LGBT related issues.

What is the state of LGBT rights in the United States? This [map](#) is a terrific illustration. In most of the country, 26 states, gender identity and sexual orientation are not protected classes. What is an employer to do?

If you are in Massachusetts, you know the state has a history of firsts in this arena, from gay marriage to a ballot initiative approving transgender rights. Even outside of Massachusetts, transgender people are not anything new and of course the workplace experiences transgender-related issues. Are your policies and handbooks in line with the state of your state? **Do you have a policy that addresses transitioning employees in your workplace?** It is an emerging best practice.

We can help you craft communications and policies that get you over the rainbow, to a productive and functioning workplace.

Delay MA Paid Family Med Leave Contributions

In the good news, bad news category, legislative leaders and the Governor have agreed to a 3 month delay in implementing the payroll contribution for the Paid Family Medical Leave in Massachusetts. Most likely to be voted on today, the delay will move back the July 1 start of contributions to the fund to October 1.

In the bad news category, the contribution rate will be increased with the October 1 start to play catch up:

The delay will not reduce total contributions paid to the new family and medical leave trust fund because ***the state will increase the contribution rate from .63 percent to .75 percent of wages.***

Every fall beginning 2021, the administration will decide whether to change or keep the rate.

The date for the leave benefit to begin remains the same, January 1, 2021.

Oh boy. This law just keeps us all on our toes. We will keep you on yours as new details emerge.

Are the PFML Notices Delayed Too?

We have smart clients. One just asked:

With today's announcement, are the notices still required by June 30th, or has that been extended to September 30th?

The problem is, the lawmakers are not as smart. A three month delay in payroll contributions will change the deduction formula. The amount deducted will be higher to make up for the delay. The exact allocation of the contribution formula has not been published. The notice requires that information. Because, duh, it is a notice of the contribution.

Bismark was right: Laws are like sausages—you do not want to see how they are made.

We will keep you updated as this unfolds. Our advice is hold off on the notices until further notice.



General Counsel's Office Hours

Special Member Benefit



All CCHRA members in good standing will have the special benefit of being able to call Attorney Michael E. Foley, in his role as the CCHRA General Counsel, to obtain his guidance on employment law compliance issues and corresponding HR-related risk management during his CCHRA GC Office Hours – **at no cost**.

[Click here](#) for the description of the role of the CCHRA General Counsel. As General Counsel, Mike will be available within his virtual and gratis office hours for all CCHRA members from 2 pm to 3 pm on the first and third Tuesday of each month. The guidance Mike provides during his office hours will cover all issues that arise within the broad spectrum of the employment relationship to help CCHRA members achieve compliance with the extensive regulations that govern their workplace and to better understand best employment practices.

Issues related to the Internal Revenue Code/the Internal Revenue Service or ERISA-related issues will not be covered under this arrangement, nor will the interpretation, editing or drafting of documents. The office hours will be limited to providing guidance on employment law questions and corresponding HR-related risk management that can be answered in one telephone conversation. Mike can be reached during his CCHRA General Counsel Office Hours at 508-548-4888.

Mike Foley has been representing employers, small and large, for-profit and not-for-profit within all industry sectors and in all matters of labor and employment law for over 30 years. He draws on the breadth of his experience to offer employers an uncommon approach and practical solutions. [Click here](#) for Mike's bio.