

Duff on Hospitality Law

What Do You Mean the Department of Labor Called about a FMLA Audit?

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Just when it seems that businesses spend more time ensuring employment law compliance than they do on actual business, the Department of Labor (DOL) has announced they intend to increase the frequency of their FMLA audits while also increasing the number of site visits during these audits. What, you may ask, is a FMLA audit and why should I care?

For employers who qualify for the **Family Medical Leave Act** ("FMLA") (over 50 employees within a 75 mile radius) the required paperwork is an administrative process and the tracking is done by the Human Resources Department. It is a formality that also provides certain job protections, but it really isn't that big a deal once the processes are in place. Right? The short answer is, no. The FMLA is form driven and form dependant – but it takes more than the forms to make sure you are complying with the law. Audits of an employer's FMLA practices are not something new – at least in theory. The DOL has always had the right to conduct audits, but it is not a right often exercised. It has not been unusual to see the EEOC investigating employee claims under the FMLA, but rarely has the DOL investigated. That is about to change.

DOL Branch Chief for FMLA, Diane Dawson, recently announced that the DOL's national office has instructed the regional offices to identify occasions when an audit would include an on-site visit. These [visits](#) could be announced or unannounced. The investigations may be triggered by an employee complaint they were not given all their rights under the FMLA, that they were about to lose their job (or had recently lost their job) due to exercising their rights under the FMLA, or because DOL is seeing a pattern of FMLA issues within the target company. Violating the FMLA can be costly. The employee can sue you and the government can fine you. The DOL is opting to increase the on-site investigations because the actual visit can reduce the time an audit may take. The investigators have ready access to the records, policies and files. More importantly, they have ready access to the employees for a face-to-face discussion while reviewing the forms.

So, what can an employer do to prepare? First and foremost, an employer should be proactive and review their current processes and forms. The DOL [forms](#) were updated recently and all employers should be using the updated forms. The current [poster](#) should also be placed in the appropriate [locations](#). It is important to note that the poster must be able to be seen by both employees and applicants.

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One of the most important things to do is to review (or develop) your FMLA policy. The DOL will start with a review of the policy (and the forms) to ensure the [March 2013 regulations](#) are incorporated. So, make sure your policy is up to date. At a minimum, the policy must incorporate issues such as the leave year calculation (calendar, rolling backward, rolling forward), eligibility requirements for leave, the reasons for leave, your call-in procedures, substitution of paid leave, the employee's obligations in the FMLA process, medical certification process, explanation of intermittent leave and that the employee is responsible for telling you when an absence is covered under approved intermittent leave, benefit rights under leave, fitness for duty requirements and any outside work during FMLA prohibitions.

Make sure that you have a prepared set of legally compliant template correspondence. This correspondence includes the letters sent to conditionally qualify a leave during the certification process; explain the need for recertification; explain the denial of leave for failure to provide certification; request additional information and explain the consequences for providing incomplete or insufficient certification; explain the employee's return to work; and request second or third opinions.

Now it is time to step out of the form world and audit your internal practices and processes for identifying and addressing a request for qualified leave and for tracking the leave. Make sure you know how your managers respond to a request for leave – whether the magic word of “FMLA” is uttered or not. Your internal processes must comply with the federal regulations. Now is the ideal time to review the processes and ensure you are compliant. Finally, conduct training. Managers and supervisors must be trained about the FMLA and how to handle the issues that arise. If you can show you have gone the extra step of not only doing the internal audit, but also training your supervisors and managers, the DOL is more likely to accept an occasional “mistake” rather than find it an intentional violation of someone's rights.

If you have any questions about how to conduct an audit, or if you are more comfortable having someone else conduct the audit, contact your employment attorney for help. They may even conduct the training for you.

Tags: DOL, Employment Law, FMLA