

Get Ready for Increased On-Site FMLA Compliance Investigations

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The U.S. Department of Labor FMLA Branch Chief Helen Applewhaite recently announced the agencies' renewed focus on conducting more on-site compliance investigations ("pivotal year for FMLA enforcement"). The DOL's stated intent is two-fold: (1) to increase its investigators' access to information; and (2) save time by reviewing the employer's documents and interviewing employees **on-site**.

A DOL spokesman mentioned key focal points the agency is most concerned about, a list that includes exactly the type of violations that we frequently see employers having difficulty understanding and complying with. Examples include:

- Refusing to authorize FMLA leave for an eligible employee;
- Discouraging a worker from using FMLA leave;
- Making someone's request for or use of FMLA leave a negative factor in employment actions, such as hiring, promotions or disciplinary actions; and
- Systemic violations.

The best advice for employers in light of the DOL's announcement that they will be increasing on-site investigations is, with the assistance of outside counsel, conduct a comprehensive audit of your company's FMLA practices and procedures so that you will be ready when the DOL knocks on your door.

The comprehensive audit should include the following:

- Ensure that the FMLA policy in the company's employee handbooks and FMLA forms are in compliance with the DOL's February 2013 regulations;
- Make sure the company has an FMLA packet to give to employees, which includes the company's FMLA policy and all of the required forms;
- Prominently display the DOL's new 2013 FMLA poster where employees and applicants can see it - it is not enough for it just to be in the handbook;
- Maintain complete files for all workers who have requested or taken FMLA leave in the past three years, including the dates of any FMLA leaves and copies of all correspondence, notices, certifications, benefit documents and disputes relating to such leave;
- Train managers to recognize when absences or leave requests have FMLA implications; and
- Make sure your attendance policy complies with the ADA and the FMLA.

Additional pieces of advice:

- When the DOL knocks on the door, particularly without notice, its intent is to catch the employer off guard, to quickly gather documents to show the employer's noncompliance, and to

conduct employee interviews before the employer has had an opportunity to prepare them for an interview. Employers should have a plan in place in advance of this happening.

- If feasible, an employer should utilize the company's business deadlines to reschedule an unannounced DOL inspection for a mutually convenient date and time. That would allow the company an opportunity to determine which documents to produce and select the appropriate employees to have ready for DOL interviews. The employer should prepare the employees to be able to articulate and demonstrate FMLA compliance.
- The employer's goals should be: (1) consistent communications with the DOL (assign one person from the company to be the company spokesperson); and (2) organization of responsive information and documents.

Remember: Conducting an audit and training managers to recognize when absences or leave requests have FMLA implications is the best advice for employers to follow.

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