



Costly FMLA Investigation Mistakes and How to Avoid Them



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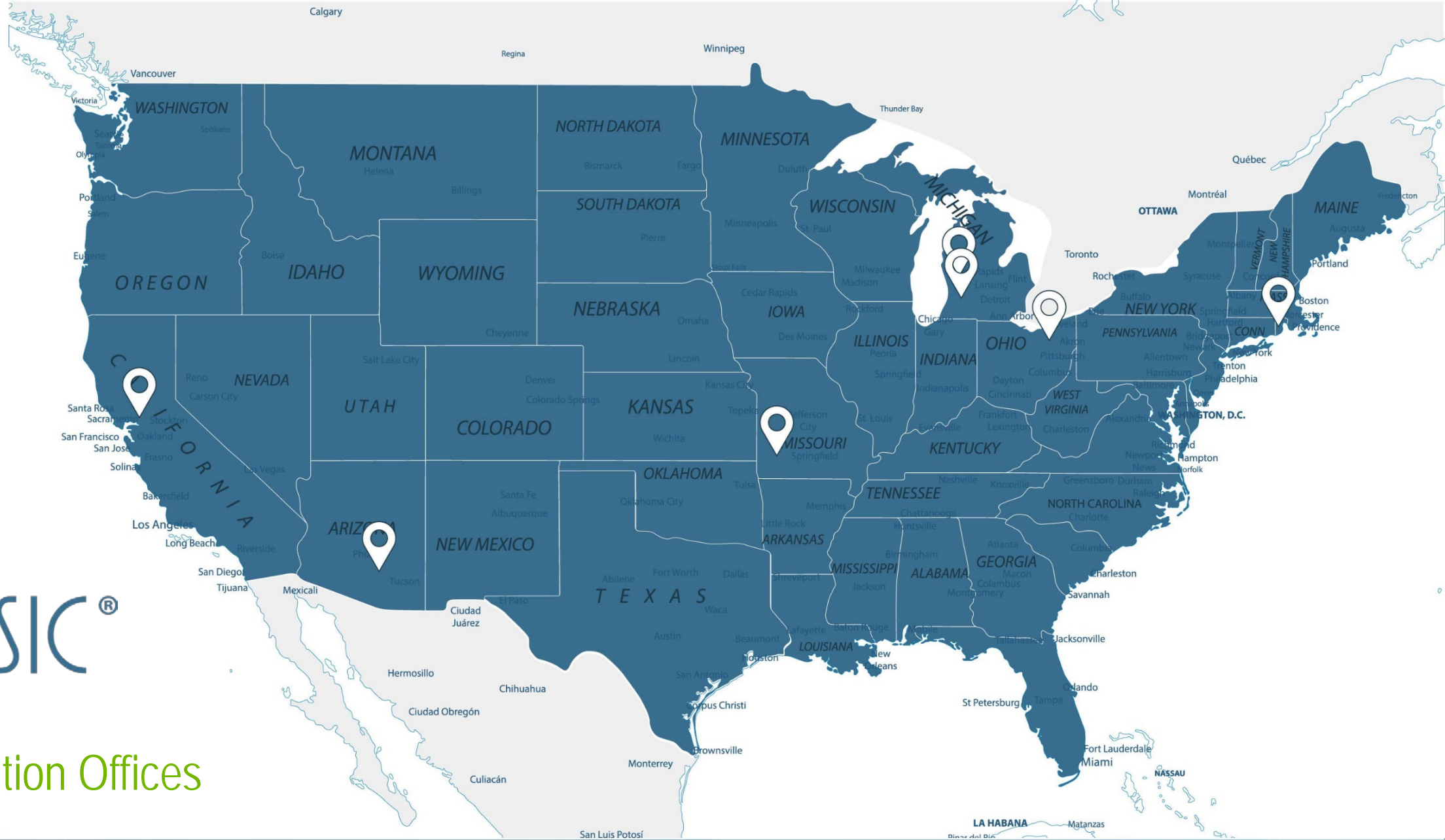
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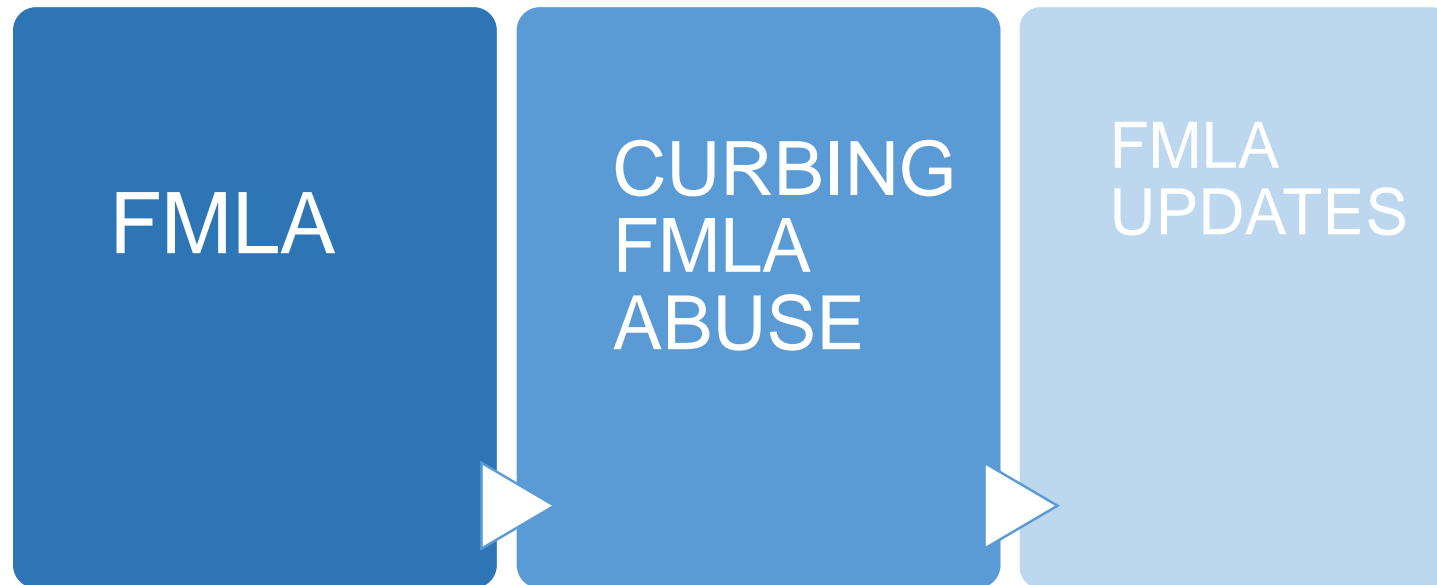
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➤ Introduction



➤ FMLA



➤ What Does the FMLA Provide?

- 12 work weeks of leave within a 12-month period
- 26 work weeks to care for a covered service member
- Leave can be intermittent (1 day or 1 hour)
- Continued health benefits
- Reinstatement to the same or equivalent position



➤ Why Can Employees Take Leave?

- Serious health condition
 - Employee's own condition
 - To care for spouse, parent, or child with a serious health condition
- Birth, adoption or placement of a child for foster care
- Care for a covered service member or qualifying exigency



➤ “Serious Health Condition”

- Condition involving inpatient care, including any follow-up treatment or recovery period
- Condition of incapacity for 3+ consecutive calendar days and continuing treatment
- Chronic, long-term or permanent condition that requires periodic treatment
- Treatment needed to prevent a serious health condition
- Condition caused by pregnancy or prenatal care

➤ “Serious Health Condition” (cont’d)

- Mental health issues often qualify
 - Brock v. United Grinding Techs. (S.D. Ohio 2003)
 - Course of anti-depressants and anti-anxiety medications can constitute continuing treatment
- But they must satisfy the statutory definition
 - Hoban v. WBNCC JV (E.D. Mich. 2007)
 - Plaintiff missed 4 days after brother’s death, claiming he was a “nervous wreck” but never sought treatment
 - No FMLA claim: absent a diagnosable serious health condition, bereavement leave does not qualify

➤ Employee Notice Requirements

- Employees need not expressly assert FMLA when they first ask for leave
- But must explain reasons for leave to allow employer to determine whether FMLA applies
- If in doubt, employer must “inquire further”
- If applicable, provide Eligibility and Rights and Responsibilities Notices

➤ Employee Notice?

- Miles v. Nashville Elec. Serv. (6th Cir. 2013)
 - Employee suffered psychotic break and took FMLA leave
 - The day after returning to work, employee informed her supervisor that she would not be coming back to work and submitted a resignation letter
 - Court found that employer did not have a duty to inquire further as to whether employer was requesting additional FMLA leave, or to reinstate her when she sought to rescind her resignation

➤ Employee Notice?

- Kobus v. Coll. of St. Scholastica, Inc. (8th Cir. 2010)
 - Employee told supervisor that he needed a “mental health leave” to deal with head and neck pain caused by stress and anxiety
 - Supervisor “prudently” asked whether employee was requesting FMLA leave
 - When told a doctor would have to provide a certification, employee replied, “I don't have a doctor. Is there any other way I can go?”
 - When supervised that no other leave was available, employee resigned
 - Court held that employee failed to adequately state an intent to take FMLA leave

➤ Covered by the FMLA?

- Employers with 50+ employees in 20+ work weeks a year
- Employees who have worked
 - With the employer for a year or more;
 - 1250+ hours within the past 12 months; AND
 - At a site within 75 miles of which the employer has 50+ employees



➤ FMLA Abuse

- At least 52% of all covered employers nationwide believe they have granted unfounded FMLA leave. – SHRM
- Honest suspicion may arise from:
 - Patterns of absence;
 - Frequent absences;
 - Duration of absences;
- Commonly used investigative tools:
 - Social Media
 - Word-of-Mouth
 - Video Surveillance

➤ FMLA Abuse?

- *Brady v. Bath Iron Works Corp.*, (D. Me. May 25, 2016).
 - Employee was seen at a local bar having a beer on FMLA leave
 - Employee allegedly suffered “chronic, serious mental health conditions, including depression, and anxiety.”
 - Court denied employer’s motion to dismiss
 - Court concluded that the Employee having a beer at a local bar was “not a situation where an employee has been caught red-handed engaging in activity clearly inconsistent with the intended purpose of leave.”

➤ FMLA Abuse?

- Moran v. Redford Union School Dist., (E.D. Mich. 2009)
 - Employee needed two days off for Florida trip
 - Employer denied request for leave
 - Employee then went to doctor, was diagnosed with “acute situational anxiety,” and submitted FMLA paperwork
 - Employee would not cooperate with employer’s requests for additional medical information or sign last chance agreement
 - Court held that employee’s obstruction supported termination after refusal to sign agreement
 - BUT “there is nothing plainly inconsistent about traveling to Florida while . . . suffering from ‘acute situational anxiety’”

➤ FMLA Abuse?

- Jones v. Gulf Coast Health Care of Del. (11th Cir. 2017).
 - Employee went on a 12-week certified leave for shoulder surgery
 - The Medical Certification stated that Employee was unable to work and that he needed physical therapy to recover from the surgery
 - While out on leave, Employer discovered Facebook photos showing Employee vacationing in St. Martin, Florida
 - Employee was suspended and later terminated
 - Court concluded:
 - Temporal proximity raised questions regarding Employer's motivation for firing Employee
 - Facebook photos – “murky at best” to show inconsistency with his medical condition

➤ FMLA Abuse?

- Smith v. S. Ill. Riverboat/Casino Cruises, Inc., No. CV-4069-JPG, 2007 U.S. Dist. LEXIS 45094 (S.D. Ill., Aug. 30, 2006).
 - Plaintiff submitted a medical certification and received medical leave
 - Plaintiff went on a vacation in Florida and lied about it despite contradicting surveillance evidence
 - Employer later fired Plaintiff
 - Court denied Defendant's motion for summary judgment
 - Court concluded that "Plaintiff's going on vacation does not, in itself, suggest that her limitations were such that she could work."

➤ FMLA Abuse?

- Robbins v. U.S. Foodservice, Inc., No. 11-4599 (JBS/KMW), 2012 U.S. Dist. LEXIS 12466, (D.N.J. Aug. 30, 2012).
 - Court granted Employer's motion for summary judgment
 - Plaintiff received FMLA leave to care for her sick husband
 - Plaintiff requested an extension due to an alleged neck injury
 - There was a final arbitration decision finding that Employer had just cause to discharge Plaintiff
 - The arbitrator found that Plaintiff was dishonest
 - Plaintiff had used her FMLA leave to cover up her plan to attend Bike Week in Myrtle Beach, Florida

➤ FMLA Abuse?

- Jackson v. BNSF Railway Co. (N.D. Tex. Aug. 1, 2017)
 - Court granted employer's motion for summary judgment on employee's FMLA claim when employee was spotted at a Beyoncé concert less than a week after reporting that she was 'not well to return to work' following a panic attack.
 - Employee's co-workers discovered her at the concert.
 - When the employee's supervisor followed up with the employee on her whereabouts, the employee ignored the supervisor's calls.
 - Employee's defense – Her therapist told her to not have contact with her supervisors to help with her anxiety.

➤ Investigating FMLA Abuse

- Gather photos and other evidence of suspected fraud;
- Thoroughly review the employee's certification documents;
- Bring the employee in for questioning;

- *Dandridge v. North American Fuel Systems* (W.D. Mich. 2015)

➤ Curbing FMLA Abuse

- Require certifications
- Authenticate/clarify certifications
- Update job descriptions
- Require use of PTO/vacation
- Require efforts to schedule treatment to minimize disruption
- Require compliance with call-in procedures, unless medical certification says otherwise

➤ Medical Certification

- Health care provider's contact information and practice/specialization
- Approximate date on which the serious health condition began, and its probable duration
- Medical facts, such as symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, or any other continuing treatment

➤ Medical Certification

- Information to establish:
 - Necessity of leave
 - Likely duration of leave
 - Estimated dates and frequency of leave if seeking intermittent leave or reduced schedule



➤ Recertification

- Can request recertification only every 30 days or minimum duration of condition unless:
 - Employee requests extension
 - Circumstances change
 - Employer doubts continuing validity of certification
- Cannot require doctor's note for each absence confirming relation to FMLA-qualifying condition
- Can request recertification every 6 months even if condition could last longer
- Can get a new certification ever year
 - Second or third opinion?
 - Still eligible?

➤ Don't Retaliate!!

- Gordon v. U.S. Capitol Police (D.C. Cir. 2015)
 - Officer granted intermittent leave for depression treatment
 - Employer then:
 - Required fitness for duty test despite lack of performance issues
 - Took away gun while test was pending
 - Put her on desk duty with no OT
 - Required doctor's notes for each intermittent leave
 - Trial court dismissed interference claim
 - Appellate court reversed and reinstated plaintiff's claim

➤ FMLA Updates

- March 2019: The Department of Labor issued an opinion letter clarifying the DOL's position on designating and taking FMLA leave, stating that “an employer is prohibited from delaying the designation of FMLA-qualifying leave as FMLA leave.”
- May 2019: The Department of Labor plans to seek comments on how to improve the FMLA to better protect workers and reduce administrative burdens on employers.
 - Request expected by April 30, 2020

➤ Final Thoughts...

- Mental health issues are pervasive
- Don't play doctor and don't ask about mental health
- Be alert and recognize requests for FMLA leave or an ADA accommodation
- Begin interactive process immediately and document it



➤ Final Thoughts...

- Cost-effective investigative tools do not shield an employer from FMLA liability;
- Understand an employee's limitations when verifying suspected FMLA abuse;
- When in doubt, call an attorney



QUESTIONS

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