



COMPLIANCE BULLETIN

HIGHLIGHTS

- Employers subject to the FMLA should be prepared for a random FMLA audit at any time.
- On-site visits from FMLA investigators are on the rise and should be considered the norm.
- A focus on "systemic" FMLA audits may require employers to provide a wide range of information to the DOL.

LINKS AND RESOURCES

The DOL has broad authority to investigate or audit an employer's FMLA practices and procedures. The DOL's [Wage and Hour Division](#) (WHD) handles FMLA audits.

For more information:

- Visit the WHD's FMLA [Web page](#)
- For an overview of the FMLA, see FMLA [Fact Sheet #28](#)

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DOL Increases FMLA Enforcement

OVERVIEW

The U.S. Department of Labor (DOL) is focusing more of its resources on enforcing compliance with the Family and Medical Leave Act (FMLA) through employer audits. Although the DOL has always had the authority to conduct FMLA audits, the agency has been ramping up its efforts and taking a more aggressive approach in its investigations.

In the past, FMLA audits were usually triggered by an employee complaint or employer violation trends. Recently, however, the DOL has been initiating more audits on its own, without any triggering event. The DOL's new approach focuses on "systemic" FMLA compliance issues. These are issues that affect multiple employees or multiple employer locations, rather than a single person or worksite.

Employers that are not prepared for an audit may be subject to costly settlements, fines and penalties.

ACTION STEPS

Employers subject to the FMLA (companies with 50 or more employees) should expect not only a greater likelihood of facing an FMLA audit, but also more on-site visits and requests for wider ranges of information from DOL investigators.

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To prepare for a possible DOL audit, employers should perform internal reviews to ensure their FMLA policies and procedures are compliant. The best time to perform an internal FMLA review is **before** the DOL selects an employer for an audit.

New Audit Approach

Before the DOL launched its current efforts, the DOL's investigation during an FMLA audit would typically concentrate on employees who were on leave at the time of the audit. Now, the DOL casts a wider net by also reviewing employers' actions relating to FMLA leave taken in prior years. Investigators may also scrutinize an employer's FMLA practices and procedures at several or all of its locations, rather than concentrating on the place where a specific complaint or violation trend arose.

The DOL's increased focus on systemic investigations may require an employer that is facing an FMLA audit to provide an extensive range of information relating to their FMLA policies and procedures.

The types of information an auditor may gather include:

- ✓ Statistics regarding FMLA leave trends, employee requests for leave, employer responses to leave requests, types of occupation, types of requests and other classifications of information;
- ✓ Interviews with employees, supervisors, administrators and managers; and
- ✓ Records of leave requests, FMLA notices given to employees, employer leave determinations, employer's FMLA policy and handbook, and medical certifications and re-certifications.

The DOL's increase in random FMLA audits and on-site visits means that employers should be ready for an FMLA audit at any time.

Preparing for an FMLA Audit

Previously, the DOL rarely conducted on-site visits for FMLA investigations. With the agency's new approach, however, on-site visits are on the rise and should be considered the norm. Employers should also be aware that they could receive the initial notice of an FMLA audit through an investigator's unannounced, in-person visit. Once on-site, an investigator may commence or continue an audit by interviewing employees, reviewing records and taking any other actions that are within the DOL's broad authority.

Employers in certain industries, such as construction and employee leasing/staffing, should be especially prepared for FMLA investigations, as the DOL has made it a priority to target them for audits.

As a general rule, the best way to prepare for a DOL audit is to:

- Ensure that your FMLA practices and procedures comply with all current federal laws and regulations; and
- Establish a recordkeeping system for maintaining all the important information and documents relating to FMLA.

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Internal FMLA Audits

The best way to prepare for an FMLA audit is to confirm that your leave policies and procedures are up to date and comply with federal requirements. It is also important to have documents showing your compliance and to maintain these documents so they are easy to access in the event of a DOL audit. If an employer takes these steps before being selected for audit, it can reduce its exposure to penalties, fines and other costly settlements. It can also make the audit process more manageable and less time-consuming.

Leave Policies

An employer's FMLA policy should be an accurate reflection of how it administers family and medical leaves and should include all the information that is required to comply with the FMLA. Two of the most recent changes an employer should be certain to incorporate into its FMLA policy are:

- The DOL's [final rule](#) that became effective March 8, 2013, regarding calculation of incremental leave and providing families of military personnel with FMLA protections; and
- The expansion of FMLA leave rights for employees with same-sex spouses.

Topics for FMLA policy:

- Eligibility requirements for all types of FMLA leave
- A definition of the employer's 12-month FMLA leave year
- The employer's call-in procedures
- Information on substitution of paid leave
- An explanation of employees' obligations in the FMLA process
- Details about the medical certification process
- Information about intermittent leave
- An explanation of benefit rights during leave
- Fitness for duty requirements
- Parameters for checking in on employees while they are on leave
- Outside work prohibitions during FMLA leave

Compliance Tip – Train Managers on FMLA Policy

Employers should make sure that employees in manager positions are trained on FMLA policies and procedures. Failing to fully train managers regarding FMLA compliance is one of the most common mistakes that can trigger liability for an employer. In particular, employers should make sure managers are equipped to recognize when an employee may be eligible for FMLA leave, especially in cases where an employee does not specifically request it.

Notices and Poster

Employers are required to provide certain notices to employees to administer FMLA leave, such as a notice designating whether a requested leave will qualify as FMLA leave. The DOL has provided model notices and certifications that employers may use. The DOL's model FMLA forms are optional; employers may decide to customize the DOL's model

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forms or create their own FMLA forms. The model FMLA forms are available on the DOL's FMLA [Web page](#). Since the DOL periodically updates its model forms, employers that use the model forms should make sure they are using the current versions. Employers that have developed their own forms should review the DOL's models to make sure their own forms contain up-to-date information.

Also, one of the simplest checks an employer can perform to prepare for an FMLA audit is to confirm that it has the DOL's current [FMLA poster](#) prominently posted at each worksite. If an employer has an employee handbook, it should include a copy of the notice in the handbook. Employers that have a substantial number of employees who speak a language other than English must also hang a copy of the FMLA poster in that language. An employer that willfully violates this posting requirement may be subject to a **fine of up to \$110** for each separate offense.

Recordkeeping

An employer should make certain that it is retaining complete and accurate records to present to investigators during an FMLA audit. Being able to produce all the appropriate records will help move the audit process along and provide an accurate picture of an employer's FMLA administration.

In general, employers should keep all FMLA documentation for a minimum of **three years**. The information and documents that an FMLA auditor may request include:

- ✓ Dates of FMLA leave taken by eligible employees.
- ✓ Hours of FMLA leave taken by eligible employees, if leave is taken in increments of less than one full day
- ✓ Copies of employee notices of leave furnished to the employer
- ✓ Copies of all written notices given to employees as required under FMLA
- ✓ Documents describing employee benefits or employer paid and unpaid leave policies and practices
- ✓ Premium payments of employee benefits
- ✓ Records of disputes between the employer and the employee regarding FMLA

Records and documents relating to medical certifications, re-certifications or medical histories of employees or employees' family members, created for purposes of FMLA, are required to be maintained as confidential medical records in separate files from the usual personnel files. If the Americans with Disabilities Act (ADA) applies, then these records must comply with the ADA confidentiality requirements.