

# **SEIU Local 113**

## **STEWARD GUIDE TO FMLA (Family and Medical Leave Act)**

As we acknowledge our commitment to ongoing education for our union stewards, we offer this comprehensive guide to FMLA (Family and Medical Leave Act). As you use this booklet and address FMLA issues, please remember:

1. Always consult your current Collective Bargaining Agreement or past practice when addressing issues affected by either of these.
2. Remember, this law addresses UNPAID leave; pay issues are determined by your contract, other laws, or past practice.
3. For FMLA qualifying events and in accordance with the Act, such time cannot be counted against an employee in matters of discipline. Make sure this is cited in your absenteeism policy at work.
4. Be familiar with the process in your facility for members obtaining FMLA forms and the process used to apply for FMLA rights.

In Unity,

Kathy Fodness  
Education Coordinator

KF:cs  
Opeiu #12

## TABLE OF CONTENTS

FMLA SUMMARY .....	3
PURPOSES OF THE FMLA .....	3
EMPLOYER COVERAGE .....	3
EMPLOYEE ELIGIBILITY .....	3-4
LEAVE ENTITLEMENT .....	4
INTERMITTENT/REDUCED SCHEDULE LEAVE .....	5
SUBSTITUTION OF PAID LEAVE .....	5
MEDICAL CERTIFICATION .....	6
HEALTH CARE PROVIDER .....	6
MAINTENANCE OF HEALTH BENEFITS .....	6-7
OTHER BENEFITS .....	7
JOB RESTORATION .....	7
NOTICES .....	7-9
UNLAWFUL ACTS .....	9
ENFORCEMENT .....	9
OTHER PROVISIONS .....	10
QUESTIONS AND ANSWERS .....	10-13
FMLA AS A GRIEVANCE ISSUE .....	13
ABSENTEEISM GRIEVANCE .....	13
LETTER TO EMPLOYER .....	14
JOB EVALUATION GRIEVANCE .....	15
JOB ASSIGNMENT GRIEVANCE .....	15
WORK PERFORMANCE GRIEVANCE .....	15
GRIEVANCES TO OBTAIN FMLA BENEFITS .....	15
GRIEVANCE QUESTIONS AND ANSWERS.....	16

# Family and Medical Leave Act<sup>1</sup>

## SUMMARY

The Family and Medical Leave Act (“FMLA”) provides certain employees with up to 12 workweeks of unpaid, job-protected leave a year, and requires group health benefits to be maintained during the leave as if employees continued to work instead of taking leave.

The FMLA became effective August 5, 1993, for most employers and employees. (For those covered by a collective bargaining agreement (CBA) in effect on that date, the FMLA became effective on the expiration of the CBA or February 5, 1994, whichever was earlier.)

The law covers only certain employers; affects only those employees eligible for the protections of the law; involves entitlement to leave, and job restoration after leave; sets requirements for notice and certification of the need for FMLA leave; and protects employees who request or take FMLA leave. The law also includes certain employer record-keeping requirements.

### **Purposes of the FMLA**

The FMLA allows employees to balance their work and family life by taking reasonable unpaid leave for certain family and medical reasons. The FMLA seeks to accomplish these purposes in a manner that accommodates the legitimate interests of employers, and minimizes discrimination on the basis of gender, while promoting equal employment opportunity for men and women.

### **Employer Coverage**

FMLA applies to all:

Public agencies, including State, local and Federal employers, and local education agencies (schools); and,

Private sector employers who employ 50 or more employees for at least 20 workweeks in the current or preceding calendar year, including joint employers and successors of covered employers.

### **Employee Eligibility**

To be eligible for FMLA leave, an employee must work for a covered employer and:

1. have worked for that employer for at least 12 months;

---

<sup>1</sup> **THESE MATERIALS ARE FOR INFORMATIONAL PURPOSES ONLY. THEY ARE NOT TO BE USED AS A SUBSTITUTE FOR SPECIFIC LEGAL ADVICE.**

2. have worked at least 1,250 hours during the 12 months prior to the start of the FMLA leave; and
3. work at a location where at least 50 employees are employed at the location or within 75 miles of the location (if less than 50 employees, may be included in the Collective Bargaining Agreement).

## **Leave Entitlement**

A covered employer must grant an eligible employee up to a total of 12 workweeks of unpaid leave in a 12-month period for one or more of the following reasons:

- a. for the birth of a son or daughter, and to care for the newborn child
- b. For the placement with the employee of a child for adoption or foster care, and to care for the newly placed child.

Leave to care for a newborn child or for a newly placed child must conclude within 12 months after the birth or placement.

- c. To care for an immediate family member (spouse, child or parent – but not a parent “in-law”) with a serious health condition; and

Who is considered an immediate “family member” for purposes of taking FMLA Leave?

An employee’s spouse, children (son or daughter) and parents are immediate family members for purposes of FMLA. The term “parent” does not include a “parent-in-law.” The terms son or daughter do not include individuals age 18 or over unless they are “incapable of self-care” because of a mental or physical disability that limits one or more of the “major life activities” as those terms are defined in regulations issued by the Equal Employment Opportunity Commission (EEOC) under the Americans with Disabilities Act (ADA).

- d. When the employee is unable to work because of a serious health condition.

Serious Health Condition – “Serious health condition” means an **illness, injury, impairment, or physical or mental condition** that involves:

- Any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility; or
- A period of incapacity requiring absence of more than three calendar days from work, school, or other regular daily activities that also involves continuing treatment by (or under the supervision of) a health care provider; or
- Any period of incapacity due to pregnancy, or for prenatal care; or
- Any period of incapacity (or treatment therefore) due to a chronic serious health condition (e.g., asthma, diabetes, epilepsy, etc.); or

- A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (e.g., Alzheimer's, stroke, terminal diseases, etc.); or
- Any absences to receive multiple treatments (including any period of recovery therefrom) by, or on referral by, a health care provider for a condition that likely would result in incapacity of more than three consecutive days if left untreated (e.g., chemotherapy, physical therapy, dialysis, etc.).

Spouses employed by the same employer may be limited to a combined total of 12 workweeks of family leave for the following reasons:

- Birth and care of a child;
- For the placement of a child for adoption or foster care, and to care for the newly placed child; and,
- To care for an employee's parent who has a serious health condition.

### **Intermittent (taken during separate intervals)/Reduced Schedule Leave**

The FMLA permits employees to take leave on an intermittent basis or to work a reduced schedule under certain circumstances.

Intermittent/reduced schedule leave may be taken when medically necessary to care for a seriously ill family member, or because of the employee's health condition.

Intermittent/reduced schedule leave may be taken to care for a newborn or newly placed adopted or foster care child only with the employer's approval.

Only the amount of leave actually taken while on intermittent/reduced schedule leave may be charged as FMLA leave. Employees may not be required to take more FMLA leave than necessary to address the circumstances that cause the need for leave. Employers may account for FMLA leave in the shortest period of time that their payroll systems use, provided it is one hour or less.

Employees needing intermittent/reduced schedule leave for foreseeable medical treatment must work with their employers to schedule the leave so as not to unduly disrupt the employer's operations, subject to the approval of the employee's health care provider. In such cases, the employer may transfer the employee temporarily to an alternative job with equivalent pay and benefits that accommodates recurring periods of leave better than the employee's regular job. *(Please see current Collective Bargaining Agreement/past practice.)*

### **Substitution of Paid Leave**

Employees may choose to use, or employers may require the employee to use, accrued paid leave to cover some or all of the FMLA leave taken. Employees may choose, or employers may require the substitution of accrued paid vacation or personal leave for any of the situations covered by FMLA. The substitution of accrued sick leave or paid medical leave is limited by the employer's policies governing the use of such leave *or*

*check your current collective bargaining agreement and past practice.* Employees cannot be required to exhaust paid leaves during concurrent FMLA/workers compensation leaves.

### **Medical Certification**

An employer may require that the need for leave for a serious health condition of the employee, or the employee's immediate family member, be supported by a certification issued by a health care provider. The employer must allow the employee at least 15 calendar days to obtain the medical certification.

An employer may, at its own expense, require the employee to obtain a second medical certification from a health care provider. The employer may choose the health care provider for the second opinion, except that in most cases the employer may not regularly contract with or otherwise regularly use the services of the health care provider. If the opinions of the employee's and the employer's designated health care providers differ, the employer may require the employee to obtain certification from a third health care provider, again at the employer's expense. This third opinion shall be final and binding. The third health care provider must be approved jointly by the employer and the employee. The "Certification of Health Care Provider" (optional form WH-380) may be used to obtain the certifications.

### **Health Care Provider**

Health care providers who may provide certification of a serious health condition include:

- Doctors of medicine or osteopathy authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices;
- Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice under State law;
- Nurse practitioners, nurse-midwives, and clinical social workers authorized to practice under State law and performing within the scope of their practice under State law;
- Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts;
- Any health care provider recognized by the employer or the employer's group health plan's benefits manager; and
- A health care provider listed above who practices in a country other than the United States and who is authorized to practice under the laws of that country.

### **Maintenance of Health Benefits**

A covered employer is required to maintain group health insurance coverage, including family coverage, for an employee on FMLA leave on the same terms as if the employee continued to work.

Where appropriate, arrangements will need to be made for employees taking unpaid FMLA leave to pay their share of health insurance premiums. For example, if the group health plan involves co-payments by the employer and the employee, an employee on unpaid FMLA leave must make arrangements to pay his or her normal portion of the insurance premiums to maintain insurance coverage, as must the employer. Such payments may be made under any arrangement voluntarily agreed to by the employer and employee.

An employer's obligation to maintain health benefits under FMLA stops if and when an employee informs the employer of an intent not to return to work at the end of the leave period, or if the employee fails to return to work when the FMLA leave entitlement is exhausted. The employer's obligation also stops if the employee's premium payment is more than 30 days late and the employer has given the employee written notice at least 15 days in advance advising that coverage will cease if payment is not received.

In some circumstances, the employer may recover premiums it paid to maintain health insurance coverage for an employee who fails to return to work from FMLA leave.

### **Other Benefits**

Other benefits need not be maintained during periods of unpaid FMLA leave. Certain types of earned benefits, such as seniority or paid leave may not continue to accrue during periods of unpaid FMLA leave provided that such benefits do not accrue for employees on other types of unpaid leave, *unless dictated by a current Collective Bargaining Agreement or past practice.*

### **Job Restoration**

Upon return from FMLA leave, an employee must be restored to his or her original job, or to an "equivalent" job, which means virtually identical to the original job in terms of pay, benefits, and other employment terms and conditions. *(Check your current Collective Bargaining Agreement and past practice.)*

In addition, an employee's use of FMLA leave cannot result in the loss of any employment benefit that the employee earned or was entitled to before using (but not necessarily during) FMLA leave.

"Key" Employee Exception - Under limited circumstances where restoration to employment will cause "substantial and grievous economic injury" to its operations, an employer may refuse to reinstate certain highly-paid, salaried "key" employees. In order to do so, the employer must notify the employee in writing of his/her status as a "key" employee (as defined by FMLA), the reasons for denying job restoration, and provide the employee a reasonable opportunity to return to work after so notifying the employee.

### **Notices**

**Employee Notice** – Eligible employees seeking to use FMLA leave may be required to provide:

- 30-day advance notice of the need to take FMLA leave when the need is foreseeable;
- Notice “as soon as practicable” when the need to take FMLA leave is not foreseeable (“as soon as practicable” generally means at least verbal notice to the employer within one or two business days of learning of the need to take FMLA leave);
- Sufficient information for the employer to understand that the employee needs leave for FMLA-qualifying reasons (the employee need not mention FMLA when requesting leave to meet this requirement, but may only explain why the leave is needed); and
- Where the employer was not made aware that an employee was absent for FMLA reasons and the employee wants the leave counted as FMLA leave, timely notice (generally within two business days of returning to work) that leave was taken for a FMLA-qualifying reason.

**Employer Notices** – Covered employers must take the following steps to provide information to employees about FMLA:

- Post a notice approved by the Secretary of Labor (WH Publication 1420) explaining rights and responsibilities under FMLA;
- Include information about employee rights and obligations under FMLA in employee handbooks or other written material, including Collective Bargaining Agreements (CBAs); or
- If handbooks or other written material do not exist, provide general written guidance about employee rights and obligations under FMLA whenever an employee requests leave (a copy of Fact Sheet No. ESA 95-94 will fulfill this requirement); and
- Provide a written notice designating the leave as FMLA leave and detailing specific expectations and obligations of an employee who is exercising his/her FMLA entitlements. The employer may use the “Employer Response to Employee Request for Family or Medical Leave” (optional form WH-381) to meet this requirement. This employer notice should be provided to the employee within one or two business days after receiving the employee’s notice of need for leave and include the following:
  1. That the leave will be counted against the employee’s annual FMLA leave entitlement;
  2. Any requirements for the employee to furnish medical certification and the consequences of failing to do so;
  3. The employee’s right to elect to use accrued paid leave for unpaid FMLA leave and whether the employer will require the use of paid leave, and the conditions related to using paid leave;
  4. Any requirement for the employee to make co-premium payments for maintaining group health insurance and the arrangement for making such payments;

5. Any requirement to present a fitness-for-duty certification before being restored to his/her job;
6. Rights to job restoration upon return from leave;
7. Employee's potential liability for reimbursement of health insurance premiums paid by the employer during the leave if the employee fails to return to work after taking FMLA leave; and
8. Whether the employee qualifies as a "key" employee and the circumstances under which the employee may not be restored to his or her job following leave.

### **Unlawful Acts**

FMLA makes it unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided by this law. It is also unlawful for an employer to discharge or discriminate against any individual for opposing any practice, or because of involvement in any proceeding, related to FMLA.

Employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies.

### **Enforcement**

FMLA is enforced by the Wage and Hour Division of the U.S. Department of Labor's Employment Standards Administration. This agency investigates complaints of violations. If violations cannot be satisfactorily resolved, the Department may bring action in court to compel compliance.

An eligible employee may bring a private civil action against an employer for violations. An employee is not required to file a complaint with the Wage and Hour Division prior to bringing such action. An employee under a Collective Bargaining Agreement should utilize their grievance process.

### **Other Provisions**

Several States and other jurisdictions also have family or medical leave laws. If both the Federal law and a State law apply to an employer's operations, an employee is entitled to the most generous benefit provided under either law.

Employers may also provide family and medical leave that is more generous than the FMLA leave requirements.

The FMLA does not modify or affect any Federal or State law which prohibits discrimination.

## **Questions and Answers**

Q: How much leave am I entitled to under FMLA?

If you are an “eligible” employee, you are entitled to 12 weeks of leave for certain family and medical reasons during a 12-month period.

Q: How is the 12-month period calculated under FMLA?

Employers may select one of four options for determining the 12-month period:

1. The calendar year;
2. Any fixed 12-month “leave year” such as a fiscal year, a year required by State law, or a year starting on the employee’s “anniversary” date;
3. The 12-month period measured forward from the date any employee’s first FMLA leave begins; or
4. A “rolling” 12-month period measured backward from the date an employee uses FMLA leave.

Q: Does worker’s compensation leave count against an employee’s FMLA leave entitlement?

It can. FMLA leave and workers’ compensation leave can run together, provided the reason for the absence is due to a qualifying serious illness or injury and the employer properly notifies the employee in writing that the leave will be counted as FMLA leave.

Q: Can the employer count leave taken due to pregnancy complications against the 12 weeks of FMLA leave for the birth and care of my child?

Yes. An eligible employee is entitled to a total of 12 weeks of FMLA leave in a 12-month period. If the employee has to use some of that leave for another reason, including a difficult pregnancy, it may be counted as part of the 12-week FMLA leave entitlement.

Q: Can the employer count time on maternity leave or pregnancy disability leave as FMLA leave?

Yes. Pregnancy disability leave or maternity leave for the birth of a child would be considered qualifying FMLA leave for a serious health condition and may be counted in the 12 weeks of leave, so long as the employer properly notifies the employee in writing of the designation.

Q: May I take FMLA leave for visits to a therapist, if my doctor prescribes the therapy?

Yes. FMLA permits you to take leave to receive “continuing treatment by a health care provider,” which include recurring absences for therapy treatments such as those ordered by a doctor for physical therapy after a hospital stay, or for treatment of severe arthritis.

Q: Which employees are eligible to take FMLA leave?

Employees are eligible to take FMLA leave if they have worked for their employer for at least 12 months, and have worked for at least 1,250 hours over the previous 12 months, and work at a location where at least 50 employees are employed by the employer within 75 miles.

Q: Do the 12 months of service with the employer have to be continuous or consecutive?

No. The 12 months do not have to be continuous or consecutive; all time worked for the employer is counted.

Q: Do the 1,250 hours include paid leave time or other absences from work?

No. The 1,250 hours include only those hours actually worked for the employer. Paid leave and unpaid leave, including FMLA leave, are not included.

Q: How do I determine if I have worked 1,250 hours in a 12-month period?

Your individual record of hours worked would be used to determine whether 1,250 hours had been worked in the 12 months prior to the commencement of FMLA leave. As a rule of thumb the following may be helpful for estimating whether this test for eligibility has been met:

- 24 hours worked in each of the 52 weeks of the year; or
- Over 104 hours worked in each of the 12 months of the year; or
- 40 hours worked per week for more than 31 weeks (over seven months) of the year.

Q: Do I have to give my employer my medical records for leave due to a serious health condition?

No. You do not have to provide medical records. The employer may however, request that for any leave taken due to a serious health condition, you provide a medical certification confirming that a serious health condition exists.

Q: Can my employer require me to return to work before I exhaust my leave?

Subject to certain limitations, your employer may deny the continuation of FMLA leave due to a serious health condition if you fail to fulfill any obligations to provide supporting medical certification. The employer may not, however, require you to return to work early by offering you a light duty assignment.

Q: Are there any restrictions on how I spend my time while on leave?

Employers with established policies regarding outside employment while on paid or unpaid leave may uniformly apply those policies to employees on FMLA leave.

Otherwise, the employer may not restrict your activities. The protections of FMLA will not, however, cover situations where the reason for the leave no longer exists, where the employee has not provided required notices or certifications, or where the employee has misrepresented the reason for leave.

Q: Can my employer make inquiries about my leave during my absence?

Yes, but only to you. Your employer may ask you questions to confirm whether the leave needed or taken qualifies for FMLA purposes, and may require periodic reports on your status and intent to return to work after leave. Also, if the employer wishes to obtain another opinion, you may be required to obtain additional medical certification at the employer's expense, or re-certification during a period of FMLA leave. The employer may have a health care provider representing the employer contact your health care provider, with your permission, to clarify information in the medical certification or to confirm that it was provided by the health care provider. The inquiry may not seek additional information regarding your health condition or that of a family member.

Q: Can my employer refuse to grant me FMLA leave?

If you are an "eligible" employee who has met FMLA's notice and certification requirements (and you have not exhausted your FMLA leave entitlement for the year), you may not be denied FMLA leave.

Q: Will I lose my job if I take FMLA leave?

Generally, no. It is unlawful for any employer to interfere with or restrain or deny the exercise of any right provided under this law. Employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies. Under limited circumstances, an employer may deny reinstatement to work, but not the use of FMLA leave, to certain highly-paid, salaried ("key") employees.

Q: Are there other circumstances in which my employer can deny me FMLA leave or reinstatement to my job?

In addition to denying reinstatement in certain circumstances to "key" employees, employers are not required to continue FMLA benefits or reinstate employees who would have been laid off or otherwise had their employment terminated had they continued to work during the FMLA leave period as for example, due to a general layoff.

Employees who give unequivocal notice that they do not intend to return to work lose their entitlement to FMLA leaves.

Employees who are unable to return to work and have exhausted their 12 weeks of FMLA leave in the designated "12-month period" no longer have FMLA protections of leave or job restoration.

Under certain circumstances, employers who advise employees experiencing a serious health condition that they will require a medical certificate of fitness for duty to return to

work, may deny reinstatement to an employee who fails to provide the certification, or may delay reinstatement until the certification is submitted.

Q: Can my employer fire me for complaining about a violation of FMLA?

No. Nor can the employer take any other adverse employment action on this basis. It is unlawful for any employer to discharge or otherwise discriminate against an employee for opposing a practice made unlawful under FMLA.

On the other hand, FMLA does not require that employees on FMLA unpaid leave be allowed to accrue benefits or seniority. For example, an employee on FMLA leave might not have sufficient sales to qualify for a bonus. The employer is not required to make any special accommodation for this employee because of FMLA. The employer must, of course, treat an employee who has used FMLA leave at least as well as other employees on paid and unpaid leave (as appropriate) are treated.

### **FMLA as a Grievance Issue**

The FMLA can be raised in many union grievances. The FMLA is especially helpful when defending an employee accused of excessive absenteeism. It can also be used in job evaluation, job assignment, and other grievances.

The grievance procedure may also be used to obtain specific FMLA benefits such as family leave, equivalent work, and reduced schedules. This is particularly effective where the FMLA is incorporated into the Collective Bargaining Agreement.

### **Absenteeism Grievance**

Unions should conduct FMLA investigations whenever employees are disciplined for absenteeism. FMLA absences cannot be used against an employee in any manner, even as part of a “no fault” attendance policy.

Example: Madge Kho was absent on 13 occasions over a six-month period. She was suspended for excessive absenteeism. After investigation, the union discovered that five absences were to take care of Kho’s ill daughter and six absences were the result of Kho’s chronic back condition. Subtracting the 11 FMLA days leaves only two absences that the employer can legally point to. This is not enough to warrant discipline.

Did the grievant provide proper notice? The employer may argue that the grievant did not provide proper notice of FMLA absences. Employees can lose FMLA protection if they fail to give sufficient notice of why they are out of work. An employee giving notice does not need to mention the FMLA or ask for FMLA leave. But he or she must indicate that the problem is more serious than a minor illness such as a cold or upset stomach. An employee who informs his supervisor that “my daughter is having an asthma attack” or “my back condition is acting up again” provides sufficient notice to trigger FMLA protections.

Did the grievant submit a medical certification? The employer may assert that the employee failed to submit a medical certification. But the employer may not have

provided the written or verbal notices necessary to insist on certification. In that case, the union's response might be as follows:

The grievant did not have to submit a medical certification because the company never gave him a proper notice informing him that he needed to submit such a document for the absences in question. Department of Labor (DOL) regulations make it clear that an employer must give individual instructions to employees to submit medical certifications. It is not sufficient simply to post a rule. If this is the employee's first FMLA absence in six months, the medical certification requirement must be included in the notice given to the employee within two days of notice of FMLA absence. If this is not the first FMLA absence within six months, and a notice has previously been provided, the certification request must at least be given verbally. Since you did not give proper instructions to submit a medical certification, you cannot deny the grievant FMLA protection.

Request for information. Under the National Labor Relations Act (NLRA) and many state collective bargaining laws, unions can request information to investigate grievances. Following is a sample letter for an absenteeism grievance:

TO: Jeff Cahoon, Labor Relations Manager  
FROM: Kathy Fodness, Steward, Local 113  
RE: Discharge of Joe Simon for Excessive Absenteeism  
DATE: July 19, 2000

Dear Mr. Cahoon:

In order to prepare the grievance of Joe Simon, the union requests the following information from the company:

1. Any discipline notices or documents, regarding absenteeism, from Joe Simon's personnel file
2. Joe Simon's attendance records for the previous three years.
3. All company policies concerning attendance and the circumstances under which leaves of absence can be taken.

This request is made without prejudice to the union's right to file subsequent information requests. Please provide the information by August 5, 2000. If any part of this letter is denied or if any material is unavailable, please provide the remaining items as soon as possible, which the union will accept without prejudice to its position that it is entitled to all documents and information called for in the request.

Sincerely,

Kathy Fodness  
Steward, Local 113

NOTE: Always question the grievant regarding whether any sick time was or may be FMLA-protected, depending on the circumstances of the case. You may need to go further by investigating absenteeism records/discipline records of other employees in that department. **Remember, this is your right as a union steward.**

## **Job Evaluation Grievance**

A supervisor may not rely on FMLA records when evaluating an employee. If the employee is rated substandard in attendance or any other category because of FMLA absences, the union should file a grievance to challenge the evaluation.

## **Job Assignment Grievance**

FMLA absences cannot be used to deny an employee a favorable job assignment. For example, an employer cannot refuse to assign a server to a high-tipping location because the server has taken FMLA Leave.

## **Work Performance Grievance**

A work performance grievance can be filed when an employer penalizes an employee for not meeting production goals. If the overriding reason for lack of production is FMLA leave, the union may be able to defend the employee based on the Department of Labor regulation prohibiting actions which discourage employees from taking FMLA leave.

## **Grievances to Obtain FMLA Benefits**

It is always a good idea to incorporate the FMLA in the Collective Bargaining Agreement. A contract incorporates the FMLA if it contains a clause such as the following:

- “The employer agrees to adhere to the FMLA and its implementing regulations in regards to all eligible employees.”
- “The employer agrees to obey all applicable federal and state laws and regulations.”
- “The employer agrees to abide by its obligations under the FMLA.”

Examples of FMLA grievances.

- To restore an employee to an original or equivalent position when returning from FMLA leave. (*See current Collective Bargaining Agreement or past practice.*)
- To obtain approval for an employee who requests time off to care for an ill family member.
- To obtain a reduced schedule for an employee who can only work on a part-time basis.
- To obtain health benefits for an employee on FMLA leave.

## **Grievance Questions and Answers**

### 1. Filing lawsuit after arbitration

Q: Our union is defending an employee who was discharged for excessive absenteeism. If the union loses at arbitration, can the employee file an FMLA lawsuit?

A: Yes, but the lawsuit must be filed within two years of the discharge or three years if the violation was willful.

### 2. Promotion grievance

Q: We filed a grievance for a union member who should have received a promotion. At the arbitration hearing, the company listed six reasons for bypassing the grievant. The fifth reason was the employee's "spotty attendance record." Almost all of the grievant's absences were to care for his diabetic wife. Does this give us enough ammunition to win the grievance?

A: Perhaps. In this kind of case, the "but for" test is usually applied. The union must show that but for the attendance record, the employee would have received the promotion. Since the employer has listed five other reasons, the union needs to prove that the non-FMLA reasons are bogus or that the employee's absence record was the crucial factor.

### 3. Last chance agreement

Q: As part of a grievance settlement, an employee with a poor attendance record was put on final warning and told that any further absences in the next six months would result in discharge. If the employee misses work because her child is seriously ill, can she be fired because she signed the last chance agreement?

A: No, employees cannot waive their FMLA rights. Nor can FMLA protections be restricted by a union grievance settlement.

### 4. Progressive discipline

Q: An employee was discharged for horseplay. At the grievance hearing, the company said its decision was based on progressive discipline and cited a suspension one year ago for absenteeism. Can the union fight the discharge by arguing that the prior suspension violated the FMLA?

A: Yes, an employer may not base a discharge on progressive discipline if the previous discipline is unlawful under the FMLA.