FMLA Practices and Perspectives

research

A Survey of
WorldatWork
Members
April 2008

WorldatWork
The Total Rewards Association

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FMLA Practices and Perspectives

Reactions to the Proposed FMLA Changes and New Military Provisions

Introduction and Methodology

On Feb. 11, 2008, the U.S. Department of Labor (DOL) released proposed changes to the regulations that implement the Family and Medical Leave Act of 1993 (FMLA). FMLA was also recently expanded with President Bush's signing of the National Defense Authorization Act, which includes provisions expanding FMLA to authorize up to 26 weeks of leave for a family member to care for a wounded soldier and allowing expanded use of the current 12-week allotment for a family member to take leave if another family member is called into active duty.

This report summarizes a survey conducted by WorldatWork to update the 2005 survey on this topic as well as gather new information relating to the proposed FMLA changes and new military provisions.

The survey was sent electronically to 12,080 WorldatWork members in the United States and was posted on various sections of the WorldatWork Web site on Feb. 21, 2008. The survey remained open for two and a half weeks and a total of 450 responses were received.

The survey responses can be considered statistically representative of the WorldatWork membership. The typical WorldatWork member is at or above the manager level in compensation, benefits or human resources, working in the headquarters of a large company in North America. Ninety-eight percent of Fortune 500 companies have at least one employee who is a WorldatWork member.

Summary of Key Findings

Suspected Employee Abuse, Lack of Advance Notice and Tracking Cause Intermittent Leave Headaches

- **Suspected employee abuse is the No. 1 complaint about intermittent FMLA leave among total rewards professionals.** (See Figure 4.) Potential for or suspicion of abuse is reported to cause extreme difficulty in 42 percent of organizations, greatly contributing to the widespread support of many of the DOL proposed changes that would allow employers to better manage these sometimes frequent but brief absences.

- **Forty-nine percent (49 percent) of intermittent FMLA absences are scheduled, but most intermittent leave users (81percent) are providing no more than a 24-hour notice, and over half give notice the day of the absence or later.** (See Figure 1.) It is possible that employers don't agree on what it means for an absence to be 'scheduled,' but clearly by the notice period results, the overwhelming majority of intermittent leave users are providing little, if any, advance notice of their need to be absent.

- **The need to track intermittent FMLA absences in order to comply with various provisions remains a considerable challenge for participating organizations.** Tracking FMLA leave is necessary to carry out many provisions of the FMLA, although it in itself is not a federal requirement. Time-sensitive requirements such as the employee notice provision make internal communication and documentation incredibly important. When employees are taking large blocks of time off under the FMLA, it is quite a bit easier to manage from an administrative perspective, than when intermittent leave is taken. Inconsistencies in who is notified, when, and breakdowns in communication channels often lead to increased difficulty in managing intermittent FMLA leave, not to mention inadequacies in tracking systems and software.

- **Cancer treatments, elder-/child-care issues and migraines are the most common "serious health conditions" requiring use of intermittent FMLA leave.** (See Figure 2.) There are, not surprisingly, a variety of conditions commonly cited to qualify for intermittent FMLA leave. It should be noted that with many of these types of conditions, no matter how many regulatory requirements or provisions are put into place, it will be difficult to completely overcome the potential for abuse. Survey respondents note that flare-ups or episodes are legitimately common with some conditions (i.e. migraines, asthma, arthritis, etc.), unfortunately making the potential for abuse much higher.

Most Total Rewards Professionals Support the DOL's Proposed Changes

This survey reveals there is little objection to most of the DOL's proposed FMLA changes. Across the board, total rewards professionals are welcoming changes that may ease some of the administrative burden they feel when implementing a very time-consuming and labor-intensive set of requirements. The change with the greatest support shown below, speaks directly to two of the most common intermittent leave challenges — lack of advance notice and difficulties in tracking absences. There is also plenty of support for provisions that would allow employers permission to seek additional documentation and grant access to health care providers when necessary. As shown in Figure 5, the FMLA changes that rank highest on total rewards professionals' approval lists include:

1. **Advance notice required for non-emergency, foreseeable leaves.**
2. **Employers could require a fitness-for-duty certificate after intermittent leave.**
3. **Employers could require annual medical certification when condition lasts more than one year.**
4. **Allow request for recertification of an ongoing condition every six months, with an absence.**
5. **Lengthen eligibility and designation notice requirements to five business days.**
6. **Allow HIPAA compliant contact between the employer and the health-care provider.**

This survey also sought to gauge the level of support for other changes talked about among total rewards professionals for many years. (See Figure 6.)The following recommendations also tie closely to the biggest intermittent FMLA leave headaches mentioned previously:

1. **More strict definition of "serious health condition" surrounding intermittent leave requests to exclude qualification for flu, cold, etc.**
2. **Allow employers to require medical documentation for each episode/day of absence, especially if abuse is suspected**
3. **Allow a minimum requirement for intermittent leave increments**
4. **Child(ren) over the age of 18 without mental or physical disability should qualify as "family members"**

Employers Need Clarification on New Military Provisions

'Covered Servicemembers' per H.R. 4986 (National Defense Authorization Act)
The recent expansion of FMLA allows employees who are the "spouse, son, daughter, parent or next of kin" to take up to 26 workweeks of FMLA leave to care for a "member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list for a serious injury or illness" sustained in active duty. This provision was effective immediately.

'Called to Active Duty' per H.R. 4986
The new expansion will also allow employees to take FMLA leave for "any qualifying exigency (as the Secretary [of Labor] shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation." This provision will not be effective until final regulations are issued defining "qualifying exigency."

Survey participants were asked in an open-ended format about their reactions and recommendations regarding the new military provisions. Employers want clear definitions surrounding these provisions and the elimination of vague language and parameters that make the provisions more difficult to implement. Employers want the following:

- **A clear definition of "next of kin."** This is unless the definition of "family member" used in the current FMLA regulations applies.
- **A clear definition of "qualifying exigency."** A large portion of survey respondents do not understand what is meant by "exigency" and therefore, were not able to recommend those circumstances which should qualify. A few respondents pointed out that a more understandable term would be helpful, supporting the finding that the term "exigency" is not intuitive for many total rewards practitioners.
- **A time limit on the allowance of FMLA for 'called to active duty' leave, preferably expressed as a specific number of days or months from the date active duty commences.** Employers are concerned that if an active duty lasts more than 12 months the employee would be entitled to a new 12-week allotment each year of their relative's active duty.
- **To be allowed to require a copy of "called to active duty" military orders.** Employers also want to reserve the right to request proof of relationship.
- **Respondents equally recommend a statement from the employee or an affidavit from the military as preferred documentation to certify the qualifying exigency.**
- **Clarification on whether "covered servicemember" leave entitles an employee to 26 weeks of leave in addition to 12 weeks of existing FMLA leave within the same 12-month period.**

- **To be able to choose the 12-month period determination method from the existing FMLA regulations for "covered servicemember" leave**: Most will likely choose the "rolling 12-month period" method.
- **Clarification on whether "covered servicemember" leave is a one-time allowance, per servicemember**. Many injuries and illnesses sustained in active duty last for more than one year and may be for a lifetime. Employers are very concerned about the burden they face if employees are entitled to take 26 weeks of leave each 12-month period for the same servicemember.

Data is inconclusive about the practitioner perspective on only non-medical related exigencies qualifying for "called-to-active-duty" leave. Open-ended responses were varied, with as many respondents supporting that qualifying exigencies must be non-medical, as those who feel medical exigencies should also qualify. This is likely due somewhat to a misunderstanding about how the new military provision intercepts with the existing provisions, as most medically-related exigencies would still be covered by the current FMLA provisions.

FMLA Processes and Usage Are Consistent

- **The "rolling 12-month period" is used by 71 percent of FMLA eligible organizations, still the most popular method for determining the 12-month period.** (See Figure 9.) This method provides the greatest protection to the employer because it prevents an employee from being able to take back-to-back leaves allowing absences for up to 24 consecutive weeks.

- **Only 58 percent of organizations <u>require</u> use of paid leave when an employee takes an FMLA-qualifying leave.** The remaining 40 percent <u>allow</u> use of paid leave. (See Figure 10.)

- **Providing notice to employees and determining employee eligibility require the least amount of time to administer** — less than 30 minutes per episode for most employers. However, requesting and reviewing documentation and making requests for second and third opinions require significantly more time. (See Figure 13.)

Detailed Survey Results

Intermittent Leave

Figure 1: What percentage of FMLA absences taken on an intermittent basis in your organization are scheduled versus unscheduled (n=286)?

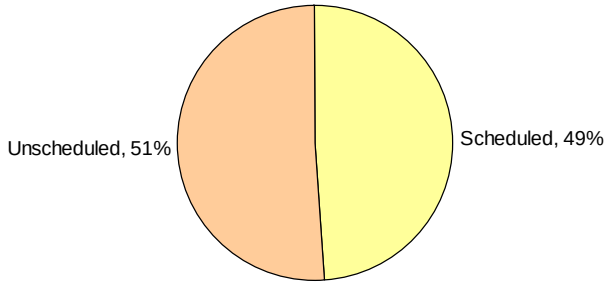
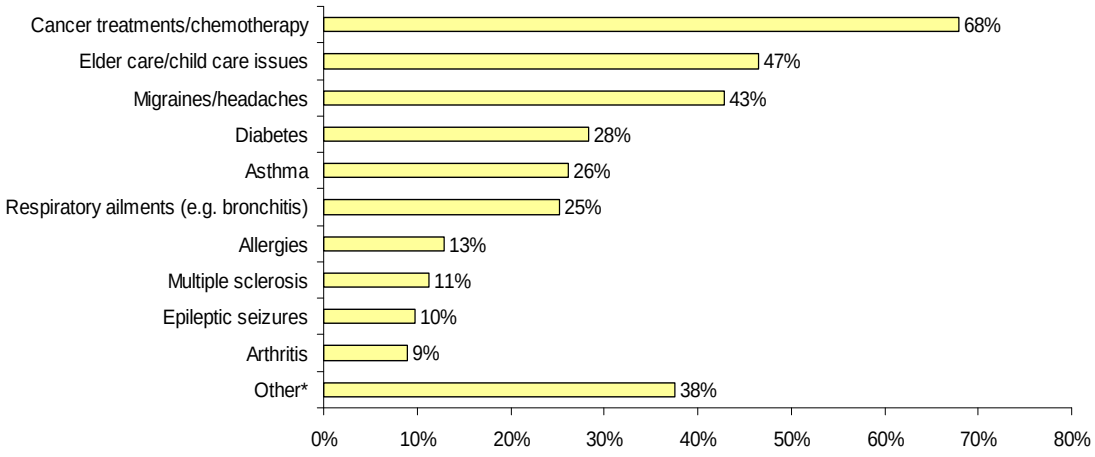


Figure 2: Which of the following conditions are most often cited as "serious health conditions" to qualify for intermittent FMLA leave?



*Common responses provided for "Other" are mental health/depression, pregnancy/maternity, surgery, and back problems.

Figure 3: What is the most common notice period given for intermittent FMLA leave (n=384)?

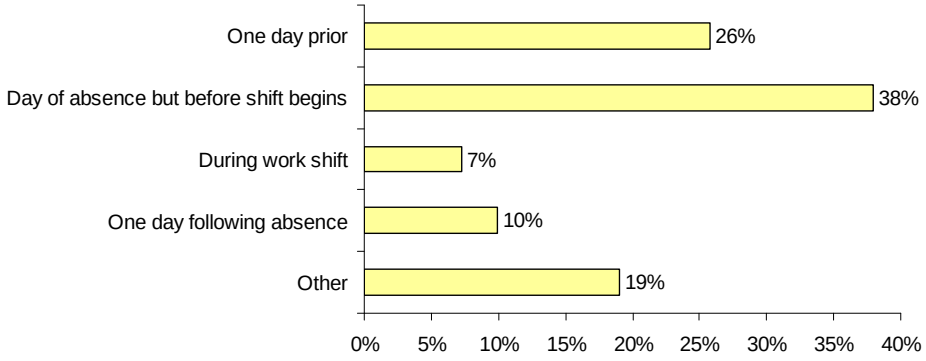
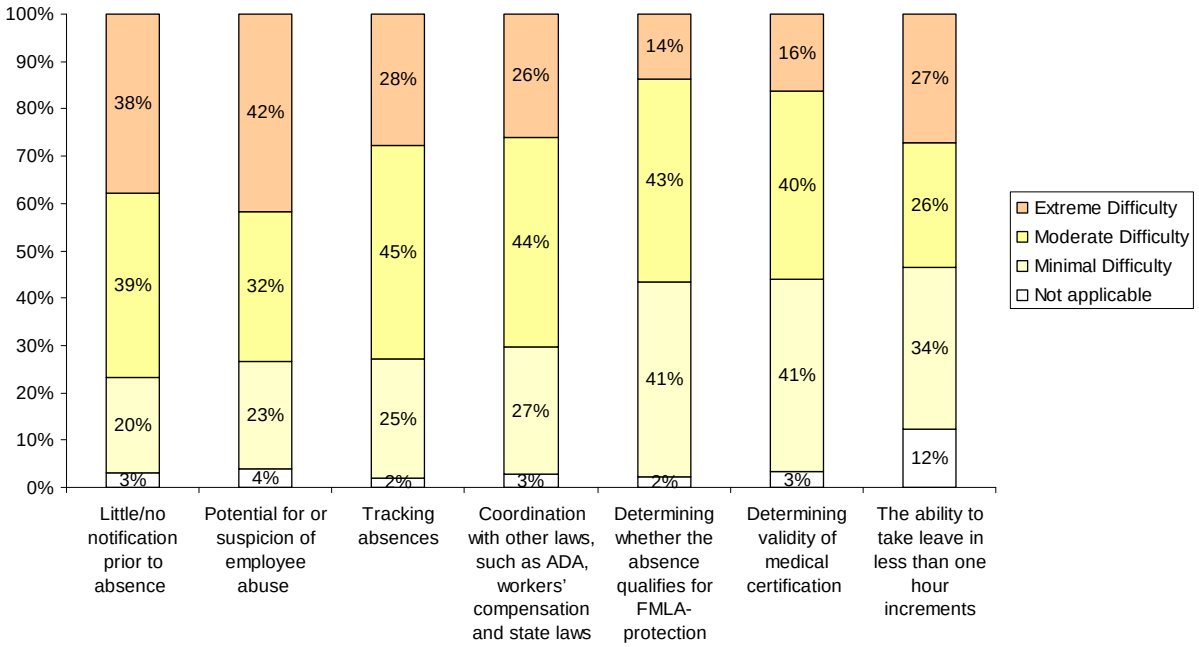


Figure 4: Please indicate the degree of difficulty your company faces regarding intermittent FMLA leave administration in relation to the following issues, challenges or responsibilities.



Proposed Changes to FMLA

Figure 5: Shown below are the key changes proposed by the DOL as well as other suggestions from your colleagues. Please indicate whether you agree or disagree that each of the following regulatory changes should be made.

DOL Proposed Changes	Strongly Disagree 1	2	Neutral 3	4	Strongly Agree 5
Change definition of "periodic visits" for chronic serious health conditions to 'at least two visits to a health-care provider per year." (Many respondents who commented agree that only two visits to a health-care provider within one year is not frequent enough, especially for chronic conditions.)	10%	11%	32%	31%	16%
Clarify that time spent performing "light duty" work does not count against an employee's FMLA leave entitlement.	8%	9%	31%	35%	18%
Allow employers to require annual medical certification from employees when the condition lasts more than one year.	2%	2%	8%	27%	61%
Allow an employer to request recertification of an ongoing condition at least every six months in conjunction with an absence.	2%	2%	7%	34%	54%
Require workers to notify employers in advance of taking non-emergency, foreseeable leaves. (Respondents strongly support this change, but also recommend a definition of "non-emergency, foreseeable leaves" and/or clear examples including such that would cause a denial of an FMLA claim.)	1%	1%	3%	23%	72%
Allow employers to require a fitness-for-duty certificate after return from intermittent leave to jobs that could endanger themselves or others or that they may be unable to perform.	1%	2%	9%	30%	60%
Change definition of "continued treatment" to "a serious health condition requiring two or more visits to a health-care provider within a 30-day period"	2%	7%	19%	37%	36%
Allow employers to deny a "perfect attendance" award to an employee who takes FMLA leave.	6%	6%	30%	21%	38%

DOL Proposed Changes	Strongly Disagree 1	2	Neutral 3	4	Strongly Agree 5
Lengthen requirement to send eligibility and designation notices to employees from two business days to five business days.	1%	2%	10%	26%	61%
Allow direct contact between the employer and the health-care provider for purposes of clarification of a medical certification form so long as the requirements of the HIPAA medical privacy regulations are met.	4%	3%	9%	24%	60%

Figure 6: Other Suggestions from WorldatWork Members

Other Suggestions	Strongly Disagree 1	2	Neutral 3	4	Strongly Agree 5
Eliminate employee's right to use intermittent FMLA leave entirely.	25%	34%	17%	12%	12%
Allow a minimum requirement of XX hour increments for leave. (Suggestions are varied, likely due to pay system tracking limitations. Some systems track in 15 minutes increments, while others may track in half- or full-day increments. Respondents say that the greatest burden is tracking intermittent leave absences lasting less than one hour.)	4%	5%	22%	37%	32%
Allow employers to require medical documentation for each episode/day of absence, especially if abuse is suspected. (Verification of each episode is more strongly supported by respondents than for each day.)	4%	11%	13%	37%	35%
Set a maximum on intermittent FMLA leave allowed within one year (less than 12 weeks)	6%	12%	26%	27%	29%
More strict definition of "serious health condition" surrounding intermittent leave requests (i.e. exclude FMLA qualification of intermittent leave for flu, cold, etc.)	3%	2%	7%	31%	57%
Child(ren) over the age of 18 without mental or physical disability should qualify as "immediate family members." (Respondents recommended some parameters around this suggestion though, such as the child must be unmarried, under 25, and/or still a dependent of the employee.)	13%	12%	19%	28%	28%

Administration & Usage

Figure 7: Is your organization covered by the FMLA?

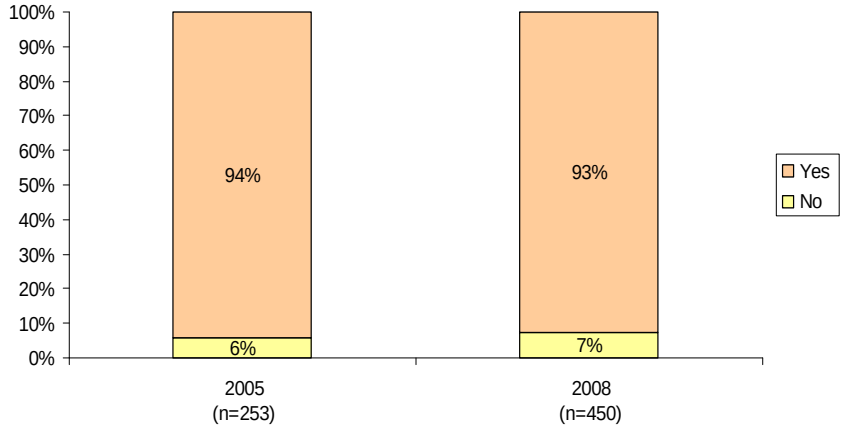


Figure 8: What percentage of your organization's U.S. employees (including those that are statutorily ineligible to take FMLA leave) took any FMLA designated leave during the past year?

	n	Mean	Minimum	Maximum
Percentage of employees that took FMLA leave	387	10%	0%	95%

Figure 9: What method does your organization use to define the 12-month period?

	2005 (n=252)	2008 (n=416)
Rolling 12-month period	69%	71%
12-month period from beginning of first FMLA leave	21%	17%
Calendar 12-month period	8%	9%
Other fixed 12-month period such as fiscal year or beginning on anniversary	2%	2%

Figure 10: Do you allow or require use of paid leave (if available) while on FMLA leave?

	2005 (n=249)	2008 (n=416)
Require use of paid leave if available	60%	58%
Allow use of paid leave if available	40%	40%
Not applicable	n/a	1%

n/a not applicable

Figure 11: Does your organization track FMLA absences by type of serious health condition (n=416)?

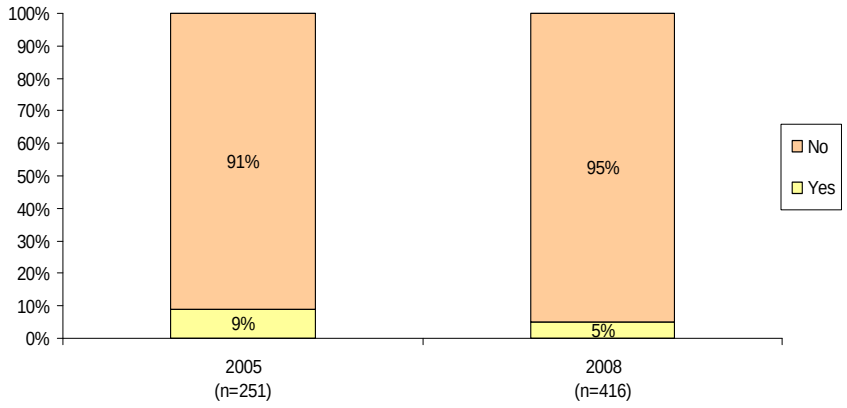


Figure 12: Of those employees who took FMLA in the past year, what percentage exhausted their full 12-week allotment (include those who may have used a portion of the 12 weeks prior to this period but exhausted it within the past year)?

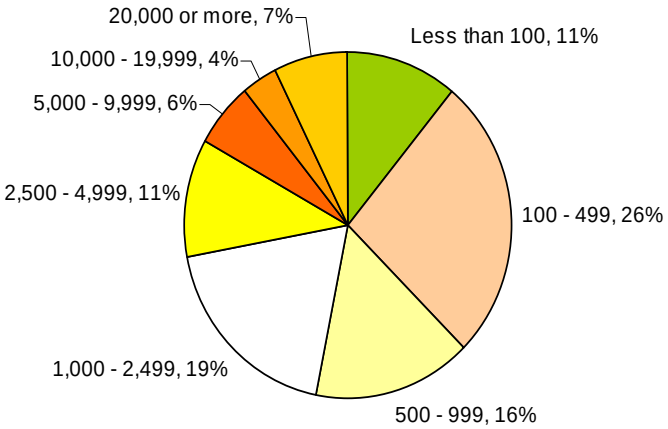
	n	Mean	Minimum	Maximum
Percentage of Employees Who Exhausted Full 12-week Allotment	377	27%	0%	100%

Figure 13: What is the average amount of time spent per episode to administer each of the following FMLA requirements?

	< 10 minutes	10-30 minutes	30-60 minutes	1 to 3 hours	3 to 5 hours	More than 5 hours
Providing Notice to Employees (n=403)	28.8%	50.4%	15.4%	4.7%	0.2%	0.5%
Determining Eligibility of Employee (n=401)	40.9%	39.7%	13.5%	5.0%	0.2%	0.7%
Requesting/Reviewing Documentation (n=401)	11.2%	43.4%	25.7%	16.0%	2.7%	1.0%
Requesting Second/Third Opinion (n=350)	35.7%	21.4%	22.0%	12.0%	3.4%	5.4%

Respondent Demographics

Number of Employees (n=340)



Industry (n=332)

Manufacturing	19%
Finance and Insurance	17%
Health care and Social Assistance	12%
Professional, Scientific and Technical Services	9%
Utilities	5%
Public Administration	4%
Information	4%
Educational Services	4%
Other Services (except Public Administration)	3%
Real Estate, Rental and Leasing	2%
Arts, Entertainment and Recreation	2%
Retail Trade	1%
Transportation and Warehousing	1%
Construction	1%
Wholesale Trade	1%
Management of Companies and Enterprises	1%
Other	17%