

FMLA - AUDITING THE ADMINISTRATOR

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A few weeks ago, we discussed audits from the perspective of the Employer as the audit target. Today our discussion is from the perspective of the Employer as auditor rather than audit target.

For many companies, the sheer size and complication of the task of Family and Medical Leave Act ("FMLA") administration has led to a decision to outsource the work to a third-party administrator. Whew, you can rest easy now that someone else is in charge of the hassle of FMLA forms, notices, tracking, etc., right?

Wrong.

As the employer, it will be you that is on the hook for FMLA violations, even when such violations occur as a result of a third-party administrator failing to properly perform FMLA administration. You may have an indemnity clause, but such clauses may have limits and, in any event, won't prevent the costs of fighting a claim in the first place.

Given this potential liability, have you taken steps to ensure that your third-party administrator is handling FMLA matters correctly? Have you audited the administrator's process? Asked tough questions about how complicated situations are handled? Inquired into the administrator's training process for the representatives assigned to your account? Ensured that the administrator is knowledgeable concerning your policies and preferences with respect to leave issues?

You have a right to expect your third-party administrator to be an FMLA expert and to follow the current regulations and proper procedures. For example:

- Is the administrator sending the eligibility and rights & responsibilities notice within five business days of receiving a request for FMLA leave?
- Is the administrator sending the designation notice within five business days of receiving enough information to determine whether leave is being taken for a FMLA-qualifying reason?
- Is the administrator reviewing medical certifications closely to ensure they are complete and sufficient? If certifications are not complete and sufficient, is the administrator communicating properly with the employee and providing an opportunity for cure?

- Is the administrator obtaining HIPAA-compliant authorizations before communicating with a health provider concerning clarification of medical certifications?
- If the administrator is responsible for tracking FMLA hours available and used for each employee, is the administrator appropriately counting overtime hours? Leave over holidays and shutdowns?
- Is the administrator requesting recertifications and new certifications at appropriate intervals?

Consider sitting down with your third-party administrator periodically to discuss the above and similar topics, as well as your indemnity provisions, to ensure that you are not risking unnecessary exposure.

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