

# Punishment for Gluttons: FMLA and FLSA (Again)

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## Disclaimers



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- We DO NOT represent teachers, students, parents, or school employees.
- This presentation and these slides DO NOT constitute legal advice.
- Neither this presentation nor these slides shall be construed to create an attorney-client relationship between you and KSB School Law or between you and us.
- You should have no expectation of confidentiality or that anything that we discuss today is privileged.

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## Plan for Today



- FMLA Back to Basics
- FMLA Top FAQs
- FLSA Refresher

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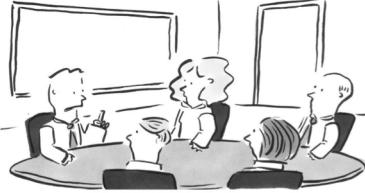
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## Family and Medical Leave Act



"If I may continue to beat this dead horse..."

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## Refresher – Purpose of FMLA



- Unpaid, job-protected leave for specified family and medical reasons
  - Employee or family member is seriously ill
  - Childbirth or adoption
  - Care for service member
- Protects job benefits (Big one – health insurance)
- No retaliation

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## The Basics – Who is an eligible employee?



- Only eligible employees are entitled to FMLA leave
- Who is considered an eligible employee?
  - Works for a covered employer (Schools!);
  - Has worked for employer for at least 12 months;
  - Has at least 1,250 hours of service for employer during the 12 month period immediately preceding leave; AND
  - Works at a location where the employer has at least 50 employees within 75 miles

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### How do I calculate the number of employees?



Per the DOL:

"The 50 or more employee count is determined based on the number of employees on payroll regardless of whether they are part-time, temporary, or seasonal employees."

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### FMLA Leave Entitlement



- Eligible employee may take up to 12 workweeks in a 12 month period
  - 26 workweeks in a 12 month period for a covered servicemember
- Leave may be taken on an intermittent or reduced schedule basis
- Birth, adoption, foster placement – intermittent or reduced schedule leave requires employer approval
- Employer may require employee to substitute or run concurrently accrued paid leave (sick, personal, etc.)

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### 12 Month Period



- Method determined by employer
  - Calendar Year
  - OR
  - Any fixed 12-month leave year
  - OR
  - A 12-month period measured forward
  - OR
  - A rolling 12-month period measured backward
- Check your policy
  - The definition of "12 month period" in your policy can have big implications in specific cases

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### Notice - Covered Employers



- Post a notice explaining rights and responsibilities under the FMLA
  - Willful failure to post may result in civil money penalties
- Include information about the FMLA in employee handbook and provide information to new employees upon hire
- When an employee requests FMLA leave or the employer acquires knowledge that leave may be for a FMLA-qualifying reason, provide the employee with notice concerning his or her eligibility for FMLA leave and his or her rights and responsibilities under the FMLA
- Notify employee whether leave is designated as FMLA leave and the amount of leave that will be deducted from entitlement

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### Notice - Employees



- Employees must comply with employer's usual requirements for requesting leave
- Employees generally must request leave 30 days in advance when leave is foreseeable
- When leave is unforeseeable, employee must provide notice as soon as possible and practicable under the circumstances
- Employee need not EXPRESSLY seek FMLA-qualifying leave (ex. Does not need to say "FMLA" or "serious health condition")

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### What if Employee Fails to Provide Required Notice?



- Foreseeable Leave- 30 days
  - School may delay FMLA coverage until 30 days after the date the employee provides notice.
- Foreseeable Leave – less than 30 days
  - Depends on the facts of the particular case, but typically can delay FMLA coverage for amount of time they could have but failed to provide notice.
- Unforeseeable Leave
  - Depends on the facts of the particular case, but typically can delay FMLA coverage for amount of time they could have but failed to provide notice.
- School can always waive notice requirements

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### What if Employee Fails to Provide Required Notice?



- Special rule for teachers who fails to timely request intermittent leave
- If an instructional employee does not give required notice of foreseeable FMLA leave to be taken intermittently or on a reduced leave schedule, school may require the employee to:
  - Take leave of a particular duration;
  - Transfer temporarily to an alternative position; or
  - Require the teacher to delay the taking of leave until the notice provision is met.

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### Forms for FMLA



- KSB recommends using the DOL's forms
- Notice and certification forms are available at <https://www.dol.gov/agencies/whd/fmla/forms>.

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### Certification



- When an employee requests FMLA leave due to his or her own serious health condition or a covered family member's serious health condition, the employer may require certification in support of the leave from a health care provider
- An employer may also require second or third medical opinions (at the employer's expense) and periodic recertification of a serious health condition.

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### Certification (Continued)



- If the employee does not provide the requested certification within the time required or fails to provide a complete and sufficient certification despite the opportunity to cure any deficiencies, the employer may deny the employee's request for FMLA leave.
- Once the employer has received a complete and sufficient certification, the employer may not request additional information from the health care provider.

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### Refresher – I just received a leave request. NOW WHAT?!



- Preliminary Review
  - Did employee provide appropriate notice?
  - Do any special school rules apply?
- Deliver:
  - Notice of Eligibility and Rights & Responsibilities
  - Deliver the Appropriate Certification Form
- Evaluate Certification Form
  - Is it timely?
  - Is it clear, complete, and sufficient?
  - Second or third opinion?
- Complete and Deliver Designation Notice

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### Special School Rules for Instructional Employees Only



"What was initially thought to be a simple process is in fact an incredibly complicated, intricate, and complex system that I've codified and organized into a few easy-to-follow rules that are more difficult to implement than you'd think."

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**Special School Rules – Intermittent Leave**



- If instructional employee needs intermittent leave or leave on a reduced leave schedule for:
  - their own serious health condition (SHC), to care for a family member with a SHC, or to care for a covered servicemember;
  - which is foreseeable based on planned medical treatment; and
  - the employee would be on leave for more than 20 percent of the total number of working days over the period the leave would extend, then...

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**Special School Rules – Intermittent Leave**



- School may require the employee to choose either to:
  - Take leave for a period or periods of a particular duration, not greater than the duration of the planned treatment; or
  - Transfer temporarily to an available alternative position for which the employee is qualified, which has equivalent pay and benefits and which better accommodates recurring periods of leave than does the employee's regular position.

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**Special School Rules - Instructional Employees Near End of Term**



- Leave that begins more than 5 weeks before the end of a term (for any FMLA reason)
- School may require teacher to take leave until end of the term if:
  - Leave lasts at least 3 weeks; and
  - Teacher will return during the three-week period before the end of the term
- Typically, leave that begins between February and April

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**Special School Rules – Instructional Employees Near End of Term**



- Leave that begins less than 5 weeks before the end of a term because of birth of a child/ placement of child for adoption or foster care; to care for spouse, son, daughter, or parent with SHC; or to care for covered servicemember [NOTE: not own SHC].
- School may require teacher to take leave until end of the term if:
  - Leave will last more than 2 weeks;
  - Teacher will return during two-week period before the end of the term
- Typically, leave that begins in April

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**Special School Rules – Instructional Employees Near End of Term**



- Leave that begins less than 3 weeks before the end of a term because of birth of a child/ placement of child for adoption or foster care; to care for spouse, son, daughter, or parent with SHC; or to care for covered servicemember [NOTE: not own SHC].
- School may require teacher to take leave until end of the term if leave will last more than five working days
- Typically, leave that begins end of April/beginning of May

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**Special School Rules –Birth of a Child in the Summer**



- Entitlement to leave begins with birth of child
- Summer weeks won't count against FMLA unless employee would normally perform duties in the summer
- 12 weeks do not begin to run until employee's contract days begin
- Also applies to staff who have a child born late in the previous school year

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## FMLA FAQs



"All of this raises what I think is a fundamental question – WTF, Tom?!"

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## FMLA Q1



- Leave wasn't designated as FMLA. I realize it should have been. What can I do about this?
- Answer: You can retroactively designate leave as FMLA leave if it wouldn't cause harm or injury to the employee.

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## FMLA Q2



- I have an employee who used all their FMLA leave and personal/sick. What should I do?
- Answer: Call your attorney.
- Possible outcomes:
  - Employee could apply for STD or LTD
  - Does your district have a sick bank (YOU KNOW WE HATE THOSE THINGS, RIGHT?)
  - Employee could be terminated (BUT BEWARE AMERICANS WITH DISABILITIES ACT IMPLICATIONS)
  - Employee could be placed on unpaid leave of absence by the board pursuant to Neb. Rev. Stat. 79-838 (BU)
- Seriously, call your attorney.

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**FMLA Q3**



- I have two employees who are married and are expecting a baby. Are they each entitled to 12 workweeks of leave for the birth of the child?
- Answer: No. They will receive a combined 12 weeks of FMLA leave.

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**FMLA Q4**



- I have a new teacher who started in August and is expecting a baby in November. Is she a covered employee under the FMLA?
- Answer: No, she has not worked 12 months.

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**Fair Labor Standards Act**



"Can we please stop pivoting? I'm getting dizzy."

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### Refresher - FLSA



- Federal law which sets minimum wage, overtime, recordkeeping, and youth employment standards
- Enforced by the Wage and Hour Division of the U.S. Department of Labor

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### Exemption – Minimum Wage/Overtime Requirements

- Employees employed as bona fide executive, administrative, professional, and outside sales employees
- All of the following tests must be met:
  - Employee must be compensated on a salary basis at a rate not less than \$684 per week;
    - Perform specific job duties
    - Ex. Direct the work of at least 2 or more full time employees
    - Ex. Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance

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### Youth Workers – Summer Help at Schools



- Employees 16 years of age and under MAY NOT DRIVE motor vehicles on public roads as part of their jobs – even if they possess a valid state drivers license.
- Employees 17 years of age may drive cars and small trucks on public roads as part of their jobs ONLY in limited circumstances.
  - No moving violations, driver's ed, occasional and incidental
- 14 and 15 year olds are not allowed to operate lawn mower or power driven machinery

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## Paying Overtime



"Technically that's correct, but I can see how it's disconcerting."

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## Overtime



- FLSA requires non-exempt employees to be paid time and a ½ for all hours worked over 40 in a work week
  - Exclusions:
    - Teachers who also coaching
    - Community member coaches
    - Volunteer coaches
      - May be paid a nominal amount (20% compared to other wages)
    - Substitute teachers may be non-exempt if primary job is teaching

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## What about non-exempt Staff Coaches?



- Generally not exempt
- Hourly employee, will hit overtime with coaching duties + staff duties
- Not a volunteer, stipend is not "nominal"
  - Not 20%
  - Not nominal when compared to wages for primary duty

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## Overtime Calculator



- DOL has a FLSA overtime calculator available on their website
- <https://webapps.dol.gov/elaws/otcalculator.htm>

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## Example Using FLSA Online Calculator



Worksheet 1

(5/1/2022 - 5/7/2022)  
You indicated 50 total hours were worked.

Step 1: Calculate total straight-time earnings

\$186.95 from \$15.32 per hour for 15 hours  
\$255.00 from \$15.00 per hour for 15 hours  
\$724.95 total straight-time earnings

Step 2: Calculate the regular rate of pay

Generally, the regular rate includes all payments made by the employer to or on behalf of the employee (except certain discretionary payments). The regular rate is determined by adding together the employee's pay for the workweek and all other earnings and dividing the total by the number of hours the employee worked in that week.

\$724.95 straight-time earnings divided by 50 hours worked = \$14.50 per hour

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## Example Using FLSA Online Calculator



Step 3: Calculate the overtime premium pay

Remember the straight-time earnings have already been calculated for all hours worked, so the additional amount to be calculated for each overtime hour worked (i.e., the overtime premium pay) is one-half the regular rate of pay.

\$14.50 regular rate x 0.5 x 10 overtime hour(s) = \$72.50 additional half-time pay

Step 4: Add straight-time earnings and the additional half-time pay

\$724.95	straight-time earnings
+ \$72.50	additional half-time earnings
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\$797.45	total straight-time earnings and overtime pay

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### Dual Rates and Overtime



- Two options available – weighted average or accrual method
  - Weighted average is the default method by the courts and DOL
  - Accrual method may lead to cost savings but is more intensive for record keeping purposes

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### Weighted Average Example



- Paraprofessional who also drives bus
- Drives bus every day
  - 1 morning route (1.5 hours for the route)
  - 1 afternoon route (1.5 hours for the route)
  - \$20 per route
- Also works 7 hours per day as a para
  - \$15 per hour

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### Weighted Average Example



- Step 1
  - Convert pay into a weekly total
    - Bus driver: \$20 per route \* 2 routes = \$40 a day \* 5 days per week = \$200 per week
    - Para: \$15 per hour \* 7 hours per day = \$105 a day \* 5 days per week = \$525 per week
    - Total pay per week = \$725
- Step 2
  - Calculate total hours per week
    - 3 hours driving bus per day \* 5 days = 15 hours
    - 7 hours as para per day \* 5 days = 35 hours
    - Total hours per week = 50

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### Weighted Average Example



- Step 3
  - Divide weekly pay by total weekly hours
    - $\$725/50 \text{ hours} = \$14.50$ 
      - $\$14.50$  is the weighted average pay rate
- Step 4
  - Multiply weight average pay rate ( $\$14.50$ ) by .5 to get weight average overtime rate
    - $\$14.50 * .50 = \$7.25$
  - Multiply blended overtime rate by number of overtime hours
    - $10 \text{ OT hours} * \$7.25 = \$72.50$  overtime wages
- Step 5
  - Add base pay calculated in Step 1 with OT total from Step 4
    - $\$725 + \$72.50 = \$797.50$  compensation per week

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### Alternative: Accrual Method



- Same facts as previously
- Requires overtime pay based on the regular rate of the position in which they worked overtime

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### Alternative: Accrual Method



- Step 1
  - Calculate when the employee hits over 40 hours in the week
  - Monday – 3 hours bus, 7 hours para
  - Tuesday – 3 hours bus, 7 hours para
  - Wednesday – 3 hours bus, 7 hours para
  - Thursday – 3 hours bus, 7 hours para
    - Employee hits 40 hours on Thursday
  - Friday – 3 hours bus OT, 7 hours para OT

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**Alternative: Accrual Method**

- Step 2
  - Calculate the OT rate for each position
    - Bus =  $\$13.33/\text{hr} (\$20/1.5 \text{ hr}) * 1.5 = \$20.00$  OT rate
    - Para =  $\$15.00/\text{hr} * 1.5 = \$22.50$  OT rate
- Step 3
  - Calculate the OT earned based on OT hours for each position
    - Bus =  $\$20.00 * 3 \text{ OT hours} = \$60.00$
    - Para =  $\$22.50 * 7 \text{ OT hours} = \$157.50$

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**Alternative: Accrual Method**

- Step 4
  - Calculate total earnings
    - Bus =  $\$20 \text{ per route} * 8 \text{ non-OT routes} = \$160$
    - Para =  $\$15/\text{hr} * 28 \text{ non-OT hours} = \$420$
    - Bus OT calculated in Step 3 =  $\$60$
    - Para OT calculated in Step 3 =  $\$157.50$
    - Total pay =  $\$160 + \$420 + \$60 + \$157.50 = \$797.50$ 
      - SAME RESULT AS WEIGHTED AVERAGE IN THIS CASE

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**Compensatory Time Option**

- Allowed if:
  - 1.5 hours per overtime hour worked
  - Employees agree to it in advance
  - Agreement should be in writing
- Can't accumulate over 240 hours
- Employer can require employees to take comp. time
- Can pay cash for comp. time "at any time"
- No clear answer on negotiability
- Adds additional "hours of service" for Obamacare purposes

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Questions?



"Sara, can you order me something in a hot seat?"

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