

# HR COMPLIANCE BULLETIN



## DOL Issues Guidance on AI and FMLA Administration

The Wage and Hour Division (WHD) of the U.S. Department of Labor recently published a [Field Assistance Bulletin](#) (FAB) warning that the use of artificial intelligence (AI) and other automated systems could cause employers to violate laws WHD enforces, including the federal Family and Medical Leave Act (FMLA).

Noting the growing use of AI and automated systems in the workplace for tasks such as tracking time off and integrating absence calendars, the FAB identified the following specific areas of concern with respect to FMLA compliance:

- The processing of leave requests;
- The imposition of improper certification requirements; and
- FMLA interference and retaliation.

FABs provide WHD investigators and staff with guidance on enforcement positions and clarification of policies or changes in WHD policy. While they do not establish legal requirements, FABs can be a useful source of compliance information for employers.

### Action Steps

Because employers are ultimately responsible for ensuring that AI and automated programs comply with the law, the WHD advises employers to ensure responsible human oversight of their use. This can help avoid the risk of widespread violations of the FMLA should these programs fail to comply with eligibility, certification or anti-retaliation and anti-interference requirements.

### Highlights

- The WHD has issued an FAB on the use of AI and other automated systems in administering the FMLA and other employment laws.
- The FAB raises specific concerns about AI and other automated systems in the areas of leave requests, medical certifications, and FMLA interference and retaliation.

### Tips for Employers

The WHD suggests employers watch for AI and automated system errors in the following tasks, among others:

- Determining eligibility based on time worked;
- Retesting for FMLA eligibility; and
- Following FMLA rules for medical certifications.



## **FMLA Overview**

The FMLA requires covered employers of eligible employees to provide up to 12 weeks of unpaid, job-protected leave for qualifying family and medical reasons. Most private employers with at least 50 employees are covered by the FMLA. FMLA eligibility requirements for employees include, among other things, that they work for their employer for at least 12 months and at least 1,250 hours during the 12 months before taking the leave.

Relevant to the FAB, employers may require medical certification in support of FMLA leave, and they are prohibited from retaliating against employees for taking the leave. Furthermore, once an employer determines an employee's eligibility for leave, an employer cannot retest employee eligibility until the beginning of a new 12-month period or if the employee requests FMLA leave for a different reason.

## **Processing Leave Requests**

The FAB cautions that relying on automated systems to process FMLA leave requests risks noncompliance in several ways. One is by using systems that make predictions and auto-populate time entries. These systems base their decisions on prior time entries, regularly scheduled shift and break times, business rules and other data. According to the FAB, the systems can incorrectly calculate actual time worked and, therefore, fail to recognize when an employee has met the hours-worked requirement for FMLA eligibility.

The WHD advises that AI and other systems can also incorrectly determine which days should be counted against an employee's leave entitlement, which could result in an improper leave denial. The FAB also alludes to but does not explain possible issues with relying on AI to evaluate whether leave is being requested for a qualifying reason. Finally, the FAB raises the concern that AI can test for FMLA eligibility more often than the law allows.

The guidance acknowledges that these compliance issues can occur with human decision-making as well. However, it asserts that the violations can be more widespread with AI or other automated systems, affecting an employer's entire workforce.

## **Certifications to Support FMLA Leave**

The FMLA has specific rules about what information can be requested via a medical certification. It also spells out the timing such requests must follow. The FAB raises the possibility that AI systems may fail to adhere to FMLA provisions for medical certifications by asking for information beyond what the law allows or by not permitting employees the required time to cure an incomplete certification.

## **FMLA Interference and Retaliation**

Although it does not provide examples of employers making this mistake, the FAB warns against using AI systems that track and analyze leave to discourage employees from using FMLA leave, as this would violate the FMLA. The FAB issues a similar warning against using such systems to retaliate against employees who have used FMLA leave, which would also violate the law.