Five Federal Employment Regulations Urgent Care Operators Need to Know (Part 2)

Urgent message: The second article in a two-part series looks at USERRA, FMLA, and NLRA—three federal labor laws that urgent care operators are likely to encounter.

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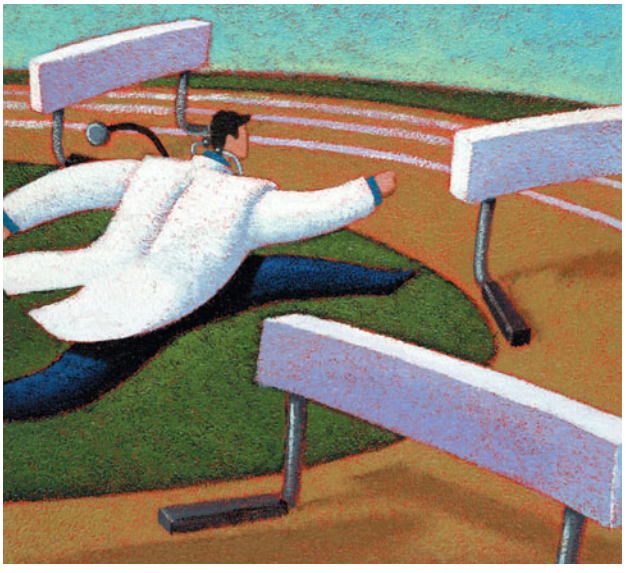
Urgent care centers are subject to a multitude of federal employment regulations and failure to comply with any of them could result in civil litigation or criminal penalties. Laws prohibiting discrimination, regulating wages and hours, permitting leave for military service and family or personal health issues, and affecting collective bargaining are commonly misunderstood, and as a result, violated by urgent care operators. The best protections are detailed human resources policies and an operating culture of integrity and compliance. As a start, managers and supervisors should be educated on the basics. This article is the second in a two-part series that offers specific cases illustrating five of the most significant federal employment regulations. The first part, published in July/August 2012, covered anti-discrimination laws and the Fair Labor Standards Ac.



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Uniformed Services Employment and Re-employment Rights Act (USERRA)

The Uniformed Services Employment and Re-employment Rights Act (USERRA) provides employment and reemployment rights for members of the uniformed services, including veterans and members of the Reserve and National Guard. The Act applies to all employers regardless of size.

Under USERRA, service members who leave their civilian jobs for military obligations can serve with the knowledge that they will be able to return to their previous jobs with the same pay, benefits, and status they would have attained if they had not been away on duty. If seniority is a factor, an employee's military service must be computed as if he or she had served the entire time with the employer. The Act also prohibits employers from discriminating on the basis of an individual's military service.[1]

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Re-employment Rights

Employees have the right to re-employment with the same employer when returning from a period of service, provided they meet the following conditions:

- The employee provides reasonable advance notice of service. However, if prior notice was impossible due to military necessity, this requirement does not apply. The military commander makes the determination of whether prior notice was impossible or unreasonable, and the determination cannot be challenged by the employer.[2]
- The employee gives written or verbal notice that leave is required. If verbal notice is given, the employer cannot require the employee to produce written orders. However, upon reinstatement if the leave is greater than 31 days, the employer can seek proof that includes discharge statements, earnings statements, or the employer can call the command post for verification.
- The employee has 5 years or less of cumulative—not necessarily consecutive—service with that employer. However, required drills, annual training, and service performed in times of war, national emergency, or in support of critical missions *do not* count towards the 5-year allotment.[3] Service with a previous employer likewise does not count toward the 5-year allotment.
- The employee returns to work or applies for re-employment in a timely manner after returning from leave.
- The employee has not been separated from service with a disqualifying or dishonorable discharge.

In addition to current employees, USERRA also affects the hiring process. For example, a prospective employee discloses in an interview that he or she has applied for the National Guard. The employer—to avoid accommodation of his/her leave or training should he/she be accepted—decides to offer the position to someone else. The employer may be liable for discrimination because USERRA protects individuals who "have applied for membership" in the uniformed service.

Family Medical Leave Act (FMLA)

The Family Medical Leave Act provides employees with up to 12 weeks of unpaid leave in a 12-month period for specified medical or family reasons. Employers with 50 or more workers for at least 20 weeks in the current or previous year are covered by the Act, as are all public agencies, regardless of size.

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The Act provides that an employer must maintain health benefits for the individual during the leave period, in the same manner as if the employee had continued to work. If necessary, the employer will also need to make arrangements for employees to pay their share of health benefits while out on leave.

The U.S. Department of Labor emphasizes that an employee returning from FMLA leave must "be restored to the employee's original job, or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment."[4]

An employer cannot discriminate against an employee for taking Family Medical Leave. Use of leave must not "result in the loss of any employment benefit that the employee earned or was entitled to before using FMLA leave, nor be counted against the employee under a 'no fault' attendance policy." If, however, a bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold, or perfect attendance, and the employee has not met the goal due to FMLA leave, payment may be denied unless it is paid to an employee on equivalent leave status for a reason that does not qualify as FMLA leave."[4]

Eligibility Criteria

An employee who works for a covered employer is eligible to apply for Family Medical Leave if he/she:

- Has worked for the employer for a *cumulative total of 12 months*. While the time does not need to be consecutive, employment prior to a break of 7 years or more does not have to be counted unless the employee was protected by USERRA during the time away.
- Has worked *1,250 hours in the previous 12-month period*.
- Is based at a location in the United States or U.S. territory that employs at least 50 employees within a 75-mile radius.

Table 1. FMLA Limitations

Issue	Limitation
Spouses who both work for the same employer	Spouses are only entitled to a combined total of 12 weeks of family leave for birth, adoption or foster care, or care of a parent. Spouses are limited to a combined 26 weeks to care for a covered service member.
Intermittent leave for birth, adoption or foster care	The leave is subject to the employer's approval. The employer can request that the employee schedule the leave to better suit the employer's operational needs.
Substitution of paid leave	An employer can require the employee to use paid leave (sick, or vacation, for example) concurrent with FMLA leave.
Scheduling time off	Reasonable efforts must be made to minimize the impact on the employer's operations

Qualifying Reasons

Twelve weeks of leave may be granted for any one—or a combination of—the following reasons:

- Birth and care of a newborn, newly adopted or fostered child within 12 months of the birth or placement;
- Care for a spouse, son, daughter, or parent with a serious health condition;
- Employee's own serious health condition; or
- Military exigencies arising from the call to active duty, such as:
  - Short-notice deployment
  - Arranging child-care and school activities
  - Post-deployment activities
  - Financial and legal arrangements
  - Military events and related activities

A "serious health condition" is defined as a condition involving inpatient care, continuing treatment from a healthcare provider—which includes at least 3 days of incapacity, a visit to a provider and an ongoing regimen of treatment—or a chronic health condition.

FMLA leave allotment is *per year, not per incident*. Regardless of the number of qualifying events, the employee is only entitled to a combined total of 12 weeks in a 12-month period. The exception is if the employee is a spouse, son, daughter, parent or next of kin of a current member of the Armed Services, National Guard or Reserves with a serious injury or illness—in which case the employee is entitled up to 26 weeks of unpaid leave during the 12-month period to provide care for the service member.

The definition of "child" has been expanded by the U.S. Department of Labor (DOL) Wage and Hour Division Administrator's Interpretation No. 2010-3. This interpretation clarified that either day-to-day care or financial support may establish a loco parentis relationship. Employees without biological or legal relationships with a child, but who assume these parental responsibilities, will qualify for leave for that child under the same circumstances as a biological parent. The interpretation also recognizes non-traditional family arrangements—including adopted children of same-sex partners—and states that an employee who will share equally in the raising of a child with the child's biological parent is also entitled to leave for the child's birth.

An employee may take continuous leave, intermittent leave, or a combination of the two. Intermittent leave allows an employee to take short blocks of leave over the course of the 12-month period, not to exceed the 12-week allocation, for a chronic condition, for example.

Requesting Leave

An employee is required to provide 30 days' notice of the need for leave, when the leave is foreseeable, such as for a scheduled surgery. If the leave is not foreseeable, the employee must provide notice "as soon as practicable." The employee is responsible for providing sufficient information to enable the employer to determine FMLA is required. *An employee does not have to specifically mention the FMLA to have met her burden to provide initial notice under the Act.*

Whether sufficient notice is given can vary based on the condition. For example, an employee requests intermittent leave because she has migraines. The employer doesn't want to grant leave because the short notice of the migraines negatively impacts schedule coverage, and consequently, the quality of patient care. Does the employee qualify for leave

under FMLA? Yes—because migraines qualify as a "chronic condition" under the Act. However, another employee requests leave for a bad headache. He was out of work for the required 3 days and saw a doctor on the first day. The doctor told him to take over-the-counter medicine if needed. Although he was out for 3 days, and saw a health care provider, he was not under ongoing care or a regimen of treatment, so his condition does not qualify for FMLA protection.

The NLRB applies to hospitals and other health care facilities (including doctors offices) that have a gross annual volume of business of at least $250,000.

An employer is generally responsible for posting a notice of employee FMLA rights. When an employer discovers that a specific employee may be eligible for FMLA leave, the employer is responsible for providing that employee with notification of eligibility, informing the employee of his or her rights and responsibilities, and—if the employer has enough information to make the determination—telling the worker that the leave has been designated as FMLA leave and will be counted toward the 12-week entitlement.

Employers are entitled to seek certification from a health care provider regarding the request for leave. If clarification is required, the following employees can contact the doctor:

- HR Professional
- Leave Administrator
- Management Official

However, the employee's direct supervisor *cannot* contact the doctor to seek clarification.

Regulations do limit leave rights in some very specific circumstances, as illustrated in **Table 1**.

National Labor Relations Act (NLRA)

The National Labor Relations Act (NLRA) provides that employees have the right to protected, concerted activity. The Act does not distinguish based on the number of employees a company has. Instead, the National Labor Relations Board (NLRB) sets standards for jurisdiction. If an employer falls under NLRB jurisdiction, it's subject to the provisions of the NLRA.

In general, the NLRB covers most non-government employers in the United States, including employee-owned businesses, non-profits, non-union businesses, and employers in "right to work" states. The NLRB applies to hospitals and other health care facilities (including doctors offices) that have a gross annual volume of business of at least $250,000. That means most employees of urgent care centers have rights under the act—even if the center employs only three people.

Under the NLRA, employees have the right to:

- Organize a union to negotiate with the employer concerning wages, hours, and other terms and conditions of employment.
- Form, join or assist a union.
- Bargain collectively through representatives of employees' own choosing for a contract setting wages, benefits, hours, and other working conditions.
- Discuss terms and conditions of employment or union organizing with co-workers or a union.
- Take action with one or more co-workers to improve working conditions by raising work-related complaints and seeking help from a union.
- Strike and picket, depending on the purpose or means of the strike or the picketing.
- Choose not to do any of these activities.[5]

An employer is prohibited from:

- Forbidding employees from soliciting for a union during non-work time.
- Discouraging union support or activities.
- Taking adverse action against an employee for concerted activity
- Threatening to close a workplace if a union represents employees
- Promising promotions or other benefits to discourage—or encourage—union support.
- Prohibiting employees from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.
- Spying on or videotaping peaceful union activities and gatherings or pretending to do so.

The union also has restrictions under the Act, and may not:

- Threaten employees that they will lose their job unless they support the union.
- Refuse to process a grievance because the employee criticized union officials or is not a member of the union.
- Use or maintain discriminatory standards/procedures in making job referrals from a hiring hall.

- Cause or attempt to cause an employer to discriminate against employees because of union-related activity.
- Take adverse action against an employee based on whether he or she has joined or supports the union.

Employers must be conscious of the appearance of "union-busting" activity. Managers shouldn't question employees about whether they have signed a union card, whether they support the organizing activity or if they plan to vote in favor of the union. Other examples of union-busting activity are promising benefits if the union is not elected, threatening reprisals against employees who form or join a union, threatening to close the facility if it becomes unionized, and discouraging employees from communicating about union-related matters.

Employers must carefully monitor communications policies in the workplace, because if the company permits break room posters or flyers promoting other non-employer organizations—such as advertising a Weight Watcher's program—it cannot subsequently refuse similar posters or flyers encouraging employees to join a union. However, NLRB did rule in 2007 that employers could distinguish between charitable causes (such as United Way solicitations) or individual employee solicitations (such as selling Girl Scout cookies) while still restricting commercial and union solicitations.[6,7] Evidence of union-busting activity is viewed unfavorably by the Board and may result in certification of the union.

Evolving case law could also prohibit an employer from censoring an employee who uses social media—such as Facebook and Twitter—to criticize or collaborate with co-workers on issues such as pay, benefits, and working conditions. In one recent case, the NLRB found that an employee's complaints about the stale buns and cheap hot dogs served at a BMW dealership event constituted protected concerted activity.[8] An employer should be cautious about disciplining or terminating an employee who complains about that employer online.

Employee Free Choice Act

In 2009, the Employee Free Choice Act (EFCA) was proposed to amend the NLRA. The bill would have eliminated the right of the employer to conduct a ballot, allowing a union to be certified if union officials collected the signatures of a majority of workers. In addition, the EFCA would have required employers and unions to enter binding arbitration to produce a collective agreement no later than 120 days after the union was recognized, and it would have increased penalties on employers who discriminate against workers for union involvement, among other things.

While Congress did not pass the EFCA, employers should be prepared for changes in union organizing tactics and procedural requirements and make sure their human resources policies are up to date on union issues. Federal agencies, including the National Labor Relations Board (NLRB), have been attempting to adopt through administrative rulemaking many of the reforms sought in

the failed EFCA legislation.

In 2011, for example, the NLRB proposed various rules that support unionization, including rules that would lead to significantly speedier union elections, and a requirement that all employers should post a notification informing employees of their rights under the NLRA. This notification requirement was challenged by the National Federation of Independent Business (NFIB), which states that the NLRB has overreached its authority. The NFIB states that the posting rule will affect over 6 million businesses, even those that have never committed a violation. According to the NFIB, "small businesses are particularly vulnerable to accidental violations because the regulatory compliance burden most often falls on the small business owner and because small businesses do not have dedicated compliance staff."

Although the notification requirement was originally supposed to take effect on November 14, 2011, it was delayed to January 31, 2012 due to a legal challenge of the requirements. Most recently, the date has been delayed again and is pending appellate court review. While the Final Rule associated with the notice posting requirement is being formally challenged, employers must stay informed of the issue to ensure compliance**.** Employers should also stay abreast of upcoming social media guidance from NLRA decisions related to employee speech and concerted activity.

How Can Employers Stay in Compliance?

Although the breadth of federal employment regulations may seem overwhelming to an urgent care operator, employers can stay up to date with the most recent rules by visiting the U.S. Department of Labor's website and using associated resources. Have a qualified human resources professional periodically review all your employment policies and procedures with an eye towards compliance. State and municipal departments—such as the Department of Industrial Relations, the Department of Fair Employment and Housing, or the local EEOC office—all can answer questions about specific state and local regulations and how they impact federal compliance. If you're ever in doubt about your compliance, you can also check your practices with an employment law attorney. ■

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