

Family Medical Leave Act Review
Executive Summary

#16-24

June 19, 2017



TRAVIS COUNTY
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From: Nicki Riley, CPA
Travis County Auditor

Date: June 19, 2017

Subject: Executive Summary of Travis County Family Medical Leave Act Review

The Risk Evaluation and Consulting Division (REC) of the Travis County Auditor's Office has completed a review of the Travis County Sheriff's Office (TCSO), Travis County Juvenile Probation Department (TCJPD), Travis County Clerk, and Travis County Human Resources Management Department (HRMD) regarding Family Medical Leave Act (FMLA) compliance. We conducted our review in accordance with the applicable statutes governing the County Auditor's Office, and those relating to FMLA compliance and County Policy.

Background

The Family and Medical Leave Act of 1993 is a United States federal law requiring covered employers to provide employees job-protected and unpaid leave for qualified medical and family reasons. These reasons include: personal or family illness, family military leave, pregnancy, adoption, or the foster care placement of a child.

The FMLA provides employees various benefits and protections, including continued employee health care coverage. It also provides the restoration of employment positions and makes it illegal for most employers to penalize or terminate workers for taking this type of leave.

Objective and Scope of Review

The primary objective of this review was to assess the adequacy and effectiveness of the FMLA compliance process for each of the four offices/departments under review. The period under review was October 1, 2013 through September 30, 2015.

Review Methodology

Our review methodology included testing 53% or 549 of the 1,045 leave events for these offices/departments during the review period and receiving verbal and written representations from office/department personnel. In regard to written and/or verbal representations obtained during this review, unless otherwise noted in this summary, management maintains that the assertions we relied upon were correct to the best of their knowledge.

Overall Findings

In our review of 549 FMLA leave events, there were issues noted for 249 (45%). These issues included FMLA certifications that were either incomplete or not submitted, recertifications that were not required, leave taken beyond the 12 workweek FMLA limit, and incomplete FMLA documents.

Examination Team

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Closing

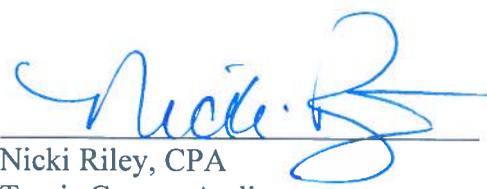
This report is intended solely for the information and use of your office and the Commissioners' Court. We greatly appreciate the cooperation and assistance received from the management and staff of all departments/offices during these examinations. Please contact us if you have any questions or concerns regarding this summary.



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BACKGROUND

Overview

In 1993, President Bill Clinton signed the Family Medical Leave Act. The FMLA became the first national law guaranteeing workers the right to take time off from work to care for themselves and for family members for qualifying health events. This includes time off for the birth or adoption of a child and family military leave.

The FMLA provides employees various benefits and protections, including continued employee health care coverage. It also provides the restoration of employment positions and makes it illegal for most employers to penalize or terminate workers for taking this type of leave.

Eligible employees may use the FMLA to take time from work after child-birth, adoption or accepting a foster child. They can also take time to care for their spouse, child, or parent if their family member is seriously ill or injured. In addition, employees may also use the FMLA if they have a health condition that prevents them from performing their job duties. Generally, an illness or injury qualifies under the FMLA if the employee or family member is receiving care from a health care professional and is absent from work for at least three consecutive days.

The eligible employee has rights and responsibilities under the FMLA. For example, if the employee will be using the FMLA, and the leave is foreseeable, the employee must give the employer thirty days advance notice (birth of a child, etc.). In accordance with Travis County Code, if an employee takes time off because of an unexpected injury or illness, the employee must have a health care professional (HCP) certify the medical condition.

The FMLA requires that, in the case of foreseeable leave, the employee must “consult with the employer and make a reasonable effort to schedule the leave so as not to disrupt the employer’s operations.” If the employee does not consult with the employer, the employer may require such consultations. An employer may delay leave for an employee that qualifies for foreseeable FMLA leave, if that employee is aware of the FMLA notice requirements but does not follow them. Posting the required notice in the workplace is considered sufficient to inform employees of these notice requirements.

FMLA Checklist

The following checklist is a general list of requirements and items to consider in relation to FMLA leave:

1. The employer must prominently display the FMLA information poster. In addition, the employer must also provide each employee with a general notice about the FMLA in the employer’s handbook or other written materials about leave and benefits.
2. When the employee requests leave, the employer must determine if the employee is eligible for FMLA leave. An eligible employee is an employee who has been employed by the employer for at least 12 months and has worked at least 1,250 hours (actual hours worked) during the 12-month period immediately preceding the start of FMLA leave. The 12 months of employment need not be consecutive. Eligible employees are entitled to 12 workweeks/480

hours of FMLA leave for qualifying events on a rolling 12-month basis (Note: Military caregiver leave is 26 weeks).

3. Within five business days of the initial request, the employer must complete and provide the employee with the notice of eligibility and rights and responsibilities (Form WH-381 Parts A&B).
4. The employee must obtain a completed medical certification as required by County Code (CC) 10.038 within 15 calendar days of the leave request, absent unusual circumstances.
5. Upon receiving the medical certification, the employer must determine if the certification details a FMLA-qualifying event. If the event does not qualify and leave is denied, the employer must communicate the deficiencies in the medical certification to the employee in writing. The employee has seven calendar days to provide the employer with updated information on a “Designation Form”.
6. Throughout the leave period, the employer must provide the employee with the same healthcare benefits they received prior to taking the leave. When the employee returns from leave, they are to be restored to the position they previously occupied or to an equivalent one.

Qualifying Events

The following is a list of qualifying events under the FMLA:

1. Birth of a newborn child,
2. Adoption or foster care placement of a child,
3. Care of the employee’s spouse, son, daughter, or parent with a serious health condition,
4. The employee’s own serious health condition, and
5. A qualifying military exigency arising from the employee’s spouse, son, daughter, or parent’s active military duty or impending call or order to active duty.

Employer and Employee Obligations and Responsibilities

Both employers and employees have notice requirements in the FMLA compliance process. In Travis County, HRMD recommends the use of specific forms which comply with Department of Labor (DOL) best practices. A summary of these forms and their information requirements follows:

Notice of Request

If the leave is foreseeable, at least 30 days advance notice should be provided by the employee. If less than 30 days notice is given, the employer may require an explanation as to why 30 days notice was not practical. The employee must provide sufficient information (i.e., state the qualifying reason for and provide anticipated timing and duration of the leave, if foreseeable) for an employer to reasonably determine that the FMLA may apply.

Eligibility Notice WH-381 Part A

When an employee requests FMLA leave, or when an employer acquires knowledge that an employee's absence may qualify for FMLA, the employer must notify the employee about their potential eligibility for FMLA leave within five business days. The employer must then verify whether or not the employee qualifies.

Rights & Responsibilities WH-381 Part B

Department of Labor (DOL) regulations require employers to provide written notice detailing the specific expectations and obligations of the employee seeking leave and the consequences of the failure to meet these obligations. The following information is to be conveyed:

1. The employer's designated 12-month FMLA year,
2. That leave may be designated and counted against the employee's FMLA leave entitlement if qualifying,
3. Whether a fitness for duty form will be required, and
4. Arrangements for continuing obligations of health care premiums.

Recordkeeping requirements

Medical certifications must be kept separate from all other types of files and be treated as confidential. The following is a list of FMLA records, which must be maintained for a minimum of three years in accordance with DOL regulations:

1. Basic payroll and identifying data,
2. Hours of leave,
3. Copies of employee notices to the employer and copies of employer notices to employees,
4. Internal documents regarding benefits and policies concerning paid and unpaid leave, and
5. Documentation regarding any disputes concerning whether leave is properly designated as FMLA.

Medical Certification

The County has adopted DOL best practices in regard to the certification of FMLA leave. Specifically, Travis County Code (CC) 10.038 requires medical certification of all FMLA leave as stated below:

“Medical Certification. When the employee requests medical leave, Travis County will require that the employee provide medical certification from a health care provider that a serious health condition exists. A Family and Medical Leave

Certification form is available from the employee's department or the Human Resources Management Department."

Since the County adopted standardized medical certifications in CC 10.038, each office or department's HR personnel are required to obtain and administer FMLA certifications under the following rules:

1. A certificate must be requested within five business days after the foreseeable leave is requested, or
2. Within five business days after unforeseeable leave commences, or
3. At a later date, if the employer has reason to question the appropriateness or duration of the leave.
4. They should also provide written notice to employees regarding the medical certification requirements in the Rights and Responsibilities (R&R) Notice Form.

The R&R Notice includes the time-period during which the employee is to return the applicable medical certification – no later than 15 calendar days after the day the employee is provided notice.

Good Faith Efforts

As detailed in the FMLA, an employee has two opportunities to provide a complete medical certification, as follows:

"The employee must provide the requested medical certification within 15 calendar days after an employer's request, unless it is not feasible under the particular circumstances to do so despite the employee's good faith efforts, or if the employer permits more than 15 calendar days to return the requested certification. When an employee makes diligent good faith efforts but is unable to meet the 15-calendar day deadline, the employee is entitled to additional time to provide the certification.

If an employee fails to return the certification in a timely manner, the employer can deny FMLA protections for the leave following the expiration of the 15-calendar day time period until a complete and sufficient certification is provided. However, the 15-day period and the period of absence beginning the day the certification was received is FMLA-protected leave. If the certification is not returned within a seven day cure period for deficiencies, the leave can be denied."

Leave Beyond a Single Year

CC 10.038 delineates the following leave parameters, which are consistent with the FMLA as follows:

"Paid/unpaid leave. Whether paid or unpaid, all Travis County employees are entitled to a total of 12 weeks of family and medical leave in a 12 month period."

Based on the above, if the leave period extends beyond a 12-month period, the leave should be recertified at the start of each new 12-month period.

Incomplete Certifications

The County adopted DOL best practices to ensure that FMLA certifications are complete and sufficient in CC 10.038, as detailed below:

“The medical certificate must include:

- 1) The name, address, and telephone number of the health care provider,*
- 2) The name of the patient,*
- 3) Expected date of return to work,*
- 4) Diagnosis, and*
- 5) A statement that the employee’s absence from work is required.”*

Serious Health Condition

The DOL has created two prototype medical certification forms – one for the employee’s own serious health condition (Form WH-380-E), and the other for a family member’s serious health condition (Form WH-380-F). Upon completing the medical certification, the applicable HCP is asked to provide all medically relevant facts in order to determine if the event is a qualifying event under the FMLA. In addition, the form requires information necessary to reasonably establish that the employee is unable to perform the essential functions of his/her position and the likely duration of such inability. If intermittent leave is requested for ongoing care, the form requires information detailing why there is a medical necessity for the leave and an estimate of the duration of incapacity or ongoing care.

If the employee returns the certification/recertification without all the required information, the employer should use the DOL/County approved “Designation Form” or provide the employee written notice of the specific information that is still required. Employees should be given seven calendar days to cure the deficiencies. This may be extended if the seven days is not sufficient despite the employee’s documented good faith efforts.

Recertifications

In accordance with Code of Federal Regulations (CFR) Title 29, Section 825.308, recertifications may be required for leave taken due to an employee’s own serious health condition or the serious health condition of a family member, or other qualifying event, as follows:

“(a) 30-day rule. An employer may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless paragraphs (b) or (c) of this section apply.

(b) More than 30 days. If the medical certification indicates that the minimum duration of the condition is more than 30 days, an employer must wait until that minimum duration expires before requesting a recertification, unless paragraph (c) of this section applies. For example, if the medical certification states that an employee will be unable to work, whether continuously or on an intermittent basis, for 40 days, the employer must wait 40 days before requesting a

recertification. In all cases, an employer may request a recertification of a medical condition every six months in connection with an absence by the employee. Accordingly, even if the medical certification indicates that the employee will need intermittent or reduced schedule leave for a period in excess of six months (e.g., for a lifetime condition), the employer would be permitted to request recertification every six months in connection with an absence.

(c) Less than 30 days. An employer may request recertification in less than 30 days if:

(1) The employee requests an extension of leave;

(2) Circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of the absence, the nature or severity of the illness, complications). For example, if a medical certification stated that an employee would need leave for one to two days when the employee suffered a migraine headache and the employee's absences for his or her last two migraines lasted four days each, then the increased duration of absence might constitute a significant change in circumstances allowing the employer to request a recertification in less than 30 days. Likewise, if an employee had a pattern of using unscheduled FMLA leave for migraines in conjunction with his or her scheduled days off, then the timing of the absences also might constitute a significant change in circumstances sufficient for an employer to request a recertification more frequently than every 30 days; or

(3) The employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification. For example, if an employee is on FMLA leave for four weeks due to the employee's knee surgery, including recuperation, and the employee plays in company softball league games during the employee's third week of FMLA leave, such information might be sufficient to cast doubt upon the continuing validity of the certification allowing the employer to request a recertification in less than 30 days.

(d) Timing. The employee must provide the requested recertification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(e) Content. The employer may ask for the same information when obtaining recertification as that permitted for the original certification as set forth in §825.306. The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or adequate authorization to the health care provider) in the recertification process as in the

initial certification process. See §825.305(d). As part of the information allowed to be obtained on recertification for leave taken because of a serious health condition, the employer may provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern.

(f) Any recertification requested by the employer shall be at the employee's expense unless the employer provides otherwise. No second or third opinion on recertification may be required.”

In CC 10.038, the County has adopted DOL best practices for recertifications as follows:

“An elected/appointed official or the Human Resources Management Department will require certification of continued need for leave... (1) Every 30 days, (2) When the employee requests an extension of leave, (3) If the circumstances surrounding the leave change, or (4) When Travis County receives information that casts doubt upon the continuing validity of the certification.”

Second and Third Opinions

The second and third opinions are perhaps the most important compliance tool the employer has to identify misuse and abuse of FMLA leave. When employers ask for a second opinion, which varies from the first opinion, they must also follow up with a third opinion to confirm the results if the second opinion differs from the first. In CC 10.038, the County has adopted DOL best practices for obtaining second and third opinions as stated on the following page:

“(bb) Additional certification. Travis County may require a second opinion be obtained from a health care provider selected by Travis County, and at the county's expense. Should the first and second opinions vary, a third opinion may be sought from a mutually agreed upon provider, at the county's expense:”

Methods of FMLA Administration

Local government entities use a variety of methodologies to administer and track FMLA leave. These include, but are not limited to the following:

Centralized

In this system, FMLA is administered by a single group, which performs compliance, record-keeping, and approval functions. For example, a county government could place all FMLA-related functions within a specialized division of its human resources department. All FMLA activities would flow through that division, and individual county offices and departments would have little, if any, FMLA-related responsibilities.

Decentralized

In a decentralized system, FMLA functions are provided internally within each county office and department. In larger entities, one or more employees may be dedicated to FMLA activities, while in smaller entities, one person may perform FMLA functions as a portion of their job duties. In

this type of environment, legal and human resources personnel may train these FMLA administrators and/or provide them support.

Mixed

In a mixed environment, the FMLA function for some entities is centralized, while other entities provide their own FMLA administration, as seen in the decentralized system. Typically, larger offices handle their own FMLA, while smaller ones are administered centrally.

Third Party

In this system, a local government contracts with a third party administrator (TPA) to handle FMLA processes in exchange for compensation. Instead of being actively involved in the FMLA process, local government personnel create parameters for the TPA to follow and audit their work. In terms of liability for violations of the FMLA, the TPA may be held liable for these violations, but in certain situations, their clients may still be at least partially liable.

How Other Counties Administer FMLA

The following chart details FMLA administration in six relatively populous Texas counties:

	Fort Bend County	El Paso County	Collin County	Tarrant County	Dallas County	Harris County
FMLA Administration Method	Decentralized	Centralized	Centralized	Centralized	Decentralized	Decentralized
FMLA tracking software	Lawson	Kronos	Peoplesoft	SAP	Kronos	Office Specific
Employees administering FMLA	One per Department	Not Available	3	4	One per Department	One per Department

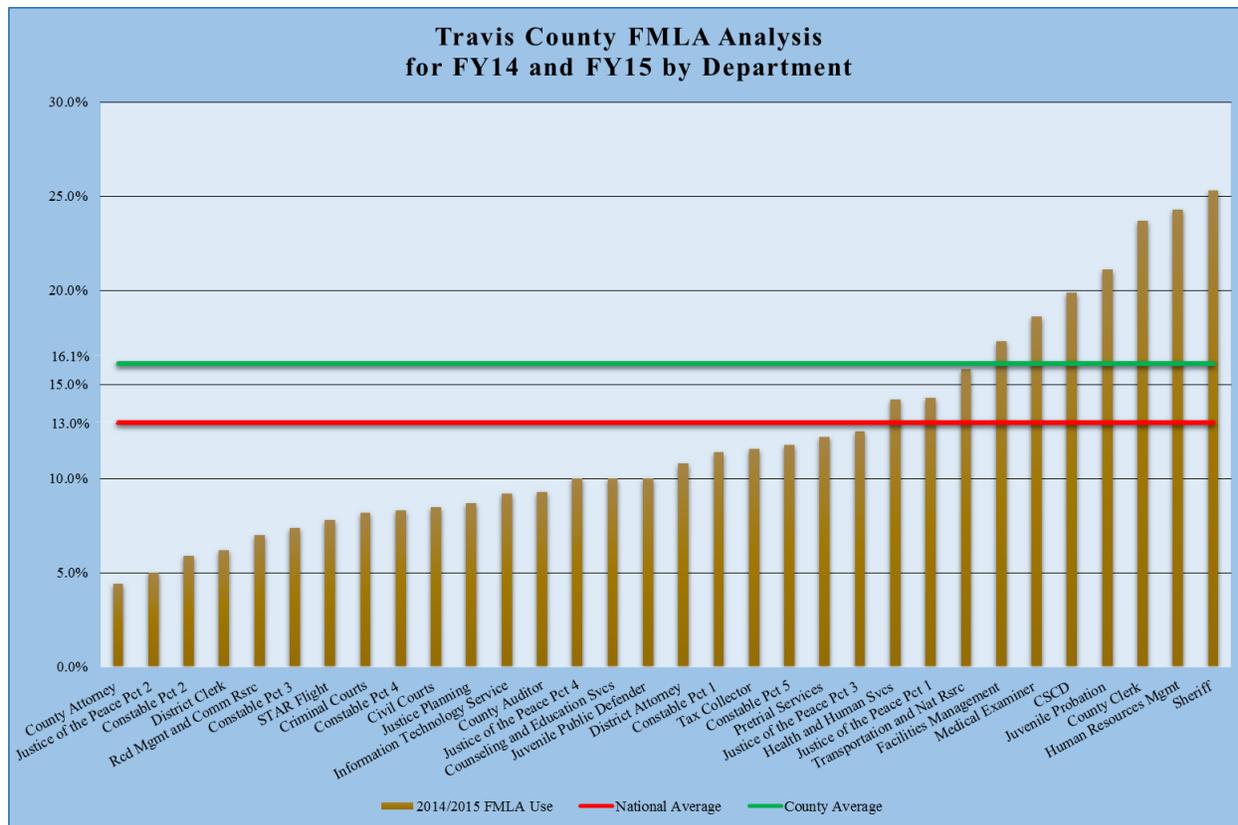
How Does FMLA Administration Work in Travis County?

Travis County has a mixed environment. Travis County HRMD provides centralized FMLA services to 11 relatively small County offices/departments, while the remaining offices/departments administer FMLA internally. In these decentralized offices, the liaisons responsible for FMLA administration have varying levels of training and experience.

In the offices/departments with larger headcounts, FMLA administration tends to be the primary job task for the FMLA liaisons. In offices with small to mid-sized headcounts, FMLA administration is often a relatively small portion of these liaisons’ duties. HRMD does not have a structured, comprehensive training program in place for the County’s FMLA liaisons.

SELECTION CRITERIA

The chart below details FMLA utilization rates for County offices and departments across fiscal years 2014 and 2015. Utilization rates are computed by dividing total individual FMLA events in a period by the total number of FMLA-eligible employees. The red line illustrates the 2013 national average FMLA utilization rate of 13.0% provided by the Department of Labor. The green line represents the County’s average FMLA utilization rate for the same period of 16.1% that we calculated using the applicable data.



For our FMLA reviews, we selected the four offices/departments with the highest FMLA utilization percentages over the two year examination period – TCSO, Juvenile Probation, the County Clerk’s Office and Travis County HRMD. During the two year period under review, 284,161 hours of FMLA time were used. The four offices/departments that we reviewed accounted for 188,314 (66%) of these total hours.

AREAS OF CONCERN

Our review disclosed significant findings in regard to administrative compliance related to obtaining medical certifications, and ensuring the related documentation is complete and sufficient in accordance with CC 10.038 and DOL regulations, particularly those in Code of Federal Regulations (CFR) Title 29, Section 825.308. We reviewed a total of 549 FMLA leave events during our review, noting 249 (45%) exceptions of various types. Individual leave events are not included in multiple findings; therefore, there are no overlapping findings.

The following paragraphs summarize our findings:

Failure to provide FMLA certification

Across the four departments/offices we reviewed, FMLA certifications were not prepared for 107 of the 549 (20%) FMLA leave events sampled. FMLA certifications are important in order to verify the reasonableness of the leave request, including the medical basis for the leave. In addition, the misuse/abuse of FMLA is more likely to occur if supervisors are not provided with sufficient information about an employee's leave, including the relevant start and end dates for the leave.

Incomplete FMLA certification

For the four departments/offices we reviewed, medical certifications were not properly completed for 42 of the 549 (8%) FMLA leave events sampled. Medical certifications should contain all medically relevant facts in order to ascertain if the individual has a qualifying event under the FMLA and to be in compliance with CC 10.038. FMLA misuse/abuse is more likely to occur when the HR staff does not receive sufficient information to properly complete and review the medical certification.

Failure to Obtain Recertifications

Across the four departments/offices we reviewed, recertifications were not completed for 49 of the 549 (9%) FMLA leave events sampled. According to CFR Title 29, Section 825.308, there are many reasons for a change in FMLA circumstance. The most common issue we noted was that the original certification had a definitive timeline or schedule (generally an exact date or range of dates), and that this timeline had lapsed, or was significantly different than the leave that was actually taken.

FMLA notice issues

For the four departments/offices we reviewed, Forms WH-381, Parts A & B, and/or FMLA request form were not completed for 36 of the 549 (7%) FMLA leave events sampled. The DOL requires that each FMLA applicant be properly advised of their eligibility throughout the FMLA process. Travis County utilizes Form WH-381 Parts A & B to document that employees receive all pertinent information regarding their eligibility. Conversely, employees are required to document their request for FMLA leave using a prescribed leave request form.

Excess FMLA Leave

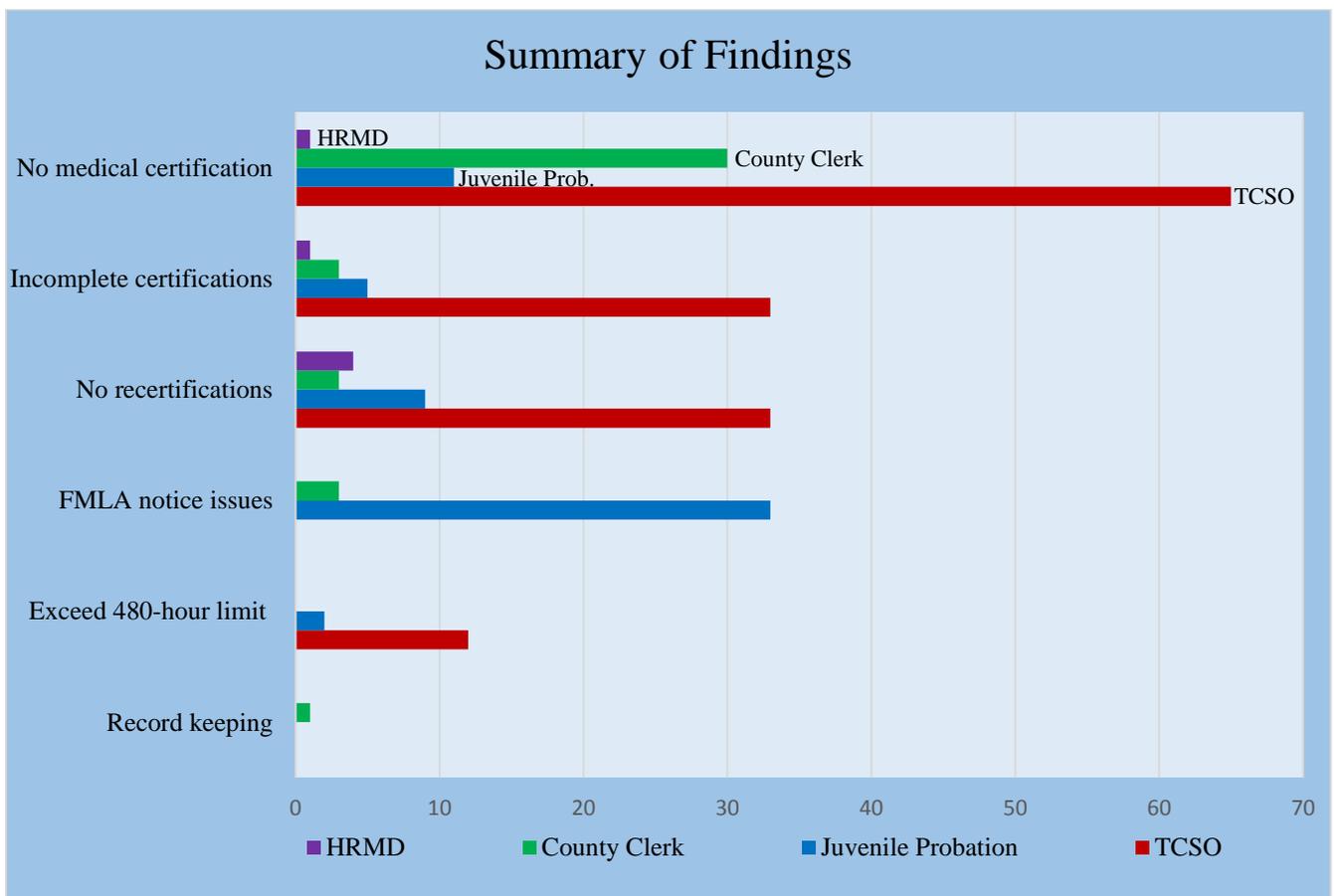
Statutorily, FMLA leave is capped at 12 workweeks per rolling 12 month period. For the four departments/offices we reviewed, FMLA leave exceeded this limit in 14 of the 549 (3%) FMLA leave events sampled.

Record Keeping Issues

Per DOL regulations, all medical certifications should be maintained separately from all other types of files and be treated as confidential. We noted one instance where FMLA certification records were co-mingled with other job performance-related information.

Summary

The following graph summarizes the above findings by office/department:



Other Issues Noted

“Stacked” Worker’s Compensation/FMLA – During our FMLA reviews of HRMD, TCSO, and Juvenile Probation, we noted 12 “stacked” worker’s compensation/FMLA leave events that were not properly supported. “Stacked” leave occurs when an employee is both unable to work under worker’s compensation regulations and is on FMLA leave for the same medical issue. According to Juvenile Probation and TCSO personnel, HRMD personnel informed them that the standard FMLA supporting documents required under CC 10.038 were not necessary for “stacked” leave.

HRMD subsequently informed all relevant County offices and departments that these forms are necessary for “stacked” leave.

Funding for Second and Third Opinions – No reimbursement mechanism is currently in place for costs incurred by employees in obtaining second and third opinions for medical certifications, if required to do so by County HR personnel. Per CC 10.038, these costs are to be paid by the County. Second and third opinions on medical certifications are perhaps the most important compliance tool the employer has to ascertain misuse and abuse of FMLA leave. Because of this, a clear reimbursement process should be implemented to facilitate their use.

County Code Update – CC 10.038 has not been updated since March 9, 1999. Since that date, the DOL has issued a number of updates to how the FMLA is to be administered that are not reflected in CC 10.038. When CC 10.038 is not updated consistently and in a timely manner, the risk of a material discontinuity between federal law and the County’s internal policies and regulations increases.

FMLA Administration Focus – FMLA administration at Travis County tends to focus more on employee needs than on compliance. This lack of focus on compliance is a contributing factor to many of the areas of concern noted above. An approach that attempts to balance responsiveness to employee needs with fair, consistent compliance is likely to reduce both the errors noted and the costs associated with FMLA leave.

SIGNIFICANCE

With a 45% error rate and a number of ancillary findings noted, it is our opinion that significant, material compliance and internal control issues exist within the Travis County FMLA function. Two primary risks are associated with a weak control and compliance environment for FMLA. First, employees whose FMLA leave requests have not been handled in accordance with the applicable statutes and regulations may pursue legal action against the County. Second, additional payroll costs may be incurred when FMLA is improperly awarded.

The issue of additional costs associated with a weak FMLA control and compliance environment is particularly notable in regard to TCSO and Juvenile Probation. Both of these offices have a significant number of non-exempt employees and correspondingly high overtime costs. During our review, we found a strong correlation between employee leave time (including FMLA) and additional overtime costs in these two offices.

As stated in the Background Section on page 12, Travis County has a “mixed” FMLA environment, with some offices being administered in a centralized manner and others using a decentralized model. The four offices/departments we reviewed gave us insights into the effectiveness of both aspects of the mixed environment. TCSO and Juvenile Probation are large, decentralized offices with employees specifically designated to FMLA administration. The County Clerk’s Office is a mid-sized, decentralized office whose FMLA administration is performed by an employee with other job duties. HRMD centrally administers FMLA for 11 other offices/departments, as well as its own.

ALTERNATIVES AND RECOMMENDATIONS

In order to improve the County's compliance environment, we recommend exploring and accessing the following alternatives:

Improve the Current Mixed FMLA Environment

One way to potentially improve the County's compliance environment is to implement changes to the current environment. This should include HRMD implementing regular, structured training for FMLA liaisons on FMLA administration, the County's FMLA policy, and statutory/legal changes to the FMLA. HRMD should also work to educate elected officials when it appears that office culture is a contributing factor to high FMLA error rates and utilization.

In addition, we recommend adding a FMLA compliance officer position responsible for ensuring that FMLA compliance is both properly maintained and consistently applied across the County. This compliance officer could report to the Administrative Operations Executive Manager.

Transition to a Third Party Administrator

We feel that obtaining FMLA administration services from a TPA is an alternative that should be explored. Therefore, we recommend that the Commissioners' Court direct staff to issue a Request for Proposal (RFP) soliciting responses from third party FMLA administrators interested in performing this service for the County. Based on the information received, the appropriate County personnel should determine if utilizing a TPA is the best course of action for the County.

Transition from a Mixed Environment to Full Centralization

A third alternative, likely the most difficult to implement, would involve implementing the improvements to the current mixed environment we discuss above, coupled with a transition to a centralized system. Specifically, all FMLA administration duties would transition to HRMD.