# Successfully Navigating FMLA, Leaves, and Accommodations in Schools

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# THE FAMILY AND MEDICAL LEAVE ACT (FMLA)

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# REASONS FOR FMLA LEAVE

- Bond with a newborn, newly adopted, or placed foster child
- To care for the employee's own serious health condition
- To care for the employee's family member (parent, spouse, or child) with a serious health condition
- Exigencies related to a parent, spouse, or child being called in to the line of duty
- To care for a covered service-member injured in the line of duty or suffering a duty-related illness

# ELIGIBILITY FOR FMLA LEAVE

- Covered employers = all public agencies are covered without regard to the number of employees employed.
- Employee eligibility = works for a “covered” employer; works 12 months of service (does not need to be consecutive); AND at least 1,250 actual work hours in the preceding 12-month period. However, teachers who work full-time are deemed to be eligible, even if the actual work hours are less than 1,250.
- For most FMLA qualifying reasons, eligible employees are entitled to up to 12 weeks of unpaid leave in a 12-month period (26 weeks for military care-giver leave).

# CALCULATING HOURS USING THE CBA

- Federal appeals court rejected a school district's argument that eligibility can be determined by multiplying the employee's work-day time in the CBA with the amount of days the employee was present at school. *Donnelly v. Greenburgh Cent. Sch. Dist. No. 7*, 691 F.3d 134, 142 (2d Cir. 2012).

# FMLA USAGE AND TRACKING

- Leave can be taken continuously, intermittently, or on a reduced-workweek basis (employer approval required for intermittent/ reduced workweek bonding leave).
- The 12-month period in which FMLA usage will be counted must be stated in the employer's FMLA policy.
- The employer is responsible for designating the employee's absence as FMLA leave.
- Failing to designate leave time may result in the employee having all of the benefits/protections of the law while maintaining his/her full 12-week entitlement.

# DOL Opinion Letter re: designating FMLA – 3/14/19

- Contrary to the decision in *Escriba v. Foster Poultry Farms, Inc., 743 F.3d 1236* (9th Cir. 2014), the U.S. Department of Labor (DOL) issued an opinion letter making clear that employers must designate FMLA when aware an eligible employee is on leave for an FMLA qualifying reason – "even if the employee would prefer that the employer delay the designation." *See* FMLA2019-1-A
- The employer is responsible in all circumstances for designating leave as FMLA-qualifying and giving notice of the designation to the employee. 29 C.F.R. §825.300(d)(1).
- FMLA regulations require employers to provide a written "designation notice" to an employee within five business days—absent extenuating circumstances—after the employer "has enough information to determine whether the leave is being taken for a FMLA-qualifying reason." 29 CFR §825.300(d)(1).

# SPECIAL FMLA RULES FOR SCHOOL EMPLOYEES

- Special rules apply to employees of local educational agencies, including public school boards and private and public elementary and secondary schools.
- The rules apply to “instructional employees” whose principal function is to teach and instruct students.
  - Instructional employees include teachers, athletic coaches, driving instructors, and special education assistants.
  - Instructional employees do NOT include: teacher’s assistants or aides whose principal job duty is not teaching or instructing, counselors, psychologists, curriculum specialists, cafeteria workers, maintenance workers, or bus drivers.

# SPECIAL FMLA RULES FOR SCHOOL EMPLOYEES

- Leave taken at the end of the school year and continuing into the next school year is taken consecutively rather than intermittently. Summer vacation is not counted against the employee's FMLA leave entitlement. The employee is entitled to the same benefits over summer vacation that they would have received if they had been working at the end of the school year.
- If an employee: (1) needs intermittent leave or leave on a reduced leave schedule that is foreseeable to care for their own or a family member's serious health condition, or to care for a service member; and (2) the employee would be on leave for more than 20% of the total number of working days over the period of the leave, the employer may require the employee to choose either to:
  - Take consecutive leave for a period(s) not greater than the duration of the planned treatment; or
  - Transfer temporarily to an available alternative position for which the employee is qualified, has equivalent pay and benefits, and better accommodates the recurring periods of leave than the employee's regular position.

# SPECIAL FMLA RULES FOR SCHOOL EMPLOYEES

- If an instructional employee: (1) begins leave more than five weeks from the end of the term; (2) the leave will last at least three weeks; and (3) the employee would return during the last three weeks of the term, **the employer may require the employee to continue taking leave until the end of the term.**
- If the instructional employee: (1) begins leave during the last five weeks of the end of the term; (2) the leave is for bonding reasons, to care for a family member with a serious health condition, or to care for a covered service member; (3) the leave will last more than two weeks; and (4) the employee would return to work during the two-week period before the end of the term, **the employer may require the employee to continue taking leave until the end of the term.**
- If the instructional employee: (1) begins leave during the last three weeks of the end of the term; (2) the leave is for bonding reasons, to care for a family member with a serious health condition or to care for a covered service member; and (3) the leave will last more than five working days, **the employer may require the employee to continue taking leave until the end of the term.**
- If an employee is required to remain on leave through the end of a term, **only the time before the employee is ready and able to return to work is charged against their FMLA leave entitlement.**
- Note: Under the FMLA, there are only two "terms." The end of the calendar year and the end of the school year in the spring.

# RETALIATION AND/OR INTERFERENCE

- FMLA prohibits employers from interfering with an employee's request for leave and/or other assertions of their right to leave.
- Employers are prohibited from retaliating against employees for requesting and/or otherwise asserting their right to leave. Retaliation includes any threat, discipline, reduction in hours, or any other adverse employment action.
- Any action taken against an employee returning from leave should be well supported by evidence and be consistent with employer policy.

# *Simon v. Coop. Educ. Serv. Agency #5*, 46 F.4th 602 (7th Cir. 2022)

- After plaintiff returned from medical leave, her employer did not return her to her previous position as a lead teacher, instead placing her in a position with fewer responsibilities that required her to split time between different schools. Court found the employer violated the FMLA by not returning Plaintiff to an equivalent position.
- Instructional employee rules, 29 CFR § 825.604 provides "the determination of how an employee is to be restored to an equivalent position upon return from FMLA leave will be made on the basis of 'established school board policies and practices, private school policies and practices, and collective bargaining agreements.'.. The "established policies" … must be in writing, must be made known to the employee prior to the taking of FMLA leave, and must clearly explain the employee's restoration rights upon return from leave…(and) must provide substantially the same protections as provided in the Act for reinstated employees… In other words, the policy … must provide for restoration to an equivalent position with equivalent employment benefits, and other terms and conditions of employment. For example, an employee may not be restored to a position requiring additional licensure or certification."

# *Nigh v. Sch. Dist. of Mellen*, 50 F. Supp. 3d 1034 (W.D. Wis. 2014)

- At the end of plaintiff's FMLA leave, she returned to the same job title, her pay and benefits remained the same, and she did not lose opportunities for promotion. However, the District stripped several duties and responsibilities she had prior to taking leave from her. The court held that these changes were sufficient to preclude summary judgment based on the District reinstating her to her prior position.
- The District next argued that if she was not restored to an equivalent position, it was because of performance deficiencies, not her leave. However, the District knew about plaintiff's performance issues well before she took leave. The court held that based on the employer's knowledge of plaintiff's performance issues prior to going on leave, a reasonable factfinder could infer that she would have continued all of her duties and powers had she not taken FMLA leave.
- The court also denied the employer summary judgment on her retaliation claim. They cited numerous suspicious events that supported a finding of discriminatory animus, such as taking away her keys, cutting off her email access, beginning to monitor her emails, reprimanding her for 14 separate infractions the day after she returned from leave, Board members ignoring her at basketball games, and being treated with hostility by the Interim Superintendent as she planned to transition back from leave.

# *Hall v. Bd. of Educ. Of Chicago*, N.D. Ill., No. 14-CV-3290, WL 2018 587151 (Jan. 29, 2018)

- Employee was a teacher and writing coach who went on FMLA leave. While on leave, employee alleges that employer contacted her multiple times requesting that she provide emergency lesson plans for the entire leave period and that she post student grades.
- Other federal courts have ruled that employers may properly interrupt an employee's leave with "non-disruptive communications such as short phone calls" asking the employee to "pass on institutional knowledge or property" as a professional courtesy. However, employers may not require employees on leave to perform work-related tasks or create work product.
- Court ruled that if employee's version of the facts are true, it would cross the line into FMLA interference by demanding that the employee perform work such as providing lesson plans and posting grades while on leave.

# *Salehian v. Nevada State Treasurer's Office*, D. Nev., No. 2:21-cv-01512-CDS-NJK, 2022 WL 3030710 (Aug. 1, 2022)

- Plaintiff was diagnosed with skin cancer and began chemotherapy. At a meeting with her supervisor, she requested and was granted an accommodation to work from home. It was clear that she was experiencing an FMLA qualifying event because of the scabbing on her face. Two weeks later, her doctor filled out FMLA paperwork for intermittent leave for her continued treatment. The next day, she attended a telephone meeting where she informed her supervisor that she had completed a round of chemotherapy, and had four weeks of treatment left. On her first day back in the office, she had a meeting where she planned to turn in her FMLA paperwork. Instead, she was terminated.
- Plaintiff plausibly alleged that she notified employer of her intent to obtain FMLA leave before her termination. She received her certification under the FMLA and alleged that she provided all of the necessary information regarding her need for leave and otherwise performed all duties necessary to take advantage of the rights conferred by the FMLA.
- Court held that even if she did not explicitly inform her employer of her intent to take FMLA leave, they had an obligation to inquire further about whether she was seeking FMLA leave instead of terminating her.

# SECOND OPINION

- Although second opinions are authorized by the FMLA, employers must be careful that they are not doing so for a retaliatory purpose. Court denied a motion to dismiss an FMLA retaliation claim where the plaintiff adequately alleged that when her employer required the plaintiff to undergo a second mental health exam by a Board-appointed doctor, they were doing so not because they had reason to doubt the validity of her initial medical certification but rather to retaliate against her for seeking to exercise her rights under the FMLA. *Larsen v. Berlin Board of Education,* D. Conn., No. 3:21-CV-427, 2022 WL 596677 (Feb. 28, 2022).

# MASSACHUSETTS PARENTAL LEAVE ACT

- MPLA runs concurrently with the FMLA. Full-time employees, upon the birth or adoption of a child, are entitled to eight weeks of unpaid leave, which begins at the birth or placement of the child. *See* G.L. c. 149, §105D.
- Although MPLA leave is unpaid, the employee may be paid for portions of the leave where the employee elects to apply accrued paid time off to the leave.
- However, the employer cannot "charge" the employee sick days for any holiday or school vacation day that the employee would otherwise not be scheduled to work.
- Leave is consecutive and includes any holidays/vacations that fall during the leave period, meaning an employee cannot extend their leave a week if a school vacation falls within it. If the birth or adoption occurs during summer vacation, it impacts the school year only to the extent that the eight-week leave extends into the school year.

# Parental/Medical Leave and Calculation of Professional Teacher Status (PTS)

- Pursuant to G.L. c. 71, § 41, a teacher who has taught for three (3) consecutive school years is entitled to PTS unless the teacher receives written notice of non-renewal by June 15 of the third school year. Upon attaining PTS, a teacher can only be dismissed for just cause, as defined in Section 42, after receiving due process, including a notice of intent to dismiss and a hearing prior to termination. A teacher with PTS can also challenge dismissal through statutory arbitration. G.L. c. 71, § 42.
- Massachusetts case law has held that, in order to satisfy the statutory requirement of serving three (3) consecutive school years to attain PTS, teachers must work complete school years, with only minor deviations. If a teacher works less than a complete school year, that year would not count toward the three (3) consecutive years of service required to attain PTS.
- However, a teacher's absence due to parental leave or other lengthy medical absence does not interrupt the consecutive nature of service required to attain PTS. For example, if a teacher works two (2) consecutive years, takes 12 weeks of parental leave in year 3, and then works a complete school year in year 4, and is renewed for the following year, the teacher will have attained PTS having worked three (3) complete school years in the four (4) years worked, disregarding the year in which parental leave was taken. *See Solomon v. School Committee of Boston*, 395 Mass. 12 (1985).

# The Americans with Disabilities Act (ADA), Chapter 151B, and Reasonable Accommodations

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## ***Importance of Job Descriptions and the Interactive Dialogue***
## *Einsohn v. New York City Dep't of Educ.*, E.D.N.Y., No. 19-CV-2660(RPK)(RER), 2022 WL 955110 (March 30, 2022)

- Employee was an assistant principal at an NYC high school and needed accommodations due to medical complications. His primary challenges were participating in hall patrol, having multiple teaching assignments and walking distances between his classes and his office.
- School Department accommodated him by moving his class locations, allowing him to sit during his classes and giving him a chair for his hall patrol duty, but did not reduce the number of classes he taught or fully relieve him from hall patrol duty.
- Court found that a reasonable factfinder could conclude that the accommodations were not reasonable. At the outset, the employee said he could not have close contact with students during hall patrol so remaining seated did not serve his accommodation needs.
- Court also found genuine dispute of fact as to whether relieving employee from patrol and/or a second class was an undue hardship.

## ***Temporary "Light Duty" Programs; Exercise Caution:***
## *Brunson v. Prince George's County Public Schools*, D. Md., No. 8:20-CV-00903-PX, 2022 WL 703915 (Mar. 9, 2022)

- Employee was a bus driver and sustained serious injuries after being assaulted by a student. Her injuries prevented her from being able to drive and the School placed her into an administrative position as a part of a "Transition Back to Work Program."
- Employee remained in the position for at least an entire school year and eventually learned that she would never be cleared to drive a bus again. She requested to stay in her position as an ADA accommodation. The School denied the request for, among other reasons, it was only a "temporary" job.
- Court denied summary judgment because, among other things, of a question of fact as to whether the reassigned job was part of a "temporary light duty program."

# OTHER ACCOMMODATIONS THAT MAY BE "REASONABLE"

- Service dog to help manage a teacher's anxiety. *Clark v. Sch. Dist. Five of Lexington & Richland Ctys.*, 247 F. Supp. 3d 734 (D.S.C. 2017).
- Moving a teacher to a classroom with natural light to alleviate the teacher's seasonal affective disorder. *Ekstrand v. Sch. Dist. Of Somerset*, 583 F.3d 972 (7th Cir. 2009).
- Assigning a teacher a special parking space near her preferred entrance to allow her to avoid stairs and take the shortest distance to the school entrance. *Durick v. New York City Dep't of Educ.*, 202 F. Supp. 3d 277 (E.D.N.Y. 2016).

## ***Considerations for Leave As A Reasonable Accommodation:***
## *Buckner v. W. Tallahatchie Sch. Dist.*, N.D. Miss., No. 3:19-CV-264-DMB-DAS, 2022 WL 1815987 (June 2, 2022)

- Employee was a teacher who had vision problems caused by glaucoma. He requested a teacher's assistant as an ADA accommodation to aid him in classroom monitoring and supervision. The school denied this request due to budgetary concerns, but attempted to provide other accommodations. He went on FMLA leave because of a surgery due to his glaucoma and thereafter request an additional 2 months of leave but without giving a definitive return date. He was terminated a week after his FMLA leave ended.
- Court found he was not a "qualified" individual with a disability because he could not fully perform his essential job functions as a teacher, i.e., monitor students' safety. Hiring a teaching assistant would shift part of his job duties onto another employee, which is beyond the requirements of the ADA.
- Court also rejected his claim the School District failed to accommodate him with additional leave. Although additional leave can be a reasonable accommodation, employers do not need to provide indefinite leave.

## ***Considerations for Leave As A Reasonable Accommodation:***
## *McKinney v. Cleveland County Board of Education,* W.D.N.C., No. 3:20-cv-221-MOC-DSC, 2022 WL 1697395 (Mar. 25, 2022)

- Employee exhausted her FMLA leave, and her employer granted her an additional 12 weeks of unpaid leave. Near the end of that leave period, she requested an additional 4-6 weeks of leave, which was denied. The School Board voted to terminate her a few weeks later. Apart from all the time missed under the FMLA, the employee had 38 absences not covered under the FMLA.
- Court explained attendance is one of the most basic requirements for a job and employees must be willing and able to demonstrate that they have the skills necessary to perform the job by coming to work on a regular basis.
- Court held that Plaintiff's stated intention to return to work sometime in the future after her prolonged absence was not enough to demonstrate that she could perform the essential duties of her position.

# REMOTE INSTRUCTION AS A REASONABLE ACCOMMODATION?

# EEOC GUIDANCE ON TELECOMMUTING

- Employers are not required to grant all telecommuting accommodations
- Factors in determining the feasibility of working at home include:
  - the employer's ability to supervise the employee
  - whether any duties require use of certain equipment or tools that cannot be replicated at home
  - whether there is a need for face-to-face interaction and coordination of work with other employees;
  - whether in-person interaction with outside colleagues, clients, or customers is necessary; and
  - whether the position in question requires the employee to have immediate access to documents or other information located only in the workplace.
- Pandemic Guidance from the EEOC: temporarily excusing one or more essential job functions when employers closed their workplaces does not permanently change the job's essential functions, prove that telework is always a feasible accommodation and/or is not an undue hardship.

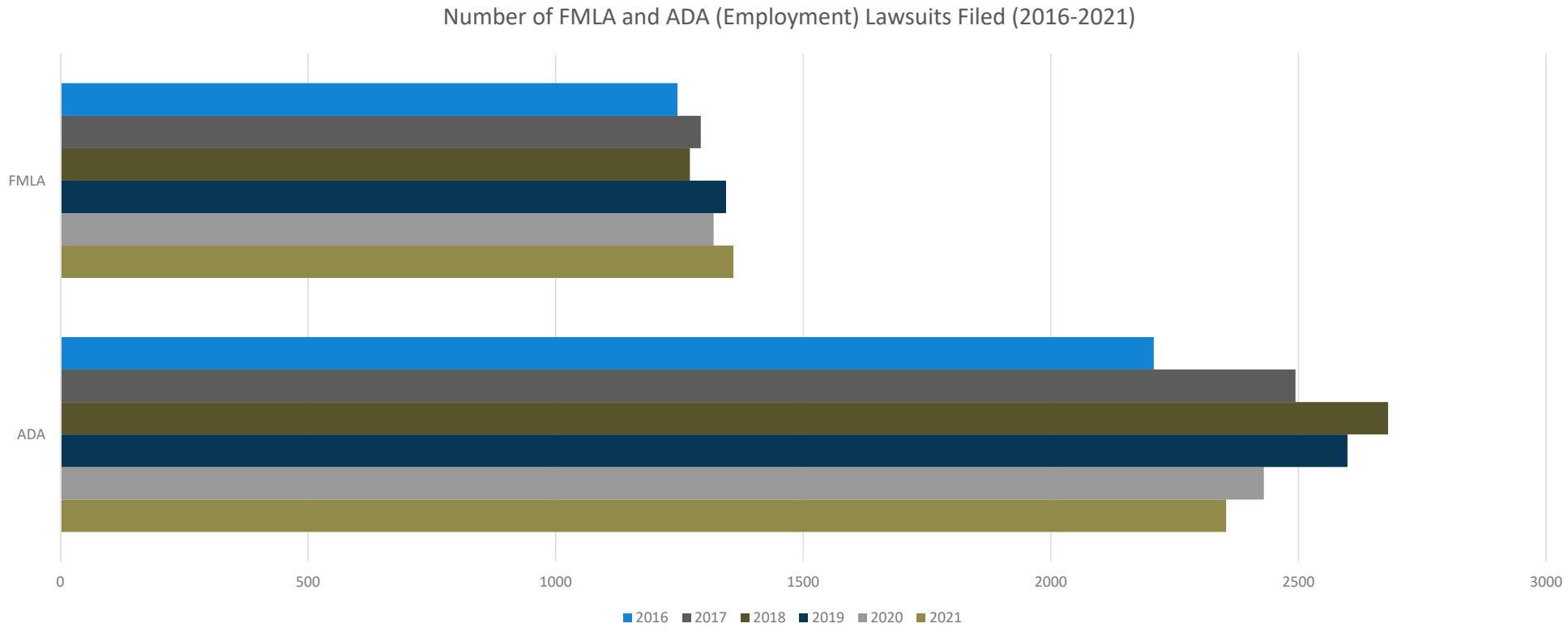
# Remote Learning/Instruction

- In the spring of 2020, due to COVID, school districts had to quickly pivot to remote learning and in 2020-2021, despite the return to in-school instruction, many school districts offered a hybrid learning option to families.
- In October 2020, the Boston Teachers Union sought injunctive relief to prevent a return to in-person instruction and allow BPS teachers the right to work from home while COVID transmission rates remained high. Suffolk Superior Court Judge Robert Gordon denied the BTU's motion, finding that in was in the public's interest to get teachers and students back in the classroom.
- In February 2022, the BTU filed a complaint in federal district court in Boston (1:22-CV-10196) claiming that, during the 2020-2021 school year, the Boston Public Schools violated the ADA and Chapter 151B for failing to engage in the interactive process and ignoring and denying requests for reasonable accommodations. The BTU alleges that teachers made requests for reasonable accommodations because of disabilities that put them at high risk for serious complications and/or death if they were to contract COVID. The BTU had previously filed a similar complaint with the EEOC in March 2021 and was granted the right to sue by the EEOC.

# *Thomas v. Bridgeport Bd. of Educ.*, D. Conn., No. 3:20-CV-1487 (VLB), 2022 WL 3646175 (Aug. 24, 2022)

- High-school Spanish teacher with a central nervous system disorder that leaves her at high risk if she contracts COVID-19 requested an accommodation to teach classes remotely. Request was denied because students were returning to the classroom.
- Teacher claimed in-person instruction is not an essential job function because she could teach over a remote platform.
- Court held that in-person instruction is an essential function of the job that did not cease because of the pandemic. Instead, it was merely suspended. Court also pointed out that the pandemic demonstrated how essential in-person instruction is because students' academic performance suffered, particularly in school districts with less in-person instruction.

# FMLA AND ADA EMPLOYMENT LAWSUIT TRENDS

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# FMLA COMPLAINTS FILED WITH THE DOL

| | FY 2015 | FY 2016 | FY 2017 | FY 2018 | FY 2019 | FY 2020 | FY 2021 |
|---|---|---|---|---|---|---|---|
| Number of Complaint Cases | 1,419 | 1,246 | 1,165 | 1,011 | 1,040 | 966 | 928 |
| Percent of No-Violation cases | 53% | 53% | 50% | 47% | 51% | 52% | 57% |
| Nature of Complaint | | | | | | | |
| Refusal to Grant FMLA Leave | | 240 | 225 | 184 | 193 | | |
| Refusal to Restore to Equivalent Position | 166 | 158 | 122 | 115 | 129 | 114 | 108 |
| Termination | 564 | 494 | 493 | 422 | 396 | 357 | 272 |
| Failure to Maintain Health Benefits | 32 | 25 | 11 | 15 | 13 | 21 | 15 |
| Discrimination | 365 | 329 | 314 | 275 | 309 | 266 | 281 |
| Status of Compliance Action | | | | | | | |
| No Violation Cases | 747 | 647 | 579 | 475 | 534 | 508 | 531 |
| Employer Not Covered | 23 | 27 | 25 | 15 | 12 | 18 | 21 |
| Employee Not Eligible | 95 | 77 | 83 | 56 | 67 | 63 | 86 |
| Complaint Not Valid | 531 | 476 | 418 | 356 | 402 | 364 | 353 |
| Other | 98 | 67 | 53 | 48 | 53 | 61 | 71 |
| Cases with Violations | 672 | 599 | 586 | 536 | 506 | 460 | 397 |
| Number of Employees Affected | 818 | 730 | 634 | 585 | 1,000 | 497 | 429 |
| Amount of Back Wages | $1,960,257 | $1,801,162 | $1,481,952 | $1,761,138 | $1,915,612 | $1,168,898 | $1,436,259 |
| | | | | | | | |
| Source: U.S. Department of Labor, Wage and Hour Division | | | | | | | |

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# Thank You!

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