

# Boss nagging employee about FMLA leave? Prepare for lawsuit

Short staffing makes management difficult. When an employee is out on medical leave, others have to pick up the slack. And there may be precious capacity to do so, given reduced labor budgets and the business imperative to do more with less.

Still, remind supervisors that they can't push employees who are out on FMLA leave to perform work while on leave. They also can't ask employees to return early from FMLA leave. Either one is just asking for legal trouble.

Instead, HR should handle all contact with employees concerning FMLA leave. The FMLA itself and the Department of Labor's regulations contain specific guidelines. Follow them.

## Concern? Or a threat?

What is the line between checking on a sick employee and harassing a sick employee to return to work early?

*Terwilliger v. Howard Memorial Hospital* (No. 09-CV-4055, W.D. Arkansas, 2011) draws that line in a case that concluded that the employee was entitled to present to a jury her FMLA interference claim.

Regina Terwilliger worked as a housekeeper for Howard Memorial Hospital. In November 2008, Terwilliger submitted an FMLA request for leave for back surgery. After the hospital approved her request, Terwilliger took her leave, underwent surgery and returned to work after release by her doctor.

While she was recovering, Terwilliger claimed her supervisor, Kim Howard, contacted her weekly to ask when she was going to return to work. During one phone call, Terwilliger claimed she asked Howard if her job was in jeopardy, to which Howard replied that she should return to work as soon as possible. According to Terwilliger, she felt pressured by Howard's calls to return to work early.

Terwilliger sued, claiming the hospital interfered with her statutory right to 12 weeks of FMLA leave by pressuring her to return to work after only 11 weeks. The district court agreed that a jury should decide that claim.

The court's opinion said:

*Interference includes discouraging an employee from using FMLA leave, ... as well as manipulation by a covered employer to avoid responsibilities under FMLA.... To prove interference, an employee must show that the employer denied his or her benefits to which he or she was entitled under the FMLA....*

*Interference occurs when an employer's action deters an employee's exercise of FMLA rights.... Here, Plaintiff had a right not to be discouraged from taking FMLA leave.... the Court finds that a reasonable jury could conclude that Defendants interfered with Plaintiff's exercise of her FMLA rights by discouraging or chilling her exercise of those rights.*

## What goes too far?

It should go without saying that employers shouldn't harass employees into returning early from FMLA leave. But, this case offers a reminder to employers that the FMLA has specific procedures in place to check on employees while they're out on FMLA leave.

- If the employee's medical certification indicates that the minimum duration of the serious health condition is more than 30 days, an employer must wait that long before requesting a recertification.
- In all cases, an employer may request a recertification of a medical condition once every six months, even if the original certification is for a longer period of time.
- Otherwise, an employer may request recertification no more often than every 30 days, and only in connection with an absence by the employee, unless the employee requests a leave extension, the circumstances described by the previous certification have changed significantly or the employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification.

In all cases, employers should avoid personal contact to check on the return-to-work status of an employee on FMLA leave. Follow the timelines above if a recertification of a serious health condition is necessary.

## Don't encourage employees to work during FMLA leave

If you can't urge employees to come back to work as soon as possible, you may be tempted to ask them instead to pitch in a little. You may even think it's a good idea to allow a bit of telecommuting. Don't do it.

Employees may feel they have no choice but to work. Then, they may sue for interference with their right to FMLA leave if they end up being terminated during a reduction in force.

You should instruct all co-workers and supervisors to leave the employee alone. Direct them to channel any requests for information through HR. You may even want to instruct employees to ignore any e-mail from the employee that tries to discuss work issues. Have the recipients forward any questions and e-mails to the HR office.