

Employee calls in sick when denied vacation - what can you do?



Employers create paid time off (PTO) policies so that workers have flexibility to handle both planned and unexpected absences. Those policies likely also include rules for advance leave requests so you can schedule around planned absences. Sudden illnesses, of course, are an exception. However, these policies can also be abused. What happens when an employee is denied vacation, then suspiciously calls in sick for those days?

Making workers call in before the start of a shift is common. But even the best thought-out plan designed to manage absences can fall apart when workers decide to game the system. Following call-out requirements doesn't excuse one from otherwise abusing PTO policies.

PTO abuse can and should be punished. Just make sure you're not running afoul of discrimination and other laws. Here's what to look out for and how to legally manage PTO leave abuse.

Establish ground rules

Managing PTO leave abuse begins with a good PTO policy. It should spell out:

When leave becomes available

Begin by deciding when workers become eligible for PTO. You may want to provide separate eligibility dates for

sick, personal, and vacation leave. That encourages careful planning for voluntary, planned absences while maintaining flexibility for absences that are essentially involuntary. Personal leave, if allowed for any reason, may be the first up. Sick leave, if only allowed for personal and family illness, could be next. Finally, vacation time eligibility could be added last. A reasonable PTO plan might make workers immediately eligible for a block of personal PTO. Sick PTO could become available after 30 days or be earned incrementally. Finally, vacation PTO could be delayed a year from starting date or be earned incrementally over the first year.

What notice workers must provide

For leave that's obviously planned ahead like vacation days, it's appropriate to have workers provide advance notice. Vacations tend to be concentrated around other scheduled days off and in the summer. If multiple employees want the same week off, employers may face scheduling difficulties. One solution is to set deadlines for vacation scheduling and use seniority to approve weeks off. Another is to use a first-come-first-served approach. For planned medical appointments such as elective, non-emergency surgeries, consider using the same leave request deadline as the FMLA. Since you probably run unpaid FMLA leave concurrent with PTO, that helps trigger the appropriate FMLA notice, too. Finally, for personal PTO, have employees provide as much advance notice as practical. Time off for a funeral, for example, might require shorter notice than planned time off for a court appearance.

Call-off requirements

Once you have established appropriate notice rules, add a call-off rule for unscheduled PTO. A typical requirement is calling in an hour before a scheduled shift. Resist the temptation to allow multiple call-off options like via text or email in addition to phone calls. That makes it harder to track call-offs. Instead, use a dedicated phone line and record the requests. You can also use the same call-off method for workers taking unscheduled intermittent FMLA leave.

Handling PTO abuse

Once you have established a PTO plan and call-off procedures, follow them in every case. Then adopt disciplinary processes that account for call-offs.

Using a point system for absenteeism

The key to curing excessive unscheduled call-offs is to consistently discipline violators. Decide how many no-calls you will allow. Keeping in mind that illnesses do occur, do not count call-offs for legitimate sickness. But unless the illness is a true emergency and the employee could not call-in, do punish no-calls.

Remember to exclude FMLA-covered absences

Some unscheduled call-offs may be FMLA protected. That is, the employee may call to report a serious health condition necessitating an unscheduled absence. In that case, employers should provisionally approve the absence as FMLA leave and follow up with the appropriate FMLA notices. If it turns out the absence was FMLA covered, do NOT count it against the employee. Instead, mark the absence as FMLA eligible and approved.

Warning - Automatic terminations

Many employers have adopted a zero-tolerance rule for employees who are absent after using all PTO. This can trigger an Americans with Disabilities Act (ADA) failure to accommodate lawsuit. If a call-off is for a disability-related reason, treat the call as a request for a reasonable accommodation. Then decide whether time off in excess of PTO is reasonable. For example, you just hired a disabled worker. She was entitled to one day of personal PTO on hire. However, she needs two days off for tests related to her disability. If you discipline her for

the second absence, you may be violating the ADA. Instead, consider whether the second day off would be a reasonable accommodation. It likely is.

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PTO abuse examples

Here are three examples of potential PTO abuse and how to respond to them.

Employee calls in sick when PTO request is denied

Harry has a total of 15 days of PTO – 10 days of vacation and 5 days of sick leave. Your PTO policy says that all vacations must be pre-approved and requests made 30 days before scheduled vacation PTO. Harry's request came just 28 days before his cruise takes off. Harry's request is turned down. His supervisor explains that a co-worker has already been approved for that week and his request was late.

Harry complains bitterly that he just won the cruise tickets and can't reschedule. Then, the day his vacation PTO would have started, Harry calls off in accordance with the company policy. He says he is sick. In accordance with your call-off policy, he continued to call in every morning to report illness. After five days off, he returns to work sporting a sunburn. What can you do?

If you have a policy that requires a doctor's excuse for absences longer than 3 days, you can request that. You could also treat the request as one for FMLA leave and request a serious health condition certification. This requires you to also provide the necessary FMLA notices — a process you should immediately have started.

Bottom line: Unless this incident was part of a pattern of PTO abuse, delay discipline until you don't get the excuse/certification.

Consecutive COVID scares

Your company adopted a generous COVID PTO policy that allows employees to take time off for potential exposure or infection. Jamie calls off, reporting that she has been exposed to a relative who has tested positive. She requests time off to test and isolate. Her test comes back negative, but her doctor recommends longer isolation and a second test. It, too, comes back negative and she returns to work on day 10. You did not send her an FMLA notice. You paid her.

Two weeks later, Jamie again reports exposure. She says she was in a restaurant that contact-traced her as a possible exposure when her server tested positive. You again let her take the time off after she provides a doctor's note and negative test.

A month later, it happens again. This time, Jamie says her pre-school son tested positive and her doctor recommended quarantine. You suspect PTO abuse. After she tests negative, you fire her. She sues, alleging FMLA violations. Does she have a claim? According to a recent Pennsylvania case, maybe. In a similar case, the court said the call-off should have triggered an FMLA eligibility notice and request for a serious health condition certification.

Always "sick" on Mondays and Fridays

Aaron requested personal PTO but his request was denied for operational reasons. He did not reveal the reason for the request. He then called off sick the next day. This was part of a pattern of Monday and Friday sick calls. Aaron had also accrued several no-call/unscheduled absence points under the employer's attendance policy. He was one occurrence away from discharge. Aaron was fired. The discharge likely will be upheld. Calling off "sick" without more doesn't trigger the FMLA notice provisions. A suspicious pattern of call-offs meant the employer

reasonably believed there was PTO leave abuse. And this absence put Aaron over the number of unscheduled absences to trigger automatic termination.

Final note

Employers should always consider whether an absence following denial of PTO may be abusive or legitimate. Review the worker's history, your attendance policy and whether the worker is possibly eligible for FMLA leave before disciplining him.