

How risky is it to fire a pregnant employee having attendance problems?

Q. A supervisor has concerns about an employee's poor attendance. The employee has been with us for less than a year, so she isn't yet eligible for FMLA leave. Last month she missed five days because her child had a high fever. She used available PTO for the time off. Last week, she was no-call/no-show for three days, which violated our attendance policy. When she returned to work, she told the supervisor she had been hospitalized because of pregnancy complications. She said she didn't report her absence because she didn't have access to a phone and was sedated. She provided a doctor's note that released her to return to work, but stated that she may need to be put on bed rest. The supervisor would like to terminate her because we can't afford to continue employing someone so unreliable. Can we do this?

A. Proceed with great caution. Even though the employee is not eligible for FMLA, and even though she violated your attendance policy, terminating her may create liability under the ADA, the Pregnancy Discrimination Act and the Minnesota Human Rights Act.

If she provides a reasonable explanation for the absences and the reason is related to a protected class status, you should evaluate the legal risk of strictly enforcing the policy.

Also consider whether you have consistently applied the policy in other circumstances. If, for example, any male employees remained employed despite violating the attendance policy, strictly applying it now could form the basis for a gender discrimination claim. Policies are useful and important tools, but they do not create absolute legal defenses against discrimination claims.

Review all of the pertinent facts with your attorney to assess the risks and your other options before terminating this employee.