

Sick employee wants less overtime? Consider that a request for intermittent FMLA leave

Like many employers, you may have lots of work, but you're still wary of bringing on more employees. Requiring existing employees to work mandatory overtime is perfectly legal. Note, however, that some who have FMLA-qualifying conditions may object, based on medical restrictions.

Intermittent FMLA leave can include missing an hour of regular work ... or missing mandatory overtime.

When that happens, consider their request for reduced or no overtime as a request for intermittent FMLA leave. Then reduce the required overtime to meet the employee's medical restrictions. In short, you can subtract FMLA leave from overtime hours you scheduled for all employees doing the same job.

Warning: Don't try to "create" artificial overtime for a disabled employee so she'll be forced to use up her FMLA entitlement. That's especially true if no one else is required to actually work overtime. Such a tactic will backfire.

Recent case: Tracy worked for Nott Company as a sales representative. A few years after being hired, she was diagnosed with multiple sclerosis (MS). The company frequently required sales representatives to work overtime hours as needed.

Tracy went to her supervisor and informed him that her doctor restricted her to working a standard 40-hour week when her symptoms flared up. He told her no exceptions were allowed. When she asked HR for an accommodation of no overtime, she was told that if she asked for an accommodation that didn't work, she might "lose her job just like someone could who had frequent absences due to illness."

Tracy was fired shortly after, allegedly for talking too loudly during a conversation with another salesperson.

Tracy sued, claiming among other things that the company interfered with her right to take FMLA leave by ignoring her request to work little or no overtime because of her medical condition.

The company argued two things:

- That Tracy never notified anyone she wanted to take FMLA leave
- That asking for less overtime isn't a request for FMLA leave, even if an employee has specifically mentioned the FMLA during her request.

The court rejected both arguments. It reasoned that by telling her supervisor she had MS and that her doctor had advised working only a regular workweek, she provided notice that she might need FMLA leave. An employee doesn't have to mention the FMLA to gain its protection.

In addition, the court reasoned that a request not to work mandatory overtime *is* a request for FMLA leave. That's because the FMLA allows intermittent leave for a serious health condition. Intermittent leave can include missing a day or an hour during the regular workweek, but also can encompass missing mandatory overtime. (*Werner v. Nott Company*, 13-529, DC MN, 2013)

Final note: Don't forget that additional time off can be a reasonable accommodation under the ADA. For example, let's say that a disabled employee has used up all her accumulated FMLA, sick and vacation leave for the year after her doctor restricted the hours she could work. Don't automatically fire her when her time is up. Instead, consider whether more time off might be a reasonable accommodation.