

# Consider FMLA before firing for attendance

Here's some advice that can save you money you might otherwise have spent defending an FMLA lawsuit: If an employee has accrued enough absences under your attendance policy to warrant termination or is coming close, make sure you haven't counted any missed work that *should have been* covered by the FMLA.

Since employees don't have to ask for FMLA by name, but need only provide enough information to suggest the FMLA may be triggered, it's best to move slowly and find out more about the absence before signing those termination papers.

**Recent case:** Before Nutrisystem hired Edith as a customer service representative, she informed the company that she had sleep apnea, was undergoing an experimental treatment and might need time off for doctor appointments and sleep studies.

The company had a point system for absences, with no points assessed for pre-arranged medical absences.

During her first year with the company, she had missed considerable work after an auto accident rendered her temporarily disabled with back and neck problems. (She did receive unpaid medical leave despite being ineligible for FMLA leave at the time.) By the time she became eligible for FMLA leave, Edith was facing potential discharge for the next unexcused absence.

Then she called in sick for several days. During one call, she mentioned that her neck was "out." Nutrisystem terminated her when she returned to work, reasoning that she had exceeded her allowed unexcused absences.

Edith sued, alleging that at least a few of those last days off were for FMLA-covered reasons.

The court said her call mentioning her neck may have been enough to trigger her employer's responsibility to dig deeper before counting the absences and firing her. A jury will now decide. (*Munoz v. Nutrisystem*, No. 13-4416, ED PA, 2014)