

# Postpone discipline while awaiting FMLA certification

It can take a long time to process an FMLA request, especially if the employee doesn't promptly respond to demands to provide medical certification of the need for leave.

Meanwhile, supervisors still need to manage the employee and account for absences.

The best approach is to go ahead and sanction any absences that would violate company attendance rules—but defer punishment until the FMLA leave request has been approved or denied.

Don't worry that provisional punishment might violate the FMLA. It doesn't, according to a recent case.

**Recent case:** Carla worked in the shipping department at Walgreens. She put in an FMLA request for time off due to "anxiety from co-workers and management."

At first, Walgreens told her she hadn't worked enough hours yet to take FMLA leave. However, HR told Carla it would hold her application until she had worked the 1,250 hours required to become eligible for FMLA leave.

Later, Walgreens requested medical certification of Carla's need for leave.

Meanwhile, even though Carla had used up all her available sick and personal leave, she continued to miss work. Her boss wrote her up, but noted that no punishment would take effect unless and until her FMLA leave was denied.

Then Carla got into a shoving match with a co-worker, which was caught on camera. At that point, her FMLA request was still pending, awaiting a doctor's report. The company fired her under its zero tolerance rule against workplace violence.

Carla sued, alleging that writing her up for absences while her FMLA request was pending interfered with her right to take FMLA leave.

She said she feared she would be punished for taking time off that might ultimately count as FMLA leave.

The 6th Circuit Court of Appeals tossed out her case. It reasoned that as long as the punishment was provisional, it did not violate the FMLA. (*Theiss v. Walgreen*, No. 14-3892, 6th Cir., 2015)

**Advice:** Train supervisors to track all absences pending FMLA approval, but to mark the violations as provisional. Wait to act until the final FMLA approval or denial.