

OK to enforce no-moonlighting policy against employees who take FMLA leave

Nothing in the FMLA specifically prohibits employees who take FMLA leave from moonlighting for another employer. Someone on leave for any number of FMLA-covered reasons—caring for their own or a loved one’s serious health condition or bonding with a new child, for example—can theoretically work for another employer.

But as long as employers clearly communicate it, it’s perfectly fine to enforce a no-moonlighting policy against any employee, including those who take FMLA leave.

If an employer discovers during litigation that the employee was moonlighting, it must convince the court that it had a rule in place and would definitely have fired the worker had it known she was violating the rule.

Recent case: Nola, who has several disabilities, worked as a nurse. She took FMLA leave on several occasions. When she was fired after one leave, she sued, alleging interference with her FMLA rights.

During litigation, it came out that while out on leave, Nola worked for another health care facility. The employer sought to have her lawsuit dismissed (or at least back pay limited) because it had a no-moonlighting rule in place.

But the court concluded that the employer hadn’t shown it would have terminated anyone caught moonlighting; therefore it couldn’t prove it would have terminated Nola. Her suit will continue. (*Smith v. North Shore*, ED NY, 2018)

Final note: Be prepared to show that you apply your moonlighting rule to all who violate it, not just those you believe are abusing FMLA leave.