

OK to offer option to work during FMLA leave

You can't require employees to work when they are out on FMLA leave. However, you can offer them the option of doing some work, as long as it is not presented as a condition of continued employment.

Recent case: Karen worked in sales for a major cruise vacation seller. Her pay was based on commissions. Her husband was in an accident, which left him largely incapacitated. Karen applied for FMLA leave to care for him.

Her leave request was approved—with two options: She could be completely relieved of her duties or she could agree to work from home servicing her existing clients during her leave. That way, she would continue to receive commissions. She accepted that offer.

Soon, the employer began hearing that Karen was not responding to customer emails. An investigation found hundreds of unread emails from her clients. The employer relieved her of all responsibilities during her FMLA leave, and said no to further commissions.

Karen sued, alleging interference with her right to FMLA leave. She claimed that being allowed to work during her leave violated the FMLA.

The court dismissed her lawsuit, reasoning that as long as working during leave was voluntary and not a condition of continued employment, it didn't violate the FMLA. (*D'Onofrio v. Vacation Publications*, 5th Cir., 2018)