

The top 10 FMLA mistakes that regularly trip up employers

Compliance with the federal FMLA can be daunting, but many answers are found within the FMLA regulations themselves. Despite many courts' attempts to make the FMLA into the next statute where attorneys utter the dreaded answer of "it depends," some common mistakes can be avoided.

1. Failing to meet employer obligations. The FMLA places many technical obligations on employers. Even the simplest mistakes can result in legal liability.

A few of the most common mistakes are easy to fix:

- Post the latest FMLA poster at every worksite.
- Have an FMLA policy. Distribute it via your handbook.
- Advise employees in writing whether their FMLA leave requests have been approved or denied, including all required designation notices, within the required time frames.
- Properly track FMLA usage and advise employees of the amount of leave remaining.
- Never retaliate or interfere with an employee's right to take FMLA leave.

2. Not including all time worked when calculating FMLA eligibility. Remember that the employee's actual workweek is the basis for determining FMLA leave entitlement. Specific categories that may ultimately need to be factored into FMLA eligibility calculations include overtime hours and break time.

3. Not recognizing a request for leave. There are no magic words required for an FMLA leave request. FMLA leave is not reserved just for medical emergencies. If you need more information to determine if an employee might need leave, ask him or her.

Even general reports of something that looks like a serious health condition may be sufficient to trigger FMLA obligations.

Example: If an employee's sick log identifies a "headache" and the employee has a history of migraines, that may signal an FMLA-qualifying condition.

4. Failing to give an employee the chance to provide certification. Employees have 15 calendar days following a leave request to provide certification from their health care provider. At the time you request certification, advise employees of the consequences of failing to provide an adequate certification.

5. Using the wrong increment to calculate the amount of FMLA used. The FMLA requires you to calculate leave using the smallest increment of time and actual days worked. The increment may be weeks, days, hours or even less than an hour. Allow employees to use FMLA in the smallest increment you allow for other leave. However, it is permissible to exclude days an employee would not be scheduled or expected to work. Examples include weekends, temporary plant closures, furloughs and holidays.

6. Requiring inflexible notice procedures. You can (and should) require compliance with your customary

notice procedure for absences, but there are caveats. The FMLA states the notice is due “as soon as practicable.” However, employees may be entitled to take leave even if they gave notice after your usual deadline.

When determining whether notice was given in a timely manner, take into account whether the need for leave was foreseeable, and the facts and circumstances of the particular case. Be flexible where the circumstances call for it.

7. Criticizing an employee’s use of leave. That can be the basis of an FMLA retaliation lawsuit.

Example: An employee who asked for FMLA leave was told he was on “thin ice” and was “burying himself” by making the request. After he returned from leave, he was suspended without pay and ultimately was fired. The employee sued for FMLA retaliation.

8. Treating an employee differently before and after leave. Employees may have grounds for a retaliation claim if they are subjected to stricter scrutiny or suddenly start receiving poor performance reviews after returning from FMLA leave. Standards by which employees are judged should be the same as before they took leave.

9. Insisting on meeting time-sensitive goals despite leave. Failure to reasonably adjust goals and standards to account for leave period can result in an FMLA retaliation claim.

Example: An account executive who took intermittent leave sued for retaliation when her employer failed to adjust her sales goals to account for the time she was out on FMLA leave and then fired her when she did not meet them.

10. Wrongly punishing perceived abuse. In a recent poll, 65% of companies complained about the unpredictability of intermittent FMLA leave. However, not every deviation from certification indicates actual FMLA abuse.

Employers should be vigilant but tread carefully. Reduce the risk of abuse by making sure to get medical certification, clarification and verification of the condition, periodic recertification, recertification when usage wildly differs from the original certification and information on any changed circumstances.

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