

Firing on FMLA: How to legally let someone go on leave

A common misconception is that workers can't be fired while on FMLA leave. Fortunately, that's just not true - *if* you have good reason to terminate and you document *everything*. Employers must show that they would have fired the worker whether she took leave or not.

The FMLA isn't a shield from pending discipline or business restructuring, despite what some employees may believe. You do, however, have to justify the discharge with good, solid reasons unrelated to asking for or taking FMLA leave. Here's how to handle discipline and other discharge reasons when the affected employee is on FMLA leave.

Common (legitimate) reasons to fire workers even on FMLA leave include:

- A reorganization that eliminates or restructures jobs, assigns new functions to some jobs or eliminates others. FMLA requirements don't demand you retain workers you otherwise would terminate under a reorganization.
- Across the board budget reductions during economic downturns or simply a desire to maximize profit. As long as you don't use past or future FMLA leave as a factor, workers can be fired while on FMLA leave to cut costs.
- Worker wrongdoing necessitating discipline. Employees don't get a pass because they're on FMLA leave. Be prepared to show you disciplined all workers who broke the same rule and didn't single out leave-takers, though. If you were finalizing a discharge based on insubordination when the worker requested FMLA leave, you can move forward.
- Poor productivity. But make allowances for time missed while on FMLA leave, ADA accommodations leave or for military service absences. In other words, adjust quotas, goals and sales targets to zero out the effect of lost time.
- Discovery of mistakes or poor performance during FMLA leave. Sometimes, it takes an employee's absence to see that the worker wasn't doing the job you thought. An absence may mean the employer moves another worker into the position to get the work done. He or she may discover uncompleted or error-filled work or other irregularities. If you would terminate *any* employee over the errors or irregularities, you can terminate the employee even while on FMLA leave. She may then have been fired while on FMLA leave, but not *because* she was.

FMLA laws show why termination is risky business

Employees fired while on FMLA leave, after asking for leave or in retaliation for taking leave can sue. That's because firing them may be:

- Interfering with the right to FMLA leave;
- Retaliation;
- Disability discrimination under the Americans with Disabilities Act (ADA); or
- Violation of the Uniformed Services Employment and Re-Employment Rights Act (USERRA).

The FMLA and other leave-related laws don't forbid discharging workers for other reasons, though. Employers have the right to fire workers for any reason, as long as it's not an illegal one. Using FMLA leave as a reason is an illegal one. So it's crucial that any discharge decision is backed up with information showing taking or requesting leave wasn't a factor. The key is understanding where your FMLA responsibilities begin and end.

The FMLA provides protected leave to workers who:

- Work for a *covered employer*;
- Have worked for the employer for at least *12 months*;
- Have at least *1,250 hours* of service for the employer during the 12-month period immediately preceding the leave; and
- Work at a location where the employer has at least *50 employees within 75 miles*.

FMLA leave entitlement

Eligible employees may take up to 12 unpaid workweeks of leave in a 12-month period for one or more of the following reasons:

- The birth of a son or daughter or placement of a son or daughter with the employee for adoption or foster care;
- To care for a spouse, son, daughter, or parent who has a serious health condition;
- For a serious health condition that makes the employee unable to perform the essential functions of his or her job; or
- For any qualifying exigency arising out of the fact that a spouse, son, daughter, or parent is a military member on covered active duty or call to covered active duty status.
- An eligible employee may also take up to 26 workweeks of leave during a "single 12-month period" to care for a covered servicemember with a serious injury or illness, when the employee is the spouse, son, daughter, parent, or next of kin of the servicemember.

Because FMLA leave is an entitlement for those eligible, employers must provide the time off. The cost, inconvenience, impact on operations, burden of continued insurance coverage and finding substitute workers is irrelevant.

Fired while on FMLA leave

Among your FMLA requirements is providing intermittent leave as needed or on a reduced schedule basis. An employee may take leave in separate blocks of time or by reducing the time he or she works each day or week for a single qualifying reason. An employee can't be fired because his serious health condition means daily breaks to medicate or rest. He can also schedule medical treatments or appointments as FMLA intermittent leave.

An employee can't be fired while on FMLA leave - whether full or intermittent - because he's missing work. You cannot use past, present or future FMLA leave usage (known or speculative) as ANY part of the reorganizational decision-making. Nor do FMLA laws allow you to single out a division with high FMLA usage for layoffs. You must adjust any division goals or quotas to take into account FMLA leave.

Reductions in force

You cannot single out a group of individuals who *may* take FMLA leave in the near future. Don't cut a division of females of childbearing years, workers with elderly parents or military spouses because of those characteristics. It doesn't matter if that leaves you with seemingly more reliable and present workers. You cannot use FMLA related attendance as part of the decision-making of who to cut. If you use attendance, make sure you have

excluded *any* FMLA usage from that attendance tally.

Are part of a reduction-in-force, workers on FMLA leave can be terminated if you don't take leave into consideration.

- Example: Jane takes FMLA leave to give birth. During her time off, the company undergoes a reorganization which eliminates 3 employees in her division. The employer's layoff list is based on the lowest performing employee based on the last 3 years of performance reviews. Jane's rank is in the bottom 3 and thus her name appears on the layoff list. Her reviews didn't penalize past FMLA leave or downgrade her ranking for related attendance. She can be terminated as soon as the layoff is effective even if she has not yet returned from leave.

FMLA abuse

Some employees abuse their right to FMLA leave. For example, FMLA requirements may authorize intermittent leave on short notice. This usually happens when a worker has a chronic condition that flares up unpredictably. But employees must still follow their employers' call-off policies and even stay-at-home rules. Just make sure the same rules apply to everyone. You can't single out those taking FMLA leave for extra scrutiny.

- Example: Claudia was approved for intermittent leave of an unscheduled day off during migraine episodes of approximately four days per month. Her employer requires employees to call in before missing a shift and has a three strikes and you're out no-call policy. Workers taking sick leave for their own personal illness must remain at home except for related medical appointments. Claudia failed to call off by the required time but emailed later to explain she was taking intermittent FMLA leave. She had already failed to call twice, so this was the third incident. When her supervisor tried to reach her at home, her husband answered and said she was at the grocery store. You can terminate Claudia for not following the employer's call-off and stay-at-home policies. She may have been fired while on FMLA leave, but not because she took leave.

What about USERRA?

Both the FMLA and USERRA work together to protect service members who need time off. Under USERRA, employees can't be punished for their military service. On return, they must be reinstated at pay and benefit levels they would have attained had they not served. The FMLA intersects in two ways. First, their military absence counts toward their FMLA eligibility. Second, USERRA allows service members extra time to reclaim their jobs - up to two years following service-related injury. In addition, the returning service member can only be terminated for cause for 12 months following return.

- Example: Madeline, an attorney, joined the Army National Guard two months after being hired by a law firm. She was called to active duty for two years, assigned to Afghanistan. There, while assisting deployed soldiers with their legal problems, she was injured in a suicide bombing. She was sent home and underwent rehabilitation for 18 months after the end of her active duty. She then told the law firm she had left she wanted to return. It reinstated her and adjusted her pay according to its pay schedule to account for missed time. Two months later, service-related complications required her to have surgery. The firm discharged her, telling her she wasn't eligible for FMLA leave. The law firm violated both the FMLA and USERRA. First, she should have received credit towards FMLA eligibility. Second, she wasn't fired for cause.