

Firing for vacation during FMLA? Hit 'pause'

Even if it appears that an employee is misusing his FMLA leave, you must make discipline or termination decisions based on a rational review of the facts, including the doctor's certification. When in doubt, check with your attorney.

Recent case: Richard, an IT manager in Massachusetts, took FMLA leave for foot surgery, and his certification form said he'd need four to six weeks of recovery. During that recovery time, he went on a prescheduled vacation to Mexico. He limited his activities because his foot was still in a medical boot.

When HR found out about the vacation during FMLA leave, it quickly investigated and fired him. He sued.

At trial, the HR director said she believed that employees on FMLA could not take vacation. But the court said that's not automatically true, noting that "an employee recovering from a leg injury may sit with his or her leg raised by the seashore while fully complying with FMLA leave requirements, but they may not climb Machu Picchu without abusing the FMLA process."

The court sided with Richard, awarding him a whopping \$1.3 million verdict, including \$715k in punitive damages. (*DaPrato v. Massachusetts Water Resources Authority*, Mass Sup. Ct.)

How do you resolve the fine line between vacation leave and FMLA leave?

Nancy Delogu, an expert employment law attorney, tackles this tough question from an HR director.

Q: "We have an employee who has been approved for intermittent FMLA leave to care for his mother who lives in Michigan. (He has provided the medical certification.) In order for our plant to run efficiently, we only allow a limited number of employees to be on vacation at one time. Our vacation year runs from January-December and employees who do not use their vacation days lose them. This particular employee hangs on to his days (at the moment he has 14 left). He wants off the week of Thanksgiving and the days between Christmas and New Year's, but was denied because other employees have already scheduled vacation for that time. Last year he did the same thing, and then the week before Thanksgiving he told us that he needed to use FMLA for Thanksgiving week. Can we prevent this from occurring again?" – Gayla, Alabama

A: The answer to your question depends upon what he is approved to use the leave for, and what he actually does with the leave. If he's needed to provide physical and emotional support for his mother, and he in fact travels to Michigan (or brings his mother to him) over the holidays to provide support, then the leave is being used appropriately.

Although the holidays are a cherished time for many families to be together, it is also true that his mother's regular caregivers may not be as available during the holiday season, making his presence more necessary. On the other hand, if he decides to use the time to visit the Caribbean, that sounds like he may be engaged in the abuse of FMLA.

I'm not sure how you administer your vacation policy, but most probably you could require employees to draw down their vacation time while on leave. That wouldn't solve your problem with end-of-year FMLA absences, but

it would minimize them for individuals who don't want to miss any more work than is necessary because they aren't paid for the time off.