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# FIVE COMMON LEAVE-OF-ABSENCE MISTAKES

The Family Medical Leave Act (FMLA) is more than 20 years old, yet employers have many questions on how the law applies to their workforce. Unfortunately, mistakes in the application can have significant business and legal consequences. In this article, we will discuss five common leave-of-absence mistakes based on our experience with real clients from our HR Hotline.

## 1. Not recognizing when your FMLA obligations trigger.

The first time an employee seeks leave for an FMLA-qualifying reason, the employee does not need to expressly assert rights under the FMLA or even mention the FMLA.

"It's not the employees' obligation to tell the employer whether their leave involves FMLA or not," says HR Consultant Rebecca Kellner, JD, SPHR.

Calling in sick without providing more information is not sufficient to trigger an employer's obligations under the FMLA. But subtle information can result in an obligation for the employer to recognize the leave may be protected under FMLA. Therefore, the employer needs to provide the appropriate forms.

The regulations provide the following examples of information that should alert an employer that FMLA may apply:

- A condition makes the employee unable to perform the functions of the job
- The employee is pregnant
- The employee has been hospitalized overnight
- The employee or employee's family member is under the continuing care of a healthcare provider
- If the leave is for a family member, the condition makes the family member unable to perform daily activities
- The anticipated duration of the absence is for more than three consecutive days

## 2. Failing to count paid leaves such as short-term disability (STD) and workers' compensation against FMLA entitlement.

Employers and employees often are confused regarding the difference between paid benefits and FMLA. The FMLA protects an individual's job and benefits during a period of leave. Paid time benefits provide pay during the leave but do not necessarily protect the employee's absence. Workers' compensation laws provide a financial incentive to protect the individual's position and may penalize an employer who refuses to provide work to the individual once the claim is resolved.

Failing to run FMLA concurrent with these benefits could result in the possibility of an individual out for an extended period of time well beyond the maximum 12 (or 26) weeks allowed under FMLA. As a result, prudent employers run FMLA concurrent with workers' compensation and/or short-term disability benefits.

## 3. Not asking for medical documentation or updated documentation.

"Employers should never just assume the employee qualifies for leave," Kellner says. "You should always get medical information."

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While longer FMLA leaves are relatively straightforward, an employee's ability to take small increments of FMLA leave sporadically generates administrative headaches for employers and raises concerns about employee abuse of intermittent leave. When an employee submits a certification for a chronic condition that will flare up and require intermittent leave — asthma or migraines, for example — employers should make sure the information is complete, clear and authentic.

One of the most common litigated areas under FMLA is when an employee starts taking leave beyond what the certification indicated. For example, if the certification allows the employee to take leave "once per month for appointments" and then the employee experiences some complications requiring a three-day absence, an employer should not be quick to terminate for potential abuse. The regulations allow an employer to get clarification from the treating physician. Courts have penalized employers that fail to exercise this right.

Once employees have an absence beyond the expected duration of the condition listed on the certification, an employer should obtain recertification. For example, if the certification indicates the employee is unable to work for 40 days, and if the employee remains on leave after 41 days, another certification should be obtained. For long-term or lifetime conditions, an employer may obtain a recertification every six months if the employee continues to have absences.

## 4. Failing to consider Americans with Disabilities Act (ADA) obligations when FMLA is exhausted or does not apply.

Employees taking FMLA leave for their own serious health condition may also have an ADA protected disability. An extended leave of absence may be a reasonable accommodation under the ADA. As a result, it is important for employers to consider whether employees are covered by the ADA before taking action on those who have provided notice of their inability to return to work following exhaustion of their maximum FMLA leave entitlement or in the event FMLA does not apply.

To find out if ADA applies, you can require employees to submit medical information. Similar to the certification required under FMLA, employers can require the employee to provide information from their treating physician to determine whether the condition is one that would be considered a "disability" under the ADA, as well as information on the expected duration of leave. Upon receipt of that information, the employer then needs to engage in the interactive process to determine whether the request for leave is reasonable and whether an alternative reasonable accommodation exists.

## 5. Allowing the employee to continue on your benefit plan after FMLA is exhausted.

Many employers don't think about the benefits issues when FMLA runs out and keep employees as active participants on their plans.

"Doing this is a bad idea," Kellner says. "Among other things, it's often contrary to the language of the plans. Employers should make sure to go through the benefits discontinuation and COBRA process, as the employee has experienced a qualifying event."

An employer's obligation to maintain health benefits under FMLA stops if and when an employee informs the employer of intent not to return to work at the end of the leave period, or if the employee fails to return to work when the FMLA leave entitlement is exhausted.

In the event the employer requires the employee to make payments toward their share of the premium while on leave (as opposed to making the payments for

the employee and requiring catch up payments upon return), the employer may stop benefits if the employee's premium payment is more than 30 days late. Keep in mind the employer must provide the employee written notice at least 15 days in advance advising that coverage will cease if payment is not received. However, even if coverage is discontinued for failure to pay, benefits must be resumed if the employee returns at the end of their FMLA leave. In the event the employee does not return, at that point a COBRA qualifying event still occurs.

Making FMLA mistakes can be costly, and many employers make mistakes they don't even know they are making. Associated Financial Group can help. We offer a series of webinars discussing FMLA in greater detail. Employers with the HR Hotline service should consider calling to discuss their practices whenever they are confronted with an FMLA claim. We also offer handbook review and drafting services that can either assess the current state of your FMLA policy or ensure that it's in legally acceptable shape. For more information contact us at info@AssociatedFinancialGroup.com or 800-258-3190.

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