

FMLA CASE STUDY

31st Annual Employment Law Conference

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NOTICE ISSUES

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COMPANY'S HANDBOOK POLICY

Bob is an 18 year full-time employee of the Company. The Company's handbook states that full-time employees who have accumulated 1,250 work hours in previous 12 months are covered by FMLA. The company does not have 50 employees within 75 miles of where Bob works.

Beginning in 2013, Bob began to display a disrespectful attitude toward his long time supervisor. In July, 2014, he was suspended for five days for failing to complete his last three assignments. He was told this was a final warning. He was given 12 days to complete the assignments.

Bob timely completed all but one assignment. On the day before the last assignment was due, Bob was admitted to a hospital for a heart condition. His wife notified the company of his illness. Sue, the HR Director, sent Bob an FMLA Notice of Eligibility stating he was eligible. Sue failed to check the box that he was not eligible because the Company did not have 50 employees within 75 miles of his work place. Bob's supervisor wants to terminate Bob.

WHAT SHOULD THE COMPANY DO?

1. The company should not terminate Bob. Bob is eligible for FMLA.
2. The company should not terminate Bob. Bob is covered by FMLA because the handbook misrepresented the definition of “eligible employee” which Bob relied upon and was discharged for not turning in the last assignment while he was on FMLA leave.
3. Terminate Bob. Bob was not eligible for FMLA because the company did not have 50 employees within 75 miles of Bob’s work site.
4. Terminate Bob because he failed to complete his last assignment.
5. Other options.

EMPLOYEE'S REQUEST FOR UNFORESEEN LEAVE

In 2013, Dean, a plant maintenance worker and former local union president, took FMLA leave for a triple-bypass surgery. On January 14, 2015, on three separate occasions, Dean's supervisor, Chuck, ordered Dean to remove some personnel effects that Dean had left in the human resources department. After the third time, Dean began to feel ill, but did not tell Chuck. Dean went to First Aid where his blood pressure was a little high but within the normal range. He asked the nurse if he could to go home but was told he would have to get permission from Chuck.

While returning to his department, Dean told his union steward that he was in pain and needed to go home to get his medication or see his doctor. Dean failed to describe the pain or identify the medicine. When Dean returned to his department, he told Chuck that he was in pain and needed to go home. Sue, the HR Director, heard the exchange and asked what was happening. Dean stated he had a "very bad head ache." Dean asked for permission to go home. Chuck and Sue told him to turn his plant badge into human resources and then he could go home. Dean did not turn in his badge and walked out of the plant.

WHAT SHOULD SUE AND CHUCK DO?

1. Grant Dean FMLA leave because he gave the company enough information to determine that he might need FMLA leave.
2. Discharge Dean for insubordination.
3. Let Dean go home but discipline him for insubordination.
4. Tell Dean to return to work because he has not given adequate notice of the need for FMLA leave.
5. Other options.

FAILURE TO FOLLOW COMPANY POLICY

Bill, a nine year employee, works in the service department. He is a very good employee. He suffers from anxiety, depression, and gastroesophageal reflux disease. The company's attendance policy requires, "employees who are going to be absent or late for work must call the attendance hot line at least thirty (30) minutes prior to the start of his/her shift." It also states, "If the employee is absent from work for three consecutive working days without informing management, the employee is terminated."

Bob calls into the designated line on Friday and says he is taking the day off for personal reasons. He calls in to the line again on Monday and says he will not be in to work. He fails to call in or show up for work on Tuesday, Wednesday and Thursday.

Sue in HR writes a letter terminating Bill. Bill's supervisor does not want to discharge Bill because he is a very good employee.

WHAT SHOULD THE COMPANY DO?

1. The company should not discharge Bill because Bill's absence for five days puts the company on notice that Bill may qualify for FMLA leave.
2. The company should not discharge Bill because he gave the company sufficient notice of his need for FMLA law when he called in on Friday.
3. The company should not fire Bill because he is a very good employee.
4. The company can discharge Bill because he failed to follow the company policy on calling in every day.
5. Other options.

ELIGIBILITY & RIGHTS NOTICE TO THE EMPLOYEE

In 2010, the company hired Lisa as a full-time instructor. On November 4, 2014, Lisa submitted a request for personal leave for the period December 4 through December 31. James, her supervisor, suggested that she apply for short term disability leave. After Lisa submitted her paperwork, HR determined she was eligible for FMLA leave. When Sue in HR met with Lisa, she had Lisa initial the box on the leave form stating Lisa was taking FMLA leave. Sue also extended the leave to April 1, 2015 based upon Lisa's medical certification signed by her doctor. During her meeting with Lisa, Sue did not discuss Lisa's rights under FMLA. Sue did send a letter to Lisa, by regular mail and by e-mail, explaining Lisa's rights under the FMLA. Lisa denies she received the letter.

On April 9, Lisa notified Sue that Lisa's doctor released her to return to work without restrictions on April 30 and provided a return to work certification from her doctor. However, Lisa's job had already been filled by a new employee when Lisa failed to return to work after the expiration of her FMLA leave on April 1. Lisa called James and Sue demanding her job back and claiming that she would have returned early from leave had she known a late return could cost her job.

WHAT SHOULD SUE AND JAMES DO?

1. The company gave Lisa all the FMLA leave to which she was entitled. Her termination should stand.
2. Even if the company failed to properly notify Lisa of her right to 12 weeks unpaid leave and the consequences of not timely returning from leave, she was not prejudiced by the company's failure because she returned several weeks after the leave expired. Lisa has no cause of action, Her termination should stand.
3. The company should discharge the replacement and hire Lisa back.
4. The company should find Lisa another similar position or transfer the replacement to a similar job and give Lisa her job back.
5. Other options.

FAILURE TO DESIGNATE LEAVE AS FMLA LEAVE

Dick, a mechanic, was a 30 year employee. In August 2014, he was discharged for keeping inaccurate records but was reinstated when he and his union agreed to a last chance agreement. One condition of the last chance agreement was that Dick report to work every day and on time. On December 6, 2014, Dick was in an automobile accident and hospitalized. He informed the company that he would be out of work at least two weeks because of his accident. The company did not notify Dick of his rights under the FMLA, including that he was entitled to 12 weeks of unpaid FMLA leave or that the company would count his leave towards his 12 weeks of FMLA entitlement.

On December 16, 2014, Dick was diagnosed with torn rotator cuffs and told he would need immediate surgery. Dick sent a doctor's note to the company on December 17 informing it of the operation and stating that he would be out of work until April. His supervisor told him to take whatever time needed. In April, Dick's doctor provided a return to work certification without restrictions. Dick returned to work 92 days after his accident. The company wants to discharge him for violating the last chance agreement.

WHAT SHOULD THE COMPANY DO?

1. The company should discharge Dick because his leave exceeded the 12 weeks allowed by FMLA and therefore he violated the last chance agreement.
2. Do not discharge Dick if Dick can show that the company's failure to notify him of his rights under FMLA rendered him unable to exercise his FMLA rights in a meaningful way.
3. Do not discharge Dick because last chance agreements are unenforceable.
4. None of the above.

LATE DESIGNATION OF LEAVE

Jim, who has been employed full time for five years, is a problem employee. He has attendance problems and is a poor performer. On December 31, 2014, he injured his back in an auto accident. On January 2, 2015, the first day of work after the accident, he called into the company's attendance line and informed the company that he was hospitalized and needs surgery. On January 3, 2015, his wife provided the company with a doctor's note stating that he will be out of work until around March 30, 2015.

Sue in HR fails to send a Designation of FMLA Leave Notice until January 30, 2015. The notice designates his leave from January 2, 2015 until March 30, 2015.

Jim fails to return on March 30, 2015.

WHAT SHOULD THE COMPANY DO?

1. The company can discharge Jim because he failed to return to work at the end of his 12 weeks of FMLA leave.
2. The company should ask Jim when he can return to work. If he can return to work by April 24 (12 weeks after the date of the designation notice), the company should let him return to work because the company was late in sending him the designation notice.
3. The company cannot discharge Jim since the company's designation notice was late.
4. The company should seek a certification of medical conditions and find out when his doctor thinks he can return.
5. Other options.

TAKEAWAYS

- Ensure employees are qualified for FMLA Leave.
- Post notices and include the notice in handbooks or written guidance.
- Determine if employee has provided proper notice, foreseen or unforeseen.
- Timely provide all notices to the employees.
- Mark all proper boxes in the Notice of Eligibility and Rights and Responsibility Form, WH Form-381, and Designation Notice Form, WH Form-381. Include job description in the Notice of Eligibility if you require a return to work certification.
- Give the notices in writing and deliver by hand or certified mail.

CERTIFICATION ISSUES

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MEDICAL CERTIFICATION

Rob is a mechanic. He claims he injured his back and cannot perform his job duties. He has missed several days of work and tells Sue that he will be out for four weeks. He has informed Sue that he needs some time off for treatment and recovery. Sue provides him with a Notice of Eligibility and a medical certification Form. She tells Rob that he has to return the certification within 15 days.

Rob returns the attached certification Form within the 15 days.

SHOULD SUE ACCEPT THE FORM

1. Yes, it is complete.
2. Yes, it is sufficient.
3. No, it is not complete.
4. No, it is not sufficient.

ROB REFUSES TO PROVIDE A COMPLETE CERTIFICATION

After reviewing Rob's certification, Sue informs Rob the certification is incomplete and tells him he has seven days to return a complete certification. Rob refuses to provide an updated certification. Sue, again, contacts Rob and gives him an additional seven days and asks if she can call his doctor. Rob contacts Sue and tells her he believes the original certification is complete and sufficient and that she is not permitted to contact his doctor. Rob has taken three weeks of leave. The company's no-fault attendance policy permits termination of an employee after three days of no show/no call.

WHAT SHOULD THE COMPANY DO REGARDING ROB?

1. His medical certification is not complete or sufficient and he has failed to provide a complete and sufficient certification within the additional seven days, the company should discharge him.
2. Accept the certification and give him FMLA leave because the certification substantially complies with the laws requirements.
3. Have Rob's supervisor call Rob's doctor and explain the information needed.
4. Have Sue call Rob's Doctor to get clarification.
5. Other options.

EMPLOYER'S LATE REQUEST FOR CERTIFICATION

Debra had a history mental and emotional problems. She began her FMLA leave on October 20 and continued her leave until December 15 when she returned to part-time work. However, she did not seek medical help for her mental condition until November 10.

Initially, the company did not request a medical certification because Debra might qualify for the company's short term disability policy which runs concurrent with FMLA leave. The company informed her that if her short term disability was denied, she would have to provide a certification.

Because Debra sought medical help for her condition on November 10, her short term disability was approved for the period November 10 through December 14. However, the company denied her short term disability for the period October 20 through November 9 and requested that she provide a medical certification to support FMLA leave for that period. Debra failed to provide a medical certification for this period. The company determined the October 20-November 9 absences were unexcused and wants to terminate Debra.

WHAT SHOULD THE COMPANY DO?

1. Let her return to work because the company failed to request the medical certification within five business days of Debra's request for leave.
2. Let her return to work because the company cannot demonstrate that its failure to request a timely medical certification was caused by fraud committed by Debra.
3. Do not allow her to return to work because the company had a reason to request the certification at a later date given its policy that denial of short term disability would trigger the requirement that the employee provide a medical certification.
4. Return her to work and discipline her for insubordination for failure to return the certification.
5. Other options.

EMPLOYER REQUEST RECERTIFICATION

Jane worked as a clerical employee for the company. In addition to its FMLA policy, the company's attendance policy permitted the discharge of an employee who had more than five days of unexcused absences in a rolling 12 month period.

In January, Jane requested intermittent leave for migraine headaches claiming to need leave four times a month lasting three to four days. The company requested medical certification. The certification stated Jane would need leave for one episode per month with each episode lasting three to four days. The company stated that the certification did not support her leave request. After several attempts to obtain a recertification that matched her request, Jane's doctor provided a recertification that stated that the doctor could not "give a clear frequency or duration [for her absences] at this time."

Following approval of her leave, Jane was absent for 28 straight days. The company requested that she recertify, but Jane failed to provide a recertification. Her supervisor wants to terminate her employment.

WHAT SHOULD THE COMPANY DO?

1. Return Jane to work because she provided the company with several recertification and is entitled to intermittent leave.
2. Return Jane to work because the company violated the FMLA by requesting recertification more frequently than every 30 days.
3. Return Jane to work because the last recertification stated that the doctor was unable to predict the frequency or length of her migraine attacks so Jane could take leave whenever she needed it.
4. Discipline or terminate Jane because she failed to provide a recertification which matched the frequency of her leaves.

TAKEAWAY

- Make sure the medical certification is complete and sufficient. If it is not, require the employee to provide a complete and sufficient certification within 15 days. Provide employee seven days to cure any deficiency.
- Use the Department of Labor Certification of Health Care Provider for Employee's Serious Health Condition Form, WH Form-380-E.
- For a request for certification, ensure you tell the employee in writing of the consequences of failing to provide the medical certification. Do it in writing. An employer may orally request subsequent certifications.
- If the medical certification indicates that the minimum duration of the condition is more than 30 days, an employer must wait until that minimum duration expires before requesting a recertification.

TAKEAWAY

- An employer may request recertification in less than 30 days if:
 - The employee requests an extension of leave;
 - Circumstances described by the previous certification have changed significantly;
 - The employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification.
- The employer may ask for the same information when obtaining recertification as that permitted for the original certification as set forth in a certification.
- Any recertification requested by the employer shall be at the employee's expense unless the employer provides otherwise. No second or third opinion on recertification may be required.

INTERMITTENT LEAVE

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CHRONIC BACK ISSUES

Tom was diagnosed with lumbar degenerative disease, a chronic back condition. The condition caused him extreme pain two to three days a month. He was given intermittent leave pursuant to the FMLA for use whenever his back pain flared up or when he had doctor's appointments for treatment of his condition.

Over several years, Tom took intermittent leave for his back condition. He often forecasted his need for FMLA leave, and his leave often occurred the day before or after weekends or vacations. Tom's manager becomes suspicious of his use of the leave. The company hired a private detective who filmed Tom on two Fridays when he was taking intermittent leave. The film showed Tom performing errands, lifting wood, bending, reaching and squatting. The company had an outside medical expert review the film. The expert opined that Tom was not suffering from back pain on the day in question. Sue interviews Tom; he views the video and does not dispute its contents. He does offer several excuses including that his doctor "maybe" gave him a Cortisone shot earlier that day.

The company suspends Tom pending a decision on what action to take.

WHAT SHOULD THE COMPANY DO?

1. Send Tom for a recertification of his condition.
2. Counsel Tom but do not discipline him because he was entitled to intermittent leave.
3. Revoke Tom's intermittent leave.
4. Discharge Tom.
5. Other options.

TAKEAWAYS

- Leave may be taken intermittently or on a reduced leave schedule when medically necessary for planned and/or unanticipated covered reasons.
- Employees may take Intermittent or reduced schedule leave for absences where the employee or family member is incapacitated or unable to perform the essential functions of the position because of a chronic serious health condition or a serious injury or illness of a covered servicemember, even if he or she does not receive treatment by a health care provider.
- Employees may take the leave in increments of an hour or more to several weeks.
- If an employee needs leave intermittently or on a reduced leave schedule for planned medical treatment, then the employee must make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations.
- The employer may require the employee to transfer temporarily to an available alternative position.

RETURN TO WORK

The company hired Mary as a clerical employee. Mary spent 60% of her time typing. The company's FMLA policy requires employees to supply a fitness-for-duty certification permitting the employee to return without restrictions. The employer's policy treats employees who fail to return to work on time as a voluntary quit. In early 2014, Mary took four weeks FMLA leave.

In August 2014, Mary injured her right hand requiring a splint on her pinky and the two adjacent fingers. The company failed to give Mary a job description to provide to her doctor. Her doctor gave her a fitness-for-duty certification stating "No restrictions in splint." When Mary returned to work on August 16, she was unable to type at her normal speed. Sue informed her that she had to type at full speed or take FMLA leave. Mary left work and went to her doctor. After seeing her doctor, Mary took FMLA leave for an additional two months. While Mary was on leave, the company hired a temporary employee to perform her job. On September 28, Mary's FMLA leave entitlement ended. She contacted the company and said she would return on October 4.

Mary's supervisor wants to hire the temporary employee. Because Mary had a prior discipline, she is not allowed to transfer to another position.

WHAT SHOULD THE COMPANY DO?

1. Allow Mary to return to on October 4. She attempted to return to work with a fitness-for-duty that contained “no restrictions” slip on August 16 and the company had to let her return at that time.
2. Hire the temporary employee and place Mary in a similar position when she returns.
3. The company should discharge Mary because she was unable to return to work upon expiration of her FMLA leave on September 28.
4. The company should discharge Mary because she was unable to return to work without restrictions on September 28.
5. Other options.

TAKEAWAYS

- An employer may delay restoration to employment until an employee submits a required fitness-for-duty certification unless the employer has failed to provide the notice of the need for a fitness-for-duty certification.
- If an employer provides the notice required, an employee who does not provide a fitness-for-duty certification or request additional FMLA leave is no longer entitled to reinstatement under the FMLA.

QUESTIONS?

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THANK YOU



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