

COMMON EMPLOYER TRAPS UNDER THE FAMILY MEDICAL LEAVE ACT AND AMERICANS WITH DISABILITIES ACT

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FMLA REALITIES

- The FMLA was created to help employees, but some take advantage of it
- Honest mistakes may still result in liability
- Even worse? The regulations don't take into account the real world
- Managing intermittent leave can be an employer's biggest challenge

ADA REALITIES

- More and more employees qualify as disabled under the ADA
- EEOC has issued guidance on ADA leave of absences and light duty policies
- ADA obligations often begin when FMLA is exhausted

SCENARIO – “I’M SICK”

Jane calls in and leaves a voicemail for her manager: “I won’t be in today, I’ve been throwing up and I’m really sick.” Jane had no known medical conditions and has never applied for FMLA leave.

SCENARIO – “I’M SICK” (CONT.)

Have your obligations under the FMLA been triggered?

- A. No, Jane did not request FMLA
- B. Yes, Jane has said enough to put you on notice that she may be suffering from a serious health condition
- C. No, she has not provided enough information to trigger the FMLA

SCENARIO – “I’M SICK” PART II

Matt calls in and tells his manager “I won’t be in today, I’m not feeling well.” Matt has been approved for intermittent FMLA leave due to migraine headaches.

SCENARIO – “I’M SICK” PART II (CONT.)

Have your obligations under the FMLA been triggered?

- A. Yes, Matt has been approved for intermittent leave and his absence is covered
- B. No, Matt has not complied with his obligations or given sufficient notice under the FMLA

SCENARIO – INTERMITTENT FMLA

Bob obtained medical certification for intermittent FMLA leave due to his asthma. The certification said his expected absence frequency would be two to four times per month, which has generally occurred the past three months.

This past month, Bob took seven days off. The employer only counted the first four days as FMLA leave.

SCENARIO – INTERMITTENT FMLA (CONT.)

Has the employer violated the FMLA by refusing to count all of Bob's absences as FMLA leave?

- A. Yes, as long as an employee is taking time off for an FMLA-qualifying illness, the employer should always count the actual time taken off without regard to any prior estimates made by the physician or employee
- B. No, the employer has the valid option to base its decision off the doctor's estimate even if all of the absences are for a FMLA qualifying illness

SCENARIO – FAILURE TO TURN IN PAPERWORK

Sarah seeks intermittent FMLA leave from her employer due to hypertension. She is immediately provided with FMLA medical certification paperwork, but fails to submit the paperwork within 15 days. Sarah eventually turns in the FMLA certification paperwork 45 days after she seeks intermittent FMLA leave.

The certification is complete and covers the period since she requested FMLA leave.

In the meantime, Sarah has missed several days of work, allegedly for hypertension: four days during the initial 15 days after she was provided with medical certification paperwork and six days during the subsequent 30 days prior to submitting the certification.

SCENARIO – FAILURE TO TURN IN PAPERWORK (CONT.)

What do you do?

- A. Do not approve Sarah's FMLA leave because she missed the 15-day deadline for turning in her medical certification paperwork
- B. Approve Sarah's FMLA leave for the entire period because the medical certification covers the entire period
- C. Approve Sarah's FMLA leave both prospectively and retroactively, but as to the retroactive approval, only as to the four absences that occurred during the 15-day period when she was to turn in the medical certification paperwork, as to the six absences between days 15 and 45, apply the attendance policy
- D. Approve Sarah's FMLA leave prospectively only and apply the attendance policy to all of Sarah's absences prior to receipt of the medical certification paperwork

SCENARIO – PROBLEM EMPLOYEE

Kelly is your HR Generalist at your new plant. She just underwent shoulder surgery and is out for four weeks. While she is out, Jack, an HR Generalist from another plant, is temporarily filling in for Kelly. Jack discovered a variety of problems, including unanswered e-mails, employee complaints that had not been investigated, sloppy recordkeeping, and other inefficient processes. Jack also receives multiple complaints from Kelly's subordinates describing her as a bully, an unorganized manager and a "problem in the office." Jack tells the VP of HR about these issues.

The VP of HR investigates and wants to terminate Kelly the day she returns.

SCENARIO – PROBLEM EMPLOYEE (CONT.)

What should you do?

- A. Agree, he's the VP and responsible for your raise
- B. Agree, because any other employee would be terminated for these things
- C. Do nothing. She is protected under the FMLA.
- D. Put her on a final written warning

SCENARIO – POSSIBLE FRAUD

Administrative Assistant John suffers from severe hip pain. He certified for intermittent FMLA following his hip replacements. On Tuesday, John called off of work citing hip pain. He called off again on Wednesday for the same reason. On Wednesday night, John drove to a local bar and had several drinks. On his way home, he was stopped by the police and taken to a local hospital for a blood test. He spent the night in jail and was released on Thursday morning. He was scheduled to work on Thursday but called off again and indicated that he would be using FMLA again for hip pain. He returned to work the following week and did not report the incident to anyone at work.

Months later, John pled guilty to the charge of driving under the influence. HR eventually found out about the DUI and conducted an investigation.

SCENARIO – POSSIBLE FRAUD (CONT.)

What should HR do?

- A. Refuse any further requests from John to take FMLA
- B. Fire John for failing to report the DUI
- C. Interview John, request documentation from his physician, and make a good faith determination as to whether he was abusing his intermittent leave

SCENARIO – RUNNING OUT OF LEAVE

You granted Tom intermittent FMLA leave on September 1, 2016 for epilepsy. Since that time, Tom has been absent from work for a total of 450 hours. If Tom exceeds 480 hours (12 weeks) of leave before September 1, 2017, can you terminate him?

SCENARIO – RUNNING OUT OF LEAVE (CONT.)

Can you terminate Tom?

- A. It depends. You should send a letter asking Tom to call you to discuss his leave situation.
- B. No, Tom needs intermittent leave as an ADA accommodation for his epilepsy regardless of the FMLA
- C. Yes, once Tom exceeds 480 hours of leave, his job is no longer protected and you may terminate him for any additional absences

SCENARIO – TARDIES

Chris has been approved for an intermittent FMLA leave due to migraine headaches. The company's absence/call-in rules require that employees call in one hour before the start of their shift if they are going to be absent or tardy.

Employees receive disciplinary points for absences and tardiness under the no-fault attendance policy. Although Chris misses a number of full days due to migraine headaches, whenever Chris will be late, he begins to call in to excuse his tardiness claiming FMLA leave due to migraine headaches.

SCENARIO – TARDIES (CONT.)

Some of the instances of tardiness for which he claims FMLA leave are as short as 0.10 or 0.20 of an hour. On three occasions in the last two weeks, Chris has called in five minutes prior to the start of his shift to claim he will be late due to FMLA but arrives at work less than 15 minutes after his start time. When an employee in Chris's position is late to work, the line is delayed in starting.

SCENARIO – TARDIES (CONT.)

Can do you do?

- A. Nothing. Chris has been approved for intermittent FMLA leave due to migraine headaches so his absences and tardiness cannot be held against him unless he runs out of FMLA leave.
- B. Terminate Chris. He is obviously falsifying his need for FMLA leave, since FMLA leaves do not last 0.10/hour.
- C. Transfer Chris to a different position on the same shift and at the same rate of pay where it is not as critical for an employee to be on station at the start of the shift
- D. Question Chris about his whereabouts and reason for tardiness, discipline Chris for failing to follow the call-in rules on three occasions, assess attendance points for the three absences and seek recertification

SCENARIO – INFORMATION REQUEST

Karen has been approved for FMLA leave intermittently due to hypertension. The anticipated frequency and duration of the leave is “as needed.”

Karen calls in absent and says she is “taking an FMLA day.” When she returns to work, you ask her the reason she was absent, and Karen tells you “FMLA” but refuses to provide more information, claiming privacy.

SCENARIO – INFORMATION REQUEST (CONT.)

Can should you do?

- A. Discipline Karen for being insubordinate
- B. Count the absence as FMLA leave. Karen has provided you with sufficient information about the need for leave.
- C. Assess Karen a point because she has not provided you with sufficient notice of her need for FMLA leave
- D. Nothing. You should not have interrogated Karen about her medical condition.

SCENARIO – EXHAUSTED LEAVE

Bruce was diagnosed with cancer and took 12 weeks of FMLA leave. The company also offers up to three months of short-term disability leave. After exhausting his FMLA leave, Bruce applied and was approved for three additional months of short-term disability leave.

At the conclusion of his short-term disability leave, Bruce did not return to work. As a result, the company sent Bruce a letter notifying him that his employment was being terminated because he had exhausted all leave available under company policy.

SCENARIO – EXHAUSTED LEAVE (CONT.)

Did the company violate the law?

- A. No, because the Company's policy applies neutrally to all employees taking medical leave
- B. Yes, because the Company's policy does not account for the possibility that Bruce may be entitled to additional leave
- C. No, because Bruce has not told the Company that he is suffering from a disability
- D. No, because the Company provided Bruce with additional leave beyond his 12 weeks of FMLA leave

SCENARIO – QUESTIONABLE LEAVE

Management has become aware that two employees, Jake and John, may be abusing their intermittent leave. Specifically, Jake's leave is taken adjacent to a holiday nearly 89% of the time while, 94% of the time, John takes leave when there is a holiday or a weekend coming up.

In an attempt to independently confirm the legitimacy of each employee's reason for an absence under FMLA, your Human Resource Department sends a letter to all employees with FMLA approval detailing a new company policy that requires the submission of a doctor's note for each intermittent leave request.

SCENARIO – QUESTIONABLE LEAVE (CONT.)

Does the new company policy regarding intermittent leave requests violate the FMLA's recertification process?

- A. Yes, the company is forcing employees to reestablish their eligibility each and every time they decide to take approved FMLA leave
- B. No, the employer has the right to require the submission of a doctor's note for each absence in order to confirm the legitimacy of the employee's reason for an absence

QUESTIONS?



THANK YOU



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