SPECIAL REPORT

12 Ways to Curb FMLA Abuse

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Employees are becoming more and more sophisticated in ways to abuse the Family and Medical Leave Act (FMLA), particularly using intermittent leave when vacation and sick leave are not available. In order to minimize disruption in the workplace, an employer must detect and deal with employees who abuse FMLA. Managers are somewhat apprehensive when questioning an employee’s requested FMLA leave because of the fear of violating the FMLA. Don’t be afraid to hold employees accountable for their actions!

The FMLA rules and regulations provide employers with rights that help limit potential FMLA abuse. These dozen helpful hints should avoid FMLA abuse:

1. **Calculate FMLA leave using a “rolling” 12 month period.** Measuring FMLA using this method (looking back 1 year and determining how much FMLA leave an employer has already used) avoids the potential abuse of employees “doubling” FMLA, which can happen if FMLA is measured on a calendar year.

2. **Require employees use all paid leave prior to taking unpaid FMLA.** Employees are less likely to abuse FMLA if they have to burn up their vacation to do so. Likewise employers can count on-the-job injuries, which qualify, toward FMLA, also limiting the number of days available for potential abuse.

3. **Require medical certifications to be returned within 15 days.** An employer who does this in writing, explaining the penalties for not doing so, may take action—including delaying the leave—toward employees who fail to follow the rules. Additionally, obtain clarification of a medical certification, if necessary. Employers must have the employee’s permission to contact the employee’s healthcare provider. However, contact must be made through a medical provider representing the company.

4. **Require employees to provide 30 days notice for foreseeable FMLA leave.** Requiring advance notice gives you the luxury to plan around the absences, which increases productivity and minimizes abuse.

5. **Demand that employees schedule medical treatments around operations.** The regulations allow you to ask employees to schedule medical treatment before work or in the late afternoon in order for the employee to work as much of his or her shift as possible.

6. **Establish and enforce reasonable attendance and call-in rules for all leave.** The law allows employers to enforce established 3-day no-call, no-show policies notwithstanding that the employee is on FMLA leave. Additionally, an employer can require employees to call-in at regular intervals, including every time he or she leaves home. Furthermore, an employer can enforce an attendance rule stating that employees will be terminated for missing 5 days from work without an excuse or a policy requiring employees to call in at least 1 hour before his or her scheduled shift can also be enforced. The key to avoiding abuse it consistent enforcement of leave policies designed to prevent it.
7. **Assign employees taking intermittent leave to alternative positions that cause less disruption, if possible.** If an employee's continued intermittent absences interfere with operations, move the employee until the FMLA is concluded.\(^9\)

8. **Require “fitness for duty” certifications for employees returning to work.** When employees return from leave for their own serious health condition, an employer can require a fitness for duty determination, which is another way to prevent abuse. However, a fitness for duty certification **cannot** be required for a return from intermittent FMLA leave.\(^10\)

9. **Require employees to submit a recertification every 30 days.**\(^11\) In some cases, an employer can even require recertifications more frequently than every 30 days.\(^12\)

10. **Require second and third opinions.** Many employees use friends and acquaintances in the medical profession to provide questionable certifications for intermittent leave. Employers who question the validity can challenge it by requiring an objective healthcare provider to look at the illness.\(^13\)

11. **Have a policy prohibiting employees from working second jobs while on leave.** Without a uniform policy against holding a second job while on any type of leave (other than vacation), an employee on FMLA can be protected from disciplinary action for working a second job while on FMLA leave. Avoid the potential for abuse with a policy on point.\(^14\)

12. **Use private investigators.** If an employee is caught engaging in fraud, courts have been reluctant to hold it against an employer who terminates the employee.\(^15\)

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\(^1\) 29 CFR § 825.200.
\(^2\) 29 CFR § 825.207(b) and (c).
\(^3\) 29 CFR § 825.709(d).
\(^4\) 29 CFR § 825.305(b).
\(^5\) 29 CFR § 825.307(a).
\(^6\) 29 CFR § 825.302(a). If thirty (30) days notice is not practicable, then notice must be given within one or two business days of when the leave becomes known to the employee. 29 CFR § 825.302(b). See also 29 CFR § 825.303.
\(^7\) 29 CFR § 825.302(e).
\(^8\) 29 CFR § 825.202(d). Similarly, require employees to report at regular intervals on his/her employee status and intent to return to work pursuant to all leave policies can be enforced against employees who fail to adhere to this requirement. 29 CFR § 825.309, 29 CFR § 825.312.
\(^9\) 29 CFR § 825.204.
\(^10\) 29 CFR § 825.310.
\(^11\) 29 CFR 825.308(a).
\(^12\) Recertifications may be obtained earlier than every thirty (30) days if: (1) circumstances described by the previous certification have changed significantly (e.g., duration, frequency, or severity of the condition); or (2) the employer receives information that casts doubt on the employee’s stated reason for the absence. 29 CFR § 825.308(a)(1) and (a)(2).
\(^13\) 29 CFR § 825.307(a)(2).
\(^14\) 29 CFR § 825.213(b).
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