



NEWS & VIEWS

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Responding to an Employee's Request for a Family Medical Leave of Absence

By:
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For as long as people have been employed to work for others, events have occurred where providing time off from work for medical or family needs-possibly, with the promise of a job when the employee returned to work-was a gift of a generous employer. These leaves were totally discretionary and not every employer could or would afford such benefits.

Prior to 1993, it was not unusual for an employee to lose their job if they had to take more than a week or two off due to illness or a family emergency. Women would routinely lose their jobs when they took four or more weeks off to have a child, and this severely limited their career prospects. So, to protect their jobs, some women would even endanger their health by returning to work too soon.

In 1993 Congress passed and President Clinton signed, the Family and Medical Leave Act (FMLA) requiring employers in specific circumstances to allow an employee to take an unpaid leave of absence because of family or medical issues. A central aspect of the FMLA is that it enables an eligible employee working for a covered employer to still have a job when they return to work. Any private-sector employer with 50 or more employees in 20 or more covered workweeks in the current or preceding calendar year is a covered employer. Other covered employers include local, state, or federal government agencies, regardless of the number of employees, and public or private elementary or secondary schools, regardless of the number of employees. Eligible employees include any employee who works for a covered employer, has worked for the employer for at least 12 months, has at least 1,250 hours of service for the employer during the 12-month period immediately preceding the leave, and works at a location where the employer has at least 50 employees within 75 miles. These covered employees are entitled to keep their group health insurance, if their employer provides group health insurance, during their leave. However, an employer may require an employee to prepay premiums or pay the premium while on the leave.

Along with helping employees balance their roles between work and family, the FMLA is an effort to help employers with the valid concerns they have regarding their need to meet their companies' production and service obligations. It also seeks to equalize employment opportunities for both men and women.

Here is a brief overview of the general aspects of the FMLA-

- Covers only certain employers;
- Affects only those employees eligible for the protections of the law;
- Involves entitlement to leave;
- Maintains health benefits during leave;
- Restores an employee's job after leave;
- Sets requirements for notice and certification of the need for leave;
- Protects employees who request or take leave; and
- Includes certain employer record keeping requirements.

Eligible employees of covered employers are entitled to FMLA leave for-

- The birth of a child and to care for the newborn child;
- The placement of a child for adoption or foster care and to care for the newly placed child within one year of placement;
- Care for a family member with a serious health condition;
- The employee's own serious health condition that makes the employee unable to perform the functions of his or her job; or
- Certain reasons related to the military service of the employee's family member (qualifying emergency and military caregiver leave).

Under the FMLA, an employer is forbidden from interfering with an employee's rights provided by the law. The U.S. Department of Labor (DOL) is authorized to investigate and enforce the provisions contained in the law. Also, an employee may not waive, nor may an employer try to persuade an employee to waive their potential rights under the FMLA. Additionally, there are no provisions in the FMLA that prevent an employer from providing greater protections and/or more leave than the law entitles an employee. These greater protections may also be provided to employees who are not eligible or if the employer is not covered.

There is much to be considered and understood when an employee requests a medical leave of absence. Consequently, an employer must know the answers to several questions before granting such a request. For example,

- Why does the employee need the leave?
- When does the employee expect to return to work?
- Is this a type of leave that the employer is required to grant?
- If the employer must provide the leave, for how long?
- What kind of documentation may an employer require the employee to provide supporting the request?

Along with obtaining the answers to these questions and the specifics involved, there are several different laws that may come into play and must be complied with-primarily, Worker's Compensation Law, the Family and Medical Leave Act (FMLA) and the American's With Disabilities Act (ADA).

Often, employers dealing with requests for medical leaves follow a process of gathering information, complying with their company's legal policies and procedures, and adherence to the policy of treating everyone alike. However, if an employer relies exclusively on these standards, they may find themselves in a non-compliant position regarding the FMLA and ADA.

Here are some of the most common missteps an employer may make regarding an employee's request for a medical leave of absence:

- Asking about the employee's diagnosis when requesting a leave.
The employer has concerns for the employee's situation and concerns about the effect that the employee's absence will have on the company's production or provision of services. However, the employer should never inquire directly about the employee's medical condition or diagnosis, either orally or in writing. However, the employer can require a statement from the employee's healthcare provider of the medical facts related to the employee's qualifications for applying the FMLA to the request for medical leave.
- Requesting a doctor's note to verify the continuing need for a medical leave of absence.
It may be the general practice of an employer to ask the employee to provide a doctor's note when asking to take a leave for a medical reason. This is often okay and the FMLA has a process for an employer to follow for obtaining the information needed to verify the need for FMLA-covered leave from an employee's doctor. However, when an employee has been approved to take FMLA leave on an

intermittent basis for a medical condition, asking for a doctor's note each time the employee is absent for that condition may be considered interference with the employee's rights and an effort on the part of the employer to discourage taking FMLA leave. However, if the intermittent leave continues, an employer may require an employee to provide new medical certification in each subsequent leave year.

- Having a "blanket rule" for terminating an employee once he or she has used up his or her 12 weeks of FMLA leave and cannot return to work may not be acceptable.
If an employee continues to have a condition that qualifies as a disability under the American's With Disabilities Act (ADA), the employer may have to provide an extra leave of absence beyond the 12 weeks of FMLA leave as a reasonable accommodation to that employee. Many courts have ruled that an employer is not required to grant an employee's request for leave of an indefinite amount of time off from work. But, an employer does have an obligation to consider on a case-by-case basis if it can accommodate such requests for a fixed amount of time after the FMLA leave ends. It is suggested that an employer carefully document the specific and unique factors used in their consideration of how much leave is tolerable (e.g. employee's position, financial impact of the leave, employer's resources and ongoing business initiatives affected by the leave) and the steps the employer followed.
- Treating everyone the same, keeps an employer from violating the law.
For the most part, this idea does minimize an employer's risk of a discrimination lawsuit; however, there are situations where an employer may need to treat one employee differently from other employees. One example of this is where the employee has limitations that are considered a "disability" under the ADA. The ADA requires an employer to provide reasonable accommodations for persons with disabilities that an employer may not normally provide for non-disabled employees. This accommodation may at times result in creating more work for the non-disabled employee who is given additional responsibilities that the employer removes from the disabled employee.

Employers are required to post a notice for employees that outlines the basic provisions of the FMLA, and a willful failure to post this notice may result in a \$100 penalty per offense. Employers are prohibited from discriminating against or interfering with employees who take an FMLA leave.

Employers should also be aware that several states have family and/or medical leave acts that may provide more benefits than those the FMLA provides. In these states, the employee is eligible to receive whichever plan provides the highest level of benefits.

Administrators: Note Med-Net Compliance Now Offers NAB Approved CE Courses

Med-Net Compliance, LLC through its educational arm, Med-Net Academy, now offers a certificate program to long term care nursing home administrators that provides education on fraud, waste, and abuse prevention, with NAB/NCERS approved continuing education credits for successful completion. All courses were developed and produced by Betty Frandsen, our Director of Healthcare Education Development and her staff. Please feel free to visit our site to learn more about these courses:

<https://www.mednetcompliance.com/med-net-academy/nab-ce-course>

Human Resources Directors: HR Specific E-Learning Courses Offered by Med-Net Compliance

Med-Net Compliance, LLC. is pleased to offer many HR specific e-learning courses on our website. We hope you will take advantage of these "free for client" educational programs produced by Betty Frandsen, our Director of Healthcare Education Development and her staff. Please use the password provided to your Administrator from Med-Net to access all HR courses located on this page:

<https://www.mednetcompliance.com/med-net-academy/healthcare-compliance-e-learning-courses/>

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