

8 Strategies for Preventing FMLA Abuse

Employee abuse of FMLA leave can be costly for employers. This eBook presents strategies to help address this growing concern.



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INTRODUCTION

The federal [Family and Medical Leave Act](#) (FMLA) is designed to help employees balance their work and family responsibilities by allowing them to take reasonable unpaid leave for certain family and medical reasons. The law also requires that group health benefits be maintained during the leave. Employees are eligible for FMLA leave if they have worked for their employer for at least 12 months and for at least 1,250 hours over the previous 12 months, and they work at a location where at least 50 employees are employed by the employer within 75 miles.



Unfortunately, employee abuse of FMLA leave has become a growing concern and can be costly to employers in terms of lost productivity. Leave abuse also places additional burdens on those employees who must take on the responsibilities of the absent employee to keep up with workflow. The potential consequences of such abuse for employers, both financial and operational, underscore the importance of monitoring employee use of FMLA leave and taking steps to prevent its abuse.

It is important to establish a clear policy for employees outlining the disciplinary actions that may result should FMLA abuse be discovered, up to and including discharge (if appropriate). An employee who fraudulently obtains FMLA leave from an employer is not protected by the law's job restoration or maintenance of health benefits provisions. It is prudent to review your policy with an employment law attorney knowledgeable in the FMLA, as well as any state-specific laws related to family and medical leave that may impact your company. Also, be sure to inform employees of your policy in writing and enforce it uniformly.

The strategies presented in this eBook can help employers reduce the likelihood that employees will abuse FMLA leave. If you have any questions regarding your company's policy on FMLA leave or your obligations under the law, please consult a knowledgeable employment law attorney. Model forms and other information for employers regarding the FMLA are available from the [U.S. Department of Labor](#). Keep in mind that many states also have laws requiring that employers grant certain employees leave from work due to specified family, medical, or other reasons, which may impose additional requirements on employers (including those with fewer than 50 employees). For more information on state family and medical leave laws, please contact your state's [labor department](#).

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1. Make Annual FMLA Training for Management Staff a Priority

Managers and supervisors are typically the first line of communication for employees when the need for leave arises, so the more knowledgeable they are regarding the FMLA, the more quickly they can identify instances of abuse.

Be sure your management staff receives annual training on the FMLA, including a review of key requirements under the law, such as the permitted reasons for leave.



Eligible employees 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 of a spouse (including a legally married same-sex spouse), child, or parent 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; and
- Certain military-related reasons.

It would also be prudent to reevaluate your company's attendance and leave policies at this time and to remind your managers and supervisors about the need to maintain confidentiality with respect to any medical information they receive in connection with an employee's FMLA leave request. Training for supervisors should also include reminding them of the importance of enforcing attendance and leave policies consistently and fairly.

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2. Choose a Method of Determining the Applicable 12-Month Period Carefully

Eligible employees are generally entitled to take up to 12 workweeks of unpaid FMLA leave in a 12-month period. An employer is permitted to choose any one of the following four methods for determining the "12-month period" in which the 12 weeks of FMLA leave entitlement occurs, so long as the alternative method chosen is generally applied consistently and uniformly to all employees:

- The calendar year;
- Any fixed 12-month "leave year," such as a fiscal year or a year starting on an employee's anniversary date;
- A "rolling" 12-month period measured backward from the date an employee uses FMLA leave; or
- The 12-month period measured forward from the date any employee's first FMLA leave begins.

The calendar year method and the fixed leave year method are both subject to a certain degree of abuse, since neither method would prohibit an employee from taking FMLA leave in the last 12 weeks of one year, immediately followed by leave in the first 12 weeks of the succeeding year. The "rolling method" and the "measured forward" method are less likely to be abused in this way.

Note that employees who are eligible for military caregiver leave under the FMLA are entitled to a total

of up to 26 workweeks of unpaid leave during a single 12-month period to care for a covered servicemember with a qualifying serious injury or illness. This "single 12-month period" is fixed by law and begins on the first day the employee takes leave for this reason and ends 12 months later, regardless of the 12 month period established by the employer for other types of FMLA leave. An eligible employee is limited to a combined total of 26 workweeks of leave for any FMLA-qualifying reason during the "single 12-month period." (Only up to 12 of the 26 weeks total may be for a FMLA-qualifying reason other than to care for a covered servicemember.)

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3. Apply Attendance Policies Consistently

An employer's regular attendance policies apply to persons on FMLA leave as well as to all other employees, absent unusual circumstances. For example, if you require employees who are absent for non-FMLA reasons to call a specific person by a specific time, an employee taking FMLA leave because of an unforeseeable need is generally subject to these same reporting policies.

When the need for FMLA leave is foreseeable, an employee must provide a minimum of 30 days' notice to the employer before the leave is to begin. If 30 days' notice is not practicable (such as when the employee does not know approximately when the leave will need to begin or in the case of a medical emergency), the employee must give notice as soon as practicable, taking into account all of the facts and circumstances.

An employee must provide at least verbal notice sufficient to make the employer aware of the need for FMLA-qualifying leave and the anticipated timing and duration of the leave. Depending on the situation, such information may include, for example:

- That a condition makes the employee unable to perform the functions of the job;
- That the employee is pregnant or that the employee has been hospitalized overnight; or
- If the leave is for a family member, that the condition makes the family member unable to perform daily activities.

In all cases where leave is foreseeable, the employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. Sometimes, the need for FMLA leave is not foreseeable. In such instances, while calling in sick without providing more information is not alone sufficient to trigger an employer's obligations under the FMLA, the employer must nonetheless obtain any additional information required through informal means.

Keep in mind that the employee, whether the need for leave is foreseeable or unforeseeable, need not expressly assert rights under the FMLA or even mention the FMLA the first time leave is sought for an FMLA-qualifying reason. (When an employee seeks leave for an FMLA-qualifying reason for which the employer has previously provided FMLA leave, the employee must specifically reference the qualifying reason for leave or the need for FMLA leave.)

Remember that your policies must be applied uniformly to all employees. If you've been lax with call-in requirements and then tighten up enforcement for an employee requesting FMLA leave, you may subject yourself to allegations of unlawful discrimination or retaliation.

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4. Require Employees to Submit Medical Certifications to Support the Need for Leave

An employer may require an employee who requests FMLA leave for his or her own serious health condition or that of an immediate family member to support the need for leave with a medical certification issued by a health care provider. If you decide to require certification, you should make this request at the time the employee gives notice of the need for leave or within 5 business days thereafter (or, in the case of unforeseen leave, within 5 business days after the leave commences). You may also request certification at some later date if you later have reason to question the appropriateness of the leave or its duration.



The employee must provide the requested certification within 15 calendar days after such request, unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts or unless you provide more than 15 calendar days to do so. If you find there is not enough information in the certification to qualify the need for FMLA leave, you should state in writing what additional information is necessary to make the certification complete and sufficient and provide the employee with 7 calendar days to cure any such deficiency.

If you have reason to doubt the validity of a medical certification, you may also, at your own expense, require employees to obtain a second medical certification from a health care provider. You may choose the health care provider for the second opinion, except that in most cases you may not regularly contract with or otherwise regularly use the services of this health care provider. If the opinion of the employee's designated health care provider differs from that of your health care provider, you may require the employee to obtain certification from a third health care provider, approved jointly by you and the employee, and again at your expense. This third opinion is final and binding.

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5. Require Employees to Submit a Recertification for Absences

An employer may request periodic recertifications for FMLA absences due to the serious health condition of the employee or that of a family member. Generally, you may request a recertification no more frequently than once every 30 days. However, if the initial medical certification states that an employee is unable to work for more than 30 days, you generally may not request recertification until the end of that longer period. Regardless of the duration of the leave, however, an employer may seek recertification every six months.

In some cases you may request recertification more frequently, such as when there is a request for extension of leave, circumstances described by the previous certification have changed significantly (such as the duration or frequency of the absence, the nature or severity of the illness or complications) or if you receive information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the existing certification. Any recertification you request is at the employee's expense unless you provide otherwise, and no second or third opinions for recertification may be required.

It is worth noting that employers generally may not place restrictions on how an employee spends his or her time while on FMLA leave, other than prohibiting outside employment if consistent with established company policy. While employers may require periodic reports on an employee's



status and intent to return to work, it is unlawful to interfere with an employee's exercise of any right provided by the FMLA. It is one thing to periodically contact an employee on FMLA leave to inquire as to work-related matters or express your concern for the employee's well-being, but be careful not to cross the line and make sure that any reports you require are included in your company policy and are applied consistently to avoid claims of discrimination. You should also inform employees that periodic reports will be required in the notice of eligibility for FMLA.

Contacting employees during FMLA leave can be a sensitive matter. If you have any questions about permitted contact, it is best to consult a knowledgeable employment law attorney.

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6. Require Employees to Use All Paid Leave Prior to Taking Unpaid FMLA

If the terms and conditions of your normal leave and attendance policy permit it, you may require employees to use accrued paid leave (such as sick and vacation leave) before taking unpaid FMLA leave.

Note that when an employee is on a workers' compensation absence due to an on-the-job injury or illness which also qualifies as a serious health condition under the FMLA, the workers' compensation absence and FMLA leave may run concurrently (at the same time), so long as the employee is properly notified in writing that the leave will be counted as FMLA leave.

7. Be Careful When Permitting Intermittent Leave or Reduced Schedules

The FMLA permits employees to take leave on an intermittent basis or to work a reduced schedule under certain circumstances. Employee use of intermittent leave is often one of the most challenging areas for employers in seeking to prevent abuse. Being vigilant in your recordkeeping can help ensure that no employee is taking leave beyond that which is legally required (or permitted by company policy).

The law provides some guidance for employers to control the impact of intermittent leave on business operations and to limit potential abuse. Keep the following considerations in mind:

- If an employee needs leave intermittently or on a reduced leave schedule for planned medical treatment, the employee must make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations. Such scheduling is, however, subject to approval of the employee's health care provider.
- When an employee requires intermittent leave, you may assign the employee to an alternative position for which the employee is qualified for the period of intermittent leave to reduce disruption that might otherwise be caused by the leave. The alternative position must have equivalent pay and benefits, but need not have equivalent duties.

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- Employers should develop user-friendly medical certification forms that collect as much information as the FMLA permits regarding the employee's health condition for which leave is requested. Such information may include symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation or treatment, or any other regimen of continuing treatment. Note that if an employee submits a complete and sufficient certification signed by the health care provider, you may not request additional information from the provider. In addition, make sure that any form you use complies with the Genetic Information Nondiscrimination Act (GINA), which restricts employers from requesting or requiring the genetic information of an employee or the employee's family member.
- Providing a copy of the job description for the employee requesting leave prior to obtaining a medical certification gives the health care provider objective data upon which to determine what the employee can and cannot do.

8. Notify Employees That “Fitness-for-Duty” Certifications Are Required Upon Return from Medical Leave

As a condition of restoring an employee who was absent on FMLA leave due to the employee's own serious health condition, an employer may have a uniformly-applied policy or practice that requires all similarly situated employees (i.e., same occupation, same serious health condition) who take leave for such conditions to submit a certification from the employee's own health care provider that the employee is able to resume work. Additionally, an employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job.



You must advise an employee in advance (in the notice designating the absence as FMLA leave) if a fitness-for-duty certification will be required for the employee to return to work and whether that fitness-for-duty certification must address the employee's ability to perform the essential functions of the employee's job (in which case you must provide the employee with a list of the essential functions of the employee's job along with this notice).

Employers may not require a certification of fitness-for-duty for each absence an employee takes on an intermittent or reduced leave schedule. However, provided that appropriate notice is given to the employee, certification may be required for such absences up to once every 30 days if reasonable safety concerns exist regarding the employee's ability to perform his or her duties, based on the serious health condition for which the employee took such leave.

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IF YOU SUSPECT FMLA ABUSE

Employers covered by the FMLA are required to maintain certain records pertaining to their obligations under the law, and it is in your best interest to do so thoroughly and accurately. These records may provide valuable documentation in the event an employee obtains FMLA leave fraudulently. If you suspect that an employee is abusing FMLA leave, you should consult with an employment law attorney to determine an appropriate course of action. You may also wish to discuss your suspicion with the employee first, in order to give him or her a chance to explain the circumstances. Whatever action you may decide to take in a particular situation, keep in mind that it is in your company's best interest to notify your employees that misuse of FMLA leave is grounds for discipline **before** the abuse occurs.

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