

The Top Five FMLA Compliance Mistakes

That Could Land You in Court



A slip of the tongue, a misplaced remark, the wrong job assignment: managers make mistakes every day. When the mistake involves FMLA, it can cost your company big time in legal fees and land you in court.

This report gives examples of common mistakes your managers can make with FMLA decisions and shows how to avoid them. Each section provides examples of the problems your managers face with FMLA regulations. Also included are lessons learned that your managers can use to stop FMLA problems before they start.

The Five FMLA Compliance Mistakes Line Managers Make covers these common slip ups:

- 1) Taking “adverse action” against employees returning from FMLA leave
- 2) Saying the wrong things when employees request FMLA leave
- 3) Assuming that minor ailments don’t qualify for FMLA leave
- 4) Disclosing a worker’s private medical information
- 5) Penalizing employees for unforeseeable FMLA leave

Mistake # 1 - Taking ‘adverse action’ against employees who have taken FMLA leave

When an employee returns from FMLA leave, FMLA regulations state that the returning employee has to go back to the same job or one of equal pay, responsibility, and benefits. Here are two scenarios that show the potential pitfalls with returning employees and “adverse action”.

Sometimes it’s easy to reintegrate an employee after a three- or six-month FMLA leave. The person was a top performer and you were really suffering while she was gone. You’re delighted to have her back.

But that’s not always the case, is it? Sometimes when workers return from extended leave, it’s hard to work them back in. Sometimes you’d just as soon the person never came back at all. It’s circumstances such as these that lead to retaliation lawsuits. Let’s look at a couple scenarios:

Scenario 1

Mary, the company’s accounts payables manager, takes three months pregnancy leave. Jane, who replaced Mary, ends up doing the job better. Dave, her supervisor, is thinking, “Why did I put up with Mary for so long? She was incompetent and I didn’t even realize it. When Jane took over for her while Mary was on leave, Jane completely reorganized the department and it now runs like a clock. So what am I supposed to do? Put Mary back in charge? That’s not in the best interests of the company. I think I’ll just put Mary in another role and hope she’s happy.”

That could be wishful thinking. In this case it invited a retaliation lawsuit against the company. Mary said: “When I left I had a position of authority and responsibility; now they’ve put me out to pasture in a low-level role. Sure, my pay is the same, but it’s not a ‘similar or equivalent’ position. This is retaliation and I’m going to sue.”

Could Mary win? Yes, in fact she did, because the company had no evidence of poor performance prior to her taking leave.

How the supervisor slipped up: Dave didn’t have a clear standard of excellence for Mary before she took leave. She was doing a mediocre job and he didn’t even know it. Mary had performance reviews stating that she was meeting expectations all along; there was no specific criticism of her work. Bottom line: From the court’s perspective it appeared that at this company the cost of having a baby is a demotion.

Remember, in court, companies almost always lose “he said/she said” arguments. Employees get the benefit of the doubt. No matter how sincere, or right, Dave may have been, the lack of documentation left the courts with no choice but to rule in Mary’s favor.

Lesson learned for Managers

When a person takes FMLA leave, you're extremely vulnerable to a retaliation lawsuit if you don't return an employee to the same position she had before. Or at least an equivalent one. Effectively demoting Mary was dangerous and this company paid the price.

How careful do you have to be with someone returning from FMLA leave? Very. But the courts do not want to dictate how you run your business. You can fire or demote a person if you can prove that you would have taken the same action regardless of whether or not she took leave.

If Dave had documented Mary's poor performance in the months prior to her taking leave, he could very likely have demoted her when she returned from leave. Here's an example where the company played its cards right:

Scenario 2

Bill was out on leave for six months for a major health crisis. When he returned to work he was still not 100%. He couldn't lift things as well as before. He wasn't as focused, and he tired easily. Fact is, he couldn't perform his old job at the level he used to, and others in the department wouldn't tolerate sub-par performance.

Bill's boss, Jackie, carefully documented Bill's inability to handle the basic tasks of the job. She talked many times with Bill about his deficiencies and finally offered to transfer him to another position that was much less demanding. He refused to take it. So Jackie fired him. Bill then sued for violation of his FMLA rights.

Bill's argument to the judge was that, "They got angry because I took leave and now they're punishing me." In many cases, that argument wins a lot of sympathy in court. After all, the person may have been on leave due to a life-threatening illness or the loss of a loved one; then they come back to work and get fired.

The company appears cold, heartless and opportunistic.

But that doesn't mean you can't fire people after they take leave. We've seen many cases where companies got away with it, but only when they proved that the person would have been fired even if he hadn't taken FMLA leave.

In the case described above, the company won. Why? Because the courts will not force a company to employ a person who can't physically perform a job. And Jackie very carefully documented that Bill wasn't up to snuff. In the end, the courts believed that the company would have transferred Bill whether or not he took leave.

That's the standard you need to meet. Would you have taken the "adverse action" anyway? If so, you've got a strong case in court.

As a measure of good faith, it didn't hurt that Jackie offered Bill another position.

Mistake #2 - Saying the wrong things when employees request FMLA leave

Saying the wrong thing to an employee regarding FMLA can be one of the quickest ways to a lawsuit. Below are the two responses you shouldn't use and the correct response.

An employee comes to you and says she needs to take FMLA leave because she has a back condition. What should you say?

Correct: I'm sorry to hear you're not feeling well. I suggest you go to the doctor and get yourself treated. And get me a note from your doctor, including a diagnosis. I'll pass that on to the HR department.

Not correct: You know, your timing couldn't be worse. Your colleagues are really counting on you right now. Are you sure you can't stay on a few more days?

Not correct: I saw you lifting boxes just yesterday. You didn't seem to be having any problems. Are you sure you're really ailing?

The last two responses set you up for a retaliation lawsuit. The FMLA gives employees the right to make their own health and well-being a higher priority than the productivity goals of their company. Sure, it's very hard when an employee takes time off during a crunch. It's also true that you'll occasionally have a malingerer who will exaggerate a minor injury and let you down.

But you're in no position to decide whether an illness is real or not. Only a doctor can do that. The minute you, as a manager or supervisor, make judgments about whether a person's ailments are real or not, you've given the employee ammunition in a retaliation lawsuit should you ever take an adverse action against the person.

The "correct" response is dispassionate, compassionate and non-judgmental. It treats the employee with dignity and respect. And it will never come back to haunt you.

Mistake #3 - Assuming that 'minor ailments' don't qualify for FMLA leave

Don't make your own call about what constitutes an illness? FMLA regulations have done that for you.

Surely a case of the flu wouldn't qualify a worker for FMLA leave, would it?

It could. The law says that a "serious health condition" is one that requires three consecutive days, 72 hours or more, of leave, and at least two in-person treatments by a health care professional. A number of courts have ruled that an ailment like the flu can be considered severe.

Scenario

Dave has the flu and stays out two days, then

returns to work on the third day. Two days later he calls in sick again for another day. During the two weeks that follow he comes in late and leaves work early several times without providing notice. When questioned, Dave says he was attending doctor's appointments to treat his condition. Dave's boss, Rick, thinks Dave is malingering and fires him for violating the company's strict attendance policy. Dave sues, claiming that because he was out for three days, he qualifies for FMLA leave and the company can't fire him.

Dave lost this case because his absences weren't consecutive, which means his illness didn't qualify as a "serious health condition."

Lesson learned for Supervisors and Managers

Don't let employees try and tell you that they qualify for FMLA leave because their ailment required three days of leave that weren't consecutive.

Mistake #4 - Disclosing private medical information about an employee

Never disclose confidential medical information to anyone but the HR department or your direct report in the chain of command

Supervisors who handle FMLA leave requests learn about employees' medical problems. This information is private and you're expected to keep it that way.

Scenario

Ed had been Bruce's manager for several years, and it pained him to learn that Bruce was HIV-positive. While Bruce was out on leave, Ed mentioned Bruce's condition to another senior colleague, whom he expected to be discreet about it. But the day Bruce returned to work he stormed into Ed's office and complained that "everyone in the

company knows I've got AIDS." Bruce ended up suing the company for violating his privacy. He won.

How the supervisor slipped up

Pure and simple, Ed blabbed. The company tried to argue that as a result of the news becoming public, people rallied around Bruce and there wasn't a single incident of bias or negativity. The courts weren't impressed. The company also argued that Bruce disclosed the information "voluntarily" on his request for FMLA leave. But, it turned out, Ed had told him if he didn't put the reason for the leave on the request, he'd be subject to discipline.

Lesson learned for Managers

Mum's the word when it comes to any information you may have about an employee's medical or psychological condition.

Mistake #5 - Not recognizing the nature of 'unforeseeable leave'

Events happen in our lives that we can't control. But knowing the dividing line what is or isn't foreseeable with FMLA issues can help your company avoid problems and lawsuits.

Most companies have policies that require employees to give reasonable notice when they intend to take family or medical leave. The FMLA recognizes that this is only fair to employers, who need to make adjustments when employees are absent.

Scenario 1 - foreseeable leave

Diane walks into your office and tells you she intends to have elective surgery the next day, and that she'll be out of work for a week recovering. You recognize that this is a violation of your company policy, which requires two weeks' advance notice for

foreseeable leave. Diane's absence will throw your entire department into chaos because you have no one to replace her, and you're angry. So you tell Diane that if she takes the leave on such short notice, you'll have to fire her.

Can she sue you for FMLA retaliation? Sure, but she probably won't win. The courts will likely rule that her leave was foreseeable and she violated your policy. Barring other circumstances, she has no case.

Scenario 2 - unforeseeable leave

John gets in a car accident and suffers a head injury. His wife calls you the same day to report John's condition and tells you he'll likely be out at least two weeks. She calls you continually during the following days to report on John's progress. In a case like this John is fully protected by the FMLA.

Scenario 3 - 'gray area'

Steve's wife is a few days past her due date to deliver her first child. So Steve calls Will, his supervisor, to request FMLA leave to care for his pregnant wife. Will says no. Steve misses nine consecutive shifts and Will fires him. Steve sues the company for denying his legitimate FMLA leave, claiming that his leave was "unforeseeable" because his wife was unexpectedly overdue and he couldn't predict when she was going to deliver. How do you think the court ruled?

The court found that Steve violated the company's attendance policy and deserved to be fired. His wife, though she was a couple weeks late delivering, had a normal pregnancy with no complications. There was no unforeseeable medical emergency. Steve was trying to bend the rules.

Lesson learned for Managers

Knowing the dividing line is between "foreseeable" and "unforeseeable" FMLA leave means the difference between winning and losing in court.