HRMORNING

The Right Answers To The 33 Toughest FMLA Questions You'll Ever Face

EMPLOYMENT LAW

Contents

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The Right Answers To
The 33 Toughest FMLA Questions You'll Ever Face

Few things are as frustrating for a manager as dealing with an employee who's taking too much time off and using every angle of the Family & Medical Leave Act (FMLA) to cling to his or her job.

If it's your thankless task to manage and document the leave process as the Benefits administrator or Human Resources professional, you probably have managers breathing down your neck pleading for a speedy termination so they can fill the position with someone else and get the work done.

But you know that one misstep can cost the company dearly. You have to be the voice of caution, bending over backwards to give the employee the benefit of the doubt before you can pull the trigger.

The FMLA has been around for a couple of decades, and even experienced HR and Benefits professionals may think they've got a pretty good handle on the law by now. But new wrinkles pop up almost all the time, and they can stump even the most seasoned pros.

Would you know how to handle these situations?

Here are 33 knotty FMLA situations you may not have faced – yet. But since you may have to face them someday, here's the best legal advice on some of the most complicated situations that FMLA requests may dump into your lap from two top labor attorneys, Kathy Hindman of the Bullard law firm and Katy Willis of the Burr & Forman law firm.

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The two attorneys made a joint presentation on FMLA at a Labor & Employment law Advanced Practices (LEAP) symposium, held in Las Vegas, which is an annual summit meeting of top employment law attorneys and HR and benefits practitioners.

1. Can a temp ever be eligible for FMLA leave from your company?

Answer: Don't say "no" too quickly.

Although in most cases the temp agency that sent the person to your company will be judged to be the primary employer and should deal with such matters as FMLA, in some cases you may be held to be a joint employer, or even the primary employer.

If a temporary has worked at and for your company for a number of consecutive years, for example each year for several months during tax season, the temp may actually become eligible for FMLA rights from your company if he or she has worked for you for at least 12 months. The key lies in the fact that those months do not necessarily have to have been worked consecutively, which is why the temp may actually qualify.

To be eligible for FMLA leave, the temp must have worked at least 1,250 hours (about 24 hours per week on average) for you over the 12-month period preceding the leave request. Some temps may well have accumulated that much time.

To be eligible for FMLA, all employees must work at a worksite that has 50 or more employees within a 75-mile radius. You have a greater chance of being considered the primary employer if you exercise control over the temp and have the right to hire, fire and supervise the employee.

The kicker: To be able to deny FMLA, the onus is on you to prove that the temp did not work enough hours to qualify. The temp doesn't have to prove anything, so good recordkeeping to keep track of hours is a must.

The FMLA paper chase

The Department of Labor (DOL) has a poster that you must display on your company bulletin board about employees' rights to FMLA (Revised Form WH-1420).

You may post it electronically on your company intranet – as long as all employees and applicants have access to it – and may obtain a paper copy as well.

The DOL's Wage and Hour Division (WH) has two other new forms to be used for all FMLA cases.

They are:

1. Form WH-380-E,F, which is the Medical Certification Form, the form you give to employees to be filled out by their healthcare providers, and
2. Form WH-382, which is the so-called "designation notice." This is the form you use to officially inform the employee you have put him or her on FMLA and what he or she must do prior to returning to work.

2. Can an 11-month employee take FMLA leave for pregnancy?

Answer: If an employee who's been with your company for only 11 months announces she is eight months pregnant and her doctor wants her on strict bed rest in the final month because of complications, she is not eligible for FMLA leave because she hasn't been with your company for a full year (the 12-month qualifying service period).

However, it might be illegal to terminate her because she may be entitled to leave under the Pregnancy Discrimination Act (PDA). If you generally allow temporarily disabled employees to take disability leave or leave without pay, under the PDA you can't change the rules for someone who is temporarily disabled by pregnancy.

Note: You want to be sure to mark in her file (and notify her in writing) the moment she's been with your company for the full 12 months. At that point, she goes on FMLA leave until she comes back after giving birth. This will start using up her FMLA allotment and will prevent abuse further down the road if she wants to take FMLA leave again later in the year for some other reason.

3. Is a same-sex partner caregiver entitled to FMLA leave?

Answer: The answer is probably yes. If the live-in partner of a same-sex couple requests FMLA leave to care for his or her partner while the partner is suffering from a serious medical condition, the employee is likely eligible for FMLA leave.

Any individual who acts "in loco parentis" (in lieu of a

parent) – and has the day-to-day care responsibilities for the person needing attention for the serious medical condition – is eligible for caregiver FMLA.

A biological or legal relationship is not necessary for the person to be entitled to FMLA leave.

Keep in mind also that if the same-sex partner is the lawfully married partner of the person needing care, that partner has the right to take FMLA leave to do so.

One more thing: In the case of lawfully married same-sex partners, one partner can take FMLA leave to care for the child of the other.

4. While the employee is out on FMLA leave, there's a holiday. Does the holiday count as FMLA leave?

Answer: It depends.

If an employee takes FMLA leave for an entire week and a holiday falls during that week, the whole week counts as FMLA leave.

But if the holiday falls on a day during a week in which the employee isn't taking the whole week off for FMLA leave, then the holiday counts as FMLA leave only if the employee was scheduled and expected to work that day.

5. Do employees have to mention 'FMLA' when requesting leave?

Answer: No, they do not have to use the magic term "FMLA." Notice may be verbal or via email (example: text message saying "feeling bad 2day will be out a few days … thnx"), as long as it provides sufficient information to the employer that the employee needs FMLA leave.

If the need is foreseeable, such as in the case of a scheduled surgical procedure, the employee must give a 30-day notice. If the need is not foreseeable because it was due to an emergency, notice must be given as soon as practicable.

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Any information indicating that the employee is unable to perform the functions of the job, or has been hospitalized overnight, is sufficient notice for the employer to draw the conclusion that FMLA leave must be granted.

6. Can stress qualify as a serious medical condition under the FMLA?

Answer: Yes, stress can be a qualifying condition for FMLA leave. Serious health conditions include illness, injury, impairment or a physical or mental condition that involves inpatient care or continuing treatment by a healthcare provider. Continuing treatment encompasses incapacity for more than three consecutive days and treatment by a healthcare provider; incapacity due to pregnancy or prenatal care; chronic conditions that require periodic visits at least twice a year to a healthcare provider; permanent or long-term conditions that require continuing medical supervision; and conditions requiring multiple treatments.

So an employee may well be incapacitated by stress for three days – or suffer recurring episodes of incapacity because of it.

7. Can denying a transfer violate the FMLA?

Answer: It may come as a shock but denying a transfer could violate the FMLA under certain circumstances.

Suppose an employee complains of continuing job-related stress that makes it hard for her to do her job, and she alleges that her supervisor is causing the stress with unreasonable demands. She takes FMLA leave but when she returns, things don't get better between her and her supervisor and she asks for a transfer to a different department. The supervisor ignores her request for a transfer, saying neither he nor she is going anyplace different any time soon.

In this case, the refusal to consider a request for a transfer, assuming that a similar job would be available elsewhere for which

the employee is qualified, could be considered retaliation for her having taken FMLA.

And that's when the FMLA's anti-retaliation clause may come into play. It states that employers may not use the employee's seeking, using, taking or having taken FMLA leave as a negative factor in employment decisions.

In a case like this, the employer may also have problems with the Americans with Disabilities Act (ADA). The debilitating stress that the employee suffered may qualify her as disabled under the ADA, in which case the employer has to engage in the interactive process with her to see if a reasonable accommodation can be found. The possible transfer to another department, if it were available, may well be considered such a reasonable accommodation.

8. Is working elsewhere while on FMLA reason for discipline?

Answer: Not necessarily.

First of all, you can't discipline an employee simply for having taken FMLA. And in the case of the employee who had been diagnosed as suffering from debilitating job stress, she may well allege that to help pay the bills, she had to take another part-time job in the meantime, for example, as a clerk in a convenience store, a job which she said she could practically do with her eyes closed – and which did not cause her any stress.

So merely being seen working in another job is no reason to end the employee's FMLA leave, suspend or terminate her, or discipline her in any way.

If you have a policy that applies across the board and says no outside employment – period – you can apply that policy to someone on FMLA leave. Employers may enforce neutral policies against moonlighting, so long as they do so consistently, both for employees who have never taken FMLA leave and those who have.

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9. Can you use private detectives to check on people on FMLA?

Answer: It's a risky move to use private detectives – or anyone else for that matter – to check up on employees who are on FMLA leave. Why? Because it could open the door to an interference or retaliation claim.

The law specifically prohibits interference with an employee's right to take FMLA, which includes discouraging an employee from taking or asking for it, or in any way restraining any rights under the law.

And you can't retaliate in any way against a person for exercising their rights. If you don't use detectives on people who just take a sick day now and then, it's a particularly bad idea to use them for people out on FMLA leave.

10. What can you do to check if someone out on FMLA leave is really sick?

Answer: If you didn't ask for a written medical certification that the employee had a condition warranting FMLA leave when the leave started, and you just took the employee's word for it that he was sick, you still may ask for medical certification after the leave has started if you have reason to believe the leave may be improper.

If you did ask for a doctor's note and it's already on file, but you still have doubts about the legitimacy of the supposed ailment, you may ask the employee to get a second opinion from a doctor of your choice (but not a doctor you employ on a regular or routine basis). The employee must submit to an examination by a second medical doctor of your choice within a reasonable period of time, but you must pay for the consultation.

If the opinions of the two doctors differ as to the need for FMLA, the employer can require the employee to submit to an examination by a third doctor agreed upon between the company and the employee (or his or her lawyer, since it is very likely that lawyers will be involved at that point). The company must again

pay for this consultation – and the opinion of the third neutral doctor is final.

Don't play doctor or detective. Instead, let the pros determine whether the need for FMLA leave is real.

11. How long do employees have before they must provide requested medical certification?

Answer: Employees generally have 15 days to provide requested medical certification.

You can ask the employee to have his or her doctor fill out form WH-380E from the Wage & Hour Division of the Department of Labor, but you have to be careful not to seek any medical information beyond what is included in this certification form.

12. What information should be in the medical certification form?

Answer: You may insist on getting five specific pieces of information in a medical certification form:

1) the name, address and telephone number of the healthcare provider and the type of practice where the healthcare provider works;
2) the date the serious health condition commenced and its probable duration;
3) a statement of medical facts regarding the health condition for which FMLA leave is being sought;
4) sufficient information to show that the employee is unable to perform the functions of his or her job; and
5) information demonstrating the medical necessity for intermittent leave, if applicable.

13. What if an employee refuses to produce a doctor's note?

Answer: If an employee refuses to produce a doctor's note justifying the request for FMLA leave, the employer can deny the leave, or delay it until the employee brings in the medical certification.

This situation may arise when employees are close to exhausting their FMLA entitlement and they want to save whatever they have left for some future event, but they need some more time off in the meantime.

You don't have to let employees abuse the system like that.

14. What can you do about suspicious looking medical paperwork?

Answer: You have to give employees seven calendar days to cure any deficiencies in the medical certification paperwork. Deficiencies may include such things as lack of a physician's signature, leading to suspicions that the employee may have filled out the note himself or herself. If deficiencies are not corrected within seven days, the employer may deny the leave.

If there is an issue with the "authentication" of the medical certification, an employer representative may contact the healthcare provider who purportedly signed the note to verify it. This employer representative should not be the employee's direct supervisor.

An employer representative (again, not the direct supervisor) may also contact the healthcare provider to ask for clarification of unclear handwriting or to get a better understanding of the meaning of the response on the certification form.

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15. Can you require employees to take more FMLA than they asked?

Answer: No. Only time actually requested and taken may be charged against an employee's FMLA entitlement. This situation often arises when employees request intermittent leave of a few hours at a time, which is a real nuisance to administer.

Supervisors also hate it because it's Murphy's Law that employees usually request this type of leave at busy times when every hand is needed on deck. Supervisors may then say: "Why don't you just take the whole afternoon off?" If the employee wants only two hours, you cannot force him or her to take the whole afternoon.

There is one exception for cases when the employee is physically unable to access the worksite a few hours into a shift. This is the so-called "flight attendant" exception. If a flight attendant needs only a couple of hours of intermittent leave, he or she may be forced to take the whole shift off as FMLA. A flight attendant can't physically hop on the plane at its next stop if he or she didn't get on at the airport where the flight originated.

The employer must permit employees to take intermittent FMLA leave in the smallest increments its payroll department uses to account for other forms of leave. But that standard increment of time may never be more than an hour.

16. How do you calculate intermittent leave for exempt employees?

Answer: It depends. Don't automatically assume that exempt employees always work a 40-hour week. You calculate leave time by determining the average hours scheduled over the last 12 months and you reach a mutually acceptable agreement with the employee.

For example, if the employee has worked an average of 60 hours per week, then an unpaid intermittent period of FMLA leave time of two hours is only 1/30th of his weekly pay, not 1/20th.

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Since FMLA leave time is unpaid, this is important so you don't dock the exempt employee for too much time. If he or she regularly works more than a 40-hour shift, as many exempt employees do, then you could easily dock the employee for too much time and thus commit a Wage & Hour pay violation.

17. Will docking exempt employees for partial days ruin their status?

Answer: No, you will not ruin or negate their exempt and salaried status by docking them for partial days for intermittent FMLA.

For the purposes of the administration of unpaid intermittent FMLA leave only, you may actually dock a portion of salary from an exempt employee for partial-day absences without affecting the exempt status under the Fair Labor Standards Act (FLSA).

This docking of pay for a few hours does not automatically convert the exempt employee into an hourly employee who would then be eligible to earn overtime. So there are no further consequences to docking exempt employees for a few hours' time.

18. Can a chiropractor sign a medical certification for FMLA leave?

Answer: Yes, but only in very limited cases.

Medical certifications signed by chiropractors are valid only if they provide treatment consisting of manual manipulation of the spine to correct subluxation. The existence of such subluxation of the spine causing the pain for which FMLA is being sought must be demonstrated by X-rays.

That's the only case for which a chiropractor should be recognized as a properly authorized healthcare provider (called HCP in the FMLA law) for the purposes of FMLA. For all other ailments supposedly requiring FMLA leave, the signature of a chiropractor alone is not accepted as a proper HCP.

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19. Can you ask an employee to have a doctor recertify the need for FMLA leave?

Answer: The general rule is that you can ask for recertification every 30 days, but there's a lot more to it than that. If the first certification said the condition would last more than 30 days, don't ask for recertification until the initial period expires. You can also ask for recertification in *less than* 30 days if the employee wants to extend the leave, the circumstances described in the initial certification have changed a lot, or you have a legitimate reason to doubt either the stated reason for the leave or the continuing validity of the medical condition. Finally, in all cases you can ask for recertification every six months.

You may attach a note to the doctor with the request for recertification detailing leave patterns, but it would be wise not to go too far. The caution here is to be reasonable.

Requiring a doctor's note for every intermittent absence of a few hours might be considered harassment and therefore come perilously close to the illegal interference with an employee's right to seek and take FMLA leave for the medical condition.

20. How does GINA affect FMLA?

Answer: Yes, there is the potential for acquiring additional family medical history information through the FMLA leave authorization process, information that you're not supposed to have under the new Genetic Information Nondiscrimination Act (GINA).

That's why leading employment law attorneys suggest adding the following disclaimer to your medical certification forms:

"GINA prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of employees or their family members. In order to comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. 'Genetic information,' as defined by GINA, includes an individual's family

medical history, the results of any individual's or family member's genetic tests, or the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services."

21. Are the rules for paid sick leave and FMLA always the same?

Answer: Not necessarily. To get paid sick leave under a company's policy, the employer may require a doctor's note if that policy is uniformly applied. If a doctor's note is not provided, under those circumstances you may deny paid sick leave.

But you may not immediately deny unpaid FMLA leave as long as information indicates that the employee (or an immediate family member) is suffering from a serious medical condition that qualifies under FMLA. You may still require a doctor's note, but you generally have to give the employee 15 days to obtain such a note.

22. Can you ask employees to schedule intermittent leave?

Answer: Yes, you can ask an employee who needs intermittent FMLA leave to schedule treatments, medical appointments and other leave as much as possible so as not to interrupt the normal business operations of the organization.

Once the company has made such a request, the employee has to make a reasonable effort to comply with the employer's request.

23. Can you ask employees with intermittent leave needs to transfer?

Answer: Yes, transferring an employee temporarily to a less busy department is often a good solution when a standing request for intermittent leave of a few hours here and there threatens to disrupt the vital operations of one particular department.

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You can do this legally, even without the consent of the employee if necessary, as long as the other position confers equivalent pay and benefits (if not necessarily the same duties).

The employee may transfer back when the need for intermittent leave ends.

24. Do the FMLA and the ADA laws sometimes overlap?

Answer: Yes, the FMLA can easily overlap with the Americans with Disabilities Act (ADA), in which case employers will have to comply with both laws insofar as they both apply to a particular situation.

For example, an employee may be taking intermittent time off as FMLA leave for back pain caused by bulging disks that cause periodic flare-ups. The employee has also told his supervisor that he takes a powerful pain medicine called Vicodin for his discomfort, which makes him feel sleepy, so he may need to take brief naps in addition to his intermittent FMLA leave. Now the company's HR personnel should engage with the employee in the interactive process to find an accommodation for his disability controlled by medication.

The employer may now seek more information on the nature and duration of the condition and how it affects the employee's ability to do his or her job.

Note: The employer may utilize all medical information gathered during the administration of FMLA leave, any ADA accommodation discussion as well as any files for workers' compensation insurance cases.

25. Can you fire a no-show employee 2 days after his FMLA ran out?

Answer: If you enforce uniform discipline for not calling in for all employees, whether they are on FMLA leave or not, you should be

able to terminate if that's what you normally do with people who haven't been seen or heard from in two days.

However, you'd better be careful to make sure there are no extenuating circumstances in favor of the employee.

If any information has reached the company, even if it is hearsay, that the employee may have suffered a new medical problem and may be so incapacitated that he or she cannot call in (for example, running a high fever because of an infection), the employee may be given the benefit of the doubt about the need to call in as soon as practically possible, so you might want to wait another couple of days.

26. Can you require fitness-for-duty exam prior to return from FMLA?

Answer: Yes, as long as you apply the policy uniformly, you may require employees to present a certification from their healthcare providers that they are able to return to work upon completion of leave. But beware: The certification can deal only with the condition that caused the need for FMLA leave.

The need for this fitness-for-duty (FFD) certification should be included in the designation notice when you originally inform the employee that the leave is being designated as FMLA leave.

27. Can you require employees out on FMLA to provide status updates?

Answer: Yes, within limits.

An employer may require an employee on FMLA leave to periodically report on the employee's health status, progress toward recovery or lack thereof, and his or her intention to return to work as scheduled.

Note: The emphasis here is on the word "periodically." Daily calls to the employee's home would probably be considered

harassment and illegal interference with the employee's right to take FMLA leave.

28. Can an employee return from FMLA early?

Answer: Yes, if the need for FMLA leave changes during the period the employee is out on leave and the employee wants to return to work, the employee must provide reasonable notice to the employer of the changed circumstances. The employer must then accommodate the employee, but again, you may insist on a fitness-for-duty certification from the employee's healthcare provider.

Note: The same is true for a change in circumstances the other way. If the employee had not been scheduled to take the full FMLA entitlement but is not recovering as fast as expected and needs more leave, the same reasonable notice requirement applies. In this case, you may also request a recertification from the employee's healthcare provider.

29. Can you refuse to reinstate a 'key employee' after FMLA leave?

Answer: Yes. You can deny job restoration to so-called "key employees," but the employee must be among the top 10% of the company's highest-paid employees within a 75-mile radius. In addition, you must tell the employee in writing at the time he tells you he needs FMLA leave that he is a key employee. Also, the decision to deny restoration must be communicated in person or by certified mail.

Most importantly: You must be able to show that restoration would result in "substantial and grievous economic injury to the operations of the employer."

30. Does counseling qualify as a reason to take military FMLA?

Answer: It can. Eligible employees may take up to 12 weeks of military FMLA leave if they, a spouse, a child or a parent need

under specific circumstances arising out of active duty in the armed forces, including the National Guard and the Reserves. Counseling is one of these nine so-called "qualifying exigencies."

The nine categories are:

1) attending counseling
2) short-notice military deployment
3) military events
4) childcare or schooling arrangements
5) financial and legal arrangements
6) rest and recuperation
7) caring for the military member's parent
8) post-deployment activities, and
9) anything else that the employer and employee agree is a qualifying exigency.

31. How much FMLA leave can be taken to care for injured soldier?

Answer: An employee may take up to 26 weeks of military FMLA leave in a single 12-month period to care for an injured service member who is a parent, spouse, child or a next of kin.

To qualify for this military FMLA leave, the injury or illness requiring care must have been incurred in the line of duty while on active duty, and the injury or illness must make the service member medically unfit to perform his or her duties.

This benefit also extends to veterans undergoing treatment, recuperation or therapy for serious illness or injury The leave must begin within five years of discharge.

32. Can an employee take leave to care for a nephew hurt in Afghanistan?

Answer: Possibly. Military FMLA leave is available to care for injured service members who are a parent, spouse, child or next-of-kin family member.

The next of kin is presumed to be the nearest blood relative, but the service member can designate a different blood relative as a next of kin. And if the injured service member has designated an uncle who happens to be your employee, and the service member is suffering from a qualifying injury or illness, you must grant the military FMLA leave to your employee to care for his nephew.

33. Can an employee take FMLA leave to provide foster care?

Answer: Yes, foster care is covered as a legitimate reason for taking FMLA leave, along with the birth of a child or the adoption of a child.

Employees may take time before the actual placement of the child via adoption or foster care arrangements needed for court appearances or to consult with an attorney.

An employee may also take intermittent FMLA leave after the placement of a child via adoption or foster care, usually to firm up child-care arrangements, etc., but only if the employer agrees.

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