



Little-Known FMLA Facts, Part I:

Under-Utilized FMLA Tools

This is the first installment of a two-part series on little-known FMLA facts. Today's installment covers under-utilized FMLA tools. Our next installment covers FMLA traps.

Under-utilized FMLA Tool #1: Using FMLA

While I get questions across the full spectrum of employment law issues, I estimate at least 25% concern an employee unable to perform the job's essential functions due to medical reasons. In those calls, some of the first determinations I will make are: (1) is the employee eligible for FMLA? (2) does the condition potentially qualify for FMLA based on what the employer knows? (3) what notices has the employee received about FMLA? The law permits employers to run FMLA (an unpaid, job protected leave) concurrently with paid leave allotments (PTO, vacation, sick) or the receipt of compensation-insurance benefits (workers' compensation, STD, LTD). [Note, however, the FMLA regs prohibit an employer from mandating an employee use employer paid leave allotments to fill in shortfalls from compensation-insurance benefits]. In most jurisdictions, it is even permitted to force-place an employee on FMLA where the employer has reason to believe their situation qualifies and where the employee is not responding to certification requests. Failing to apply FMLA leave to qualifying situations leaves the potential for FMLA interference claims open indefinitely, and may also result in deviation from written policies, an unfair windfall to some employees, and even discrimination claims.

Under-utilized FMLA Tool #2: Investigating Inconsistencies

An employee doesn't have a right to abuse FMLA. Almost every supervisor/manager I've met in our Effective Supervisor training in the past five years has raised their hand in the affirmative when I've asked the assembled crowd if they have ever received social media screenshots from other employees of a co-worker who appears to be having too much fun to need FMLA leave. Most of these supervisors will not elevate this information to HR or senior leadership because (a) "it's hearsay;" or (b) "I can't touch an employee on FMLA." The first belief is misguided, and the second belief is just wrong, yet supervisors continue to make these calculations on their own, leading to not just leave abuse, but lowered morale on their teams.

Under-utilized FMLA Tool #3: Clarification and Authentication

An employer has the right to a medical certification that is legible, that establishes the existence of a serious health condition (not the particular diagnosis, but that the condition meets one of the definitional thresholds), and that puts an employee's expected leave use within a reasonably predictable range. When an employer receives an illegible, internally-conflicting, or completely open-ended certification, it may and should send a notice of designation (Form WH-382) with the "Additional information" box checked, "Additional Information Needed" section completed, and cover letter identifying the deficiencies and giving the employee at least seven days to obtain correction from their provider.

Under-utilized FMLA Tool #4: Recertification

Among other reasons, an employer can require recertification at any time when there has been a change in circumstance (typically, employee using intermittent leave in excess of amount certified) or the employer has reason to suspect misuse. While HR must direct the request to the employee, specific cover letters and compelling attendance tables are crucial, because the employer may ask the health care provider to certify the employee's absence pattern is consistent with the existing certification. So, if the employee is regularly scheduled M-F and is missing Mondays and Fridays at a higher rate, show that graphically and express the percentages of absences on each day in the letter. For employees that don't work a M-F schedule, it's even more important to highlight where their "weekend" falls and how their absences coincide.

Under-utilized FMLA Tool #5: Alternative Placement for Predictable Reduced-Schedule Leave

Both under-utilized and misunderstood, this tool enables an employer to place an employee requesting foreseeable reduced-schedule or intermittent FMLA leave into another position that better accommodates their reduction in hours. The job does not have to have equivalent duties. The employee does have to receive equivalent pay and benefits, either because the alternative position is in the same rate/benefit structure, or, if the pay range for the alternative position is lower, the employer continues to pay the employee at their same rate. Importantly, even if an employee is working a part-time schedule, they maintain eligibility for health insurance (a key feature of the FMLA). The most common misunderstanding we see about this tool is the understandable desire to apply it to employees with unpredictable intermittent FMLA needs, which DOL's regulations don't permit.

If your company has any questions or concerns regarding FMLA topics, we at Lehr Middlebrooks Vreeland & Thompson, P.C. are happy to help. Please contact Whitney Brown at (205) 323-9274 or wbrown@lehrmiddlebrooks.com.