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Ten Ways Employers Negate Their FMLA Rights

Although the FMLA (Friday-Monday Leave Act) has been in effect for 27 years, employers still make administration mistakes that limit employer rights and can lead to litigation. Here is my Top 10 list of employer and supervisor misconceptions about the FMLA that limit the employer's ability to manage employee leave use or to defend against subsequent FMLA-related litigation:

1. "If the employee does not request FMLA, then we don't have a FMLA issue." The employee does not have to ask for FMLA or even mention FMLA. Rather, once the employee notifies the employer of what *may* be a FMLA-covered event ("I will need to be out two weeks for surgery/recovery"), the employer is on notice to consider whether the FMLA applies and, if so, to provide the employee with a Notice of Eligibility and any Certification form.
2. "The employee does not want to use FMLA;" often paired with, "The employee has enough paid leave accumulated for the planned absence." That is not an option, unless you let it be one. FMLA is a statutory unpaid job protected leave, and thus offers the employee a separate benefit that employer paid leave programs do not. It's up to the employer whether the absence is covered under FMLA; it is not an employee option. In fact, if the employer has reliable information that the employee is absent for an FMLA-qualifying reason, it may send the Designation Notice and run FMLA leave even without receiving a completed medical certification. We strongly encourage employers to mandate that FMLA runs concurrently with employer-provided paid leave programs (vacation, PTO, sick, etc.) as a matter of policy and practice.
3. "I do not have to run workers' compensation absences through FMLA." Any "serious health condition" is potentially FMLA-qualifying, and most workplace injuries leading to three or more days' absence or ongoing treatment or therapies will qualify as serious health conditions. It's also important to remember that in most jurisdictions, workers' compensation is an income-replacement insurance benefit, and not a statutory leave program, so, again, running FMLA concurrently with workers' compensation-covered absences provides the employee the full slate of benefits they're entitled to, while also ensuring the employer preserves all their rights under both programs.
4. "If an employee is not able to return to work at their prior position without restrictions at the expiration of FMLA, we're ok to terminate employment." As the football broadcasting icon Lee Corso would say, "Not so fast, my friend." For example, if the employee has many serious health conditions could qualify as disabilities under the ADA, and the employer must undertake the interactive process to determine if the employee's restrictions can be temporarily or permanently accommodated in their current job, in another open position, or by a continuation of leave for a defined period of time. Similarly, an employee who has

exhausted FMLA for reasons related to pregnancy or childbirth but is still unable to return to her prior position may be entitled to reasonable accommodation under the Pregnant Worker Fairness Act, PDA, and/or the ADA. Importantly, at least under the ADA, the employer enjoys broad rights to request information from the employee's physician relevant to verifying and assessing the medical restrictions and possible accommodations.

5. "The social media post of an employee doing keg stands on the same day he called out citing FMLA leave for his back pain is hearsay and I can't do anything about it." Employers have the right to investigate and discipline or terminate employees for FMLA abuse just like any other abuse or falsification to obtain a benefit of employment. And the employer certainly isn't bound by evidentiary rules in conducting its investigation, though involving counsel early is a smart idea any time the stakes are this high.
6. "We have to accept the employee's incomplete certification statement." No. The employer has the right to require a completed certification document consistent with that offered by the DOL. It is critical for intermittent leave requests especially that the certification specify the frequency and duration of expected leave use.
7. "The employee's intermittent FMLA designation is a get out of jail free card." Nope. If an employee's intermittent FMLA use exceeds the frequency and duration of the certification or follows a suspicious pattern, the employer is entitled to request recertification.
8. "We cannot apply our call-in policy to FMLA absences." That is not true with respect to unforeseeable intermittent FMLA leave. If the call-in could not occur because of the serious health condition, that's one thing. If the call in did not occur according to company policy because the employee chose not to follow the policy, the FMLA-using employee is not entitled to better (or worse) treatment than any other employee who could have complied with the call-in policy, but did not.
9. "We may not require a fitness for duty statement before allowing the employee to return to work." Not true. Depending on the medical issue, the employer may require a fitness for duty statement or exam prior to returning to work, but the employer must mark this on the Designation Notice.
10. "We have to administer FMLA in addition to city, county or state leave laws." If the employer operates in a jurisdiction with additional leave laws, those leave laws may allow the employer to run those leaves concurrently with the FMLA so that no additional leave is necessary.

When my colleague, Whitney Brown, conducts [Effective Supervisor](#) training, she includes a section entitled "Learning to Love the FMLA." What that means is that employers have FMLA rights—know them and use them wisely.

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