

Five Common FMLA Mistakes to Avoid

The federal Family and Medical Leave Act (FMLA) and Wisconsin Family and Medical Leave Act (WFMLA) are sources of confusion and frustration for many employers. This article describes five common FMLA mistakes and steps employers should take to avoid these mistakes.

1. Terminating an Employee When the Employee Is Unable to Return to Work Following the Exhaustion of FMLA/WFMLA Leave

If an employee is unable to return to work following the exhaustion of FMLA/WFMLA leave that is due to their own serious health condition, an employer should not automatically terminate that employee. Instead, the employer must examine whether the employee is entitled to any additional time off under other employment laws or internal policies. Most often, the laws that require an employer to grant an employee additional time off are state and federal disability laws. Specifically, under the Wisconsin Fair Employment Act (WFEA) and the federal Americans with Disabilities Act (ADA), additional leave may be considered a "reasonable accommodation."

In order to determine whether an employee should be granted additional time off as a reasonable accommodation, the employer must first determine whether the employee's condition is a disability. Under the ADA, many, if not most, of all "serious health conditions" (as defined in the FMLA and WFMLA) will constitute disabilities. Therefore, if an employer is in doubt as to whether the condition is a "disability," it should consult legal counsel or err on the side of caution and assume the condition is a disability.

Next, the employer will need to determine whether the requested time off is "reasonable" and whether there are other reasonable accommodations that would allow the employee to return to work at the end of their FMLA/WFMLA leave. Under the WFEA and ADA, employers do not need to grant leave as an accommodation if it would pose a "hardship" or an "undue hardship", respectively.

POSTED:

Jan 8, 2013

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2. Failing to Calculate WFMLA on a Calendar Year Basis

Under the FMLA, employers may calculate FMLA leave using any of the following four methods: (a) the calendar year; (b) any fixed 12-month period (such as a fiscal year); (c) the 12-month period measured forward from the date an employee's first FMLA leave begins; or (d) a "rolling" 12-month period measured backward from the date an employee uses FMLA leave. In contrast, under the WFMLA, employers must calculate WFMLA leave on a calendar year basis. Therefore, it is essential an employer ensure it is properly calculating the employee's available leave under both FMLA and WFMLA, especially if it uses different leave years for FMLA and WFMLA leave.

3. Failing to Meet FMLA's Deadlines

FMLA imposes very specific deadlines on employers for processing requests for FMLA leave. First, within five business days (absent extenuating circumstances) of learning that the employee needs FMLA leave, the employer must provide the employee with the "Notice of Eligibility Rights and Responsibilities Form," or a similar form prepared by the employer. Second, if the employer requires the employee to submit a certification form, the employer must provide the employee with at least 15 calendar days (unless this deadline is not practicable under the particular circumstances) to submit the completed certification form. Third, within five business days after receiving the certification form, the employer must provide the employee with an FMLA designation form, informing the employee whether the leave request has been approved. However, if the certification form is incomplete or insufficient, then the employer must provide the employee with seven calendar days (unless not practicable under the particular circumstances, despite the employee's diligent good faith efforts) to cure any such deficiency. Employers should advise employees in writing of all applicable deadlines and the consequences for failing to meet the deadlines.

4. Incorrectly Determining Bonus Eligibility for Employees on FMLA Leave

Many employers' bonus policies require employees to satisfy certain objectives in order to be eligible for a bonus, such as quantity of products sold, number of hours worked, etc. A common area of confusion for employers is how to

determine an employee's eligibility for such bonuses when the employee has been unable to meet the bonus objectives due to FMLA leave.

Under the FMLA, employers may disqualify an employee who has not met the bonus objectives, even if the failure is due to the employee's use of FMLA, if employees on similar (but non-FMLA) leave are treated the same. Therefore, for purposes of determining an employee's bonus eligibility, an employee who used vacation leave during an FMLA leave must be compared to an employee who used vacation leave during a non-FMLA leave. Similarly, an employee who took an unpaid FMLA leave must be compared to an employee who took an unpaid non-FMLA leave.

5. Reassigning an Employee on FMLA Leave

Due to the disruption of operations that may be caused by an employee on FMLA leave, employers often wish to reassign the employee on FMLA leave to a position in which the employee's absence may be more easily accommodated. However, the FMLA limits an employer's ability to require an employee to transfer positions. First, employers may only reassign employees who need intermittent or reduced schedule leave. Second, the reassignment is permissible only if: (a) the intermittent or reduced schedule leave is due to planned (i.e., foreseeable) medical treatment for the employee, the employee's family member or a covered servicemember; (b) the intermittent or reduced schedule leave is due to a period of recovery from a serious health condition of the employee or the employee's family member, or an injury/illness of a covered servicemember; or (c) when the employer has agreed to permit the employee to take intermittent or reduced schedule leave due to the birth of a child or placement of a child for adoption/foster care. Third, the reassignment must be limited to the period for which the employee requires the intermittent or reduced schedule leave and to a position for which the employee is qualified and better accommodates the employee's need for leave. Fourth, the employer must ensure the employee receives equivalent pay and benefits while in the alternative position. Employers may not transfer employees to a position in an effort to discourage the employee from taking FMLA leave. As an example, even if pay and benefits are the same, an employer should not transfer a white collar worker to a janitorial position, as this may be viewed as interfering with the employee's FMLA rights. Finally, employers may not require a transfer when the employee will need intermittent or reduced schedule leave on an unforeseeable basis.

WFMLA does not have a similar provision regarding reassignment. Therefore, the



employer should either: (a) wait until the employee's WFMLA leave has been exhausted before reassigning the employee; or (b) determine if the employee will voluntarily agree to the reassignment during the employee's WFMLA leave.

Please contact your Reinhart attorney or any member of Reinhart's Labor and Employment group with questions regarding FMLA and WFMLA leave.

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