

## *Family medical leave guidelines are nothing for employers to sneeze at*

Imagine this scenario. An employee calls in sick Monday and fails to call in the rest of the week. When the employee fails to report to work the following week, the employer writes a termination letter for job abandonment. A month later the employer is served with a complaint alleging that the employee's Family and Medical Leave Act (FMLA) rights were violated.



### **FAMILY MATTERS**

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Did the company violate the employee's FMLA rights? Possibly.

FMLA was passed to allow employees to take extended medical leave for themselves, their parents or children, without sacrificing their job position. When President Bill Clinton signed FMLA into law on Feb. 5, 1993, he stated: "American workers will no longer have to choose between the job they need and the family they love."

FMLA covers businesses that employ 50 or more people for at least 20 calendar work weeks throughout the current or preceding calendar year. Employees on paid or unpaid leave and suspended employees are included in this count.

An employee is eligible for up to 12 weeks of FMLA leave if the employee was employed for at least 12 months and worked at least 1,250 hours over the previous 12-month period. Because an employee may take intermittent leave under FMLA, an employee may request periodic leave to go to medical appointments due to a serious medical condition.

Employers generally adhere to the standard notification requirements under FMLA by prominently posting a sign that advises employees of their rights in a common employee

area and giving an explanation in an employee handbook. However, employers frequently fail to directly notify employees of their rights when an employee requests leave due to an illness.

When the need for FMLA leave is not foreseeable, an employee is required to give notice "as soon as practicable." A potential employer pitfall arises when the employee does not specifically request FMLA leave, but merely informs the employer of the need to be absent from work for three or more days.

Because workers may not be fully aware of their FMLA rights, our courts have held that an employer is responsible for informing employees of their eligibility. Once the employee states that leave is needed, the employer is responsible for informing the employee, in writing, of his or her rights.

An employer can best protect itself against liability by sending an FMLA notice letter to the employee that contains the following information:

- That the employee may be eligible for FMLA leave under the following circumstances: (1) the birth or care of an employee's newborn; (2) the result of placement of a child with the employee for adoption or foster care; (3) the care of an employee's child, spouse or parent having serious health conditions, or (4) the employee's own serious health condition;

- That the leave will be counted against the employee's annual FMLA leave entitlement, which is a maximum of 12 weeks of unpaid leave;

For a "key employee," he or she must be informed that restoration to work may be denied following FMLA leave and be told why. A key employee is defined as a salaried FMLA-eligible employee who is among the highest-paid 10 percent of all employees working within 75 miles of the employee's worksite. An employer can

deny an employee reinstatement if the employer would sustain a "substantial and grievous economic injury" to the employer's operations by reinstating the employee;

- That the employee notify the employer of the intent to take FMLA, if eligible.

The following information should also be included in the letter, if the employer has established these specific FMLA requirements within the company:

### **EMPLOYERS FREQUENTLY FAIL TO NOTIFY EMPLOYEES OF THEIR RIGHTS WHEN AN EMPLOYEE REQUESTS LEAVE.**

- That the employee furnish medical certification of a serious health condition and the consequences of failing to do so;

- That the employee use all accrued time first;
- That the employee make premium payments to maintain health benefits, and the

arrangements for making such payments, and the possible consequences of failure to make such payments on a timely basis;

- That the employee furnish a fitness-for-duty certificate to be restored to employment;

- That the employee furnish periodic reports of the employee's status and anticipated date of return.

The adage "it is better to be safe than sorry" applies here. A clearly written and promptly sent notification letter may protect an employer from future FMLA notification claims and substantial liability. The penalties to an employer for violating an employee's FMLA rights can be substantial and costly.

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