

How to Stop FMLA Abuse

Do some of your employees consistently fall ill just before or after the weekend? Here's help.

SHRM | By Allen Smith, J.D. February 12, 2020



Frequently requesting Fridays or Mondays off or taking leave after objecting to new job assignments can be signs of FMLA fraud. But an employer can't assume that these acts amount to abuse of such leave. Instead, it must determine whether the individual is covered by the FMLA and whether the time off is protected.

Medical Certifications and Recertifications

"Clearly, one of the best tools employers can use to fight FMLA abuse is the medical certification form," said Jeff Nowak, an attorney with Littler

in Chicago. Too many employers fail to obtain from the employee the medical information necessary to determine whether the employee has a serious health condition and is entitled to FMLA leave, he said. "Keep your employees honest. Require them to certify their absences and seek recertification at the earliest opportunity."

An employer can seek recertification if the employee requests an extension of leave, if the circumstances described by the previous certification have changed significantly, or if the employer receives information that casts doubt on the employee's stated reason for the absence or the continuing validity of the certification, noted Abigail O'Connell, senior counsel with Sun Life Financial in Wellesley Hills, Mass.

So, if an employee uses FMLA intermittent leave frequently on Mondays or Fridays, the employer could seek recertification from the health care provider to determine whether this is an expected pattern of absence given the employee's serious health condition.

Anne-Marie Vercruyssse Welch, an attorney with Clark Hill in Birmingham, Mich., gave another example: If an employee was certified for FMLA leave approximately one time per month in a four-hour increment for migraines and the employee instead took an entire Monday and Friday off, the employer could request recertification.

The employer also could share the absence pattern with the health care provider and ask if it is consistent with the need for leave, she said. "More likely than not, the health care provider will say 'yes.' If nothing else, however, it lets the employee know that the employer is monitoring their FMLA use and may curb future abuse."

Another option is to request second and third opinions for those employees whose certifications raise doubts, said Joan Casciari, an attorney with Seyfarth in Chicago.

Nowak recommended getting a new certification upon the first absence in a new FMLA year.

[SHRM members-only toolkit: Managing Family and Medical Leave (FMLA)]

Talk with Employees

Employers should confront workers who are suspected of misusing leave, Nowak said. Reiterate call-in requirements, set expectations about the information the employee will provide when calling in an absence, and review the FMLA policy.

The policy should prohibit employees from using false information to support a leave request or misusing FMLA leave, said Tamara Devitt, an attorney with Haynes and Boone in Costa Mesa, Calif. Employees should be required to notify the employer if the amount of FMLA leave turns out to be less than anticipated, she added.

Make sure the employee is aware of the employer's expectations so he or she cannot later claim ignorance about the process for requesting leave.

If an employee misses consecutive Fridays for no apparent reason, have a candid conversation about why the leave requests tend to fall in conjunction with a weekend.

"It's defensible to express concerns over unusual patterns in leave usage," Nowak noted. "That said, employers must avoid explicitly stating or even implying that the employee's legitimate use of leave is frowned upon or may be subject to discipline."

Employers should prepare a list of questions to ask employees when FMLA abuse is suspected, he recommended. The employees' responses will help better determine whether the FMLA applies or the request is fraudulent.

He said such questions might include:

- What is the reason for the absence?
- What essential job functions can the worker not perform?
- Will the employee see a health care provider for the injury or illness?
- Has the employee previously taken leave for this condition? If so, when?
- If an employee is calling in late in violation of the call-in policy, when did the worker first learn he or she would need to be absent? Why did the worker not follow the company's call-in policy?
- When does the employee expect to return to work?

Be cautious, though. Stan Hill, an attorney with Seyfarth in Atlanta, is leery of managers quizzing workers about FMLA leave or medical conditions. That may result in a legitimate FMLA claim, he cautioned.

Investigate

Instead, Hill suggested, employers should empower managers to spot issues and elevate them to HR or an attorney for assessment. The employer should conduct an investigation and interview the person suspected of abusing FMLA leave, he said.

Keep an open mind going into an investigation, added Grant Wills, an attorney with Fisher Phillips in Columbia, S.C. "Give the employee an opportunity to explain suspicious circumstances, and follow up on co-worker complaints. If it comes to it, follow up with neutral third-party surveillance."

Employers that thoroughly investigate any suspected abuse can rely on an honest-belief defense if an employee is disciplined or fired for FMLA abuse and then sues.