

Employees Have FMLA Responsibilities, Too

As most employers know, complying with the Family and Medical Leave Act (FMLA) can be a human resource nightmare. The maze of employer responsibilities and compliance matters may seem insurmountable. Fortunately, the responsibility of meeting the FMLA's demands does not rest solely on employers. Employees who want to reap the protections that the FMLA has to offer must shoulder some of FMLA's burdens as well. Even the U.S. Department of Labor, agrees.

DOL Guidance. Recently, the U.S. Department of Labor (DOL) launched its new Employee's Guide to the Family and Medical Leave Act (Guide). Links are here to the DOL's [webinar](#) and the [Guide](#). The Guide reminds employees that FMLA leave is not an absolute right. Instead, an employee must be eligible for leave, and leave is available only for specified reasons. The Guide also informs employees of their additional responsibilities, such as:

- properly notifying their employer of the need for FMLA leave;
- communicating with their employer during the leave;
- providing a complete and sufficient certification within 15 calendar days, and assisting with any incomplete or authentication requests;
- familiarizing themselves with their employers' leave and absence policies (because employees must comply with both employer policies *and* the FMLA regulations); and
- cooperating with an employer's request for a second or third opinion.

The Guide offers several easy-to-follow flowcharts and encourages employers to review the flowcharts with any employee who requests FMLA so that the employee understands his or her obligations and rights at the beginning of leave. Taking this approach also creates an opportunity for employers to review with the employee the employer's policies that may overlap or apply concurrently with FMLA leave.

Under the FMLA, an employer can require that an employee comply with the employer's policy for requesting leave. (29 C.F.R. § 825.302(d)). Employer policies that overlap or apply concurrently with FMLA may include policies such as:

- leave of absence requests;
- reporting absences;
- using paid time off; and
- reporting workplace injuries.

An employee can't simply ignore his or her duties under an employer's policy because the FMLA also protects the employee's leave of absence. Therefore, reviewing these policies with an employee, if possible, prior to his or her FMLA leave, may eliminate many FMLA headaches in the future. Here are some examples from recent cases:

Leave of Absence and Reporting Policies: An employee can be required to follow the employer's internal policy regarding reporting any leave of absence, even if the absence is covered by the FMLA. This applies to requesting a continuous leave of absence, a reduced work schedule, or when reporting intermittent FMLA leave for a medical appointment or flare-up of a serious health condition. If an employee fails to follow the employer's reporting policy, the FMLA does not shelter the employee from any resulting discipline. See, *Millea v. Metro-North Railroad Company* (2nd Cir. 2011).

In addition, in most circumstances, the requested FMLA leave may be delayed or denied if the employee fails to request it in compliance with the employer's reporting policy. Exceptions include

where unusual circumstances prevented the employee from providing the prescribed notice, or where required notice under the employer's policy is sooner than required by the FMLA and the employee in fact provides timely notice under the FMLA. In the latter situation, the employer can still discipline the employee for failure to follow policy but cannot delay or deny the FMLA leave. 29 C.F.R. § 825.302(d).

Paid Time Off Policies: An employer can require an employee to use accrued paid time off, such as paid personal, vacation, or family leave, concurrently with an FMLA leave of absence. 29 U.S.C. § 2612(d)(2). When taking an FMLA-approved absence that also uses accrued paid leave, an employee is responsible for complying with the employer's paid leave policy during the absence. 29 C.F.R. § 825.207(a). Courts have upheld sick leave policies that require the worker to remain at home or not travel while using sick leave. *See, Pellegrino v. Communications Workers of America* (W.D. Pa 2011).

Additionally, if the employer's paid leave policy requires employees to use paid absence in half-day or whole-day increments, an employer can require an employee who uses paid sick leave during an FMLA absence to take the time as a half-day or full-day absence. The DOL's [FAQs to the FMLA](#) provide the following example:

Neila needs to take two hours of FMLA leave for a treatment appointment for her serious health condition. Neila would like to substitute paid sick leave for her absence, but her employer's sick policy only permits employees to take sick leave in full days. Neila may either choose to comply with her employer's sick leave policy by taking a full day of sick leave for her doctor's appointment (in which case she will use a full day of FMLA leave), or she may ask her employer to waive the requirement that sick leave be used in full day increments and permit her to use two hours of sick leave for her FMLA absence. Neila can also take unpaid FMLA leave for the two hours.

NOTE: The employer's ability to require use of FMLA leave in increments that match the increments under a paid leave policy is one subject of the DOL's 2012 proposed changes to the FMLA regulations. The proposed regulations have not yet been adopted and are likely to undergo revisions prior to finalization.

FMLA Policies: Employer's FMLA policies typically mirror the FMLA regulations by requiring employees to use FMLA time only for reasons approved under the FMLA. Therefore, employees are responsible for ensuring that when they report an absence as FMLA-qualifying, they actually used the time for the approved FMLA reason and not to conduct personal activities. For instance, FMLA does not cover time taken to fill prescriptions, arrange for a referral, or transfer medical records to another physician, even if the employee visits the doctor's office for such errands. The employee's absence must be because the employee is *unable to perform the job functions*, which includes receiving treatment by the doctor. A visit to the doctor to pick up medical records or a prescription will not suffice. *See, Jones v. C&D Technologies*, (7th Cir. No. 11-3400, 2012).

Worker's Compensation Policies: If an employee is absent due to a workplace injury that also qualifies as a serious health condition, the absence will run concurrently with FMLA leave. 29 C.F.R. §§ 825.207(e) & 825.702(d)(2). Therefore, an employee is responsible for complying with the employer's worker's compensation policy, which can include timeframes within which to notify the employer regarding the workplace injury and cooperating with the workers' compensation insurance carrier. *William Spring v. Sealed Air Corp.*, (3rd Cir. No. 11-3828, 2012).

Employer Take-Aways. Informing and reminding employees of their FMLA and workplace policy responsibilities prior to or during an employee's FMLA leave can prevent human resource-related headaches, such as misunderstandings, lost productivity, employee discipline, and even termination and/or litigation. An employer should not hesitate to enforce workplace policies even when they overlap with an employee's FMLA absence. Time and again, these employer notice requirements and policies have been supported by courts if and when an employee files suit.



Help is available! The FMLA provides plenty of challenges on its own. When various state leave of absence laws are layered on, the task of compliant leave management becomes even more complex. Reed Group can help. We have the Triple Crown of leave management tools, each the best in its class, to meet the needs of all organizations.

- Services. For those employers who prefer outsourcing, Reed Group can provide expert leave of absence administration [services](#) .
- Software. Employers who elect to retain leave management in-house but need a better tool than a spreadsheet or sticky notes, our state-of-the-art [LeavePro™](#) leave management software is unmatched.
- Content. Reed Group's [MDGuidelines™](#) is the industry's most comprehensive return-to-work toolkit for managing disability, workers' compensation, FMLA and other leaves. Our [Leave of Absence Advisor™](#) is the most complete, in depth, and user-friendly on-line leave of absence reference tool available, covering federal and state leave laws.

For services or software inquiries, call us at 1-800-347-7443 or email us at services@reedgroup.com.

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