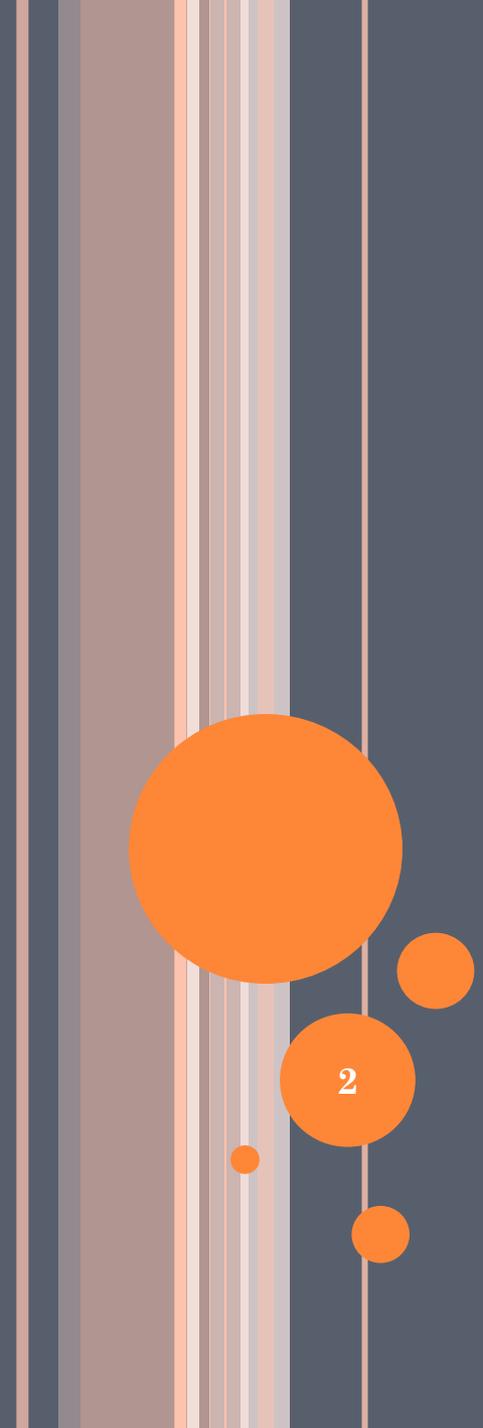


IDENTIFYING AND AVOIDING FMLA ABUSE

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IDENTIFYING FMLA LEAVE ABUSE

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SIGNS THAT THERE MAY BE FMLA ABUSE

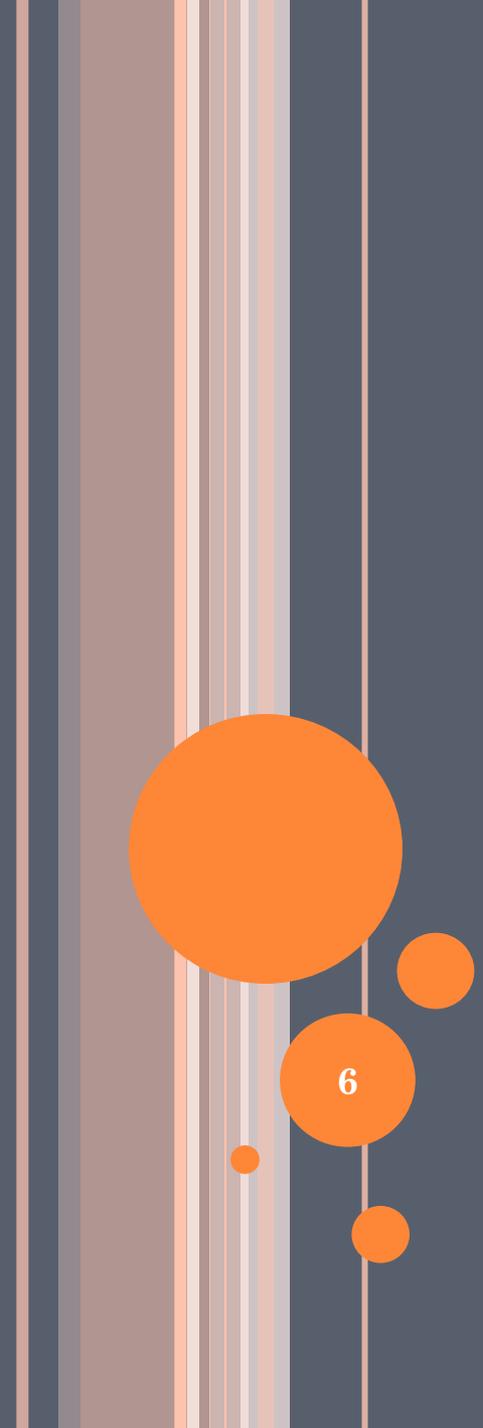
- Employee is frequently absent on Mondays, Fridays, or during holiday or sporting seasons.
- Employee only uses FMLA leave when he or she has a low leave balance.

SIGNS THAT THERE MAY BE FMLA ABUSE, CONT.

- The perfect fit employee – employee only uses 12 weeks of leave every year.
- FMLA request follows denied requests for time off.
- FMLA request follows discipline or counseling.

SIGNS THAT THERE MAY BE FMLA ABUSE, CONT.

- Reliable office grapevine, or other reliable evidence, that the absence was not FMLA qualifying.
 - Employee tells you that while on FMLA leave for a spouse, she traveled to another city to help a family member with wedding planning.
- Employee's absence is not consistent with the medical certification.
 - Check leave usage against the medical certification.



AVOIDING FMLA ABUSE

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AVOIDING FMLA ABUSE

- Who is in the best position to help avoid FMLA abuse?
 - Supervisors.
 - Human Resources.

AVOIDING FMLA ABUSE: TOOLS FOR SUPERVISORS

- How can supervisors help avoid FMLA abuse?
 - Asking questions.
 - Documentation.

SUPERVISORS ASKING QUESTIONS

- If the request is in advance:
 - Why are you going to be absent?
 - What is the reason for the doctor's appointment?
 - When did you schedule the appointment?
 - Who is the doctor?
 - Where is the doctor's office located?

SUPERVISORS ASKING QUESTIONS, CONT.

- If the request is in advance, cont.:
 - What are the doctor's office hours?
 - Is the absence medically necessary?
 - What condition are you going to receive treatment for?
 - Have you seen this doctor before?

SUPERVISORS ASKING QUESTIONS

- If the employee is calling in sick:
 - What is wrong?
 - Why are you unable to work today?
 - What is the medical condition/diagnosis?
 - How long have you had these symptoms?
 - Have you seen a doctor?

SUPERVISORS ASKING QUESTIONS, CONT.

- If the employee is calling in sick, cont.:
 - Have you called a doctor?
 - Do you have a doctor's appointment?
 - What did the doctor tell you?
 - Did the doctor prescribe any medications?
 - Are you able to work part of the day? Why or why not?
 - When do you think you will return to work?

SUPERVISORS ASKING QUESTIONS, CONT.

- If the employee has been absent for more than one day (these questions can be asked regularly):
 - Have you seen the doctor?
 - Have you called the doctor?
 - What have you been doing at home to ensure your recovery?
 - Have you left the house at all? If so, why?

SUPERVISORS ASKING QUESTIONS, CONT.

- If the absence is for a family member.
 - Ask questions about the relationship.
 - Who is the family member?
 - If it is a child, how old is the child?
 - Ask about the care the employee is providing to the family member.

SUPERVISOR ASKING QUESTIONS, CONT.

- What if the employee calls and says “I am taking an FMLA day?”
 - That is not enough information.
 - The supervisor still needs to ask questions to help determine if that absence is FMLA qualifying.

SUPERVISORS ASKING QUESTIONS, CONT.

- Do you have the right to ask these questions?
 - YES.
- What about HIPAA?
 - HIPAA does not apply to conversations between employers and their employees.
- When should a supervisor ask questions?
 - When an employee requests/takes sick leave.

SUPERVISORS & DOCUMENTATION

- **Document everything.**

SUPERVISORS & DOCUMENTATION

- Document conversations you have with employees concerning their need or use of leave.
 - The date and time of the conversation.
 - Exactly what the employee tells you:
 - The reason for leave.
 - The condition and symptoms.
 - If the employee saw a doctor, information about the visit – date, name of the doctor, time of the visit, etc.

Note: If you do not have some of this information, then consider having another conversation with the employee.

SUPERVISORS & DOCUMENTATION, CONT.

- Document the date(s) of leave.
- Document performance issues.
 - This should be done at all times.
 - If the documentation begins after the employee put the employer on notice of an FMLA request, it may be too late.

OTHER WAYS SUPERVISORS CAN HELP AVOID FMLA ABUSE

- Enforce the 30-day notice for foreseeable leave requirement.
 - Insist that employees schedule as many treatments/doctor appointments as possible during off-work hours.
 - Think, is this absence “medically necessary.”
- Enforce call in procedures.

AVOIDING FMLA ABUSE: TOOLS FOR HUMAN RESOURCES

- Medical Certifications.
- Recertifications.

MEDICAL CERTIFICATION

- Get a complete medical certification.
- Can contact healthcare provider for authentication or clarification.
 - Contact cannot come from employee's direct supervisor. Should be made by Human Resources or someone else in management.
 - Cannot contact before you receive a complete and sufficient certification.

MEDICAL CERTIFICATION, CONT.

○ Authentication

- Give a copy to healthcare provider and ask the healthcare provider to verify that the information was completed or authorized by the healthcare provider.
- Employer does not need employee's advance permission, but this contact is restricted to authentication.
- Consider seeking authentication if you believe that the employee has a close friend or relative working for the provider.

MEDICAL CERTIFICATION CONT.

○ Clarification

- If it is more than a handwriting issue, you should first give employee an opportunity to “cure.”
- To understand handwriting or the meaning of a response.
- Cannot ask for additional information beyond that required by the certification form.
- Should ask for employee’s consent first – get a release.

RECERTIFICATION

- May be obtained earlier than every 30 days if:
 - Circumstances described by previous certification have changed significantly – duration, frequency, or severity of condition; or
 - Employer receives information that casts doubt on the employee's stated reason for the absence. (Tricky)

RECERTIFICATION

- Every 30 days, or other period if specified, *if* in conjunction with an absence.
 - The recertification request must be in conjunction with an absence. Cannot just ask for recertification as a matter of course.
 - If the period of absence was “unknown” and the employee continues to be absent.

RECERTIFICATION

- Must be obtained later than every 30 days if the medical certification states that the duration is more than 30 days.
 - If the medical certification states the employee will be unable to work continuously or intermittently for 40 days. Employer cannot request recertification until the 40 days have run.
 - If the condition is a lifetime condition, then employer can request recertification every 6 months.*
- If an employee requests an extension of leave.

RECERTIFICATION

- How is every 30 days calculated?
 - The regulations seem to indicate that the date of the employer's request controls.
- You can attach the employee's timesheet and ask the medical provider if the absences are consistent with the need for FMLA leave.

CERTIFICATIONS

- If the certification is not submitted within time prescribed, it is advised that you give the employee a reminder and another opportunity to provide the certification/ recertification.

FMLA AND DISCIPLINE.

- FMLA prohibits an employer from using FMLA covered absences against an employee.
- FMLA does not prohibit an employer from disciplining an employee during a period covered by FMLA.
- Employers still have the right to hold employees accountable.

FMLA AND DISCIPLINE

○ HYPO:

- Jane Smith was approved for FMLA leave for migraines. She is absent approximately 4 days each month. She is required to complete 10 investigations a month. Since she has been approved for FMLA leave she has only completed 5 investigations per month.
- Can she be counseled, disciplined, or placed on a corrective action plan?

FMLA AND DISCIPLINE CONT.

○ Factors to consider:

- If employee received positive reviews prior to going on FMLA leave.
- If you were in a position to discover the information prior to the employee taking FMLA leave.
- If the information was discovered because someone else is doing the employee's work while he or she is out on leave.

FMLA & DISCIPLINE, CONT.

- Factors to consider, cont.:
 - Would the employee receive discipline even if she had not taken FMLA leave?
 - Do you have documentation?
 - Does your documentation support your explanation?
 - If the employee has a history of performance issues, why didn't you discipline the employee before?

FMLA AND CORRECTIVE/PERFORMANCE ACTION PLANS

- Employees can be placed on a corrective or performance action plan during a period covered by FMLA.
- Again, FMLA only prohibits employers from using FMLA absences against employees. It does not prevent employers from holding their employees accountable.

OTHER CONSIDERATIONS

- Allowing the employee to exhaust FMLA.
- Surveillance.
- Periodic check-ins.
 - Courts have ruled that it is permitted.
 - Should be reasonable.
- The fact that an employee was approved for FMLA does not mean that the absence is FMLA qualifying.

FMLA & ADA

- What happens if the employee needs additional leave after he or she exhausted FMLA?
 - You should consider whether the employee is disabled as defined under the ADA.
 - Considerations for reasonable accommodation under the ADA:
 - Additional leave.
 - Modified work schedule.
 - Transfer employee to a vacant position at a lower level for which the employee is qualified.

QUESTIONS?