

NEXTCONCEPT

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Leave Management Challenges: FMLA or the “Friday, Monday Leave Act”

By Rachel Shaw
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Excessive and fraudulent leave matters are some of the most challenging for employers to manage. On the 20th anniversary of the Family and Medical Leave Act (FMLA) in 2013, the U.S. Department of Labor asserted that “The FMLA is working.”¹ Frankly, I found this announcement naïve, since there’s a lot that isn’t working with the FMLA. The truth is the FMLA’s impact on the American employer is significant. As written, the FMLA fosters misuse by employees who struggle to maintain regular and reliable attendance. In fact, a 2014 survey of executive employers found that 69 percent were concerned about FMLA abuse within their organizations.²

Please don’t misunderstand me—I believe that the FMLA is a necessary and important law. However, misuse of FMLA leave threatens its integrity and undermines its intent—to provide job-protected leave for those in need, for defined periods of time. FMLA needs to be protected so it may serve the people it’s intended to assist: those who need to bridge the gap between medical incapacity, childbirth, parental leave, kin care, military leave, and safe and full return to work. The FMLA was never intended to support permanent part-timers in receiving the benefits of a full-time worker. Nor was it intended to protect the jobs of employees who are too disabled to ever return to work full time. Finally, the FMLA was never intended to protect those who use it to lengthen weekends or as an excuse for poor attendance patterns.



Ultimately, we need a legislative solution in order to really fix the issues brought on by FMLA intermittent and forever-use issues. Until then, there are ways you can assist your organization to better manage some of the most difficult leave management issues facing human resources professionals today.

¹ https://www.dol.gov/whd/fmla/survey/FMLA_Survey_factsheet.pdf

² Littler Mendelson. Littler Mendelson Executive Employer Survey Report, 2014.
http://www.littler.com/files/2014_Littler_Executive_Employer_Survey.pdf

FMLA leave will always be reasonable under ADA law

To begin, FMLA leave will always be reasonable under ADA law when an employee is eligible and qualified. If an employer has concerns about FMLA leave, or if leave has been used outside of what the healthcare provider has stated, an employer can require recertification of an employee. This can be done at the end of a leave or certification period, or if use is inconsistent with FMLA certification for personal and family care. Similarly, if you have concerns FMLA leave is not medically needed, you can consider a second opinion option. If a second opinion comes back and it provides an opinion different than the employee's original request, he/she can request a third and binding opinion under this process. Be sure to consult with your state's specific laws for example, California law differs significantly.

Key issues to keep in mind.

When entering second and third opinion options, there are key issues to keep in mind. If requested by the second opinion health care provider, an employee must release medical records to the provider conducting the opinion. In addition, in the case of a second opinion chosen by the employer, the provider must not be a one that is regularly used by the employer with some exceptions³. The employer pays the full cost of both a second and third opinion. And finally, in a third opinion, the provider must be chosen from a mutual list by the employer and employee. Note, employing a second or third opinion can be expensive, so budget accordingly.

The misuse of FMLA leave threatens its integrity and undermines its intent—to provide job-protected leave for those in need, for defined periods of time. The truth is the FMLA's impact on the American employer is significant.

Once the employee has exhausted FMLA entitlements, the ADA requires employers to consider additional leave, as long as it is reasonable. Criteria that makes leave reasonable outside of FMLA is when there is 1) a known duration of leave and 2) leave is expected to support a return to work and 3) there is an availability of qualified substitutes. In these cases, employers can use the disability interactive process to evaluate if leave outside of FMLA is reasonable. To manage this and to address concerns with abuse, misuse and excessive use of leave, it is important to have a leave management program. In this program begin inviting those into the process that are the highest users of time off and/or where there is concern for abuse or misuse of leave based on consistently applied criteria. For example, include those who have taken more than 60 days off, 2 years in a row, or whose leave is taken more than 50 percent of the time on Mondays and Fridays. Whatever you chose, be consistent and be sure to use data – not complaints to delineate who will be included. When picking a data point, it is recommended moms and employees with accepted workers' compensation claims are removed from your leave management program.

I employ a disability interactive process hallway with four doors – or process steps. Once you have a list of employees you wish to explore interactive process activities with, the first door – obtaining clear

³ 29 CFR § 825.307(b)(2) - "selected health care provider may not be employed on a regular basis by the employer. The employer may not regularly contract with or otherwise regularly utilize the services of the health care provider furnishing the second opinion unless the employer is located in an area where access to health care is extremely limited (e.g., a rural area where no more than one or two doctors practice in the relevant specialty in the vicinity)."

medical information will be the most important in understanding if leave is being misused. Ask specific questions of the employee's provider. For persons not taking leave under FMLA, if you cannot get information that is reliable, consistent with past usage, or timely, consider a Fitness for Duty examination. Once medical information is obtained it is vital you engage, interact and explore with the employee possible accommodations and openly discuss if the leave is reasonable. Doing so ensures when a final decision is made by the employer, the employee isn't surprised.

Remember why you are doing this work.

Finally, it's important to remember why you are doing this work. Your aim is for full time employees to work full time, with regular and reliable attendance. You are honoring the employees who come to work when they are well, and making sure employees who are missing when not sick know you see their absences. Stay inspired and humane. A leave management program is not about firing people. It is to support persons who are too disabled to work full time to consider alternative options, and to remind those that may be abusing leave to understand they matter, and you see their misuse. The goal is improved attendance and employment longevity.

About the Author



Rachel Shaw authored the award-winning and industry best-selling book "The Disabled Workforce: What the ADA Never Anticipated." She is the president of Shaw HR Consulting, Inc., which provides disability compliance consulting, training and program development for organizations in the public and private sector. She will be speaking on how to combat FMLA and other leave misuse on March 10th at HR West 2020 in Oakland, Calif.