Facebook Foils FMLA Faker

Insights
5.01.13

(Healthcare Update, No. 2, May 2013)
The legitimate and beneficial purposes of the Family and Medical Leave Act (FMLA) are undeniable. The law provides employees who have a serious health condition, are caring for a family member with a serious health condition, or are undergoing certain major life events such as the birth or adoption of a child, a safety net in the form of job-protected leave.

Many employers can recount success stories of employees who were experiencing very stressful times in their lives, took FMLA leave for qualifying reasons, and returned to the workplace as productive members of the team. These success stories underscore the purpose and benefits of the FMLA.

Unfortunately, these everyday success stories are not the ones that stand out in the minds of many managers, and the old adage that a bad apple can ruin the barrel is true. Many experienced human resources professionals can vividly recall an employee who they believed was fraudulently taking FMLA leave. These can be the employees who conveniently develop a health condition the same day they were to max out on attendance points or the employee who appears to believe the FMLA stands for the Friday, Monday Leave Act while taking intermittent leave.

Employees who abuse the FMLA are the exception and not the norm. But one instance of suspected abuse can sour management to the law, create discord in the workplace, and undermine employee morale. A recent case in Michigan reminds employers both of the impact of social media on the workplace and also that employers are not defenseless against FMLA abuse by employees.

Fraud Found On Facebook
Detroit Medical Center hired an employee as a student nurse associate and then promoted her to a full-time registered nurse position. She was a satisfactory performer and capable of performing the duties of her position. One day, the nurse was moving stretchers and subsequently felt "excruciating" pain in her lower back and legs. Her doctor said she was unable to work and the Medical Center granted her three months of FMLA leave.

While on FMLA leave, the nurse took a prepaid, planned trip to Mexico and posted vacation photos on Facebook, including pictures of herself riding in a motorboat and lying in bed with two bottles of beer in her hand. The nurse also posted pictures on Facebook of herself holding her two

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

grandchildren, one in each arm, and wrote about trips to Home Depot, watching her grandchildren, and taking online classes.

The nurse's Facebook postings irked her coworkers. After seeing the postings, they complained to her supervisor about what they believed was her misuse of FMLA leave. Coincidentally the supervisor had recently received an email from the nurse complaining that she had not received a get well card from staff at the Medical Center. In light of the coworker complaints, the supervisor responded to the email stating: "the staff were waiting until you came back from your vacation in Mexico to determine the next step. Since you were well enough to travel on a 4+ hour flight, wait in customs lines, bus transport, etc., we were assuming you would be well enough to come back to work."

The nurse replied that she was in a wheelchair in the airport and as she went through customs and that she "wouldn't have went to Mexico if a wheelchair was not available at both airports so I would not have to stand for any length of time."

Upon her return to work approximately a month later, management from the Medical Center met with the nurse to discuss her use of leave. Initially, the nurse insisted that she had to use a wheelchair on her trip to Mexico. But when shown printouts of her Facebook postings, and reminded that airports have cameras, the nurse admitted she lied about the use of wheelchairs and had never used a wheelchair on her Mexican vacation. The nurse was terminated for fraudulent continuation of FMLA leave. Giving new meaning to the word "chutzpah" she subsequently filed a lawsuit alleging that the Medical Center interfered with her lawful use of FMLA leave and retaliated against her for taking leave. She admitted, again, during the course of the lawsuit that she had lied about using a wheelchair while on vacation.

A federal judge in Michigan dismissed the lawsuit, finding that the Medical Center had terminated the nurse based on its honest belief that she had abused leave and not for taking leave. The judge ruled that "[b]ased on such undisputed dishonesty" the Medical Center had a right to terminate the nurse "without regard to her leave status because the FMLA does not afford an employee greater rights than she would have if she was not on FMLA leave." The judge determined that the nurse's conduct, including her Facebook postings and admitted dishonesty about using a wheelchair, were sufficient evidence to support an honest, good faith belief by the Medical Center that she had misused her leave.

Mexico, Margarita, And Medical Leave

Bad decisions involving margaritas and Mexico appear to plague not just college-aged spring breakers, but also adults. The February 2013 decision involving the Detroit Medical Center was not the first decision where a court dismissed the lawsuit of an individual fired for FMLA abuse after a Mexican vacation. In May 2011, a federal court in Pennsylvania upheld the termination of an employee after she went on a trip to Cancun while on FMLA leave for a hysterectomy.

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

In the Pennsylvania decision, the employer required employees to use accrued paid sick leave while on FMLA leave. Pursuant to its policy, employees on paid sick leave were not permitted to travel away from the vicinity of their homes, except for emergencies and medical appointments. The employer did not believe that a trip to Cancun constituted an emergency and, therefore, terminated the employee for misusing leave. The court found in favor of the employer in the ensuing lawsuit.

Practical Pointers For Preventing Problems

The best way to prevent and respond to suspected FMLA abuse begins with good documentation. It is imperative that an employer has a complete and current certification form for every employee taking FMLA leave. A complete and current certification form will identify the job functions the employee is unable to perform while on leave, the medical facts related to the condition necessitating leave, and information on the duration and frequency of the need for leave. Too often, employers accept incomplete certification forms and subsequently find their hands are tied when they try to prove an employee is acting inconsistently with their restrictions or need for leave.

If suspected abuse is brought to your attention, document how you learned about the potential abuse or misuse of leave. If the report involves Facebook or other online postings, it is important to understand how the online content was accessed. If it was posted on a public page or a "friend" of the employee voluntarily produces a document such as a printout from a Facebook page, federal and state privacy laws are generally not implicated.

But it's not permissible for employers and managers to become overzealous when playing detective and either log into an employee's online accounts or require other employees to share private, posted online content, as doing so may violate privacy laws.

Investigate and document credible reports of abuse. Employees on FMLA leave do not have any greater protections than those who are not. Therefore, termination for misuse or abuse of FMLA leave is generally appropriate if you honestly and in good faith believe that the employee misused leave, the action is consistent with how an employer would treat individuals who have not taken FMLA leave, and the decision is not motivated by the fact that the employee took FMLA leave.

Finally, review your policies on FMLA leave and paid leave. Policies should contain provisions prohibiting the misuse of leave and warn that misuse or abuse of leave is grounds for discipline up to and including termination.

For assistance in reviewing your leave policies or handling a tricky FMLA situation, give us a call.

For more information contact the author at KLuchka@laborlawyers.com or (803) 255-0000.

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.