

MARCH 2019 | VOL 11 NO 2

# @work

Official Publication of Disability Management Employer Coalition

## Employment Practices Compliance

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# FMLA, or the Friday-Monday Leave Act

While the Family and Medical Leave Act (FMLA) was created for a noble and much needed reason — “to balance the demands of the workplace with the needs of families” — it can foster misuse by employees who struggle to maintain regular attendance. Today, employers find themselves struggling to combat leave misuse that often happens concurrently with the Americans with Disabilities Act (ADA) disability interactive process.

If it appears an FMLA leave has been used outside of the healthcare provider’s stated reason, an employer can require recertification. This can be done at the end of a leave or certification period or whenever use is inconsistent with FMLA certification for personal and family care.

If you doubt the medical validity of the original request for FMLA leave, you can request a second opinion. If a second opinion conflicts with the employee’s original request, he or she can request a third and binding opinion under this process. Be sure to consult specific state laws; California’s law, for example, differs significantly.

For second and third opinions, keep several key issues in mind. The provider of the second opinion can require an employee to release medical records for the opinion. When the employer is requesting the second opinion, the employer cannot select a provider it

routinely uses, unless the employer is located in an area with extremely limited access to healthcare, such as a rural area. The employer pays the full cost of both a second and third opinion. In a third opinion, the provider must be chosen from a list mutually agreed upon by the employer and employee. Note that second or third opinions can be expensive, so budget accordingly.

Once an employee has exhausted FMLA entitlements, the ADA requires employers to consider additional leave, and this may qualify as reasonable when:

- 1) leave duration is known;
- 2) leave is expected to support return to work; and
- 3) qualified substitutes are available.

In these cases, employers can use the disability interactive process to evaluate if leave outside of the FMLA is truly reasonable. This process is conducted within a leave management program in which criteria are applied consistently. Invite into the process the employees who are the highest users of time off or where other patterns suggest consistent abuse. For example, include those who have taken more than 60 days off for two years in a row or whose leave use falls on Mondays or Fridays more than 50% of the time. Whatever your criteria, apply them consistently based on data — not complaints — to delineate who will be

reviewed. However, in the first review cycle at least, consider removing pregnant and post-partum mothers and approved workers’ compensation claimants, as these groups more often have legitimate reasons for falling outside the norm.

Once you have selected a list of employees for the disability interactive process, begin by obtaining clear medical information to objectively assess if leave is being misused. Ask specific questions of their healthcare providers. For persons taking leave outside FMLA, if you cannot get reliable, timely information about past usage, consider requiring a fitness-for-duty examination. Once medical information is obtained, then engage and interact with the employee to explore potential accommodations and openly discuss if a leave is reasonable. Ensure that when the employer makes a final decision, the employee isn’t surprised; this helps reduce litigation.

Finally, remember why you are doing this work: stay inspired and humane. Leave management is not about firing people. It is about finding alternatives for persons who are too disabled to work full time, and reminding those who may be abusing leave to understand they matter and you see their misuse. The goal is improved attendance and employment longevity.