

U\$TEWARD

FIRST LINE OF DEFENSE

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA • OCTOBER 2019

When Discipline for Absences is Prohibited

DON'T
LEAVE
WORK
WITHOUT
IT!



Here are some situations that routinely occur. Does the employee have a case or not?

1) Maurey Sugar comes up to his steward and says, "Lucy, the foreman says I got 2 points for being out of work last week. I missed two days because I had to take my mother in for chemotherapy treatments. I don't think that's fair." Lucy Parsons says, "Hold on Maurey, let me check this out. By the way can you get proof that your mother is receiving chemo treatments?"

2) Ralph Cramden approaches his steward and says, "I want to file a grievance. I was out of work yesterday with a bad back and the supervisor says that's an unexcused absence. I say I was on FMLA leave and you can't be disciplined for an FMLA leave." Miguel, the steward asks, "Do you have a doctor's note?" Ralph gets mad and says, "I don't need a doctor's note, it's none of their business. I just know it comes under FMLA."

3) Emma Lazurus calls her steward on the phone at night. "Peter, I didn't come to work today because my doctor said I should stay off my feet for a couple of days." Peter Kropotkin replies, "Well that make sense, when's the baby due anyhow?" "Just about 5 weeks from now. I'm calling because Adolph my supervisor said I can't miss work or I'll be written up. He said I have to put in for maternity leave if I am going to miss any work but I'd rather wait a couple more weeks before I put in for the leave."

Peter replies, "You do what the doctor tells you, I'll take care of Adolph. I'll call you tomor-

row."

All these situations touch on absences covered by the FMLA, the Family and Medical Leave Act which was passed by Congress in 1993. Since the law was passed, there have been many rulings by the US Department of Labor and the Courts on the application of the law.

First a few brief reminders on the basics of the FMLA:

FMLA covers all Federal, State, County and Municipal workers. It also covers all workers in the private sector whose employer has 50 or more employees. These employers are called "covered employers."

For an individual to be covered by the FMLA he/she:

Must work for a covered employer and have worked for that employer for at least 12 months and worked at least 1250 hours in the past 12 months.

An employee can apply for Family and Medical Leave under any of the following conditions:

- A serious health condition makes the employee unable to work;
- The employee must care for a seriously ill child, spouse or parent;
- Before child birth for prenatal care or a condition which makes a pregnant woman

unable to work. Child birth or to take care of a newborn up to 1 year old (thus both men and women can apply for this kind of leave); or

- Upon placement of a child with the employee either through adoption or foster care.
- Any qualified exigency resulting from a family member going on active duty; or
- Up to 26 weeks leave for a family member or next of kin to care for a service member undergoing medical treatment for a serious injury sustained in the line of duty.

The FMLA provides for **up to 12 weeks unpaid leave from work per 12 month period**. During this period an employee's benefits cannot be terminated, he/she cannot be disciplined for missing work and upon return to work must be returned to his/her job.

"**Serious health condition**" is defined as an illness, injury or condition that meets one or more of the following standards:

- It requires medical treatment which incapacitates the employee or a family member for more than 3 consecutive calendar days and which requires continuing treatment by a health care provider;

Examples may be:
Broken bones
Pneumonia

(continued on back)

(continued from front)

Tonsillitis

- Incapacity related to pregnancy or to a serious chronic disorder;

Examples:

Arthritis (severe)
Asthma
Cancer
Colitis
Diabetes
Epilepsy
Heart disease
Lupus

- An overnight stay in the hospital;
- Permanent or long term disability.

The FMLA allows employers to require **medical certification** from a health care provider that leave is necessary because of the employee's or family member's serious health condition. A note saying "Joe is sick" won't do. The employer also has the right to send an employee to another doctor (which they must pay for) to verify the original diagnosis.

What about **notice**? The employee must provide 30 days notice if the need for leave is foreseeable. If the need for leave is unexpected the employer must be notified of the medical facts within two working days.

What is commonly not covered, because they do not incapacitate the individual for more than three consecutive days, are illnesses such as the common cold, flu, strep throat, ear infections, hay fever, minor ulcers, poison ivy or upset stomachs.

Let's look at the problems:

1) Should Maurey Sugar get points for missing work while taking his mother to chemotherapy treatments?

Even with a "no fault" (or lazy boss) attendance system, workers cannot be disciplined for legitimate FMLA absences. In this case Maurey is taking care of his mother, for a serious illness, cancer. His mother of course qualifies as family under the FMLA and cancer treatment meets the requirements as a serious illness. Therefore taking one's mother for chemo treatments would qualify as FMLA leave. In the future Maurey should try to tell the employer as far in advance as possible when he will be absent for this reason. **If asked, he will have to bring in a doctor's statement** as proof that his mother has cancer and she must receive chemotherapy treatment. However, an employer's request that employees on intermittent leave provide a doctor's note for each absence is tantamount to requesting a medical certification *for each absence*, which may violate the FMLA.

2) Should Ralph be disciplined for missing one day with a bad back and does he have to present a doctor's note?

This one is a little harder. First, under FMLA, if the employer asks, the employee must present a doctor's note which explains the nature of the illness or injury. The employer's general awareness of the employee's prior back troubles would not relieve him of the obligation to inform the company that he was taking leave because of his back. So Ralph must present the doctor's note. A bad back could be covered under FMLA **if Ralph can show that it is a chronic ongoing condition**. If it is just a onetime thing, then it is **not** an FMLA case. Ralph will need back-up to prove this is a chronic condition. That means proving he has been getting ongoing treatment and the doctors really believe something is wrong. Many employers are suspicious of back injuries so Ralph can probably expect to be sent to another doctor for a second opinion.

3) Can Emma be made to take maternity leave when she doesn't want to?

Peter was right in telling Emma to follow her doctor's orders. Missing work due to complica-

tions from pregnancy is covered under the FMLA.

Emma's union contract also allows 26 weeks of paid sick and accident leave for pregnancy and the employee is allowed to decide when to take it. However S&A leave only applies to absences longer than 3 days. Emma therefore can use the FMLA to cover the one or two day absences she has due to her pregnancy. These will be unpaid, but then Emma can wait to apply for the maternity leave for when she wants it. Again she may need to produce a note from her doctor explaining why he wants her to "stay off her feet." So in this case the FMLA is an extra cushion added onto the union-negotiated sickness and accident leave.

Note: Employers can count sick leave as time used from a person's 12 weeks of FMLA. So if Emma takes 15 weeks of maternity leave, the employer could count the 12 weeks of FMLA time as part of the maternity leave.

For a more detailed review of how FMLA works you can order "The FMLA Handbook- A Union Guide to the Family and Medical Leave Act" by Robert Schwartz. \$20.00 per copy plus shipping and handling. Go to labornotes.org/store/books/work-rights-press.

Tips for Stewards - A quick checklist for FMLA absences

- 1) **Is your employer covered by the FMLA?**
Private employers with 50 or more employees
Public employers, including federal, state, city & local agencies & schools
- 2) **Is the employee in question qualified for FMLA coverage?**
Has worked for employer for at least 12 months, and
Has worked at least 1,250 hours during the past 12 months
- 3) **Does the absence in question come under one of the six qualifying situations?**
 - A serious health condition;
 - Care for a seriously ill child, spouse or parent;
 - Child birth or to take care of newborn up to 1 year old; or
 - Placement of a child with the employee through adoption or foster care.
 - A qualified exigency resulting from a family member going on active duty;
 - *Up to 26 weeks leave for a family member or next of kin to care for a service member undergoing medical treatment for a serious injury sustained in the line of duty.*
- 4) **If it is an absence due to health problems, does it meet one of the four definitions of "serious"?**
 - A hospital stay of at least 1 night;
 - Incapacity for more than three consecutive calendar days and continuing treatment by a health care provider;
 - Incapacity due to a serious chronic disorder; or
 - Pregnancy or long-term disability.
- 5) **Can the employee provide the doctor's notes if required?**

If an employee's absence meets these requirements then he/she should not be disciplined for the absence and it cannot be used against him/her in future cases.