**FMLA and Restoration of Job**

Following are some common Q&A’s regarding the Family and Medical Leave Act (FMLA). This is not intended to be an exhaustive list.

***1.  Can you deny FMLA when the medical certification states the employee will not be able to perform their job for an indefinite period of time?***

Unless the employee gives unequivocal notice that they do not plan to return to work (recommended in writing), a covered employer must grant FMLA to an employee who meets the eligibility criteria (12 months, 1250 hours in previous 12 months and a qualifying serious health condition).  If an employee advises that they would like to return but are unable to because of health reasons, they will be entitled to the FMLA benefit.

***2.  What are other reasons FMLA can be denied?***

* The employer is not covered, or the employee works at a location that is not covered (50 employees within 75 miles).
* The employee has not worked 12 months (does not have to be consecutive) and 1250 hours in the previous 12 months.
* The employee requests leave for a non-covered family member.
* The employee fails to provide the required medical certification to support the need for leave when the reason is not obvious.  (Employers may have enough information to designate FMLA when requested in some cases such as known inpatient hospitalization, covered by short term disability or workers’ compensation.)
* The employee fails to provide adequate notice of the need for foreseeable leave or follow the appropriate call in procedures. [See [http://www.law.cornell.edu/cfr/text/29/825.302.]](https://www.law.cornell.edu/cfr/text/29/825.302)

***3.  If an employee’s job was already scheduled to be eliminated before we're notified of the need for upcoming FMLA, can we still terminate or should we wait until the end of the FMLA?***

If the decision was already made and the business documentation is in place (reasons, emails about decision, management conversations, etc.), the FMLA may be denied.  You would have the same dilemma for denying restoration as for denying leave.   However, it is your choice if you want to provide the FMLA leave benefit and then deny restoration to continue employee benefits during this period (precedent setting).  If you cannot support the business reasons to eliminate the job other than for the taking of FMLA leave, reconsider your decision.

***4.  FMLA restoration can be denied if:***

* The employee is a key employee, and you notified them at the time they requested FMLA that restoration would cause “substantial and grievous economic injury."  The definition of a key employee under FMLA is is a salaried, FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed by the employer within 75 miles of the employee's worksite. Under limited circumstances where restoration to employment will cause "substantial and grievous economic injury" to its operations, an employer may refuse to reinstate certain highly-paid, salaried "key" employees. In order to do so, the employer must notify the employee in writing of his/her status as a "key" employee (as defined by FMLA), the reasons for denying job restoration, and provide the employee a reasonable opportunity to return to work after so notifying the employee. (US DOL)
* You determine the employee fraudulently applied for FMLA and used the time for another reason.  You must be able to prove fraud to deny the FMLA.  Obviously this would also result in disciplinary action according to your company policy.
* You have a policy that employees cannot work for another employer while on an approved leave of absence, and you determine the employee worked. [Note: It is possible that an employee may be unable to perform the functions of their job with your company but could perform other work that would be within their medical restrictions.  However, you may still have a policy that they cannot work during the hours they would have worked for you when on a Leave of Absence.]
* Their job would have been eliminated even if they had not been on FMLA (layoff, restructure, etc.).  Documentation to show the business reasons for this may be required if an employee files a claim.

For more information on the FMLA and other HR issues, contact Catpult's Advice team at 919-878-9222..

Written by a Catapult Advisor