
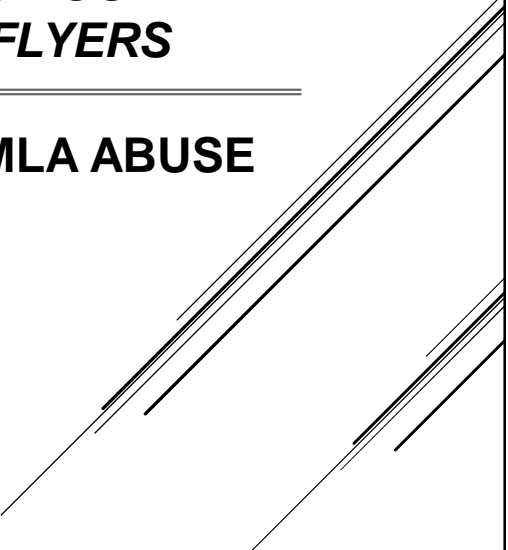



GROUNDING YOUR FREQUENT FLYERS

PREVENTING FMLA ABUSE

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HOW BIG OF A PROBLEM?

2013 DOL survey:

- **3% of covered worksites reported abuse**

2007 SHRM survey:

- **39% of HR professionals granted leave they believed to be illegitimate**



WHAT DO YOU THINK?



In the last three years, do you believe that at least one employee in your organization has abused his or her FMLA leave rights?



OVERVIEW



- **Time off**
 - **12 weeks of leave in 12 month period for most FMLA events**
 - **26 weeks of leave in 12 month period for military caregiver leave**
 - **26 weeks is combined total leave**



OVERVIEW



- **Eligibility**
 - **Work 12 months for company**
 - **Work 1,250 hours in last 12 months**
 - **Employer must have 50 employees within 75 miles**



OVERVIEW



- **Qualifying reasons**
 - **Birth/care of child**
 - **Placement/care of foster or adopted child**
 - **Self, spouse, son/daughter, or parent with serious health condition**
 - **Military qualifying exigency**
 - **Military caregiver**



OVERVIEW



- **Types of leave**
 - **Block**
 - **Intermittent**
 - **Reduced schedule**



OVERVIEW



- **Employer liability**
 - **Interference (no intent)**
 - **Retaliation (intent required)**

Which kind is easier to defend?



WHAT DO YOU THINK?



Better to terminate an employee who is out on leave or wait until the return?

- 1. Terminate NOW**
- 2. Wait and See**
- 3. Depends on Circumstances**



“HONEST BELIEF”



- **Judicially created defense**
 - **Employer does not need to establish employee actually abused FMLA leave entitlement**
 - **Employer need only demonstrate honest belief that abuse was occurring**



“HONEST BELIEF”



- **Some courts also require employer to show it “reasonably relied” upon particular facts suggesting abuse**
- **Other courts require showing that belief of abuse was “reasonable and honest”**



“HONEST BELIEF”



- **Employee may still prove that alleged abuse was just a pretext for retaliation**



COMMON TYPES OF ABUSE



- Moonlighting/second job
- Personal matters
- Failing to take care of family members
- Extended vacations
- Recreational activities (partying etc.)



WHAT DO YOU THINK?



Can employees work a second job while on FMLA leave?

1. Yes
2. No
3. Depends



MOONLIGHTING



Pharakhone v. Nissan N.A. (6th Cir.)

- Employer had documented policy against second job without approval while on leave
- Took leave to care for wife and child after birth
- Informed employer he was going to run the family restaurant



MOONLIGHTING



Pharakhone (cont.)

- Ignored employer's warning about not performing second job
- Employee terminated for FMLA abuse



WHAT DO YOU THINK?



Was Pharakhone's termination upheld by the court?

1. **Yes**
2. **No**



MOONLIGHTING



Pharakhone (cont.)

- **FMLA permits employers to adopt "uniformly-applied policy governing outside or supplemental employment"**
- **Court found no evidence company had ulterior motive for termination**



MOONLIGHTING



Agee v. Northwest Airlines, Inc. (E.D. Mich.)

- Employer apparently did not have policy against moonlighting
- Employee went out on FMLA leave for condition that allegedly rendered him incapable of working



MOONLIGHTING



Agee (cont.)

- Employee then began working on a ranch caring for 50 horses
- Terminated for lying about reason for leave



WHAT DO YOU THINK?



Was Agee's termination upheld by the court?

- 1. Yes**
- 2. No**



MOONLIGHTING



Agee (cont.)

- Court determined termination was based on employee's lie, not his use of FMLA**



PERSONAL ERRANDS



Kitts v. General North Telephone, Inc. (S.D. Oh.)

- Employee was authorized to take intermittent leave for panic disorder
- Need for leave could be up to once a week



PERSONAL ERRANDS



Kitts (cont.)

- Employer denied PTO to attend parent-teacher conference
- On day of conference, Kitts took FMLA leave, then later decided she felt better and attended conference



PERSONAL ERRANDS



Kitts (cont.)

- Supervisor became suspicious, but Kitts denied going to conference
- Employer hired P.I. and Kitts admitted to lying
- Employer terminated Kitts for misrepresenting health status for absence



WHAT DO YOU THINK?



Was Kitts' termination upheld by the court?

1. Yes
2. No



PERSONAL ERRANDS



Kitts (cont.)

- FMLA does not prohibit investigating alleged dishonesty or terminating for misconduct



PERSONAL ERRANDS



Mosley v. Hedges (N.D. Ill.)

- Employer suspected FMLA abuse and hired P.I.
- P.I. observed Mosley walking, driving, running errands, and shopping
- Mosley terminated for engaging in activities contrary to medical limitations



WHAT DO YOU THINK?



Was Mosley's termination upheld by the court?

1. Yes
2. No



PERSONAL ERRANDS



Mosley (cont.)

- Company honestly believed employee was misusing FMLA

BUT BEWARE



PERSONAL ERRANDS



Nelson v. Oshkosh Truck Corp. (E.D. Wis.)

- “FMLA contains no requirement that an individual on intermittent leave must immediately return home, shut the blinds, and emerge only when prepared to work.”



CARING FOR FAMILY MEMBERS



- How much time do you have to spend caring for family member?



CARING FOR FAMILY MEMBERS



Scruggs v. Carrier Corp. (7th Cir.)

- Employee had FMLA to take mother to doctor's appointment every six months
- P.I.'s video surveillance showed Scruggs not leaving own house on day he had taken leave to take mother to doctor
- Employer terminated Scruggs



WHAT DO YOU THINK?



Was Scruggs' termination upheld by the court?

1. Yes
2. No



CARING FOR FAMILY MEMBERS



Stonum v. U.S. Airways, Inc. (S.D. Oh.)

- Obtained FMLA leave to care for mother
- Co-worker informed supervisor that Stonum was using leave to do other things
- P.I. hired and observed Stonum's activities
- On one occasion, Stonum took a full day absence and spent 12 minutes with mother



CARING FOR FAMILY MEMBERS



Stonum (cont.)

- On another day, he didn't visit at all
- Stonum denied abuse and employer terminated her for repeatedly misusing her FMLA leave



WHAT DO YOU THINK?



Was Stonum's termination upheld by the court?

- 1. Yes**
- 2. No**



TAKING OR EXTENDING VACATION



Hughes v. City of Bethlehem (3rd Cir.)

- "Whatever happens in Las Vegas does not necessarily stay in Las Vegas!"**
- Employee is diabetic**
- Went to Las Vegas for vacation and permanent lip/eyebrow tattoos for cosmetic reasons**



TAKING OR EXTENDING VACATION



Hughes (cont.)

- Timing conflicted with two days she was supposed to work, so she called in sick
- “Anonymous” note claimed Hughes was improperly using sick leave



TAKING OR EXTENDING VACATION



Hughes (cont.)

- Hughes denied going to Los Vegas
- Employer ultimately determined Hughes had been in Los Vegas, and terminated her employment



WHAT DO YOU THINK?



Was Hughes' termination upheld by the court?

- 1. Yes**
- 2. No**



TAKING OR EXTENDING VACATION



Hughes (cont.)

- No interference – calling in “sick” did not provide notice FMLA leave was needed**
- Legitimate reason for termination – improper use of sick leave and attempt to cover up her whereabouts**



HAVING “FUN” DURING LEAVE



Jaszczyszyn v. Advantage Health Physicians Network (6th Cir.)

- Employee on intermittent leave for back pain that could flare up “about four times a month”
- “Friend” posted pictures on Facebook of employee attending Polish heritage “festival”



HAVING “FUN” DURING LEAVE



Jaszczyszyn (cont.)

- Other employees were upset at having to cover for employee while she was out having fun and reported her
- Employer investigated and terminated employee for FMLA abuse
- Employee sued for interference



WHAT DO YOU THINK?



Was Jaszczyszyn's termination upheld by the court?

1. **Yes**
2. **No**



HAVING "FUN" DURING LEAVE



Jaszczyszyn (cont.)

- **Interference claim failed because she received all leave to which she was entitled**
- **Retaliation claim failed – dishonesty was legitimate, non-retaliatory reason for termination**



ACTIVITY OUTSIDE RESTRICTIONS



Dalpiaz v. Carbon County (10th Cir.)

- Employee was benefits administrator who handled FMLA for county
- Leave due to a back condition
- Co-workers reported physical activity that exceeded restrictions



ACTIVITY OUTSIDE RESTRICTIONS



Dalpiaz (cont.)

- Employee lied about activity and did not cooperate with requested follow-up
- County terminated employment



WHAT DO YOU THINK?



Was Dalpaiz's termination upheld by the court?

- 1. Yes**
- 2. No**



“HONEST BELIEF”



- **Reviewed 35 court cases**
- **In each, employee terminated (or suspended in one case) for suspected FMLA abuse**
- **In each, employee sued employer for interference, retaliation, or both**



WHAT DO YOU THINK?



What was the employer's "win percentage" for those cases?

1. 0 – 33%
2. 34 – 67%
3. 68 – 100%



HONEST BELIEF

Lessons learned

- Surveillance can be valuable



HONEST BELIEF

Lessons learned

- Listen to suspected abuser
 - Can't defend actions absent a reasonable investigation



HONEST BELIEF

Lessons learned

- Implement FMLA abuse policies
 - No moonlighting or work while on leave
 - Courts have also upheld travel restrictions while on leave



INTERMITTENT LEAVE ABUSE



Employee exceeds estimated leave amount?

- How much is excessive?
- Use common sense and give benefit of the doubt when reasonable
- Medical certification only asks for an “estimate”



INTERMITTENT LEAVE ABUSE



Addressing “excessive” intermittent leave?

- Recertification because:
 - Estimate significantly exceeded
 - Circumstances have otherwise changed
 - Other information casts doubts on certification’s validity



WHAT DO YOU THINK?



Have you terminated an employee for suspected abuse or fraud?



DISRUPTIVE LEAVE



Seek leave schedule that accommodates employer's preference

- **Requires reasonable effort by employee**
- **Employer may actually facilitate scheduling of doctor's appointments**
- **Don't discuss the actual condition**



DISRUPTIVE LEAVE



Require employee to use PTO when allowed

- Employer policy controls
 - Can only require when paid leave could be taken for this type of leave
 - E.g., cannot require use of paid sick leave when caring for family member unless sick leave can be so used absent FMLA leave



TRANSFERRING AN EMPLOYEE



- Employer's choice when leave is foreseeable for planned treatment
- Must be agreed upon for pregnancy, birth or adoption/placement



TRANSFERRING AN EMPLOYEE



- **Limitations:**
 - **Must better accommodate periods of leave than regular position**
 - **Same pay/benefits (even if transferred to position that is normally lower pay)**
 - **Cannot require employee to take more leave than medically necessary**



TRANSFERRING AN EMPLOYEE



- **Limitations (cont.):**
 - **Cannot discourage intermittent leave (i.e., day shift to night shift transfer)**
 - **Return to prior position when intermittent leave no longer needed**



ADDITIONAL CONTROLS



- Establish employees' expectations of notice of leave when foreseeable
- Maximize use of medical certification availability
- Use the "rolling" 12-month period
- Limit leave increments to shortest period of time used by payroll, but must be 1 hour or less



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Questions?



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