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# Beware When Employees Call In "Sick" - Employers' Growing Obligations Under the FMLA

Under the Federal Family and Medical Leave Act of 1993 ("FMLA"), employers with 50 employees in a 75 mile radius generally have to provide up to 12 weeks of unpaid leave to eligible employees who have a serious health condition or employees who are needed to care for a parent, child or spouse with a serious health condition. A "serious health condition" is one that involves an overnight stay in a health care facility, a period of incapacity of more than 3 days and involves two or more treatments by a health care provider or a regimen of continuing treatment under a health care provider's supervision.

Under the FMLA, employees have to provide notice to their employer that they need leave for an FMLA qualifying reason. However, an employee need not even mention the statute by name to qualify for leave under the FMLA. In fact, notice is sufficient if the employee merely states that leave is needed for a potentially qualifying reason. Then, the burden shifts to the employer to inquire further to determine if the leave is for an FMLA qualifying reason. The implications for an employer who fails to properly designate leave as FMLA leave are significant. For example, if an employee is able to show that he or she was harmed by the employer's failure to designate, the employee may be entitled to additional leave beyond the 12-week maximum or other monetary or equitable relief.

As you can imagine, what constitutes "sufficient notice" by the employee is frequently litigated. Increasingly, the burden is being placed on the employer to determine whether the requested leave is FMLA-qualifying. This article discusses what does and does not constitute adequate notice by an employee to shift the duty onto the employer to further investigate whether the employee's request for leave qualifies under the FMLA.

*(Sufficient Notice By Employee)*

- Employee provided a brief note from employee's doctor stating that she needed three weeks off and told her supervisor she wasn't feeling well;
- Employee called in sick for 11 days after having a seizure at work;
- Employee sought time off for nasal surgery;
- Employee told the employer of series of health issues over the course of several months;
- Employee is discharged from hospital and employer required employee to obtain a doctor's release to return to work;
- Employer's knowledge of employee's nervous breakdown and depression and employer's receipt of doctor's note requesting time off for employee;
- Employee requested to work part-time to care for her sick husband;
- A request for time off to "get life back together" following pregnancy and being victim of domestic abuse.

*(Insufficient Notice By Employee)*

- Employee's note to employer only mentioned "state of mental and physical distress";
- A doctor's note that simply stated employee needed "medical therapy";
- Employee stated: "I am sick";
- Employee indicated that he wouldn't be coming into work because he "wasn't feeling well";
- Employee stated: "I am having personal and family problems";
- Employee stated: "I want to stay home with my wife until she has a baby";
- Employee requests leave to care for grandchildren whose father had been called up for military service;
- Employee stated: "I have thyroid meningitis, only rest and a strong immune system can fight off the virus";
- Employee stated: "My father's is sick";
- Employee told employer that she was "sick and pregnant."

Significantly, if an employee exhibits noticeable behavior changes or a deterioration in job performance, that may be enough to put the employer on notice that the employee may need FMLA leave. For example, in Byrne v. Avon Products, Inc., 320 F. 3d 379 (7th Cir. 2003), the Seventh Circuit concluded that when Avon knew that an employee had previously been treated for depression, the company was given adequate "notice" that the employee needed FMLA leave merely because his work habits and behavior had changed (i.e., he began sleeping on the job and exhibiting paranoia towards his coworkers), when he had previously been a model employee.

Similarly, in Lozano v. Kay Mfg. Co., 2006 WL 1083998 (N.D. Ill. Mar. 28, 2006), the employee may have given adequate notice of his need for leave when the employer knew that the employee had previously been hospitalized for a psychiatric condition, and when his work performance deteriorated after he returned to work.

However, not every change in behavior will put an employer on notice that an employee may need FMLA leave. For example, in Burnett v. LFW, Inc., 472 F.3d 471 (7th Cir. 2006), the plaintiff argued that his insubordinate behavior to his supervisor should have been a "red flag" because he had no performance issues in the past. However, the court refused to find adequate notice because the plaintiff's "changed behavior" was not related to any known medical condition. Similarly, in Stevenson v. Hyre Elec. Co., 2006 WL 2497783 (N.D. Ill. Aug. 24, 2006), the plaintiff also tried to argue that her sudden erratic behavior should have placed the employer on notice that she was suffering from a serious health condition and therefore needed FMLA leave. However, the court found that the alleged change in the plaintiff's behavior was not the source of her inability to communicate her need for FMLA leave.

The bottom line is that employers increasingly face a burden to ascertain whether an employee needs FMLA leave. They cannot sit back and wait for an employee to specifically ask for FMLA leave. Instead, employers must recognize that changes in an employee's performance or behavior may put them on notice of the need to explore whether the employee should be given FMLA leave, especially when the behavior or performance change is related to an underlying physical or psychological condition.