

MISCONDUCT DISCOVERED WHILE EMPLOYEE ON FMLA LEAVE

While we all strive to be knowledgeable when it comes to the complexities of our employment laws, it is often much more difficult than anticipated. This is especially true when you have competing or conflicting laws. One such area of law that can frequently challenge even the most experienced human resource professional, involves the Family Medical Leave Act and what appears to be conflicting standards with



the “best practices” commonly associated with managing unemployment liability. Employers are understandably cautious and hesitant when it comes to disciplining or discharging an employee while out on FMLA. The question arises: can we discharge someone if we discover some type of misconduct while an employee is on FMLA? If we do, would they be able to collect unemployment? If an employee is out on FMLA leave, what can be done regarding issues such as misappropriation of equipment, falsification of records or sexual harassment that might not be discovered for weeks or months? If such a violation or breach is discovered after an employee begins leave, what are the employer’s options?

Answer:

You can lawfully and appropriately discipline and discharge employees on leave on the same basis as every other employee. If you have sufficient grounds to fire someone who is on leave, you can do so. However, with the discharge and the leave in such close proximity, it could give rise to concerns that your stated reasons for discharge are simply a pretext for something else, so proceed carefully. For unemployment purposes, when an individual is on FMLA, the employer’s burden to comply

with the state’s statutory standard to prove “misconduct or a knowing violation of policy” is not negated, if they are to be appropriately discharged while on FMLA. To protect yourself against a claim arising from action taken while an employee is on FMLA, your organization should follow the same protocols they normally would to successfully prepare for an unemployment case. You must document your reasons for the discharge and have a strong, valid explanation why such action is being taken during the leave.

Strong validation is:

- 1 The misconduct was discovered during the leave itself or
- 2 The misconduct is connected to the leave, (i.e. employee lies to obtain leave, falsification of documentation, etc).
- 3 There is a work rule or policy in place that the claimant was aware of prior to violating such and did so, regardless. It is always best that this is a written policy!

Please remember, while the above listed are protections against certain claims or actions against the employer, you still need to meet the statutory standards for a discharge to be successful in your UI case. The burden of proof is on the employer to establish there is a policy in place, the claimant was aware of the policy, the claimant violated the policy and that you address all employees who violate this policy in a uniform manner. Obviously, there are competing interests in our scenarios (i.e. for UI purposes, you have to establish the

claimant's state of mind to satisfy individual state law versus the legal application and use of a Federal Leave statute). As you can see, there is an overlap regarding these competing issues (denying unemployment v. proper use of FMLA) but if done fairly, properly and equitably, both of these employer interests can be protected. Rule of Thumb: Never take any action against an employee on leave that you wouldn't take against those on the active payroll, and always check with your labor attorney before making a decision to terminate an employee on FMLA leave.

We hope this is helpful information. As always, if you have any questions about this Topic, please contact UTCA directly at 1-800-480-7725 or 1-888-395-7273. This article can be viewed on-line at www.utcainc.com by entering your client user name and password. Please contact UTCA if you do not have a client user name or password.

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