

# FMLA Interference: How To Get Sued

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Under the FMLA, an employer must not –

- Interfere with, restrain or deny the exercise of, or attempt to exercise, an employee's FMLA rights [29 U.S.C. § 2615(a)(1)], or
- Discharge or discriminate against an individual for opposing any unlawful practice under the FMLA [29 U.S.C. § 2615(a)(2) and (b)].

The Department of Labor regulations expand on these protections, providing –

- An employer is prohibited from interfering with, restraining or denying the exercise of (or attempting to exercise) any rights provided by the FMLA [29 C.F.R. § 825.220(a)(1)]
- An employer is prohibited from discharging or otherwise discriminating against any person (whether or not an employee) for opposing or complaining about any unlawful practice under the FMLA [29 C.F.R. § 825.220(a)(2)]
- All persons (whether or not employers) are prohibited from discharging or otherwise discriminating against any person (whether or not an employee) because that person has –
  - Filed a charge or initiated any proceeding under or related to the FMLA;
  - Given, or is about to give, any information in connection with any inquiry or proceeding relating to a right under the FMLA; or
  - Testified, or is about to testify, in any inquiry or proceeding relating to a right under the FMLA. [29 C.F.R. § 825.220(a)(3)].

Although the FMLA does not expressly prohibit an employer from terminating an employee for exercising, or attempting to exercise their FMLA rights, the regulations interpret the Act as prohibiting an employer from considering an employee's FMLA leave when making decisions about –

- Hiring
- Promotions
- Discipline

What is interference?

The regulations provide that interference includes –

- Refusing to authorize FMLA leave.
- Discouraging an employee from taking FMLA leave.
- Manipulating facts to avoid FMLA responsibility, including –
  - Transferring employees to avoid the threshold number of employees at a worksite.
  - Changing the essential functions of the job to preclude the taking of leave.
  - Reducing hours available to work to avoid employee eligibility.
- Not maintaining health benefits while an employee is on leave in the same manner as if the employee had continued to work.
- Proving the employee with notice each time a certification is required.
- Advising an employee when a certification is incomplete or insufficient.
- Advising an employee of the consequences of failing to provide adequate certification.
- Refusing to grant extension requests.
- Mischaracterizing FMLA leave as personal leave.
- Failing to explain FMLA benefits and leave rights in an employee handbook or at the time the employee requests leave.
- Forcing an employee to take unnecessary FMLA leave that interferes with a later request for FMLA leave.
- Suggesting an employee work from home rather than take FMLA leave.
- Failing to respond to an employee's inquiries and inform him of eligibility for leave.

### What is not interference?

Interference was not found where there was a technical violation of the Act, but no resulting prejudice to the employee. For example –

- Placing an employee on involuntary leave when she did not suffer from a serious health condition, where the employee was never subsequently denied FMLA leave as a result.
- Making sarcastic and derogatory comments about the need for leave, where the employee was granted leave whenever she requested it.
- Threatening an employee with termination if he did not return to work, where the employee was not actually terminated.
- Stating the employee is important to the company and the company really needs her.
- Prohibiting an employee from earning bonuses while on leave.

The employment team of Sandberg Phoenix and von Gontard P.C. can help employers address, work through, and litigate these and other employment law issues.