

**Dear HR Knowledge, does being on FMLA-protected leave excuse poor performance?**

The Family Medical Leave Act (FMLA) is a federal leave law that applies to all companies with 50 or more employees; public agencies; and all public and private elementary and secondary schools. Under the FMLA, eligible employees receive up to twelve (12) weeks of unpaid leave during a 12-month period for the following reasons:

- For the birth and care of the newborn child of an employee;
- For placement with the employee of a child for adoption or foster care;
- To care for an immediate family member (spouse, child, or parent) with a serious health condition;
- To take medical leave when the employee is unable to work because of a serious health condition;
- Any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty; or
- To care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the servicemember (military caregiver leave – 26 weeks).

When an employee requests or is granted an FMLA leave, this does not protect the employee against discipline or discharge for reasons unrelated to the FMLA leave. Therefore, if an employee would have been terminated or disciplined prior to, or regardless of, their leave status, employers can take action while an employee is on active FMLA, including those on intermittent leave, for appropriate disciplinary reasons independent of the FMLA leave. However, employers should proceed with caution. If poor performance was an issue in the past but the employer failed to properly address it and document employee discussions, beginning to do so in the wake of an FMLA-protected leave period could be problematic. In addition, the burden of proof that the employer was in the process of taking the disciplinary action or had already begun the termination process prior to the employee notifying the employer of the need for FMLA will be on the employer to prove. This is a difficult task if the employer has not properly documented throughout the employee's life-cycle and begins to document only after FMLA is requested.

Employers cannot hold an employee accountable for work that was not completed during an FMLA leave, and employees cannot be disciplined, terminated, or otherwise retaliated against in any way for requesting or taking a leave. Employers can take appropriate disciplinary action up to and including termination against those employees who have violated company policies or have a history of underperformance, when they have taken the proper steps to do so. However, if an employee feels they were retaliated or discriminated against for requesting or taking a leave and they pursue a claim, the courts put the burden on the employer to prove that the employee would have been disciplined or terminated regardless of the leave request or status.

**Here are some general guidelines when navigating discipline and the FMLA:**



1. Document, document, document. If you determine that performance improvement or disciplinary action is necessary, you must accurately and clearly document the decision and action. Additionally, you should document any actions taken regarding allegations of performance issues or misconduct.
2. Hold all employees to the same standard and enforce discipline consistently.
3. If there is a specific company policy or procedure that an employee did not follow, consider a progressive performance system and start with written warnings to address inappropriate behavior, when warranted. Before taking disciplinary action, counsel the employee, document the issue, and create a performance improvement plan, if needed. Failing to properly document these instances in writing is ultimately the failure of proof that your employee's performance was ever an issue in the first place.
4. Once performance issues surface, take prompt, corrective action, consistent with the company's standard policies and procedures. If an issue was discovered prior to the FMLA leave and an employer waited until the employee went on leave to take action, the timing could support an FMLA interference or retaliation claim.
5. If you pursue disciplinary measures, you should be able to prove that the same disciplinary action would have been taken regardless of any request for FMLA leave. For example, if you have previously investigated similarly situated employees involved in similar issues, who did not take FMLA leave, and you did not discipline them or you disciplined them less severely, you may be facing a valid FMLA interference or retaliation claim.
6. You should be able to accurately and consistently convey the reasons for an employee's discharge or other adverse action and provide documentation.
7. Prior to taking any action consult HR Knowledge, if you are a client, or consult your employment attorney to ensure that through the unbiased eyes of a third-party you are taking the appropriate action.

### About HR Knowledge

Founded in 2001, HR Knowledge, Inc. is a privately funded company providing integrated outsourced HR services tailored to our clients' needs. Our full array of offerings includes managed payroll, employee benefits administration, and HR consulting and support services, such as training, compliance, custom-built software solutions, and Hiring Process Management™, our comprehensive recruitment service that takes you from finding to onboarding new talent. Our major markets are fast-growing small- and medium-sized businesses, many of which are venture-capital-backed; foreign companies expanding into the states; and charter schools. Partnering with HR Knowledge can reduce your administrative costs, minimize your legal risk, help you find and develop talent, and alleviate the HR burden so that you can focus on your core business.

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