

What Am I Doing Wrong?? Common FMLA Mistakes November 2019

Article By:

Sheri L. Giger

Sean P. Dawson

“*What did I do wrong?*” and “*Am I doing this correctly?*” are frequent questions from clients regarding FMLA administration. This is the 27th blog in this series, which digs into the FMLA regulations and related issues to address discrete mis-steps that can result in legal liability.

Filling an employee’s position while on FMLA leave even when it appears that the employee might not return to work.

Does an employee in need of a transfer as an ADA accommodation get to fill the position of another employee on FMLA leave?

According to a Mississippi federal district court, the answer is “no.” In *Maxwell v. Wash. Cty., Miss.*, No. 4:18-CV-154, 2019 U.S. Dist. LEXIS 170065 (N.D. Miss. Oct. 1, 2019), an employee was on continuous FMLA leave for 12 weeks after exhausting all company-paid sick leave. The employer had some reason to believe that the FMLA employee would not be coming back to work because the employee failed to purchase personal devices that would enable him to perform his job.

Meanwhile, another employee who could no longer perform his job functions because of a disability requested a transfer to the FMLA employee’s position as an ADA reasonable accommodation. The employer refused the transfer request. While transfer to a vacant position may be a reasonable accommodation for an employee’s disability, the court concluded that a position is not “vacant” if the vacancy is created because another employee is on FMLA leave. The court found that the employer did not violate the ADA by refusing to transfer the ADA employee to the FMLA employee’s position—even though it appeared that the FMLA employee might not return to work. The court implied that if the employer had transferred the ADA employee, it would have violated the FMLA employee’s rights under the FMLA. The court reasoned that the FMLA employee’s position could only be considered “vacant” if the employer *knew for certain* that the employee was not going to return from leave.

This case addresses the unique situation of an employer’s FMLA obligations running up against ADA accommodation requests. This case illustrates that an employer can potentially violate the FMLA by

filling the position of an employee on FMLA leave even if the employer has some belief that the employee will not return to work after FMLA leave. What might be a reasonable alternative? Risk is likely reduced by placing the ADA employee into the FMLA employee's position on a *temporary* basis until the FMLA employee either returns from leave, or the employer is *certain* that the FMLA employee is not returning.

Jackson Lewis P.C. © 2025

National Law Review, Volume IX, Number 311

Source URL: <https://natlawreview.com/article/what-am-i-doing-wrong-common-fmla-mistakes-november-2019>