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Counting FMLA-Protected Absences: What Am I Doing Wrong?? Common FMLA Mistakes part 4

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What did I do wrong?" and "*Am I doing this correctly*?" are frequent questions from clients regarding FMLA administration. This is the fourth in a monthly series highlighting some of the more common mistakes employers can inadvertently make regarding FMLA administration.

Counting FMLA-protected absences against an employee.

Accurately tracking or coding FMLA leave is important to know how much of the allotted 12 weeks has been used by an employee. Proper tracking/coding becomes crucial when administering absence policies and programs. If an employer improperly tracks FMLA leave as non-FMLA time off, and then "counts" those absences when administering an absence management program, when giving an unsatisfactory performance review, or when terminating an employee, the result can be a FMLA lawsuit that can be very challenging to defend.

In *Wahl v. Seacoast Banking Corp.*, Case No. 09-81382-CIV-MARRA (S.D. Fla. Mar. 9, 2011), an employee prevailed on her claim for FMLA interference when she was fired in part for absences related to her pregnancy. The employee notified the employer of her pregnancy, and took intermittent leave related to morning sickness and other pregnancy complications. The employer counted the instances of absences and tardiness against the employee in its decision to terminate her – it decided that her unsatisfactory attendance in the past coupled with these new absences warranted her termination. The court found that the absences in question were protected by the FMLA, and the employee's initial notice of her pregnancy was sufficient to put the employer on notice that these types of absences would be FMLA-protected. The court decided that the employer's use of these pregnancy-related absences in its decision to terminate employment was improper and constituted FMLA interference. When the employer considered those absences in reaching its decision to fire the employee, it interfered with her right to take leave under the FMLA. The court also found that the employer's failure to properly designate the intermittent leave as FMLA was a violation of the statute.

Conversely, in *Nobach v. Auto-Owners Inc*., Civil Action No. 1:13-cv-1126 (W.D. Mich. Oct. 22, 2015), an employee claimed that her employer had counted her FMLA leave towards its decision to terminate her for absenteeism. As the litigation developed, the employee admitted that for much of the absences that she alleged were improperly counted as non-FMLA, she was either mistaken or had failed to follow company policy for notifying the employer that the reason for leave was FMLA.

The employer was further able to show that when all of the employee's properly-designated FMLA leave was excluded from her absences, she still had enough non-FMLA absences that would have resulted in termination. The court granted summary judgment for the employer, finding that the termination was not in violation of the FMLA.

By improperly tracking FMLA leave time, an employer increases its risk of facing FMLA claims. Employers should carefully analyze the administration of their absenteeism policies for any "weak points" in how FMLA time is tracked or coded, and revise the process as necessary to make sure that FMLA-protected absences are not counted against employees. Employers should also carefully scrutinize every absence leading to discipline or termination of an employee, to make sure none of the absences do not qualify for FMLA protection. It is important to remember that if the employee provided enough information to put an employer on notice that the time off might be FMLA qualifying, then the employer's FMLA obligations are triggered.

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