

# What can you not do while on FMLA leave?

## Top things to look out for.

FMLA leave serves an important purpose; allowing employees to take time off to care for family members or handle serious health issues without the risk of losing their jobs. However, FMLA leave is also a complex human resources matter for employers, who need to follow the law precisely while also keeping an eye out for potential FMLA abuse.

What happens when an employee out on FMLA leave starts posting photos from their luxurious beach vacation or mountain climbing adventure? Or when a co-worker spots them moonlighting at another job? Employers who jump to conclusions without diving into the specific guidelines on these matters may end up in hot water themselves if they wrongfully terminate or discipline employees on FMLA leave. However, that doesn't mean you can't take corrective action if any employee on FMLA leave truly violates the terms.

To help clarify what employees are allowed to do, we've outlined some of the most common concerns below. Learn what employees can and can not do while on FMLA leave, and when an employee's activities should actually raise suspicions.

### What is FMLA leave?

FMLA leave refers to leave taken in accordance with the Family and Medical Leave Act (FMLA). The FMLA is a federal law that allows eligible employees to take up to twelve weeks of leave for certain family or medical reasons within a single 12-month period. This leave is unpaid, but it is job-protected leave, meaning that employees are entitled to reinstatement to the same or an equivalent job position with equivalent pay and health benefits at the end of their leave. Employees may take this as an extended leave period or as intermittent leave throughout the year, depending on their medical or family needs.

### FMLA leave can be used for:

- Family bonding within one year of the birth, adoption, or foster care placement of a child.
- Possession of a serious health condition that significantly limits the employee's ability to perform the essential functions of their job. This may be due to the symptoms of the condition incapacitating the employee or for treatment related to a serious medical condition.
- Caring for a family member with a qualifying serious health condition. This generally applies to the employee's spouse, children, and parents. In rare circumstances, siblings may qualify.
- A qualifying exigency related to an employee's spouse, child, or parent's "covered active duty" military service.

**To qualify for FMLA leave, the employee must meet certain eligibility guidelines, including:**

- Working for a covered employer. Covered employers include private employers with 50 or more employees working within a 75-mile radius. Government agencies and local educational agencies also qualify as covered employers regardless of the number of employees that they have.
- Meeting length of service requirements. The employee must have worked for the same employer for at least 12 months and clocked in at least 1,250 hours of work during the preceding 12 months.
- Possessing a qualifying reason. Employees will need to provide verification, generally in the form of medical certification, showing that they have a qualifying reason to request FMLA leave.



## What employees can and cannot do while on FMLA leave

The guidelines on what employees can't do while on FMLA leave are not always black and white. Most FMLA issues vary on a case-by-case basis, so employers need to maintain clear procedures and documentation on FMLA matters and should seek legal advice before accusing employees of FMLA abuse or other wrongdoings.

### Going on vacation during FMLA Leave

An employee going on vacation during their leave period does not inherently mean that FMLA abuse is taking place. As long as the employee is using their FMLA leave for its intended purpose, there generally aren't any restrictions on where they can spend their time off.

For example, some families choose to use a portion of their family bonding leave as vacation time. Under the FMLA, new parents can use their leave at any point in the 12-month period following the birth, adoption, or foster placement of a child to bond with the child. Family vacations or visiting extended family with the child

certainly fall under family bonding time, so there's no reason for employers to balk at families using their FMLA time to go to Disney World or on another family getaway.

Employees may also perform FMLA-eligible caregiving duties for sick family members going on vacation. While you may picture those battling a serious health condition to be bedridden, it's not uncommon at all for seriously ill (and even terminal) patients to go on vacations to lift their spirits or see destinations that they've always wanted to experience.

Where vacationing often becomes more questionable to employers is when FMLA leave is taken for an employee's own serious health condition. An employee can certainly rest and recover from a medical procedure or health flair-up on a restful beach vacation, but an employee taking FMLA leave for a contagious illness like covid-19 probably shouldn't be spending their time off visiting crowded tourist destinations or nightclubs. When the activity does not align with the information provided on the employee's FMLA request and medical certification, FMLA abuse might be at play.

Employers need to tread carefully here as terminating an employee for vacationing on FMLA leave without a thorough investigation and strong reasonings for suspecting FMLA abuse will often lead to wrongful termination lawsuits and other legal disputes. Seek legal advice before taking any disciplinary employment action.

## **Completing work while on FMLA leave**

Employers cannot require employees on FMLA leave to complete or finish up any work. The Department of Labor (DOL) prohibits employers from interfering with, restraining, or denying the exercise of or an attempt to exercise any FMLA rights. This includes discouraging employees from using FMLA leave.

However, employees can technically work voluntarily during their leave. In the case of [D'Onofrio v. Vacation Publications Inc](#), the court ruled that "giving employees the option to work while on leave does not constitute interference with FMLA rights so long as working while on leave is not a condition of continued employment". Therefore, voluntary work is technically alright as long as all other employment laws, including applicable wage laws, are followed.

Employers should still not request that employees complete any work or encourage employees to work while on leave. Though it is generally considered acceptable to reach out with occasional questions related to the location of documents or the status of a project or account, as long as these communications are minimal and non-disruptive. If an employee volunteers to work during leave, employers may allow it, but they should proceed with caution and be cognizant of their wording and requests.

## **Working another job during FMLA leave**

FMLA leave is unpaid leave. This can cause financial stress for eligible employees that need to take FMLA leave to receive medical treatment, bond with a new addition to the family, or handle caregiving responsibilities for a sick family member. But can employees work a second job or pick up gig work during their leave to alleviate some of this financial burden? The answer is often yes.

The FMLA does not restrict an employee's ability to earn supplemental income while on leave. However, the law does allow employers to apply existing company policies on moonlighting to employees on leave. Per FMLA guidelines, "if the employer has a uniformly-applied policy governing outside or supplemental employment, such a policy may continue to apply to an employee while on FMLA leave". Employers that do not have such policies in place cannot restrict outside employment or deny FMLA leave protections to employees working a second or supplemental job during their leave unless the employee is engaging in FMLA leave abuse.

The one thing that employers will want to look out for here is employees working a second job that is very

similar to the job that they are on leave from. If the employee took leave in relation to their own medical condition and the essential job functions are largely the same between the two jobs, it could call into question the legitimacy of the employee's need for FMLA leave.

## Using FMLA Leave for Other Illnesses

Employees with intermittent FMLA leave approval should only use their leave for the specific medical issue or family situation listed on their FMLA documentation. An employee with FMLA approved for a serious health condition like migraines, depression, or cardiovascular disease shouldn't be using FMLA leave when they need to stay home with food poisoning. Employees on intermittent FMLA leave still need to use their standard sick leave when they need time off for illnesses not related to their approved leave purpose.

**Additional resource:** Read more about [FMLA requirements](#) and what they mean for your business.