



Fact or Fiction: Can an Employee be Fired while on FMLA?

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Employees and employers are often of the mistaken belief that an employee cannot be fired while on Family and Medical Leave Act ("FMLA") leave. The truth is that an employee on FMLA leave can be fired, but employers need to be very thoughtful and diligent when taking such action because terminating an employee on FMLA often invites litigation.

Litigation claims following an employee's termination while on FMLA typically assert that the employer terminated the employee in retaliation for taking FMLA leave. In order to establish a claim of retaliation under the FMLA, a terminated employee must generally prove that he or she:

- Took leave protected under the FMLA;
- Was terminated; and
- A causal connection exists between the employee taking FMLA leave and the termination.

In order to successfully defend against these allegations, an employer must be able to show that the termination occurred for another reason, such as poor performance or as part of a planned departmental restructuring. The employer's reasoning and basis for the termination should be thorough and well-documented. And it's best to consider such decisions in consultation with legal counsel so that red flags and tripwires that might give rise to litigation can be identified and addressed before action is taken.

The main takeaway from this is that employers should understand that they *can* terminate an employee on FMLA leave, but in doing so risk that the terminated employee will sue for retaliation. It's important to have legitimate, nondiscriminatory business reasons for terminating an employee on FMLA leave, and to make sure there is adequate documentation supporting the business decisions behind the termination or other adverse employment action. Best practices include:

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PRACTICE AREAS

Employer Services

Employment Litigation



- Always perform a full and fair investigation when deciding to terminate an employee, especially when the employee is on FMLA leave;
- Prepare and keep documentation for all evidence that supports that adverse employment decisions have been taken for non-discriminatory reasons;
- Create a timeline of events to establish that decisions were made prior to the decision to take leave and offer documentary evidence that was created contemporaneously with each of those decisions;
- Have all termination decisions reviewed by legal counsel and other appropriate management personnel to ensure that unlawful retaliation is not involved in the decision.

If you have any questions about the FMLA, please contact a labor and employment attorney at Foster Swift.