



Be Careful Providing Discretionary Leave When FMLA is Not Required

Employers are inundated with laws, regulations, and mandates. At times, it can be challenging for employers to determine when certain laws apply to them. One example of this is when smaller employers offer leave under the federal Family and Medical Leave Act (FMLA) when they are not required to.

FMLA regulations require companies with more than 50 employees to offer unpaid leaves of absence for purposes of the birth of a child, adoption, foster care placement, to care for a seriously ill family member, or for the employees' own serious illness. In the absence of an established company policy or knowledge of the eligibility criteria, however, many employers with fewer than 50 employees simply default to providing FMLA. By doing so, they are burdening themselves with the obligation to provide more generous benefits than they may have intended.

Employers create unnecessary legal risk when they offer FMLA leave even when not covered by the law. Small employers that are not covered by FMLA have wide latitude to create leave policies that fit their business. For example, an employer that chooses a discretionary leave policy rather than promising FMLA is not subject to the strict reinstatement requirements of FMLA. Thus an employer could restore an employee to another position, rather than the same position, without risk of a lawsuit. Furthermore, while FMLA provides 12 weeks of leave, an employer who is not covered by FMLA may decide that a lesser amount of time better suits its operations.


Such an employer should contemplate how it will deal with the non-FMLA covered worksites. An employer may choose to create a separate leave policy for employees not covered by FMLA, or simply offer FMLA under the same conditions for all employees. Deciding in advance how the organization will handle situations where FMLA coverage is not available, and properly communicating those decisions, will prevent the company from "defaulting" to FMLA and taking on more leave obligations than are required.

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Whatever leave policy an employer decides to use, it should create a written policy specifically stating that the company is not covered by FMLA and that all leaves are determined and administered through the company's policies. To avoid misunderstanding when discussing leaves with employees, refer to leaves as medical and/or personal leaves, rather than using terminology such as FMLA or family leave.

FMLA coverage issues frequently arise for multi-site employers. Smaller offices (less than 50 employees) are generally not covered by FMLA. For example, a company that employs 600 individuals in Wisconsin and 20 in Illinois is required to offer both federal and Wisconsin FMLA to those individuals working in Wisconsin. However, there may not be a legal obligation to offer FMLA to those employees working in Illinois, unless there are 50 company employees working within a 75-mile radius of the Illinois office.

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