

## What Am I Doing Wrong?? Common FMLA Mistakes - Clear Communication with Employee on FMLA

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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 fifteenth in a series highlighting some of the more common mistakes employers can inadvertently make regarding FMLA administration.

### **Not properly communicating with an employee who is about to exhaust the 12 week leave period.**

The FMLA allows eligible employees of a covered employer to take job-protected, unpaid leave for up to a total of 12 workweeks in any 12 months. Employers should keep in mind that failure to properly communicate with an employee who is about to exhaust the 12 weeks of leave, and terminating the employee, can pose legal risk.

In *Ashby v. Amscan, Inc.*, 2017 U.S. Dist. LEXIS 33576 (W.D. Ky. March 9, 2017), the employee requested FMLA leave when she fell at her home and fractured her ankle. The employee was given a full release to return to work with no restrictions soon after she exhausted her twelve weeks of FMLA leave. Immediately upon her return to work, the employee was terminated for exceeding the allotted twelve weeks of leave by four days. The court determined that the employer interfered with the employee’s FMLA rights when it terminated her. The court stated that the employer had a duty to inform the employee of her rights under the FMLA, which included warning the employee that her leave period was coming to a close.

In *Dusik v. Lutheran Child & Family Servs. of Ill.*, 2017 U.S. Dist. LEXIS 62119, (N.D.Ill. April 24, 2017) the employee advised her employer that she would need three to six months of leave following a torn ACL and meniscus in her knee that required surgery. The employer advised the employee that her FMLA leave would begin on March 31, 2015, but did not communicate with the employee after that point regarding her leave. The employer terminated the employee on July 15, 2015, because she had exhausted her FMLA leave. The court stated that the employer interfered with the employee’s FMLA rights, and retaliated against her for engaging in those rights, because the employer was “suspiciously non-communicative” as the employee approached the end of her FMLA leave.

When an employee is about to exhaust FMLA leave, employers should consider communicating with the employee regarding the leave and return-to-work status. Employers should also consider the interaction between the FMLA and ADA, and explore whether additional leave can be provided as a reasonable accommodation under the ADA.

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