



TEXAS

EMPLOYMENT LAW LETTER

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JUST ASK JACOB

What does FMLA leave 'to care for a child' encompass?

by Jacob M. Monty
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Q One of our employees recently learned that her child was molested by her former boyfriend. He has been arrested in another county, and she will need to be off work intermittently to attend hearings and other legal proceedings. Although the leave wouldn't specifically be needed to care for the child or for counseling or therapy appointments, could we consider it protected leave under the Family and Medical Leave Act (FMLA)?

A Yes. FMLA leave is available to eligible employees of covered employers for certain health-related issues resulting from domestic violence. The FMLA allows an eligible employee up to 12 weeks of unpaid leave because of her own serious health condition or to care for a spouse, child, or parent with a serious health condition. Issues related to domestic violence generally constitute a serious health condition protected under the FMLA. Because of the sporadic nature of domestic violence, you may face the issue of allowing the employee to take intermittent FMLA leave. Additionally, you should consider state-law requirements because many states (*not* including Texas) have enacted their own laws governing family and medical leave.

Q May we keep background check results in employees' regular personnel files? If so, should the results be removed before an employee or a supervisor views the file?

A Background check results and drug tests should be kept separate from any records supervisors or hiring managers have access to because these reports often include protected or confidential employee information. Additionally, a hiring manager shouldn't be given copies of an employee's background check but only notified of whether the employee passes. Finally, after the employee is hired, any background check and drug-test results should be placed in her confidential file, separate from her personnel file.

Q If an adjustment needs to be made to an employee's paycheck (e.g., because we failed to pay him for eight hours of vacation time), does the adjustment have to be made within a certain time? Is it OK to have a policy that states adjustments for less than, say, \$50 will be made on the following paycheck?

A Employers should have clear policies in place addressing underpayment and overpayment of wages. Your policy should explain how and when employees must report an error or a discrepancy in pay. Moreover, the policy should make it clear that employees must promptly bring the wage error to your company's attention so you can correct it as soon as possible. If an employee was underpaid, you should correct the error no later than the next pay period.

Q We are contemplating deleting the e-mails and e-mail accounts of employees who no longer work for our company. Are we required to keep former employees' e-mails/e-mail accounts, or may we delete them as soon as someone is no longer employed by our company?

A Requesting e-mail correspondence has become a common practice during discovery (the pretrial exchange of evidence) in business-related litigation. Therefore, it's imperative for employers to have clear e-mail retention policies in place and even more important to ensure that all employees strictly comply with your policies. Although e-mail retention policies vary based on business circumstances, it's a best practice to include an e-mail archiving policy in your records management program, which will have its own record retention policies and procedures. Most companies retain e-mail messages for at least a few years.

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