

ON OR OFF? WHAT TO DO WITH EMAIL WHEN THE EMPLOYEE IS ON FMLA LEAVE.

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When an employee goes out on continuous (not intermittent) leave under the Family and Medical Leave Act (or analogous state law), the employer must decide whether to turn off the employee's email access during the leave. If the employer has a standard practice that applies to other comparable leaves of absence, then the employer should follow that practice for FMLA leave as well. But if the employer has no existing practice, what practice should it adopt?

On the one hand, employees should not be expected to work while they are on FMLA leave and, generally, should not work. Turning off the email access demonstrates the employer's seriousness about compliance with this principle, precludes a one-off supervisor ignoring this principle and asking the employee to do something, and prevents the employee from ignoring this expectation and instead doing work (and making a claim later that he or she is entitled to pay and/or should not have had certain hours counted against the employee's FMLA entitlement).

On the other hand, employers are permitted to communicate with employees while they are on leave, and may even ask employees on occasion to help briefly with something (like providing a summary of the status of a matter, or letting the employer know who the contact is for a project, or where to find a file) without violating the FMLA. This is typically viewed as something akin to a professional courtesy and will not support an interference claim, so long as it does not cross the line and become "work." This kind of communication could be hindered if email is turned off. In addition, turning off email access can feel like a negative action that isolates the employee from the workplace. And it can make life difficult for employees who use their work email address as their principal (or only) email address.

Whichever approach employers adopt, they should apply it as consistently as possible, in order to avoid claims of discrimination. Also:

- If the employer decides to shut off email access during continuous leave:
 - Inform the employee that this is occurring, so the employee understands that this is the general practice and should not be viewed as negative treatment;

- Ensure that the employer and employee are aware of alternative methods of communications (phone numbers, personal email, current home address);
- Ensure that an out-of-office message is communicated, so that co-workers, customers, friends and others know how to contact the employee;
- Make sure that important workplace communications still make their way to the employee.

- If the employer decides to leave email access on:
 - Ensure that the employee is aware of and complies with the expectation of no work;
 - Ensure that relevant supervisors and managers understand that the employee is not to work while on leave;
 - Explain that the email can be used for periodic communications if desired, but that alternate methods of communication can be used as well;
 - If the employer becomes aware that the employee is doing work, put a stop to it.

Bryan Cave Leighton Paisner LLP has a team of knowledgeable lawyers and other professionals prepared to help employers assess best practices under FMLA. If you or your organization would like more information on FMLA or any other employment issue, please contact an attorney in the Employment and Labor practice group.

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