

Effective Management During Employee Leave

Sarah Sawyer: Welcome to this week's OK at Work with myself, Sarah Sawyer, my colleague Russell Berger with attorneys at Offit Kurman. And today we have pleasure of being in person together to record, which is great. Always excited to do that. And we're talking about managing employees while they might be taking leave or have other needs going on and exercising those rights potentially under FMLA or with sick time or different types of leave. So what are some things that companies should keep in mind, Russell, when they're managing those kinds of situations?

Russell Berger: Yeah. Well one of the most common questions that we get is, can I still manage that employee? And they might be out on FMLA leave or some other protected form of leave.

Can I still manage them? The answer is yes and you should. There's added risk, there's added complication for sure. But you need to keep operating your business. You need to [00:01:00] enforce the policies the other policies that are in place. And you need to ensure that everything's running on time, so to speak, and that, your operations are consistent and your rules are being consistently applied.

So yes, you should manage those employees. 'cause what, for example, the FMLA does, is it creates protections against retaliation for the employee. But it doesn't protect the employee from being managed in a general sense. And obviously, that's a fine line and there could be ample gray area, and that's something that, employees and employers will litigate over.

In general, the answer is yes, you can and should do that, and you should make sure that in doing so, you're conscious of, the potential risk. So while managing is one thing, terminating, demoting is another, and again, you could still do those things within the scope of the law.

But it implicates the thing you're not allowed to do, which is retaliate. So, by managing, you set up the background you're [00:02:00] demonstrating the lack of sufficient performance or, documenting whatever the bad acts are so that you can escalate to those types of actions.

But you don't wanna just jump to that.

Sarah Sawyer: We always talk about being proactive and always being really on top of these things when we talk about these things on OK at Work as far as performance management, documenting that type of thing, and that type of timing and being proactive is really important here because whenever you might be managing an employee, there's stuff going on in the background with their lives, whether it be with their family, their own health, their own whatever might be going on. And what you don't want is there to be just this coincidental timing of you haven't been managing someone.

Then they start dealing with some type of personal issue that has some type of protection around it, some type of leave, some type of issue, and all of a sudden now that's when you start documenting the performance, and sometimes that happens and sometimes that timing is just, yeah, there's no way around it.

And that increases the risk. But if you have been on top of things at [00:03:00] least ahead of time, that gives you a little bit of a better chance. But you can't go back in time, obviously. Right. So, it's important. It's one another reason why it's important to be on top of managing employee.

Russell Berger: Absolutely we're always fans of proactive management here at OK at Work. But it raises another question too. And we see this sometimes where, and this is certainly not the majority of cases, but sometimes you see employees protect themselves by using the laws. So they know they're being managed.

They know they're probably being managed out, they're about to be terminated, and then all of a sudden it's, oh I have a leave request and you haven't heard anything about it beforehand. It's just hitting you out of nowhere it seems and so again, it doesn't mean you can't take the action that you were already on the track to take but it complicates it and adds risk, and you have to navigate through those waters as well.

So, even when you're doing the right things, this can be a dicey area. So it's just important to do the right things and be prepared to navigate around those obstacles.

Sarah Sawyer: Yeah, make sure you're following your process. If someone makes a request, even when [00:04:00] they're being managed or maybe they're on a pip or maybe there's something actively going on and they submit a request, well follow that process.

Make sure you're keeping those things separate even though they might be happening at the same time.

Russell Berger: That's right.

Sarah Sawyer: Well, thanks Russell. We'll see you next time.

Russell Berger: Thanks, Sarah.