

## Giants Beat Patriots in the Super Bowl! Can I take FMLA Leave Today?

By [Jeff Nowak](#) February 06, 2012

Monday, February 6, 2012 is a bittersweet day for employers across New York and elsewhere. Just hours earlier, their employees watched the [New York Giants](#) beat the [New England Patriots](#) in Super Bowl XLVI. For these employers, however, many of their employees won't be at work Monday morning. The reason? In a [2008 survey](#) conducted by The [Workforce Institute](#) at Kronos Incorporated, 1.5 million people will call in sick to work and an additional 4.4 million will call in late. Outplacement firm Challenger, Gray & Christmas has put worker lost productivity from the Super Bowl at more than \$820 million.

"There will be lots of workers partying all night," John Challenger told [Bloomberg BNA](#) (subscription required), "either celebrating the team's win or crying in their beer—not ready for work on Monday morning."

Employers in and out of New York and New England will have to be prepared for the apparent onslaught of call offs the day after the Super Bowl. Many of these employees certainly will use the FMLA as an excuse to recover from the night before. So, what can an employer do to obtain more information from the employee in these situations to avoid FMLA abuse? I remind employers of the same suggestions I offered in this [post](#) one year ago:

1. Determine first whether the employee is seeking leave that might be covered by the FMLA. Your first order of business is to determine whether the employee has even notified you of the possible need for FMLA leave. If it's an absence that clearly does not trigger the FMLA (e.g., "I'm sick," or "My daughter has the flu"), you simply can subject this absence to your usual attendance policies and take action as necessary.

Unfortunately, it's not always that easy. Employees typically are not required to cite specifically to the "FMLA" as a reason for their absence; rather, the FMLA puts the responsibility on employers to decide whether FMLA is in play. As you process the request, consider whether the information from the employee indicates that he or she: a) will likely be absent for more than three consecutive days, during which time he/she cannot perform any work; b) is suffering from a chronic condition that manifests itself intermittently throughout the year; c) is caring for a family member with a possible serious health condition; d) is suffering from complications due to pregnancy, or morning sickness. Of course, this list is not exhaustive but is a key starting point to determine what your obligations as employer are under the FMLA.

2. Prepare a list of probative questions you ask of all employees when they call in to report an absence. The employer has the right to know why the employee cannot report to work. During the call with the employee (or when you call them back after they've left you a voicemail reporting their absence) you should inquire about:

# FMLA Insights

*Guidance & Solutions for Employers*

- The specific reason for the absence
- What duties of the job they cannot perform
- Whether they will see a doctor for the injury/illness
- Whether they have suffered from this condition before and previously taken leave for it. If so, when?
- When they first learned they would need to be absent
- The expected return date (or time, if less than a day)

3. If this is a medical condition for which they have taken FMLA leave on a prior occasion, determine whether recertification is an option. Does the absence seem to be part of a pattern of absences that tend to occur on Mondays and Fridays? Is the absence inconsistent with the information previously provided on the medical certification form? Has medical certification expired? If your answer is “yes” to any of these questions, seek recertification immediately. Moreover, if you are concerned about Monday/Friday absences, the FMLA regulations (29 C.F.R. 825.308(e)) allow you to provide the pattern of absences to the employee’s health care provider and inquire whether this pattern is consistent with the employee’s need for leave.

For more thoughts on combating suspected FMLA abuse, click [here](#).

For the rest of us (who are [Chicago Bear](#) fans, of course), better luck (and a lot of it!) next year.

Copyright © Franczek Radelet P.C. All Rights Reserved. Disclaimer: Attorney Advertising. This is a publication of Franczek Radelet P.C. This publication is intended for general informational purposes only and should not be construed as legal advice.