

# PUBLICATION

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## Faulty Issues with No-Fault Attendance Policies

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Many of our clients have no fault attendance policies by which the employees are assessed a point or half of a point for each tardy, absence or for leaving their shift early. Once the employee meets the required number of points, he or she is disciplined or terminated without regard to the reason for the absence. While these policies provide "black and white" guidance for both the employee and the employer, many untrained supervisors assess points for absences that are attributable to the employee's own serious health condition [in violation of the Family and Medical Leave Act (FMLA) or the Americans with Disabilities Act (ADA)]. There has been a rise in Equal Employment Opportunity Commission (EEOC) charges and lawsuits by employees who have wrongfully been assessed points and later terminated for violating the no-fault attendance policy, due to FMLA and/or ADA qualifying reasons.

It is incumbent upon the employer to identify potential situations in which the employee may qualify under the FMLA or ADA. Often the employee is reporting an absence to his or her direct supervisor, not human resources (HR). We see problems arise when these supervisors are only trained to assess points without regard to the actual reason for the absence. Best case scenario, HR should be in charge of the attendance policy and assessment of points so that all supervisors' direct employees report their absences to HR so that an HR employee educated on qualifying reasons for FMLA and ADA can assess whether the absence is attributable to one of these statutes and, if so, not to assess an attendance point for the absence. However, this is not practical for many long term care facilities that do not have on an onsite HR department. In those instances, it is critical to train supervisors to identify when the employee is absent for his or her own serious health condition and/or disability, or to train the supervisors and managers to send the employee to corporate HR in the event that the reason for his or her absence is related to the employee's health.

While not all employee health issues will result in no attendance point being assessed (such as an absence for a common cold), many will require, at least, further questioning to determine whether the illness qualifies as a serious health condition under the FMLA or a disability under the ADA in which case the employer is required to initiate the interactive process with the employee to determine whether there are any accommodations that would allow the employee to perform the essential functions of his or her job. In many cases, the requested or necessary accommodation under the ADA is leave. Simply assessing an attendance point for any health related absence, without regard to the above, can lead to litigation.

To avoid liability, employers should include a provision in their no fault attendance policies that clearly articulates that no points will be assessed for FMLA or ADA qualifying reasons and directs the employee to contact HR if he or she has any questions as to whether the assessment of an attendance point was due to an FMLA or ADA qualifying reason. Employers should likewise train supervisors to recognize when the employee may have a qualifying absence that would be an exception to the no-fault policy and to direct that employee to HR or simply not assess the point if it is a qualifying reason. Finally, employers should ensure that every job description lists regular attendance as an essential function of every employee's job.

For more information about drafting acceptable no-fault policies and/or appropriate training for supervisors in long term care facilities, contact Angie Davis or a member of our [Long Term Care Team](#).

