

## Can You Force Your Employee to Take FMLA Leave?

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Many employers know that they should provide an employee with information regarding leave under the Family and Medical Leave Act (“FMLA”) if they have reason to believe the employee qualifies for such leave. However, what if an employer gives the employee information about FMLA leave and the employee refuses to take the leave? Can the employer force the employee to take FMLA leave?

While these questions have not been directly addressed by a New Jersey court, the Ninth Circuit has considered them and its reasoning has been endorsed by several other courts. Specifically, in *Escriba v. Foster Poultry Farms*, 743 F.3d 1236 (9th Cir. 2014), an employee asked for vacation time to care for a family member who was ill. She was granted vacation time, but then asked for additional unpaid time off. Her employer asked if she was requesting leave under the FMLA, but the employee said no, she was not. The employee took her vacation time and failed to return to work as scheduled. She was terminated as a ‘no call, no show’ after three days. Thereafter, the employee brought an FMLA interference claim against the employer. The employee argued that the employer was required to designate her leave as FMLA-protected and provide her with a notice of her rights under the FMLA. The court found that while an employer has an obligation to inquire if FMLA leave is being sought, employees can refuse to take FMLA leave. As such, the court found that the employee declined FMLA leave and could not bring an interference claim against the employer. The court noted that the employee had taken FMLA leave several times in the past and therefore was familiar with the process.

What does *Escriba* mean for New Jersey employers? A New Jersey court could reject the Ninth Circuit’s reasoning, but it is unlikely. Indeed, while no New Jersey court has directly addressed *Escriba*, in *Fitzgerald v. Shore Memorial Hospital*, 92 F. Supp.3d 214 (D.N.J. 2015), a New Jersey district court did consider and distinguish *Escriba*. In *Fitzgerald*, the plaintiff brought an interference claim, alleging that she provided her employer with adequate notice regarding her absence. The plaintiff’s employer maintained that because the plaintiff had repeatedly submitted the proper FMLA forms whenever she needed leave and failed to submit the proper forms for the absence in question, she had opted not to take FMLA leave for that absence. The court rejected the employer’s argument, explaining that in *Escriba* “there was evidence in the record that the plaintiff specifically asked her supervisor for vacation time and not family leave, whereas there was no such evidence in *Fitzgerald* regarding the employee’s intent to refuse FMLA leave. Given that the court in *Fitzgerald* chose to distinguish *Escriba* based on the facts of the case, instead of rejecting the holding that an employee can refuse FMLA leave, it is likely that a New Jersey court would hold that employees can refuse FMLA leave when presented with that specific issue.

**TAKEAWAY:** Employers should not force an employee to take FMLA leave.

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