



Preventing Intermittent Leave Abuse: What You Need to Know & What You Can Do

February 24, 2010



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About the Speaker

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Covered Employers

- 50 (or more) employees for 20 or more calendar work weeks**

Eligible Employees

- Employed for at least 12 months**
- Worked 1,250 hours in the previous 12 months**
- 50 employees within 75 miles**



Family Leave

- Serious health condition of child, parent or spouse
- Birth, adoption, or placement of child in foster care

Medical leave

- Serious health condition of employee

Military-Service Connected Leave

- “Qualifying exigency” leave
- Military caregiver leave, for serious injuries or illnesses



FMLA Basics

12 weeks of job-protected leave (26 weeks for military caregiver leave)

Reinstatement to the same or an equivalent position

Maintenance of healthcare benefits on the same basis as normally provided during periods other than FMLA leave



FMLA Basics

An employee may take 12 workweeks of leave during any 12-month period

An employer may choose how to calculate the 12-month period:

- calendar year**
- fixed period**
- measured from first leave request**
- “rolling” 12-month period**

Military caregiver leave – 26 weeks – can work differently



FMLA – What Kind of Leave?

Block Leave

- **A single period of leave taken once**

Intermittent Leave

- **FMLA leave taken in separate blocks of time due to a single qualifying reason**

Reduced Schedule Leave

- **A leave schedule that reduces an employee's usual number of working hours per workweek or workday**



Intermittent Leave/Reduced Schedule Leave

When permitted, and for what purposes?

Medical necessity

- Employee's own serious health condition
- To care for a covered family member with a serious health condition
- To care for a covered service member with a serious injury or illness

Qualifying exigency leave

Distinction for leave after birth or placement of a child



Scheduling of intermittent leave

- Requirements applicable to employees with respect to planned medical treatment
 - Must attempt to schedule leave so as not to disrupt the employer’s operations. See 29 C.F.R. § 825.203.
 - “Reasonable effort” to avoid disruption



Intermittent Leave

Alternative position?

**Possible under FMLA, but some stringent limitations
(See 29 C.F.R. § 825.204)**

Applicable only to circumstances involving “planned medical treatment”

- New position must provide equivalent pay and benefits and better accommodates the employee's intermittent or reduced leave schedule**
- Cannot be instituted to discourage use of leave or to retaliate for the exercise of this right**



How Do We Calculate Intermittent FMLA Leave?

Only the amount of leave actually taken may be counted toward the 12 weeks of leave to which an employee is entitled. 29 C.F.R. § 825.205.

If an employee's schedule varies from week to week, a weekly average of the hours worked over the 12 months prior to the beginning of the leave period would be used for calculating the employee's normal workweek. See 29 C.F.R. § 825.205(b).

Impact of overtime. See 29 C.F.R. § 825.205(c).



Deductions from Pay Possible for Intermittent Leave Hours?

If the employee is non-exempt, the employer may pay the employee only for hours worked.

If the employee is exempt, the employer may **deduct** from the employee's salary for any hours taken as intermittent or reduced-schedule leave **without** jeopardizing exempt status under the FLSA (but check relevant state laws).

Notice Requirements – Employer Obligations



General Notice (employee handbook, poster and/or upon hire)

Eligibility Notice

“Rights & Responsibilities” Notice

Designation Notice

Timeframe for provision of Notice by Employers



Notice Requirements – Employee Obligations

Employees must follow the employer’s usual and customary call-in procedures for reporting an absence (absent unusual circumstances)

Except for emergency situations, where employee becomes aware of a need for leave, expectation that notice of the need will be provided either the same day, or the next business day

- One-to-two business days for notice in prior regulations had been misinterpreted as permitting such delay, even if earlier notice practicable**
- See Opinion Letter FMLA2009-1-A (January 6, 2009)**

Healthcare Provider's Certification



**Components of healthcare provider's certification – See 29
C.F.R. § 825.306**

Should Include:

- The date on which the serious health condition commenced**
- The probable duration of the condition, and**
- A statement that the employee is unable to perform the functions of the position because of the condition**

Where providing care for a family member, an estimate of the amount of time that the health care provider believes the employee needs to care; and

A statement that the serious health condition warrants the participation of a family member to provide care during a period of the treatment or supervision.



The medical necessity for this kind of leave;

The expected duration of the intermittent leave or reduced leave schedule, and, if applicable,

The date on which the treatment is to be given; and

The duration of the treatment



When May An Employer Request Recertification?

For intermittent leave, employer may not request recertification in less than the minimum period specified on the certification as necessary unless:

- Circumstances described by previous certification have changed significantly;**
- The employer received information that casts doubt upon the employee’s stated reason for the absence.**

**In all instances, however, even if minimum period extends beyond six months, can request recertification every six months, in connection with a covered absence.
29 C.F.R. § 825.308 (a).**



Responding to Claimed Use of Intermittent Leave

Challenges and Strategies



Monday/Friday Absence Abuse

- **See DOL Opinion Letter – May 25, 2004**
 - **Communicating with healthcare provider re: patterns of absence can be acceptable**

What to Do When You Suspect an Employee is Abusing FMLA Leave?



For example ...

- Second jobs during work hours**
- Monday/Friday absences**
- Refusal to work OT or weekends**

What to Do When You Suspect an Employee is Abusing FMLA Leave?



“Nothing in the FMLA prevents employers from ensuring that employees who are on leave from work do not abuse their leave.” *Callison v. City of Philadelphia*, 2005 WL 900029 (3rd Cir.(Pa.).

Consider requiring new certification of eligibility



An employee may not continue to work at a second job during FMLA leave if the employer has an established policy that prohibits outside employment.

– DOL Opinion Letter No. 106 (July 1, 1999)

The Company may have a written policy which prohibits outside employment. If this is more than you want, at least have a policy which prohibits outside employment while an employee is on paid or unpaid leave where benefits may be retained while on leave.

Preventing Intermittent Leave Abuse – Potential Strategies



Require employee to provide detailed information when employee requests FMLA leave or provides sufficient information to suggest that time off may qualify as an FMLA absence.

Treat an absence as a non-FMLA absence if employee calls in and simply says "I'm sick today." If no other information is provided, employee has not provided sufficient notice that absence may qualify as an FMLA absence.

Require employee to call in when absent (and do so by a designated time) and obtain "status report" each time employee calls in by asking for detailed information about the absence. For example, ask what the problem is, how long it will last, whether employee will be able to work part of the day, why employee can't work, if employee will be seeing or calling the doctor, and if not, why.

Preventing Intermittent Leave Abuse – Potential Strategies



Ask employee non-medical questions related to the absence when employee returns to work, such as how employee spent the day, and types of things he or she did during the day, etc.

Provide employee's health care provider with a job description or list of essential functions of employee's job so that the health care provider is in a better position to determine if employee can or cannot perform essential duties.

Insist that the medical certification be "complete" and put the burden on the employee to obtain such missing information as is necessary to make it complete. Consider requiring a new certification when and if permitted by the DOL regulations.

Preventing Intermittent Leave Abuse – Potential Strategies



If a complete medical certification is not furnished, treat the absences as non-FMLA absences, subject to disciplinary action under the employer's attendance policy.

Require a second and third opinion on the medical certification submitted by the employee. If employee refuses to cooperate, treat the related absences as non-FMLA absences, subject to the employer's attendance policy.

Preventing Intermittent Leave Abuse – Potential Strategies



Discipline employee who fails to comply with the employer's procedural requirements for leaves of absence.

Adopt a blanket policy, if feasible, prohibiting employees from working elsewhere while on leave or engaging in any productive work of a compensable or non-compensable nature.

Consider available information about employee activities other than recovery and necessary medical treatment/appointments while on protected leave. (A "serious health condition" involves a period of incapacity during which the employee is unable to work or "perform other regular daily activities.")

Preventing Intermittent Leave Abuse – Potential Strategies



Consider means/strategies to verify absence (e.g., activities inconsistent with stated need for recovery time).

- Some companies, in some circumstances, consider surveillance of the employee if there is a strong basis for belief that FMLA leave is being abused.**

Consider transfers during the period of intermittent or reduced schedule leave (if permissible under applicable regulatory constraints).

Terminate the employee if the employer has reasonable evidence that FMLA leave has been fraudulently used.



- **Self-administer and track leave with automated tools**
 - **Assists you in determining eligibility**
 - **Provides easy, intuitive way to spot trends (e.g., calendar view, reports)**
 - **Enables easy access to required documents**
 - **Provides an easy way to distribute documents and notify employees when documents are due**
- **Consider outsourcing the entire leave administration function.**



Lessons from Court Rulings Involving Intermittent Leave Under the FMLA



Years of employer complaints to DOL re: impact of FMLA regulations

Intermittent leave (particularly, leave taken without prior notice, based on prior certification) was the #1 problem raised by employers

Final 2008 rules

Changes made and limited modifications

New controls?



Additional Resources

Free business analysis – 800-CALL-ADP

- Ask about ADP’s leave management solutions, including fully outsourced leave administration

Free white papers, case studies and articles

- www.adp.com/workforce-management



Thank You



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