

CURBING ABUSE OF “INTERMITTENT” FMLA LEAVE

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The Family Medical Leave Act (FMLA) allows employees to take 12 weeks of leave for their own or a family member's serious health condition and up to 26 weeks for military caregiver leave. The leave can be taken in one block, over several stretches of time or intermittently. To take intermittent leave, the employee need only provide a certification that there is a medical need for such leave.

While longer FMLA leaves are relatively straightforward, an employee's ability to take small increments of FMLA leave sporadically generates administrative headaches for employers and raises concerns about employee abuse of intermittent leave. The FMLA offers a number of tools – many of which are not widely employed – that you can use to discourage abuse of intermittent leave. Here are eight of the best strategies for getting a handle on this troubling problem.

Question The Original Certification

You have a number of opportunities to ensure that a certification calling for intermittent health-related absences is sufficient, valid, and supports the need for intermittent leave. When an employee submits a certification for a chronic condition that will flare up and require intermittent leave – asthma or migraines, for example – the human resources professional reviewing the certification should consider these options:

Incomplete or insufficient certification

When a certification has entries missing or is vague or ambiguous, you may ask the employee to provide complete and sufficient information. The request must be in writing and must specify the reason the certification was considered incomplete or insufficient. The employee then must provide the additional information within seven

days. If the employee fails to provide the information, leave may be delayed or denied.

Authentication and Clarification

You may contact the health care provider to ensure that he or she actually prepared the certification, and to clarify handwriting or the meaning of a response, but you must use a human resource professional, health care provider, leave administrator or management official to make the contact. The employee's direct supervisor may not be the one who contacts the health care provider.

During this process, be careful not to request more information than what is required to authenticate or clarify the form. This too, can be used at the recertification stage as well as with an initial certification.

Ask For A Second Opinion

Employers who have reason to doubt the validity of an initial certification may ask for a second opinion. The physician may be of the employer's choosing but cannot be one the employer employs on a regular basis. It is the employer's responsibility to pay for the second opinion. If the first and second opinions differ, you may require the employee to see a third health care provider, again at the company's expense. The third provider's opinion is binding. Although there are a number of opportunities to ask for recertification of an employee's serious health condition, you may not seek second or third opinions on recertification.

ENSURE THAT ALL ABSENCES RELATED TO THE CONDITION ARE COUNTED

The job of managing intermittent leave is not over after an employee submits a certification that calls for sporadic health-related absences. Employers must be certain that all absences related to the condition are counted against the employee's FMLA entitlement, while at the same time ensuring that they are *not* counted against the employee under a no-fault attendance policy.

In larger organizations, front-line supervisors must be the eyes and ears of the organization and must pass along information about FMLA-covered intermittent absences to human resources. This, in turn, requires you to train supervisors to recognize absences that may be covered by the FMLA.

Identifying FMLA absences is not simple, in part because the U.S. Labor Department and the courts have held that the employee does not have to cite to the FMLA in a request. If there is an existing certification, it is enough for the employee to notify the employer that he had a recurrence of the health condition covered by the certification. For first-time health related absences, supervisors should be trained to

notify human resources any time an employee is out for more than three days with an illness, particularly if the employee saw a physician during that time.

REQUIRE EMPLOYEES TO FOLLOW YOUR PAID LEAVE POLICY

Employers may require that employees use up paid leave time for their intermittent FMLA absences. In fact, all employers should include such a requirement in their FMLA policies and enforce the practice of using up paid time off during FMLA leave, in order to prevent the situation where an employee can take paid leave after their FMLA leave expires and thereby extend a leave of absence beyond the FMLA entitlement.

The 2008 FMLA regulations made clear that you may require employees to abide by your paid-time-off policies in order to be paid for FMLA leave time. For example, you may require the employee to call a certain person or a particular telephone number to notify the organization of an FMLA absence.

The FMLA standing alone would not allow you to request a doctor's note for every absence if there is a valid medical certification in place. But if your written paid-time-off policy calls for it, you may require a doctor's note for paid-leave time. (Remember, that if the employee fails to provide the note, FMLA leave cannot be denied. The leave time would simply be unpaid. The prospect of paid leave provides a strong incentive to comply.)

REQUEST RECERTIFICATION

FMLA regulations offer a number of opportunities to seek recertification of the need for FMLA leave, including intermittent leave. Unless there are changed or suspicious circumstances, these rules of thumb apply:

- employees may be asked for recertification any time they seek to extend an existing FMLA leave;
- for long-term conditions or conditions that may require sporadic absences, an employer may request recertification every thirty days in connection with an absence;
- if the employee is taking a solid block of leave for more than thirty days, the employer may ask for recertification if the leave extends beyond the requested leave period;
- if the employee is out on a leave that has been certified to extend for more than six months, the employer may seek recertification every six months; and finally,

- employers may ask for a new certification at the beginning of each leave year.

As with initial certifications, the employee has fifteen days to provide the recertification.

FOLLOW UP ON CHANGED OR SUSPICIOUS CIRCUMSTANCES

You should always keep tabs on use of FMLA leave, and may want to pay special attention to patterns of intermittent leave usage. You may seek recertification more frequently than thirty days if: a) the circumstances described by the existing certification have changed; or b) the employer receives information that casts doubt on the employee's stated reason for the absence or on the continuing validity of the certification.

"Changed circumstances" include a different frequency or duration of absences or increased severity or complications from the illness. The regulations allow you to provide information to the health care provider about the employee's absence pattern and ask the provider if the absences are consistent with the health condition.

"Information that casts doubt on the employee's stated reason for the absence" may be information you receive (possibly from other employees) about activities the employee is engaging in while on FMLA leave that are inconsistent with the employee's health condition. The example provided in the regulations is an employee playing in the company softball game while on leave for knee surgery.

A note of caution, however. Employers who receive information from coworkers about an employee's actions while on leave must be certain the information they receive is credible and that the coworker has no axe to grind against the person on leave. Always attempt to independently verify information received from coworkers before taking action or requesting recertification for suspicious circumstances.

CONTROL THE WAY THAT EMPLOYEES SCHEDULE PLANNED TREATMENT

Employees may take intermittent leave for treatment, therapy, and doctor visits for serious health conditions. FMLA regulations specifically require that employees schedule those absences for planned medical treatment in a way that least disrupts your operations. When you receive a request for this type of intermittent leave, communicate with employees about the frequency of the treatment, the office hours of the health care provider and ways that the employee may be able to alter the schedule to cut down on disruptions.

CONSIDER TEMPORARY TRANSFERS

If the need for intermittent leave is foreseeable, you may transfer the employee during the period of the intermittent leave to an available alternative position for which the employee is qualified and which better accommodates the recurring periods of leave. The alternate position must have equivalent pay and benefits, but does not have to provide equivalent duties. If the employee asks to use leave in order to work a reduced work schedule, you may also transfer the employee to a part-time role at the same hourly rate as the employee's original position, as long as benefits remain the same.

Alternatively, you may allow the employee to work in the employee's original position, but on a part-time basis. You may not eliminate benefits that would otherwise not be provided to part-time employees, but may proportionately reduce benefits such as vacation leave if it is the employer's normal practice to base the benefits on the number of hours worked.

These tips won't entirely eliminate the problem of employees trying to take advantage of the intermittent leave regulations – probably nothing can do that – but they will help. If you'd like us to review your FMLA policies to help cut down abuse, give us a call.

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