

COMBATTING INTERMITTENT FMLA LEAVE ABUSE: AN EMPLOYER'S TOOLBOX

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As most employers know, the Family Medical Leave Act (FMLA) allows employees to take up to 12 weeks of leave for their own or a family member's serious health condition and up to 26 weeks for military caregiver leave. While longer FMLA leaves are relatively straightforward, an employee's ability to take small increments of FMLA leave on a sporadic basis generates administrative headaches for employers and raises concerns about employee abuse.

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.

1. Question The Original Certification

You have several 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 – you should consider two options.

First, if the certification has missing entries or is vague or ambiguous, you should ask the employee to provide

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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.

Second, you can contact the health care provider to ensure that they 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.

2. Ask For A Second Opinion

If you have reason to doubt the validity of an initial certification, you should ask for a second opinion. The physician may be of your choosing but cannot be one you employ on a regular basis. It is your responsibility to pay for this second opinion.

If the first and second opinions differ, you may require the employee to see a third health care provider, again at your 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.

3. 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. You 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.

4. Require Employees To Follow Your Paid Leave Policy

You 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. This will prevent employees from taking paid leave after their FMLA leave expires, thereby extending their leaves of absence beyond the FMLA entitlement.

Also, 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 your 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.

5. Request Recertification

FMLA regulations offer a number of opportunities to seek recertification of the need for FMLA leave, including intermittent leave. For example, you can ask for recertification any time an employee seeks to extend an existing FMLA leave. Also, you can request recertification every 30 days in connection with absences related to long-term conditions or conditions that may require sporadic absences.

If the employee is taking a solid block of leave for more than 30 days, you can ask for recertification if the leave

extends beyond the requested leave period. Similarly, if the employee is out on a leave that has been certified to extend for more than six months, you can seek recertification every six months. Finally, you may ask for a new certification at the beginning of each leave year.

6. 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 30 days if the circumstances described by the existing certification have changed, or if you receive information that casts doubt on the employee's stated reason for the absence or on the continuing validity of the certification.

This could include a different frequency or duration of absences, or increased severity or complications from the illness. You are permitted to provide information to the health care provider about the employee's absence pattern and ask if the absences are consistent with the health condition.

An example of an employer's successful use of the ability to request recertification for "changed circumstances" was presented in a recent case from Indiana (*Norris v. Allison Transmission, Inc.*). The employee requested intermittent FMLA leave for his wife's serious health condition, stating that he would need leave one to two days per month. In the three weeks after his certification, however, the employee had taken approximately 10 days of FMLA leave. Therefore, the employer requested recertification.

The wife's physician prepared a recertification, which increased the likely use of intermittent leave to three to four days per month. However, over the next few weeks, the employee once again used more than the predicted amount of leave. When the employer asked for a second recertification, the employee did not respond and began to be absent for several weeks. The employer fired him and he filed suit for FMLA

interference. The court handed a victory to the employer and upheld both requests for recertification.

The court held that those requests were authorized by the FMLA regulations, which specifically allow recertification if the “circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of the absence).” As you can see from this example, recertification for changed circumstances is a powerful tool if you see employees using intermittent leave in a way that is different from or exceeds the certification on file.

You may also receive information about employee activities during FMLA leave that appear inconsistent with the health condition (for example, an employee playing in a softball game while on leave for knee surgery). A note of caution, however – if you receive information from coworkers about an employee’s actions while on leave, you 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.

7. 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.

8. 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. Although the alternate position must have equivalent pay and benefits, it 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.

Alternately, you may allow the employee to work in the 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 your 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, but they are important pieces to have in your toolbox when the next situation arises.

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