

FMLA Intermittent Leave: Preventing Abuse While Mitigating Interference or Retaliation Claims

Establishing Effective Leave and Transfer Policies, Challenging Medical Certification, and Leveraging Defense Theories

THURSDAY, JUNE 8, 2017

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Jeffrey S. Kopp, Partner, **Foley & Lardner**, Detroit

Evan H. Pontz, Partner, **Troutman Sanders**, Atlanta

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 10.**

Tips for Optimal Quality

FOR LIVE EVENT ONLY

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-866-370-2805** and enter your PIN when prompted. Otherwise, please send us a chat or e-mail sound@straffordpub.com immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.

Continuing Education Credits

FOR LIVE EVENT ONLY

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 35.



FMLA Intermittent Leave – Preventing Abuse



Presented by Jeff Kopp and Evan Pontz

Objectives



- Identify abuse patterns
- Manage FMLA intermittent leaves
- Understand certification process
- Implement strategies for reducing abuse
- Practical scenarios
- Questions and answers

FMLA: Overview



- **Who is eligible?**
 - An employee who:
 - Has been employed for at least 12 months (within past seven years if rehired); and
 - Has worked at least 1,250 hours during the 12 months prior to the start of the leave; and
 - Works at worksite with 50 or more employees within a 75-mile radius
 - Special rules for temporary employees
- **Burden is on the employer to determine eligibility**
- **If employee is not eligible, deny FMLA in writing**

FMLA: Overview



- **Eligible employees may take FMLA leave for any of the following reasons:**
 - The employee’s own “serious health condition” (medical leave);
 - To care for a spouse, son, daughter, or parent with a serious health condition (family leave);
 - For the birth or adoption or foster care placement of a child (family leave) so long as the leave starts within 12 months of the birth/adoption;
 - For certain military exigencies (qualifying exigency leave); and
 - To care for a spouse, son, daughter, parent, or next of kin who is a covered servicemember or veteran (military caregiver leave).

FMLA: Intermittent Leave Basics



- CAUTION: Always check for applicable state or local law. Applicable state or local laws may be more restrictive and/or have different requirements: California, Connecticut, Hawaii, Maine, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, Washington, Wisconsin, and the District of Columbia.

FMLA: Defense Strategies



- **Employer should inquire to determine whether leave is FMLA-qualifying:**
 - » What is the medical condition that renders the employee unable to work?
 - » Is the employee/family member hospitalized?
 - » Is the employee or family member under continuing care of a health care provider?
 - » What is the anticipated duration of the absence?
 - » When did you or do you plan to see a doctor?

FMLA: Intermittent Leave Basics



- Intermittent leave is FMLA leave taken in separate increments of time due to a single qualifying reason.
- Reduced leave schedule – reduces an employee’s usual number of working hours per workweek or workday increment.
- Intermittent Reduced Schedule Leave
 - Examples:
 - Employee needs “5 to 6” days off each month for migraines
 - Employee with chronic health condition needs to go to doctor’s appointments twice each week
 - Employee can only work 8 hours per day, 40 hours per week

FMLA: Intermittent Leave Basics



- **Intermittent leave must be medically necessary.**
 - » *In the case of birth or baby bonding, the employer can agree to permit intermittent leave*
- **Employers can require medical certification.**
- **Employee must provide information about the expected frequency and duration of the periods of incapacity.**



- **Managing Intermittent Leave**
 - Requires dedication and commitment
 - Employ consistent strategies for enforcement

FMLA Medical Certifications



- Use DOL certification forms
- Require employee to complete medical certification forms:
 - When the need for leave first arises
 - Every leave year when the leave lasts beyond a single leave year (this also offers an opportunity for another second opinion)
 - Every time the reason for leave changes
 - Every time there is a request for an extension of leave

FMLA: Medical Certifications



What do we do when an employee won't comply with medical information requests?

- Employer has the right to obtain a medical certification from an employee verifying the employee or family member has a serious condition
- Make sure you give the employee the form as soon as you have knowledge about the need for leave
- Employee has 15 calendar days after receipt of the medical certification to submit the information – ***but, if the employee is making good faith efforts to submit the information, the employer must allow extra time***
- We need to advise the employee if they have submitted incomplete (entries left blank) or insufficient (vague, ambiguous, non-responsive) information. Employee has 7 calendar days to complete and return the corrected form
- If the form is not submitted on a timely basis, we can deny the request for FMLA leave

FMLA Medical Certifications



- Insist that employees complete certification forms annually when the leave lasts beyond a single leave year
- Ensure certifications are timely – Certifications due 15 calendar days after the employer’s request
- If employer has provided clear and appropriate notice of the 15 days and consequences for failing to meet the deadline, may delay or deny leave
 - » Practical implications

FMLA: Intermittent Leave Management



- **Determine if Certification is Complete and Sufficient**
- Does it establish the existence of a serious health condition of employee or family member, a qualifying exigency, or a need for military caregiver leave?
- Is it complete, legible, and internally consistent?
- Obtain clarification if uncertain whether the leave qualifies
 - Employer's leave coordinator/HR **can directly contact** health care providers, in compliance with HIPAA, for purposes of determining the authenticity or for clarification of the certification (often need HIPAA release from employee in order for healthcare provider to talk with employer representative)
 - Example: Incomplete medical description in paragraph 4 of the form: “pain in shoulder”
- For incomplete certifications, employee must be informed in writing of deficiency and given 7 calendar days to cure
- Consider whether a second opinion is appropriate

FMLA: Medical Certifications



- Foreign medical certifications could be an issue
- Validate authenticity
- Closely scrutinize the form – what is the duration of the expected condition?
- Frequency of absence?
 - » Planned treatment?
 - » Is intermittent leave medically necessary
 - » Flare-ups?

FMLA: Medical Certifications



- **Scrutinize medical certification to make sure employee has a Serious Health Condition:**
 - Inpatient care (e.g., hospitalization for gall bladder surgery)
 - Continuing treatment
 - Absence of more than 3 consecutive days due to a condition that requires 2 or more treatments by a health care provider or that requires 1 treatment by a health care provider and a regiment of continuing treatment (e.g., prescription). The two visits must occur within 30 days of the beginning of the period of incapacity and the first visit must occur within 7 days of the first day of incapacity
 - Pregnancy or prenatal care
 - Chronic conditions which require at least 2 visits per year and continue over an extended period of time (e.g., asthma, diabetes, epilepsy)
 - Permanent or long-term conditions (e.g., Alzheimer's)
 - Conditions requiring multiple treatments by a health care provider
 - Continuing treatment does not include:
 - Taking over-the-counter medicines
 - Bed rest, drinking fluids, exercise
 - Similar activities that can be undertaken without a visit to a health care provider

FMLA: Medical Certifications



- **What is *not* a serious health condition?**
 - The FMLA regulations include a list of conditions that “ordinarily” are not serious health conditions.
 - Common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc.
- Best practices when considering whether a condition is a “serious health condition”
 - Don’t be distracted by the name of a condition or how serious (or not serious) it sounds
 - Look at the particular facts and determine whether the employee’s absence meets one of the FMLA criteria for a “serious health condition”
 - Remember, even minor conditions (including without limitation the conditions listed above) can evolve into serious health conditions



- Re-certification:
 - Why recertify? Circumstances change
 - Frequency and duration change
 - At the end of the duration of the leave or every 30 days, ***whichever is longer***
 - No matter the duration, every six months in connection with an absence
 - If there is a pattern of suspicious absences or if the frequency and duration of leave taken is inconsistent with the medical certification

FMLA: Recertifications



- » When we ask for recertification, we can ask the health care provider to analyze the employee's absence record compared to the need for leave. For example:
- » Jane Doe is currently employed by ABC Co. in the position of [insert title]. A current job description of the [insert position] is attached for your information.

Jane is currently certified for leave under the FMLA based upon a medical certification form submitted by your office on [date]. This [date] medical certification form indicates that due to [insert employee's condition] we should expect that she may need to be absent from work [insert frequency of leave, i.e., 1-2 times per week, 4 hrs per day]. Since her intermittent FMLA request was approved 5 months ago on October 1, 2014, Jane has used intermittent leave on 67 occasions as follows: [Insert details of absences]

Because Ms. Doe's number and frequency [pattern] of absences is inconsistent with the information set forth in the certification form you provided us, we are asking you to recertify Ms. Doe's need for intermittent leave, including the frequency and duration of the leave. We are enclosing a new Certification of Health Care Provider for Employee's Serious Health Condition form for this purpose, which you should complete and return to us within fifteen (15) days after you receive it.

FMLA: Second Opinion Process



- **Alternative option for questioning the certification form: The Employer may, at its own expense, require the Employee to obtain a second medical certification.**
- **Employer may choose health care provider for the second opinion, except that Employer may not regularly use the services of the health care provider.**
- **If the opinions of health care providers differ, Employer may require the Employee to obtain certification from a third health care provider, again at the Employer's expense.**

FMLA: Second Opinion Process



- This third opinion shall be final and binding. The third health care provider must be approved jointly by the Employer and the Employee.
- Sometimes useful if healthcare provider is not an MD.
- Cannot use this process after designation has been made or for recertification.

FMLA: Transfers to Alternate Positions



- Temporary transfers – can transfer employees needing foreseeable FMLA leaves to alternate positions (pay and benefits must be the same, duties can differ). Can't require light duty to avoid permitting employee to take FMLA leave

FMLA: Intermittent Leave Strategies



- Require employee to cure deficiencies.
- Contact health-care provider if information looks suspicious.
- Request a second opinion when you encounter conflicting information.
- Re-certify if the leave exceeds frequency or duration.
- Understand reason for FMLA when employee has multiple approved FMLA.

FMLA: Intermittent Leave Strategies



- Encourage employees to schedule treatments for medical conditions so as not to disrupt employer's operations.
- Perfect attendance awards – such awards can be denied to employees who exercise FMLA leave (so long as other employees on non-FMLA leaves of absence also do not receive such bonuses).

FMLA: Intermittent Leave Strategies



- Reinstatement – must return employee to same or equal job with the same or equal pay, benefits and equivalent terms and conditions of employment (strict standard).
- Do not retroactively count leave as FMLA-covered.
- Prohibit outside employment – in writing

FMLA: Intermittent Leave Strategies



- **Strictly enforce call-off procedures.**
- **Require complete and sufficient medical certifications.**
- **Supervisors and managers must pay particular attention to abuse.**

FMLA: Employer's Obligation



- Request information when employee calls-in: The employee must:
 - Reference the qualifying reason or reference the need for “FMLA”
 - Employees with FMLA-approved leave for multiple reasons/conditions, can be required to identify the specific reason/condition for which FMLA leave is being taken
 - “I am sick” is not enough

FMLA Intermittent Leave Management



Enforcing Call-in Requirements

- An employee is required to comply with an employer's usual notice and procedural requirements for calling in absences and requesting leave, absent unusual circumstances. So,
 - If a call-in policy requires an employee to call in at least one hour before the shift starts to report an absence and the employee fails to do so, the employer can discipline the employee
 - *But note, an employee who has been certified for continuous leave may generally not be required to call in daily*



■ Track FMLA Used and Notify Employee of Usage

- Record all FMLA absences subtracting from the 12 weeks of FMLA the employee gets each year
- Employees should be told, in writing, whenever their absences are being counted as FMLA
- Employees should be informed when FMLA is exhausted
- After the employee exhausts his or her 12 (or 26) weeks of FMLA leave in the leave year, further absences are treated as regular absences under the attendance policy, subject to protection by the ADA and/or WC laws.

FMLA: Defense strategies



- **Employee Absences**
 - FMLA absences may not be counted against an employee
 - Employees may not be disciplined for absences covered by the FMLA
 - BUT employees may, in some cases, be disciplined for failure to comply with reasonable call-in/notice requirements
 - FMLA absences cannot be considered in evaluating performance or attendance

FMLA: Defense strategies



- **Best Practices When Considering Discipline/Discharge for Absenteeism**
 - Before discharging an employee for attendance related reasons, double check to make sure none of the absences are FMLA protected
 - If unsure whether absence is FMLA protected, best practice is to exclude it from consideration

FMLA: Tricky Applications



Multiple Caretakers

- The employee does not need to be the only available caregiver

Visitation

- Pure visitation does not constitute “caring for” sufficient to justify FMLA. But, psychological care does justify FMLA. Tough line to prove for employer

Vacationing with Sick Family Member

- Is the employee providing care on the trip? “So long as the employee provides ‘care’ to the family member, where the care takes place has no bearing on whether the employee received FMLA protection”

FMLA Defense Strategies



Negative remarks about the FMLA

- As in all employment-related lawsuits, we try to win an FMLA lawsuit on summary judgment (i.e., getting the judge to rule in our favor before it ever goes to trial)
- Our own bad conduct when it comes to FMLA will almost always prevent summary judgment
 - Harassment of an employee by a manager for taking leave
 - Negative comments about FMLA rights
 - Suggestions that the employee should not take the leave
 - Negative comments on a performance review about the amount of FMLA the employee has used

FMLA Defense Strategies



» Examples from recent cases:

- Supervisor saying “there are too many sick people here” and “why don’t you just resign and save us the trouble”
- Supervisor visiting sick employees at home to “check” on them and encourage them to return to work
- Putting a high performer on a PIP immediately after she returned from FMLA leave

FMLA: Defense strategies



■ Don't forget "incapacity"

- An employee must be incapacitated to be eligible for FMLA leave for his or her own serious health condition
- See *Jones v. C&D Techs, Inc.*, (7th Cir. 2012): Employee must be incapacitated at the time of the absence – otherwise, the absence is not FMLA protected. In *Jones*, an employee was approved for intermittent FMLA leave for periodic visits with physician to treat back and leg pain and anxiety. Employee had appointment with back specialist in the afternoon. Absence in the morning was not FMLA protected
- *But be careful with this argument. Just because someone can't work due to a medical condition doesn't mean they are unable to do anything else*

Defense Strategies



Terminating an employee based on “honest belief” of fraud

- In general, employer can terminate based on honest belief employee is committing fraud
- *Tillman v. Ohio Bell* (6th Cir. 2013): Plaintiff has been on intermittent leave for back condition for several years. Employer noticed most absences occurred on Fridays, Mondays, and days surrounding holidays. Employer hired investigator who observed the employee doing errands, working in his yard, bending, lifting pieces of wood. Employer’s doctor watched video and concluded the employee’s activities were inconsistent with his alleged FMLA condition. Court upheld termination based on employer’s honest belief the employee was able to work.

Defense Strategies



Terminating an employee based on “honest belief” of fraud

- *Hamm v. Nestle USA* (N.D. Ill 2013): Employee requested floating holiday, which was denied. Employee then requested FMLA to take his father to the doctor. Employer investigated and found the employee had not taken his father to the doctor. Co-workers reported the employee had previously used FMLA days to play golf, go to breakfast. Court upheld termination, determining employer had honest belief there had been FMLA abuse.

Defense Strategies



- **Terminating an employee based on “honest belief” of fraud**
 - *Seeger v. Cincinnati Bell Telephone Co., LLC* (6th Cir. 2012): Employee on FMLA, unable to perform any work. Four co-workers reported seeing the employee at Oktoberfest. Employer terminated the employee for fraud. Court upheld the termination, noting the “key inquiry” is whether the employer made a “reasonably informed and considered decision . . . The determinative question is not whether (the employee) actually committed fraud, but whether (the employer) reasonably and honestly believed that he did.”

6. Please answer the following questions only if the employee is asking for intermittent leave or a reduced work schedule to provide care to the patient:

(a) Is it medically necessary for the employee to be off work on an intermittent or reduced schedule basis (to work less than the employee's normal work schedule of _____ hours/days per week), in order to provide care to the patient?
___ No Yes.

(b) If "yes," please estimate the hours for which the patient needs care on an intermittent basis:

24 hour(s) per day; 5 days per week from 9:30-11:30 through 12:30-11:30pm

Signature of Health Care Provider

Patricia Moore

Date

2/4/14

Provided
by
employee

6. Please answer the following questions only if the employee is asking for intermittent leave or a reduced work schedule to provide care to the patient:

(a) Is it medically necessary for the employee to be off work on an intermittent or reduced schedule basis (to work less than the employee's normal work schedule of _____ hours/days per week), in order to provide care to the patient?
___ No Yes.

(b) If "yes," please estimate the hours for which the patient needs care on an intermittent basis:
2 hour(s) per day; 5 days per week from 9:30-11:30 through

Signature of Health Care Provider
Patricia Moore

Date
2/4/14

Faxed
from
DOCTOR

Defense Strategies



Before we decide to terminate based on fraud:

- **(a) conduct a thorough investigation (e.g., surveillance, talk to co-workers),**
- **(b) review the medical documentation,**
- **(c) in appropriate cases, have a medical expert review the information; and**
- **(d) give the employee a chance to tell his/her side of the story**



- Use the employer's right to run vacation/paid sick leave concurrent with FMLA
- Enforce your call in rules
- Get/pay for second opinions at the time of the original certification or the annual certification
- Investigate (and possibly conduct proper surveillance) when you suspect fraud



- **Have the employee sign a personal certification. For example:**

ACKNOWLEDGMENT OF ABSENCE

I, _____, certify that my absence on _____ was due to the reason stated in the FMLA Medical Certification form that I submitted to the Company on [date] in connection with my Family/Medical leave or for [insert reason for absence due to illness] I stated to [insert to whom reason for absence due to illness was stated]. I understand that any absences taken due to the serious health condition set forth in the Medical Certification will be counted against my leave entitlement under the Family and Medical Leave Act and Company policies. I also understand that providing false or misleading information about my absence will result in disciplinary action, up to and including immediate termination.

FMLA Defense Strategies



- **How do we calculate FMLA for employees who work more than 40 hours per week?**
 - The actual workweek is the basis for leave entitlement.
 - An employee who normally works 50 hours per week is entitled to 600 hours (50 hours x 12 workweeks) of FMLA leave per leave year.
 - The amount of leave used is calculated as a fraction or percentage of the employee's regular workweek.
 - If an employee who would otherwise work 50 hours per week takes off 5 hours during that workweek, the employee has used 1/10th (or 10%) of a week of FMLA leave. If an employee would otherwise work six 8-hour days (or 48 hours) per week takes off one 8-hour day, the employee has used 1/6th (or 16%) of a week of FMLA leave.
 - When an employee works part-time or variable hours, the amount of FMLA leave used is pro rated. For instance, if an employee normally works 50 hours per week but has been restricted to a 20-hour workweek, the employee's 30 hours of leave each week would equal 3/5^{ths} (or 60%) of a week of FMLA for every week the employee works the reduced schedule.

FMLA Intermittent Leave Example #1



- Jane, an administrative assistant, has been approved for FMLA leave for her depression and anxiety. Her psychologist has completed a medical certification for Jane that indicates that Jane may be off work for 1-2 days per month when she feels particularly depressed. She often calls in on the morning of the absence, or waits until the next day before reporting that the absence was FMLA related. You have noticed that Jane often calls-in on either a Friday or a Monday in connection with a long weekend. The medical certification indicates that this is a lifelong condition.

FMLA Intermittent Leave Example



- **What can you do to manage Jane's leave proactively?**
 - » Require Jane to sign an acknowledgement that she is taking FMLA leave on these occasions
 - » Ask her about her medical condition and need for leave
 - is leave medically necessary?
 - » Enforce a reasonable call-off policy
 - » Seek recertification, possibly a second opinion
 - » Send a letter to health care provider with copy of attendance history

FMLA Intermittent Leave Example #2



- **Joe has dialysis that requires him to be absent once a week for three hours to attend treatment. His supervisor approved his intermittent leave request form for every Wednesday morning. Joe's file contains absence slips but no accompanying medical certification. Joe is a critical member of the production process.**

FMLA Intermittent Leave Example



- *Employers should request and process medical certification forms and require the employee to reschedule their appointments so as not to disrupt the employer's business, if possible.*

FMLA Intermittent Leave Example #3



- John, an IT service representative for a large retailer, spends most of his time answering calls at a help desk. He has informed his manager that he re-injured his shoulder when he slipped and fell in his driveway. He submits medical certification paperwork indicating that he will need to be off from time to time when his shoulder “acts up.”
- How should you manage this employee’s leave?

FMLA Intermittent Leave Example



- Is intermittent leave medically necessary?
- Determine whether John can perform job requirements given medical condition.
- What is the estimated time off when his shoulder acts up? Get details.
- Review medical certification and seek clarification if necessary
- Monitor attendance

FMLA Intermittent Leave Example #4



- Jennifer has migraines, anxiety, and depression. She holds a very important deputy controller position. She is approved for intermittent leave for all three conditions. Her absences have been increasing during the past year, and she is well exceeding the frequency and duration of her approved leave. She takes off frequently on Fridays and Mondays.
- What do we do with Jennifer's case?

FMLA Intermittent Leave Example #5



- **Bill has intermittent leave for the past three years for chronic back pain. Bill has on average missed one day of work per month, except in October and November each year. In those months, he has taken 4-5 days FMLA per month. Bill is an avid hunter. Any issues?**

FMLA Intermittent Leave Example



- **Gina is pregnant and is having false contractions. She applied for intermittent FMLA for scheduled visits to see her healthcare provider. Her doctor restricted her from working overtime. After the birth, she is still on leave for the false contractions. She still has vacation and paid leave available. Any options?**

FMLA Intermittent Leave Example



- Monitor absence patterns
- Exceed frequency and duration?
- Do days off consistently fall on Monday or Friday or always on a day contiguous with a holiday.
- Periodically recertify, in case conditions have changed. Employers have the right to recertify leaves every 6 months.
- Require employee verification
- Require make-up?

FMLA Intermittent Leave Example



- Require substitution of paid leave (PTO, vacation), subject to union contracts and state laws
- Doctor's notes?

Effective investigations



- Don't Interfere or retaliate before you have the facts.
- Five W's
- Investigate potential fraud, but don't jump to conclusions.
- Interview witnesses and the employee.
- Internet research is priceless. Facebook is very effective, but don't communicate with the employee.
- Surveillance in some cases.

Effective investigations



- **Surveillance – Factors to Consider**
 - » Type of medical condition
 - » Length of absence
 - » Costs
 - » Use only in egregious cases of possible fraud
 - » Social networking sites



Questions?

Jeffrey S. Kopp
Foley & Lardner
jkopp@foley.com

Evan H. Pontz
Troutman Sanders
evan.pontz@troutmansanders.com