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On Again, Off Again: Intermittent Leave Under the FMLA

Special Report

Highlights:

- Basics of the Family and Medical Leave Act
- Obtaining a medical certification for a serious health condition
- Communicating with employees requesting or taking FMLA leave
- Calculating the amount of FMLA leave taken
- Strategies for dealing with suspected abuse of FMLA leave
- Lessons learned from court decisions
- Questions and answers on FMLA leave issues



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On Again, Off Again: Intermittent Leave Under the FMLA

By Peter A. Susser, Esq.

Employees' use of intermittent leave is probably the number one frustration that employers voice about the Family and Medical Leave Act (FMLA), particularly circumstances in which the need to use intermittent leave time is ostensibly unforeseeable and no advance notice is provided of the days on which such rights will be exercised. The FMLA regulations as interpreted by the U.S. Department of Labor (DOL) through Opinion Letters, as well as rulings by federal courts, place a number of frustrating limitations on employers when they attempt to question or control the use of intermittent leave. This report is intended to provide employers with some guidance on what they can and cannot do to minimize the impact of intermittent leave on their operations.

The FMLA provides eligible employees of covered employers with the right to take up to 12 weeks of job-protected leave in a 12-month period due to the employee's own serious health condition, or to provide care and assist in treatment for the serious health condition of the children, parents or spouse of the employee. The statute also provides for protected leave in connection with the birth or adoption of a child, or placement in foster care of a child with the employee, and care provided in the child's first year after arrival. The employer must maintain health care benefits for the employee on the same basis as it normally provides during other periods, and must reinstate the employee to the same or an equivalent position at the conclusion of leave.

Unfortunately – from the perspective of many employers – the statute provides no recognition of any hardship experienced by the employer that comes from the exercise of FMLA leave, which can be a particular problem with intermittent leave rights. Unlike laws such as the Americans With Disabilities Act (ADA), which recognizes a concept of “undue hardship” as a defense to a claim of failure to accommodate a “qualified individual with a disability,” there is no such defense under the FMLA. The FMLA is a statutory provision, and it requires employers to comply with these obligations this right and protection just as they comply with minimum wage and overtime laws. This is an important (and sometimes difficult) realization for employers that must deal with the challenge of administering intermittent FMLA leave requests and maintaining normal operations.

This special report is based on a ThompsonInteractive audio conference delivered by attorney Peter A. Susser, Esq. Mr. Susser is a partner in the Washington, D.C., law firm of Littler Mendelson, and is the author of the Family and Medical Leave Handbook and a member of its editorial advisory board.

Covered Employers and Eligible Employees

The FMLA covers employers with 50 or more employees who work for 20 or more calendar workweeks in the current or preceding calendar year.

To be eligible to exercise rights under the FMLA, employees must meet all three of the following criteria:

- have been employed by the employer for at least 12 months, not necessarily consecutively;
- have worked for the employer 1,250 hours in the previous 12-month period; and
- be employed at a work site in which the employer has 50 employees located within 75 miles.

Are All Locations Covered?

It is conceivable that a large company could itself be covered (because it employs more than 50 employees), but if its operations are such that it has many remote locations that use only a few employees, the company might not have any eligible employees. Or it could have some locations in which employees are eligible to use FMLA leave and others where employees are not.

Establishing a 12-Month Period

The period of protection under the FMLA is 12 workweeks in any 12-month period, and the regulations (29 CFR §825.200(b)) spell out how an employer might choose to designate the 12-month period. The employer can elect to use any of the following:

- a calendar year;
- any fixed 12-month period, such as a fiscal year;
- the 12-month period that begins with the first day of FMLA leave; or
- a rolling 12-month period, which is measured backward from the date an employee uses any FMLA leave.

‘Serious Health Condition’

One of the key terms under the FMLA is “serious health condition” of employees and covered family members. This is particularly important with respect to intermittent leave because there is a distinction between a right to use of intermittent leave for serious health conditions and the potential use of that leave in connection with care following the birth or arrival of a new child. The employer has much more control and discretion over the use of intermittent leave for the latter.

The term “serious health condition” is viewed as problematic by many employers because the statute has been interpreted to make the definition very broad. The DOL regulations (29 CFR §825.114) define the term “serious health condition” to cover “inpatient care” and “continuing treatment by a healthcare provider.” “Inpatient care” refers to an overnight stay in a hospital, hospice or residential medical care facil-

ity (as well as related subsequent treatment), and is fairly straightforward. The term “continuing treatment” is more complex, and involves treatment by a healthcare provider and one of the following:

- periods of incapacity of more than three consecutive calendar days where the person cannot attend work or school, and that also involve multiple treatments by a health care provider, or a single health care provider treatment, plus a “regimen of continuing treatment” under a health care provider’s supervision;
- any periods of incapacity relating to pregnancy or prenatal care;
- chronic serious health conditions;
- multiple treatments in various circumstances; and
- treatments for long-term conditions in which treatment may not be fully effective.

Thus, “continuing treatment” for a serious health condition must involve treatment two or more times by a health care provider, or treatment on one occasion with a regimen of continuing treatment, which could be as little as one round of medication that the employee will follow.

Legislative History of the Act

When enacted, the FMLA provided minimal guidance and direction regarding circumstances in which intermittent leave would be justified. Compared to many other pieces of legislation, there is very limited legislative history providing guidance to DOL, the courts and employers on what the meaning and application of the concept of protected intermittent leave should be. The reports of the congressional committees that looked at the possible uses of intermittent leave tended to focus on only two principles:

- (1) Employees should only be charged for the time they actually use for the protected purpose in the form of intermittent leave.
- (2) Employers should have some flexibility to temporarily transfer employees who need intermittent leave or need to work a reduced schedule to positions that are better suited to that.

Other issues were highlighted in the key congressional committee reports, but those limited points represent virtually the entire direction that the DOL received from Congress when it developed regulations to implement the act in January 1995.

Caution — Know Your State and Local Laws

The federal Family and Medical Leave Act is applicable in all locations throughout the United States, but many state governments have enacted their own versions of family and medical leave protections. If the provisions of the federal FMLA are more generous to employees than a state law, then the federal law applies, but if the state law is more generous than the federal one, then the employer must follow the more generous provisions of the state law.

Intermittent and Reduced Schedule Leave

The FMLA envisions protection of a single period of leave (be it two weeks, six weeks, or any other amount, up to 12 weeks continuously) during which the employee is out for the entire period. In the 14 years since the statute has been on the books, most employers have come to accept, understand and learn to manage their operations around this type of leave in most instances.

The use of intermittent leave, however, has been much more challenging. Intermittent leave is described in the regulations (29 CFR §825.203) as leave used in separate periods or blocks of time due to a single qualifying reason. Reduced schedule leave is a special kind of intermittent leave that amounts to a change in an employee's usual number of working hours in a workweek or in a workday, in many cases reducing an employee's full-time schedule to a part-time schedule due to a qualifying condition under the statute.

Serious Health Condition v. Birth or Placement of a Child

There is a major distinction between the rules that apply with respect to intermittent leave after the birth or placement of a child for adoption or foster care versus intermittent leave for serious health conditions. Section 825.203(b) of the regulations states that an employee may use intermittent leave after the birth or placement of a child only if the employer agrees to that use. Leave taken for serious health conditions, on the other hand, can be taken whether or not the employer agrees to it. So employers have much more control over — and frequently do restrict in some fashion — the use of intermittent leave for childcare purposes.

There are some related limitations, of course, that need to be kept in mind. If the desire to use intermittent leave relates to a serious health condition that a mother develops with respect to childbirth, or if a newborn child develops a serious health condition or is born prematurely and has other health problems, the limitation found in Section 825.203(b) does not apply because the situation now involves a serious health condition rather than only a childcare circumstance.

Requiring Employees to Re-request Intermittent Leave

One important question relates to how many times an employee must request and be approved for intermittent leave. Establishment of qualification and eligibility for FMLA leave is applied only at the time of the individual's first application to use intermittent leave. This includes establishing that the employee worked 1,250 hours in the previous 12 months.

If an employee uses intermittent FMLA leave that extends for a very long period of time, perhaps over the course of an entire year, an employer might question when that 1,250 hours eligibility test is measured. The Labor Department has said through interpretive Opinion Letters that the test can be applied *only once* during the same 12-month FMLA leave year, at the commencement of a series of intermittent absences, as long as you are dealing with the same serious health condition.

Thus, if an employee applies for the use of intermittent leave for a serious health condition, and that employee worked 1,250 hours for the employer in the preceding

year, then the individual is eligible for all of the subsequent intermittent leave associated with that serious health condition during the year, even if he or she might not meet that standard at some later point in the year. An employer cannot reconduct the 1,250-hour qualification test later in the year if it is dealing with the same condition.

However, there have been a few reported decisions in which courts have stated that, essentially, FMLA leave cannot be taken forever on the basis of one leave request. This means that qualification extends for one 12-month period, not indefinitely. At the end of that 12-month period, the individual's eligibility to use intermittent leave can be considered once again.

Certification of Medical Necessity

One potential element of control for the employer regarding use of intermittent leave is the health care provider's certification of medical necessity, which the employer uses to verify the eligibility of the individual and the circumstances for coverage and on the use of intermittent leave.

The regulations provide an entitlement for use of intermittent or reduced schedule leave only when it is medically necessary. Leave for a voluntary treatment or procedure would not qualify for this purpose because it would not be medically necessary. This is a major limitation in that the leave is not totally for the individual's discretion or convenience. If the employer requests it, the employee must provide a certification by a health care provider which states that working on this different schedule, or being able to take leave on an intermittent basis, is necessary to provide treatment to the employee or care or psychological comfort to a family member with a serious health condition.

While this may seem like a good standard for employees if employers try to constrain broad use of this form of leave, it must be recognized that under the FMLA the concept of serious health condition is quite broad. It includes providing psychological comfort and reassurance, if that is judged to be beneficial, to a qualifying family member who is receiving treatment and care. It also might extend to situations where the family member's disability or illness is intermittent and also to circumstances in which the need for the employee to provide that care and comfort is required only intermittently. Of course, that is something that can be probed in the course of the certification process.

Elements of the Health Care Provider's Certification

The Labor Department provides a sample form (Form WH-380) for health care provider certification. Employers are not required to use this form; it is intended only as an example of what employers might want to use. The form includes:

- 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 in question because of the serious health condition.

If the certification is for a family member, it must include a statement that the serious health condition warrants the participation of the employee to provide care during

a period of treatment or supervision, and an estimate of the amount of time that the health care provider believes the employee will need to provide that care.

There are additional certification requirements that come into play when intermittent leave is in the picture. Employers should ensure that the health care provider has certified its necessity and the circumstances of the leave. The health care provider's certification should focus on and make clear the medical necessity for this kind of leave and how long intermittent or reduced schedule leave will be required. If the condition will require the employee to be absent for treatment, the certification should provide the date that treatment will begin and the expected duration of treatment.

Verification and Recertification of Medical Necessity

An important protection for employers is their ability to verify the need for leave, through requests for second and third opinions, or, if the employee consents, by having the employer's medical provider contact the employee's health care provider to question, clarify or get (minor) amplification of the descriptions of the need for leave in a particular case.

Another one of the protections provided is that in some circumstances, employers are allowed to ask for recertification of FMLA leave necessity. However, Section 825.308 of the regulations states that when intermittent leave is in play, an employer is not permitted to request recertification in less than the minimum period that is specified in the health care provider's original certification unless:

- circumstances suggest different conditions are present;
- circumstances have changed;
- the employee is seeking a longer period of leave; or
- information comes to the employer that casts doubt on the continuing validity of the initial certification, such as observing the employee performing activities that are inconsistent with what was previously conveyed by the health care provider.

An Employee on Perpetual FMLA Leave?

Experience with the FMLA has come to clarify certain expansive protections available to employees, perhaps extending to insulation for long-term modification of work schedules in ways that Congress did not intend or envision. One is the possibility that an individual will have a continuous entitlement to FMLA intermittent leave throughout his or her employment, essentially converting a full-time job to a part-time job if medical conditions justify it.

For example, consider a situation where an employee has a health care provider's certification that says the employee needs an absence of one day per week. Over the course of a year that individual would be absent for 52 days, which is eight days fewer than the 12 weeks of statutory entitlement for an employee who works a typical 5-day, 40-hour workweek. It is likely that the employee would work a sufficient number of hours in that leave year to qualify again for the full 12 weeks of FMLA protection in the following year. So, if the medical conditions justify it, the employee's right to the four-day workweek might carry over to the next year and possibly the years that follow.

Generally, this is more restrictive on the recertification capability than the ability that employers have under the FMLA when the leave is taken in a single block of time. This can mean that recertification might essentially be barred, in some cases for the entire leave year.

For example, if an individual has to go through kidney dialysis on a regular basis. At the beginning of the year the health care provider says that the employee needs to be out one day per week to receive that treatment and therapy and that this will extend throughout the entire year (52 days in the course of a year). If the individual normally works five days a week, 40 hours per week, that would be one-fifth of a workweek for each absence, a total of 52 days out of the 60 protected days under the FMLA. Because of the way that the certification was phrased by the health care provider, under the regulations the employer would not be able to request an additional certification in the course of the entire year.

Of course, if an employee is required to undergo kidney dialysis, many employers would probably not be inclined to question the ongoing need for leave. For other conditions and circumstances, though, employers might want to obtain further assurance and desire recertification. However the same restriction might apply, again depending on the wording of the health care provider's certification.

According to the DOL, once a new leave year begins, the employer would have the ability to recommence the certification process in most instances. (See FMLA Opinion Letter 2005-2-A (2005).) Such an approach should be considered with respect to serious health conditions that extend from one leave year into the next.

How to Handle Intermittent Leave Following a Single Block of Leave

One common circumstance relates to the use of intermittent leave following a period of continuous absence for the same serious health condition. The following is an example: an employee has a serious health condition, is out for six weeks of protected leave and then wants to come back to work, but only on an intermittent basis. The employer must consider how much leave time is left and whether the use of intermittent leave is justified by the original certification that the employee provided.

Typically, when an employee is out for a block of time, the health care provider's certification will relate only to that initial period. It may not focus on longer periods of time during which the individual will be able to work and substantially perform the essential functions of the job, but perhaps for lesser periods or only intermittently due to ongoing treatment. Many times those kinds of complications and follow-up care are not addressed in the original health care provider's certification, so that can be an issue to be addressed following the employee's return from the period of full-time leave. At this juncture, the appropriate step may be to seek an additional certification from the health care provider relating to this new period of limitation.

How to Determine the Amount of Leave Taken

How does one determine the amount of leave that's used when an employee takes FMLA leave intermittently or through a reduced schedule? Basically, the employer can only charge the individual for the amount of time actually used for FMLA leave.

If an employee who normally works five days a week takes one day off per week on an intermittent or reduced schedule basis, that employee would use one-fifth of a week of FMLA leave entitlement during each week. Similarly, if a full-time employee who normally works eight-hour days works four-hour days under a reduced schedule leave, that individual would use half a week of FMLA leave during each week in which he or she works on that schedule (29 CFR §825.205).

Section 825.205 of the DOL regulations also provides examples about individuals who work part-time schedules or variable hours. In that instance, one has to look at what the employee's schedule was on a normal basis in the weeks before the commencement of the leave period. To calculate what the employee's normal workweek is, take an average of the employee's workweeks in the 12 weeks before the beginning of leave. Once determined, deduct from that average accordingly.

For example, if an employee who normally works 30 hours per week works only 20 hours a week under a reduced leave schedule, the employee's ten hours of leave would constitute one-third of a week of FMLA leave for each week the employee works the reduced leave schedule.

What Constitutes Acceptable Notice?

One important issue concerns the kind of notice an employee must give an employer when the need for FMLA leave is foreseeable and also when the leave is not foreseeable. As mentioned above, this is one of the major frustrations in FMLA administration.

DOL regulations (Section 825.302) spell out that an employee is supposed to give the employer at least 30 days advance notice before using FMLA leave if the need for leave is foreseeable. If that is not practical because of a lack of knowledge or uncertainty about when the leave will need to begin or due to a change in circumstances or a medical emergency, notice is supposed to be given "as soon as practicable." That means both as soon as possible and practical, taking into account all of the facts and circumstances in the individual case.

Employee Must Consult With the Employer When Scheduling Medical Treatment

The regulations contain an important clarification of this scheduling question, which offers the employer an element of control over the use of intermittent leave to some extent. Section 825.302(e) provides that when employees are planning medical treatment, they are required to consult with the employer to make a reasonable effort to schedule leave so as to avoid unduly disrupting the company's operations.

Of course, this is subject to the approval of the health care provider involved and the circumstances of the individual case. If an employee fails to consult with the employer before scheduling the treatment, the employer may initiate discussions and require the employee to attempt to make arrangements that will not disrupt its operations subject to the approval of the health care provider.

Unforeseeable Need for Leave

The crux of the problem often tends to be where the need for intermittent leave is not foreseeable, in which case the requirement of notice by employees is much reduced. In this case, employees are only required to provide such notice within two days of their awareness of the need for leave. So when an individual who has a serious health condition experiences a flare-up or a problem and has no way of knowing before the workday or the workweek begins that it will occur, he or she is substantially relieved from providing advance notice to the employer about the bona fide need to be absent.

Of course, there may be other circumstances in which an employer might believe that an employee might be abusing this process because it may be to the employee's advantage to take protected leave without any kind of advance notice, causing disruption to the company's operations. Regardless of whether the employee's use of the intermittent leave is bona fide, it can cause major problems because the employer must scramble to fill in for individuals whose absences have not been forecast, projected or predicted in advance. In some cases, it even may be required to reschedule production operations.

Transferring the Employee to a New Position During the Intermittent Leave Period

One of the major protections that Congress provided to employers in the statute is their potential ability to transfer employees who are using intermittent leave or reduced schedule leave to other positions within the organization that will better accommodate that kind of recurring periodic absence.

However, there also are important limitations on employers' discretion in this regard. Section 825.117 of the regulations states that the new position to which the employee is transferred has to provide equivalent pay and benefits and better accommodate the employee's altered schedule. Such a transfer must not be used to discourage the use of leave or to retaliate against employees for the exercise of leave rights; it is a significant source of liability for the employer if the transfer can be shown to violate this provision. Thus, in application, it is not permissible to use the transfer opportunity without providing a position that is equivalent in terms of pay and benefits.

Neither is it permissible to transfer the employee to a new position if circumstances will impose a hardship on the employee. One of the early opinion letters from the Labor Department (No. 42, issued in 1994) said that an employee must accept a transfer or lose FMLA protection unless the transfer to the new location or job would adversely affect the individual. For example, the transfer would not be permissible if it caused the employee's commute to be longer in distance or time or to cost more because, say, the employee typically uses public transportation but this transfer during the period of intermittent leave would require the individual to drive a car to the temporary position.

Of course at the end of the use of intermittent leave, the employer is required to reinstate the employee to the same or an equivalent position as the job that he or she left when the use of the FMLA leave began.

Making Deductions From Pay for Hours Not Worked

Another important issue relating to intermittent leave is the ability of employers to make deductions from compensation for periods of absence while intermittent leave is being exercised. This is one of the key concessions to employers in the statute, particularly with respect to exempt employees under the Fair Labor Standards Act who must be paid on a salary basis to be eligible for exemption from overtime premiums.

Normally an employer cannot dock a salaried employee's pay if he or she is absent for less than a day, regardless of the reason for the absence; rather the employee is paid on a salary basis no matter the number of hours worked in a week. However, Congress put a unique provision in the FMLA that allows employers to deduct pay from salaried employees for hours missed during an FMLA-protected leave. So, particularly in the context of intermittent leave, the employer may deduct from an exempt employee's salary for the time that he or she is away from work due to the protected condition without jeopardizing that employee's exempt status.

Notice of Leave Rights and Obligations

The DOL regulations require employers to include information about protected family and medical leave in employee handbooks, or to provide the employee with written information at the time the leave is requested. Employers must also prominently display a notice in the workplace that tells employees about their rights under the act. The employer must designate the leave as FMLA leave and notify the employee within two business days of the employee's request for leave of his or her eligibility or ineligibility.

In 2002, the U.S. Supreme Court essentially invalidated some aspects of the Labor Department's rules concerning communication to employees about protections under the act and procedures for using FMLA leave (*Ragsdale v. Wolverine World Wide Inc.*, 122 S. Ct. 1155 (U.S. 2002)). The regulations say that if an employer failed to notify employees that leave they are taking would count against their 12 weeks of allotted FMLA leave, then the employer could not count that leave time as FMLA leave, and the employees would still have 12 weeks of protected FMLA leave remaining. The Supreme Court said that those portions of the regulations go against what Congress had intended: Congress provided 12 weeks of leave, and the DOL exceeded its boundaries by saying that this type of deficiency could extend the leave rights and expand them.

However, the Court did leave open the possibility that employees could challenge employer deficiencies in providing such notice if they were able to demonstrate that they were prejudiced by the employer's failure to notify them of their rights and classifications of absences. For example, if an employee was absent for a full 12 weeks on a continuous period of leave and then was terminated for absenteeism subsequent to returning to work, the employee might argue that the employer's failure to inform him or her of intermittent leave rights led to their accelerated exhaustion of leave rights. The employee might allege that he or she would have chosen a shorter period of "block" leave had he or she been aware of the possibility of intermittent leave. The

impact of the Supreme Court's ruling and the manner notice requirements still have vitality are still being weighed and examined in the courts, and at DOL.

Strategies for Dealing With Suspected FMLA Abuse

Despite challenges created by the legislative and regulatory structure, there remain certain strategies that employers can apply if they suspect that employees of abusing FMLA leave. For example, even the Labor Department's interpretations recognize

Other Strategies for Avoiding Abuse

- Provide the employee's health care provider with a job description or list of essential functions of the employee's job so that he or she is in a better position to determine if the employee can or cannot perform essential duties.
- Insist that the medical certification be "complete." Put the burden on employees to obtain missing information needed to make it complete. Consider requiring new certification, but only when permitted by the DOL regulations.
- If complete medical certification is not furnished, treat the absences as non-FMLA absences subject to disciplinary action under the employer's attendance policy.
- Develop a medical certification form for use with FMLA leave, but make certain that the form does not ask for more information than is authorized by the FMLA regulations.
- Require a second and third opinion on medical certifications submitted by employees, where the health care provider's certification raises questions that are not or can not be clarified through limited contacts by the employer's health care provider with the initial provider (if agreed to by the employee). If an employee refuses to cooperate, treat the related absences as non-FMLA absences subject to the employer's attendance policy.
- Discipline employees who fail to comply with the employer's procedural requirements for leaves of absence.
- Prohibit employees from working elsewhere while on leave or engaging in any productive work of a compensable or non-compensable nature, if consistent with general policies prohibiting "moonlighting" or requiring company approval for acceptance of such work.
- Consider any information obtained regarding employees on leave due to their own serious health conditions who are reported to be engaging in other strenuous activities while on leave that are inconsistent with diagnoses and prognoses submitted by the health care provider. (A "serious health condition" involves a period of incapacity during which the employee is unable to work or "perform other regular daily activities.")
- Periodically call or visit absent employees (if feasible, and not in an abusive or intrusive manner) to verify that they are home and recovering. Consider surveillance of employees strongly believed to be abusing FMLA leave.
- Consider transfers during the period of intermittent or reduced schedule leave (while complying with applicable rules governing such actions).
- Terminate employees if the employer has convincing evidence that they fraudulently used FMLA leave.

that there can be patterns that suggest abuse, there may be some ways at least to highlight those and get some clarification. If the developing circumstances are not consistent with the previous certification, an employer might be able in the course of using intermittent leave to get a recertification.

In 2004, DOL issued an opinion letter (No. 2004-2-A) addressing the question of a recertification period where there were patterns of absence that were not consistent with what was evident in the employee's submitted health care certification. The doctor had indicated that there might be a need for intermittent leave for two or three days a month due to migraine headaches, and the employee took leave every Monday or Friday, thus extending weekends. The opinion letter allowed that such a situation might be a trigger for a recertification, and that the employer could inform the health care provider about this pattern of absence and ask some specific questions about that.

What about other types of suspected FMLA abuse? One common problem is an employee at one job appearing to be working at a second job while exercising FMLA leave at the first job. Another is employees who refuse to work overtime or on weekends and submit FMLA certifications supporting that refusal.

At least one appellate court has said that "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. 2005)). So there can be situations that can allow for a new certification of eligibility.

Also, employers are free to continue policies that they may have limiting outside employment and apply them to an employee on FMLA leave. DOL Opinion Letter No. 106 (July 1, 1999) indicates that 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. If the employer does not wish to limit all outside employment, it can have a policy that prohibits outside employment while an employee is on paid or unpaid leave where benefits may be retained while on leave.

There are several other possibilities to consider in looking at circumstances that arise where the employer may believe the employee is abusing FMLA leave. Many of these strategies on preventing intermittent leave abuse depend on how determined employers might be to challenge the use of intermittent leave.

Typically this relates to their perceptions of whether that right and authority is being abused within their workforce. Sometimes, particularly if a few employees appear to be using their familiarity with FMLA rules to manipulate attendance, absenteeism and tardiness rules, the employer might fear that the abuse could spread. Thus, employers sometimes feel a need to push back a bit and try to maximize their abilities to question, scrutinize and challenge asserted FMLA eligibility and the justification for an individual absence in relation to the claimed and demonstrated need for intermittent leave. This can be a reasonable strategy.

An employer can require the employee to provide detailed information when he or she requests FMLA leave or to provide sufficient information to suggest that time off may qualify as an FMLA absence. If the employee does not provide sufficient infor-

mation, the employer might treat the absence as non-FMLA leave, which would then be subject to disciplinary action under the employer's regular attendance policies. For instance, if the employee just calls in and says "I'm sick today" and provides no other information, then the employee has not provided sufficient notice that the absence may qualify as an FMLA absence.

Another situation sometimes arises when an employee has a serious health condition, or a family member has a serious health condition, for which intermittent leave is authorized, and the employee calls in or indicates that he or she needs to be out that day because of a circumstance that has come up. Certainly, there are limitations on recertification, but can an employer ask for any kind of proof or documentation relating to an individual instance of leave?

The Labor Department is not clear on this, and there have not been decisions addressing the question. Some observers believe that there may be an ability, in certain, individual cases, to ask for non-medical documentation of events that may prove or disprove the employee's claim tying the claimed appropriate exercise of protected intermittent leave rights to the medical justification already established or on file.

For instance, say the employee has a child with a serious health condition that can result in an episodic need for health care, and the employee says that an emergency has taken place at school and the employee needs to take the child to a health care provider. It seems likely that the Labor Department's rules or interpretations would not prevent an employer from requiring some proof, perhaps a note from the school that confirms the occurrence of an event that required calling the parent in for an emergency circumstance. This note would not address the medical aspects — the school in most cases would not have a health care source or an authority on premises anyway — but would merely confirm that the claimed event claimed really did occur.

Lessons Learned From the Courts

Many court cases have focused on intermittent leave issues and have spelled out some of the requirements that are involved.

For what purposes can an employee take intermittent leave or reduced-schedule leave? In *Hodgens v. General Dynamics Corp.*, 144 F.3d151, the U.S. Court of Appeals for the First Circuit held in 1998 that intermittent leave can be used for doctor visits to diagnose or treat a serious health condition. In this case, the employee experienced atrial fibrillation, but required several doctor visits to make the diagnosis and rule out other serious diagnoses. The court said that it is unlikely that Congress intended to punish people who are unlucky enough to contract a disease or suffer a serious symptom for some period of time before a medical professional is able to diagnose the cause of the problem.

Several district courts have indicated that employees do not need to be completely incapacitated to take intermittent leave. In fact, some of them have gone on to say that the fact that an employee needs leave because he or she cannot perform a specific job does not preclude the employee from participating in other life activities like shopping, eating lunch or visiting bars while on intermittent leave. A district court in

Iowa in 2003 said the FMLA contains no requirement that an individual on intermittent medical leave must immediately return home, shut the blinds and emerge only when prepared to return to work.

Other cases have considered what employees need to show to demonstrate that leave is medically necessary. Courts have generally interpreted medical necessity rather broadly, as suggested by the *General Dynamics* case, to include visits to diagnose a condition or even to participate in medical decision-making for an ill family member.

Regarding intermittent leave unduly disrupting the employer's operations, courts have wrestled with the requirement that employees must give notice of the need for intermittent leave and the requirement that employers must give notice of the designation of leave. For example, a New Jersey decision dealt with a situation in which an employee who had taken leave for various reasons in the past was granted intermittent leave to care for his wife, who had a back injury. The employee believed he had approval for up to 26 weeks of leave and reported absences to his supervisor via voice mail. However, the court denied summary judgment in the case even though the employee did not state whether the absences were to care for his wife or for other reasons, and did not provide medical certification despite the employer's request.

There have also been some cases where courts considered that the Supreme Court's decision in *Ragsdale* might apply differently in the intermittent leave context, and did not grant summary judgment for employers who were being sued by employees for failure to notify them that their leave was being considered FMLA leave.

In a Third Circuit case involving a public electric and gas company in 2004, the court denied summary judgment to the employer, finding it was an issue of fact as to whether the employee had been prejudiced by lack of notice that leave was FMLA-qualified and then allowing the employee to try to demonstrate that he might have taken leave in a different fashion if he had been aware that leave could have been taken intermittently.

By contrast, there have been some cases in which employers have prevailed and gotten summary judgment under those kinds of *Ragsdale* claims, including one 2003 Wisconsin decision. In that ruling, an employee who resigned from a managerial job to take a part-time position elsewhere claimed that she was not told she could take intermittent leave; however, she was not successful in convincing the court that she would have acted differently in that particular case.

There has been a lot of litigation under the FMLA considering a number of questions relating to transferring employees who need intermittent leave, abilities or inabilities of employees to perform essential functions of the job when not on intermittent or reduced schedule leave, and other critical issues. In one recent decision by a court in Ohio, an employer moved to dismiss a diabetic employee's FMLA claim, arguing that his request for breaks of a few minutes each during the course of a workday to get something to eat was not covered by the FMLA. The court disagreed, finding that leave during the workday by a diabetic employee in order to eat to correct low blood sugar when medically necessary can qualify as intermittent leave under

the FMLA even if it is only for a few minutes and only uses up a small quantity of FMLA leave entitlement.

DOL to Review the Regulations

On Dec. 1, 2006, the Labor Department announced that it is seeking information from the public regarding the FMLA rules. This is linked to some extent to the Supreme Court's *Ragsdale* decision because it struck down one of DOL's rules. There have been other court decisions that have stricken other aspects of the FMLA regulations as well.

Employers have agitated for some years — particularly during what is presumed to be a favorably-inclined Bush administration — for DOL to address some of the problems and frustrations experienced by employers in administering the FMLA. One of the questions posed by DOL in the notice was: Does intermittent leave present different problems or benefits than leave taken in one continuous period of time? It remains to be seen if those procedures and constraints will be eased somewhat before the Bush administration leaves office, but certainly most of the employer community is hopeful that will happen.

Questions and Answers

Q: Can an employee take a continuous block of leave *and* intermittent FMLA for the same FMLA condition?

A: Yes. Assuming that the health care provider's certification specifies that that both a block of leave and a period intermittent leave are required, then it is perfectly appropriate to use both forms of leave.

Q: In determining whether an employee has worked the requisite 1,250 hours in the previous year, does the employee have to be physically at work for 1,250 hours?

A: The 1,250 hours relates to hours actually worked, whether present in the workplace or not. For example, if you allow employees to work remotely, those hours would count if they are actually working. However, it does not apply to paid or unpaid time on leave, such as vacation, sick leave, jury duty or any other leave not counted as hours worked under the Fair Labor Standards Act.

Q: If an employee who is authorized for FMLA leave for one serious health condition submits a request for FMLA leave for a second, unrelated serious health condition, can the employer look back over the preceding year to determine if the employee has worked the requisite 1,250 hours to be eligible for the leave?

A: Yes. It is entirely possible that an employee who has been out for some time on allowable leave for one serious health condition might not have worked the requisite 1,250 hours to qualify for leave due to a second serious health condition. The employer is well within its rights to deny leave for the second condition if the employee did not work 1,250 hours during the preceding 12 months.

However, the employee would remain eligible for leave related to the first condition. Any subsequent absence really would have to relate back to the first condition to be protected under FMLA.

Q: Does an employee have to be certified for the entire first year, or does it depend on what the doctor writes, or is it the employer's choice to certify for six months instead of a year?

A: It is always the employer's choice in terms of what information and evidence it requires to justify entitlement to leave. There is no requirement in the FMLA that employers require a health care provider certification at all. The statute just permits the employer to obtain that. Generally, most employers should adhere to a policy that if an employee is seeking to use intermittent leave, the health care provider certification should reflect the need for leave on an intermittent basis, and it should get all of the information to which it is entitled to concerning the health care provider's projection in terms of the need for the leave, how long the leave will be required, to what extent leave will be required, etc.

That does not necessarily mean that the certification will run for a year. For instance, the health care provider might say the employee has a specified condition for which he will need treatment twice a week for a month; in that case, the certification period would last only for that month. In cases in which certification specifies a defined period for the serious health condition, the individual's authorization really should expire after the period the doctor provided. If the employee wants it to extend that period, another certification should be submitted.

Q: Are there any strategies for dealing with employee bad behavior? For example, say someone has submitted certification that he will need intermittent leave periodically for asthma, and has asthma attacks every Monday or lots of Mondays. Then you find out that he participates in a dart league on Sunday nights for four hours in a smoky bar.

A: This is getting close to the line where recertification might be justified because circumstances do not seem to be consistent with what was described in the original certification. There is what seems to be a pattern of absence, which is covered by a DOL opinion letter. If you have not had a second opinion done on this employee, you might consider an independent doctor's opinion; the regulations themselves are silent on the period of time in which an employer can exercise its right to seek a second opinion from a health care provider of its choice.

In this case, there may be reason, and means, to subject the proffered explanation and purported illness with closer scrutiny because of the inconsistency between what has been described and the behavior and actions that the employer is aware of.

Q: Say an employer has several people that have requested and been approved for intermittent FMLA leave to care for a family member, and the employer sus-

pects that one of those employees is abusing the leave. Must the employer ask all employees for documentation when they have to be out for FMLA leave to care for a family member, or is it acceptable to require it only of the one employee suspected of abusing it?

A: This is not directly addressed by the regulations, but it seems reasonable that you can treat the one situation where you think there is leave abuse differently from those where you do not suspect abuse. The statute and regulations envision at least the possibility that there might be employee abuse. If there is a good basis to suspect one employee, you do not need to apply the same scrutiny, tests and standards of proof to every employee.

Q: If the employer suspects that an employee is abusing FMLA leave, whether it be patterning or otherwise, can the employer require an independent medical evaluation even if the recertification period is not up?

A: If you have good evidence of abuse, then you are allowed to schedule the recertification before the end of the certification year. Section 825.308(c)(3) of the regulations allows recertification “at any reasonable interval” when the employer receives information that casts doubt on the continuing validity of the certification.

Q: What can you do if an employee appears to maximize his or her attempted use of FMLA leave — for example, takes a day of leave as soon as it is available — but it is not clear if the need really exists or if the employee is merely manipulating the leave? Can the employer require further proof of the need for the leave?

A: Although the regulations do not specifically authorize an employer to request non-medical confirmation of the need for the leave, they do not prohibit doing so. The employer might look for some documentation confirming the use of individual days of leave in circumstances where that might be available. If the employee calls in and says “I’m staying home today because I have a migraine,” it would be difficult to get any kind of confirmation or independent documentation of that.

But if the employee says “I can’t come in today because I have to get treatment” or “I need to take my child to the doctor,” there might be some documentation available from a third party that would not confirm the medical facts, but would confirm that the action was taken — such as confirmation that there was a doctor’s appointment. That may be the only strategy at this point to try to let the employee know that some scrutiny will be applied and to make it a little more difficult for the employee than just calling in.



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