

By David P. Jendrzejek



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APPROACHES TO HANDLING INTERMITTENT LEAVE

Joe, one of your employees, is afflicted with migraine headaches and often needs to take a day of sick leave because he is incapacitated. Another employee, Mary, is pregnant and wants time off for the birth of her child. Cindy's parents are in failing health and she is often called to help with an emergency or needs time off to take them to their medical appointments.

Under the Family and Medical Leave Act ("FMLA"), each of these employees is entitled to up to 12 weeks of unpaid leave in a 12-month period to address these issues. In many cases, such as the birth of a child or surgery or other treatment for an illness or injury, this time off is taken in one segment. In other cases, however, the leave may be taken "intermittently." Requests for intermittent leave present difficult and frustrating issues for employers. While entitlement to intermittent leave has been a great help to employees dealing with serious health conditions, such leave may be abused by employees who see it as an easy way to secure a three or four-day weekend. This article highlights some of the strategies employers may use to combat such abuse.

Conditions Necessary for Intermittent Leave

Employees eligible for FMLA leave may take it intermittently when "medically necessary" because of their own serious health condition or to care for a family member with a serious health condition. Employees like Joe or Cindy may find this necessary in their situations. Employers may also grant intermittent leave for the birth, adoption, or placement of a child,

but are not required to do so. Intermittent leave is considered a single leave of absence taken in separate blocks rather than discrete leaves of absence.

Intermittent leave is "medically necessary" when there is a "medical need" for leave and the need is best accommodated through intermittent leave. Instances in which a chronic medical condition might require intermittent leave may include an employee with asthma who must stay home because of the onset of an asthma attack or an employee with chronic low back pain who cannot work from time to time. As noted above, Joe's migraine headaches and the demands on Cindy for the care of her parents may also require intermittent leave.

If an employee has proper certification from a healthcare provider, he or she can take intermittent leave, even if those absences occur without advance notice. If an employee's need for intermittent leave interferes with the employer's operations (e.g., the position held by the employee must be manned at all times), the FMLA allows employers to reassign the employee to an alternative position to accommodate the need for intermittent leave. However, the alternative position must have equivalent pay and benefits and must better accommodate the need for the intermittent leave. But it is often difficult for employers to cope with unexpected absences due to intermittent leave, even with reassignments.

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Certification of Need for Intermittent Leave

Where a serious health condition of an employee will require intermittent leave, the employer can and should require the employee to provide medical certification from his or her healthcare provider about the leave, including a statement of the medical necessity for the leave, the expected duration of the intermittent leave, the anticipated frequency of episodes of incapacity, and ongoing treatment. An employee like Cindy, who needs to be absent to care for a family member, may also be required to provide such a certification, although the information required is somewhat different. If the certification provided is incomplete, the employer must so advise the employee and allow a reasonable opportunity to cure the deficiency.

If the employer questions the adequacy of a medical certification, the employer may have a healthcare provider selected by the employer contact the employee's healthcare provider, with the employee's permission, "for purposes of clarification and authenticity" of the medical certification. An employer may also require the employee to obtain a second opinion, at the employer's expense.

Recertification of Need

To better monitor cases of chronic health conditions and minimize the risk of abuse, employers should request recertification as frequently as possible. However, the right to request recertification is limited. If the original medical certification for a chronic or long-term condition does not specify a minimum duration of incapacity, an employer may require a recertification "on a reasonable basis," but no more often than once every 30 days, and only in connection with an absence. However,

recertification may be requested more frequently than every 30 days if: (1) the circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of absences, the severity of the condition, complications), or (2) the employer receives information that casts doubt upon the employee's stated reason for the absence.

Information that casts doubt upon the employee's stated reason for the absence could include a suspicious pattern of absences, such as a pattern of Friday/Monday absences or other apparently excessive absences. For example, Joe may claim that his chronic migraine headaches cause him to be absent two or three days a month, but if his absences always occur on a Monday or Friday, his employer would have sufficient information to trigger the right to recertification. Where such information presents itself, an employer should request recertification.

If the original medical certification specifies a minimum duration of incapacity (such as six months or one year), an employer may not request recertification during that minimum period of incapacity unless the employee requests an extension of leave or one of the two conditions described above is met.

In any event, an employer may and should require a new medical certification, not just recertification, for an employee's first absence in each new 12-month leave period for a previously-certified serious health condition. FMLA leave cannot be taken forever on the basis of one leave request.

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Additional Strategies

Employers might also consider the following in dealing with suspected abuse situations:

- When requesting a recertification because of information that casts doubt on the employee's stated reason for being absent, consider informing the employee's doctor (via a question on the recertification form or separate letter) of the employee's pattern of absences or apparent excessive absences. Ask the doctor if this pattern is consistent with the employee's serious health condition.
- Where recertification is permissible, require the employee to furnish the recertification within the 15-day calendar period allowed under the FMLA.

Intermittent leave situations present one of the more challenging applications of the FMLA. If you are faced with such a situation, you should consult with counsel for answers to specific questions.