HRMORNING

Intermittent FMLA Leave:

Taking Control of HR's Biggest Headache

EMPLOYMENT LAW

Contents:

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Taking Control of HR's Biggest Headache

If there's a phrase that makes executives and managers shudder, it's got to be this one: The Family and Medical Leave Act.

FMLA's been a thorn in the side of companies across the U.S. since its passage in 1993.

And as the years have worn on, one aspect of the law has emerged as a chronic source of confusion, worry and consternation.

It's called intermittent leave – and a survey by the Society for Human Resource Management (SHRM) called it the "most difficult activity" facing U.S. employers.

You know why.

It's an administrative nightmare. The random nature of employee absences makes it very difficult for companies to hold the reins on staffing levels – and therefore their overall productivity.

The final insult: A few small administrative mistakes can get employers in a world of legal trouble.

The biggest challenges posed by intermittent FMLA leave, says SHRM, are:

- Chronic abuse
- Controlling labor costs
- Loss of productivity
- Compliance and leave-tracking
- Morale problems among the people who have to cover for the employee out on intermittent leave, and
- Incomplete or vague documentation of the employee's medical certification.

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And the FMLA isn't exactly employer-friendly.

Unlike laws such as the Americans with Disabilities Act, there's no "undue hardship" provision to soften the blow of the accommodations companies must provide to employees on FMLA leave.

An FMLA refresher course

The FMLA requires companies with 50 or more employees to grant workers 12 weeks of job-protected – but unpaid – leave per year. The leave can be used to care for the worker's own or a family member's serious health condition.

To be eligible, the employee must have worked for the firm at least 12 months (not necessarily consecutively) and logged 1,250 work hours in the previous year.

At the heart of the matter is the phrase "serious medical condition." It's a remarkably broad category, covering everything from "inpatient care" – time spent in a hospital or other residential medical care facility – to "continuing treatment by a healthcare provider."

Continuing treatment

It's the "continuing treatment" part that baffles most employers, especially when it comes to intermittent leave. The designation requires treatment by a healthcare provider and at least one of the following:

- Periods of incapacity of more than three straight calendar days that also involve multiple treatments, or a single healthcare provider treatment plus a "regimen of continuing treatment"
- Periods of incapacity due to pregnancy or prenatal care
- Chronic medical conditions

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Serious pain

Just how big an issue is FMLA intermittent leave? Here are some results of a Society for Human Resource Management survey:

- 80% of HR managers said they had difficulties tracking intermittent leave
- 39% said they'd had to grant intermittent leave requests they didn't think were legitimate, and
- 57% said they'd run into problems determining whether an employee seeking intermittent leave actually suffered from a "serious medical condition."

- Multiple treatments (under a wide range of circumstances)
- Treatments for long-term conditions, even if they don't cure the problem

A list of some court-approved serious health conditions (some of these are likely to come up in an intermittent situation): Pregnancy/caesarian delivery, cancer, sickle-cell anemia, degenerated spinal discs, migraine headaches, major depression, ulcers, sleep apnea, Parkinson's disease, atrial fibrillation, bronchitis, hysterectomy, alcohol abuse-related symptoms and ulcers.

Some medical issues the courts have not viewed as serious medical conditions: arthritis, diabetes, rotator cuff injury, fractures, chipped tooth, headaches, kidney stones, fibromyalgia, gastroesophageal reflux disease, attention deficit disorder, seizures and depression related to pregnancy.

An employee can take intermittent leave – for a few days or even a few hours – when "medically necessary." Employees must ask for intermittent leave (as opposed to a specific block of time).

The land mine: An employee doesn't even have to mention FMLA for a company's responsibilities to kick in.

Here are some off-the-cuff employee statements the courts have deemed sufficient to place employers on notice that the worker might be in a position to go on FMLA leave:

- "I need time off to have nasal surgery"
- "I need to work part time to care for my sick spouse"
- "I need time to get my life back together" (following pregnancy, or being a victim of domestic or other type of violence)

- "I need to leave early, my migraine is killing me"
- "I've decided to take some time off following my maternity leave to stay home with my newborn"
- "I have the flu and went to see the doctor today"
- "I need every Friday off for chemotherapy treatments"
- "I need to make nursing home arrangements for my mother"

However, there are limits to just how clairvoyant companies can be expected to be.

Consider this real-life example:

A man was fired for being AWOL from his job for several days.

The company tried to contact him during the absence, to no avail. He listed his mother as his emergency contact, so the HR director got in touch with her.

She said her son had been sick, but she didn't know how serious it was.

After the man was terminated, he sued, claiming the time off should have been designated FMLA leave.

His mother had provided sufficient notice that he had a qualifying medical situation, he said.

The judge didn't buy it.

FMLA does allow another person to contact the employer on the worker's behalf – but only if the employee is unable to do so personally. Mom's report didn't make the grade.

(Brown v. The Pension Boards)

Setting the FMLA clock

The law gives employers several options to determine the 12-month eligibility period:

- The calendar year

- Any fixed 12-month period, like a fiscal year
- The 12-month period that begins with the first day of FMLA leave, or
- A "rolling" 12-month period that's measured backward from the date the employee uses any FMLA leave.

Even for employees on extended intermittent leave, companies can apply the test for 1,250 work hours only once in the FMLA year.

But courts have ruled that FMLA leave can't be taken forever on the basis of one leave request – eligibility extends only for that one 12-month period.

The employee can, of course, apply for intermittent leave for the next year, and it would likely have to be approved.

Not all employee hours count toward the 1,250 required by FMLA.

Consider this real-life example:

> *A nurse opted to work in a"weekender program," a 12-hour shift on Saturdays and Sundays. For doing so, she was paid for an extra 10 hours.*
>
> *When she asked to take FMLA leave for a surgical procedure, her employer balked – according to its records, she hadn't worked the required 1,250 hours.*
>
> *The woman took the time anyway, and was fired.*
>
> *She sued, claiming that if her bonus time had been included in the calculation of hours worked that year, she'd have had enough to meet the requirement.*
>
> *But the judge sided with the company. The bonus hours were an incentive, not time actually worked.*
>
> *So they didn't count toward the 1,250 FMLA threshold.*

(Mutchler v. Dunlap Memorial Hospital)

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Steps to take

Perpetual FMLA leave?

Here's how screwy things can get under FMLA rules: It's possible that an employee could be on intermittent leave forever.

If a person took off one day a week, he or she'd miss 52 days per year – eight less than the FMLA limit of 60.

And on a 5-day, 40-hour workweek, that person would still be working 1,664 hours – more than enough to meet the FMLA requirement of 1,250.

Thus, theoretically, the intermittent leave could go on year after year.

No question, FMLA missteps can inflict some real pain on employers. But contrary to the way some employees seem to feel about it, intermittent leave does not give workers carte blanche to take time off whenever the mood strikes.

Here are concrete steps employers can take to keep intermittent leave under control.

Certification

Revamping paperwork

Many companies just give employees FMLA certification forms that have boxes for their doctors to check. But employers can ask for more specific information. That includes:

- When did the condition start?
- How long is it likely to last?
- What are the medical facts relating to the condition?
- What is the health care provider's contact information?
- Why is intermittent leave medically necessary?
- What are the dates of planned leave or estimated frequency and duration of periods of incapacity?

Another tip: HR can give the doctor a copy of the employee's job description, or a list of the worker's essential duties. That'll give the physician a better context for answering the questions on the form.

Asking for more information can not only help companies stay on top of absenteeism; it can also protect them legally.

Consider this real-life example:

> *A man in Pennsylvania requested intermittent leave because of a chronic back condition.*

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> *He turned in a medical certification form – but it didn't include how often the doctor thought the man would need to be out. The flare-ups, the physician said, were "completely unpredictable."*
>
> *So the company asked the employee to submit another form. This time, the doctor gave the employer an overall time frame, but still failed to estimate how long and how often the man would be out of work.*
>
> *The leave was denied, and the man sued.*
>
> *The judge sided with the company, saying the law gives employers a right to know how often an employee is likely to use intermittent leave.*

(Tome v. Harley Davidson)

Getting a second opinion

If HR doubts the validity of an employee's certification, an employer is within its rights to ask for a second opinion – although the company has to pick up the tab.

A word of caution: Don't use a doctor you have under contract to handle other employee health issues, like workers' comp.

If the first and second opinions differ, HR can ask for a third opinion, again, at the company's expense. The third opinion is final and binding.

Recertify, recertify, recertify

The law generally gives companies the right to require recertification every 30 days. But there are also scenarios that can trigger recertification, no matter what the time frame:

- The employee asks for an extension of leave
- The duration or nature of the illness has changed, or complications have arisen, or

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- The employer receives information that casts doubt on the validity of the certification.

The first scenario is pretty straightforward. But the second two require some judgment on the part of FMLA administrators.

Just because an employee's out on FMLA leave doesn't mean he or she's precluded from pursuing life's normal activities – like shopping, going to the movies, etc.

Nothing in the law says somebody on FMLA leave has to hunker down at home until he or she is ready to come back to work.

Here's an interesting twist:

A few years ago, a federal court ruled that an employer can establish a policy that requires workers on paid sick leave to remain "in the immediate vicinity of their home" while also providing that FMLA leave will run concurrently with paid sick leave. It upheld the firing of an employee who took a trip to Mexico while she was on sick/FMLA leave. The court said the policy was not inconsistent with the FMLA.

It's an option to consider.

The majority of the time, employers need a solid reason to ask for the new certification.

Example: A worker who's out with a back injury is seen bowling or engaged in some other strenuous activity. Suspicious patterns of absence are grounds, too: Why does the person who suffers from migraines always seem to have them on Fridays and Mondays?

HR can deal with the absence pattern question directly with the certifying physician. The written inquiry should include a copy of the person's recent attendance record, and this query: Is the pattern of absences consistent with the employee's medical condition?

An additional caveat on the 30-day rule: If an employee's certification is specific enough (it says he or she will need X number

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of kidney dialysis sessions over a specific period of time, say), employers probably can't ask for recertification until that time period is up.

Adjusting their compensation

The FMLA allows employees to take unpaid leave. For workers paid on an hourly basis, the issue's pretty clear – when they don't work, they don't get wages.

But some companies worry about running afoul of federal regs when docking the pay of exempt workers – those who earn a set salary no matter how many hours they're on the job.

The good news: Companies can dock the pay of exempt employees under the Fair Labor Standards Act (FLSA) when they're out on intermittent FMLA leave. The Department of Labor (DOL) has said such a practice doesn't affect the employee's exempt status.

This is however, a sensitive area. In an intermittent leave scenario, exempt employees can be docked for their FMLA time, not for any other reason.

If an exempt employee is docked for any reason other than FMLA, the employer risks losing exempt status not just for that worker, but for all similarly situated workers.

And that could carry a giant bill for unpaid OT.

There is an area of potential savings for employers (and perhaps a small disincentive for using more intermittent leave than necessary): Employee bonuses can be prorated according to how much work they've missed.

Consider this real-life example:

> *An employee of a financial services firm who'd been out on FMLA leave sued because the company had prorated the bonus for the time he'd missed.*

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He claimed the bonus was based on the employee's continued employment – and since his FMLA leave was approved by the company, he shouldn't have been penalized.

The court disagreed. It said that although the bonus plan did encourage attendance, its written purpose was to "contribute to the firm's performance." Since the employee wasn't around on a full-time basis to contribute to that performance, he wasn't entitled to the full bonus.

(Sommer v. The Vanguard Group)

Not all leave requests are equal

The FMLA allows employers some flexibility in granting different kinds of intermittent leave. Employees are entitled to take it for serious health conditions, either their own or those of immediate family members.

The law also allows use of intermittent leave for child care after the birth or placement of an adopted child, but only if the employer agrees to it. It's the company's call.

It's not always simple, however.

If the mother develops complications from childbirth, or the infant is born premature and suffers from health problems, the "serious health condition" qualifier would likely kick in. As always, it pays to know the medical details before making a decision.

Companies can successfully dispute bogus employee claims to FMLA eligibility.

Consider this real-life example:

A female employee in Maine said she suffered from a chronic condition that made it difficult to make it to work on time.

After she racked up a number of late arrivals – and refused an offer to work on another shift – she was fired.

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She sued, saying her tardiness should have been considered intermittent leave.

Her medical condition caused her latenesses, she claimed, so each instance should have counted as a block of FMLA leave.

Problem was, she'd never been out of work for medical treatment, or on account of a flare-up of her condition.

The only time it affected her was when it was time to go to work.

Sorry, the court said. Intermittent leave is granted when an employee needs to miss work for a specific period of time, such as a doctor's appointment or when a condition suddenly becomes incapacitating.

That wasn't the case here, the judge said – and giving the employee FMLA protection would simply have given the woman a blanket excuse to break company rules.

(Brown v. Eastern Maine Medical Center)

Designating leave retroactively

In order to maximize workers' using up their allotted FMLA leave, employers can sometimes classify an absence retroactively.

Here's an example: An employee's out on two weeks of vacation, but she spends the second week in a hospital recovering from pneumonia.

Her employer doesn't learn of the hospital stay until she returns to work. But she tells her supervisor about it, who then informs HR. Within two days, HR contacts the woman and says, "That week you were in the hospital should be covered by the FMLA. Here's the paperwork." The key here is that the company acted quickly – within two days of being notified of the qualifying leave.

As long as the employer provides proper notice to the employee and the retroactive designation doesn't hurt the employee, the tactic's perfectly legal. It could make a difference in the impact

FMLA leave time could have on the firm's overall operation.

It's also an excellent example of the key role managers play in helping companies deal with the negative effects of FMLA.

Using employees' PTO

First, a no-no: Employers should never tell workers they can't take FMLA leave until they've used up all their vacation, sick and other paid time off (PTO).

Instead, you can require employees to use their accrued PTO concurrently with their intermittent leave time. Employers can also count workers' comp or short-term disability leave as part of their FMLA time – but in that case, employees can't be asked to use their accrued PTO.

The transfer option

Companies can temporarily transfer an employee on intermittent leave, to minimize the effect of that person's absence on the overall operation.

The temporary position doesn't need to be equivalent to the original job – but the pay and benefits must remain the same.

And, of course, the employee must be given his old job – or its equivalent – when the intermittent leave period's over.

A few restrictions: The move can't be made if the transfer "adversely affects" the individual. Example: The new position would lengthen or increase the cost of the employee's commute.

Such transfers need to be handled in such a way as to avoid looking like the employer is trying to discourage the employee from taking intermittent leave – or worse yet, is being punished for having done so.

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Cooperation, please

Although FMLA is certainly an employee-friendly statute, employers do have some rights when it comes to scheduling intermittent leave. For instance, employees are required to consult with their employers about setting up medical treatments on a schedule that minimizes impact on operations.

Of course, the arrangement has to be approved by the healthcare provider. But if an employee fails to consult with HR before scheduling treatment, the law allows employers to require the worker to go back to the provider and discuss alternate arrangements.

Sometimes, it's as simple as taking an employee aside and saying, "I know you've got to go to physical therapy. But these 10 o'clock appointments are really affecting work flow. Could you see about scheduling them for after work hours?"

The firing question

Yes, companies can fire an employee who's on intermittent FMLA leave. Despite the fears of many employers, FMLA doesn't confer some kind of special dispensation for workers who exercise their leave rights.

Obviously, workers can't be fired for taking leave. But employers can lay off, discipline and terminate those employees who violate company policies or perform poorly.

When an employee on FMLA leave is terminated, the DOL decrees that the burden's on the employer to prove the worker would have been disciplined or terminated regardless of the leave request or usage.

Reductions in force

When an employer has a valid reason for reducing its workforce, the company can lay off an employee on FMLA leave – as long as

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the firm can prove the person would have been let go regardless of the leave.

So companies should be prepared not only to prove the business necessity of the move, but to show an objective plan for choosing which employees would be laid off.

Misconduct or poor performance

Employees on FMLA leave – of any type – are just as responsible for following performance and behavior rules as those not on leave.

But companies that fire an employee out on FMLA will be under increased pressure to prove that the decision was based on factors other than the worker's absence.

And courts might well pose employers a key question: Why didn't you fire this person before he/she took leave?

That answer's not always difficult. Many times, employers don't realize how badly an employee was doing until they see the mess he or she has left behind.

The good news: A number of courts have upheld employers' rights to fire employees on FMLA leave – even when the employee's problems were first discovered when the employee went off the job.

A few pertinent questions

A selection of questions – and answers – that reflect some of the issues employers face when dealing with intermittent leave:

> *An employee has been one or two hours late to work several mornings in the past couple of weeks. She advises her supervisor that she suffers from migraine headaches and needs to stay at home until her medicine starts to work each morning. How should an employer handle this?*

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This is a classic FMLA intermittent leave scenario. Migraines, while well-established as a chronic condition that might well make an employee eligible for intermittent leave, are also one of the toughest situations to control.

Employee absences are very difficult to foresee, and the whole situation lends itself to abuse.

So it's very likely that this employee's partial-day absences are covered under FMLA regs. Best practice: Require medical certification (in as much detail as possible – see earlier section on Certification) and then monitor her absences closely.

If HR starts to see a suspicious pattern of absences, recertification should be requested.

> *Bill's been on intermittent leave for some time, and we transferred him to a different shift in order to minimize the impact of his absences. We moved another employee into Bill's slot during this period, and he's really fit in well. So we'd like to keep Bill on the "temporary" shift he's been working when his intermittent leave period's over. Can we do this?*

It happens all the time: Supervisors don't realize how bad an employee really is until he goes out on FMLA leave.

Unfortunately, the company probably can't make Bill's temporary assignment permanent.

While firms do have some wiggle room to move people around when employees are on intermittent leave, the workers have to be restored to an "equivalent position" when their leave ends.

And the feds have ruled that changing the shift of a worker coming off FMLA leave is likely to violate the "equivalent position" requirement.

> *We have a policy requiring employees to call a designated number to request leave. Can we apply this policy to someone who takes FMLA leave intermittently?*

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Yes. An FMLA regulation specifically says that even when the need for leave is not foreseeable, an employee can be required to comply with the employer's notice requirements for requesting leave. Many court decisions have backed this requirement. But don't get carried away here. For example, if an employer's condition requires emergency treatment, he doesn't have to call in until his condition is stable.

We've got an employee we're pretty certain is abusing his intermittent leave. Can we hire an investigator to find out what he's really doing during the times he's supposed to be incapacitated?

It's a pretty serious – and potentially expensive – step to take, but such practices have been approved by the courts. And many companies find that catching a single FMLA abuser in this way acts as an effective deterrent to similar behavior by co-workers.

One of our employees has a parent who's a full-time resident of a nursing home, under 24-hour care. Do we have to approve intermittent leave for the employee to care for the parent?

Yes. Just because a family member's under the care of medical providers doesn't mean employees aren't entitled to intermittent leave. Several court cases have upheld the concept of family members providing "psychological comfort" to relatives with serious illnesses.

If a doctor certifies that a family member's presence affords the patient needed reassurance and comfort, the employee's entitled to the leave.

Our company works on a point system for monitoring attendance. Unexcused absences and lateness are assigned values. Thirty points get the employee a verbal reprimand; 50 points trigger a written warning; 70, a second written notice; and at 80 points, the employee's terminated. We've got an employee we're thinking about firing – he's accumulated 84 points. But 15 of those points were from FMLA-covered absences. Can we still fire this guy?

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Not for his FMLA attendance issues.

Basically, FMLA-covered time off is a company-approved absence, so the points he supposedly accumulated during that time are illegal to assess.

So he doesn't meet the 80-points-and-you're-gone threshold.

A similar situation arises in companies that give bonuses for perfect attendance. If a person's been out for two hours every Friday on intermittent FMLA leave, but hasn't missed any other time, he or she gets the bonus payment.

> *We recently had a "corrective counseling" session with an employee who's missed a lot of time recently from tardiness and unexcused absences. In the middle of the discussion, she claimed that she'd missed the time because of complications from her diabetes. Do we have to consider that time as intermittent FMLA leave?*

No. Employees can't just say, "Remember when I had to leave early that Thursday three months ago? That was because of my diabetes. I'm giving you notice now."

Employees are required to give notice within a reasonable amount of time.

In this case, it's likely that the employee's just trying to throw up a smokescreen to divert attention from her attendance problems.

Just to be safe, HR might check with her manager to make sure she hadn't brought up her diabetes as a reason for her absences prior to this counseling session.

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