

Use 4 strategies to certify and control FMLA intermittent leave



Managing FMLA intermittent leave can be vexing, but employers do have some tools to combat leave abuse. One of the most important is FMLA certification.

As with FMLA leave taken in one block, employees who request FMLA intermittent leave must give you notice—at least 30 days in advance when the need is foreseeable. When it's not, they must notify you "as soon as practicable."

Certify and schedule the leave

Don't accept intermittent leave requests at face value. The FMLA allows you to demand certification from a doctor that an employee needs FMLA leave. You can request new medical certification from the employee at the start of each FMLA year. You're also entitled to ask for a second or third opinion (at your expense), before granting FMLA leave.

When employees have chronic conditions and certifications that call for intermittent leave, attempt to work out leave schedules as far in advance as possible. It's legal to try to schedule FMLA-related absences, but you can't deny them.

Immediately nail down the expected frequency and duration of FMLA intermittent leave. Demand a medical provider's estimate of how often the employee will need time off. You also can wait until the provider gives you that estimate to approve intermittent leave.

Here are four tips on certifying FMLA intermittent leave requests:

- 1. Ask about the specific condition.** Medical certification must relate only to the serious health condition that is causing the leave. Don't ask about the employee's general health or other conditions.
- 2. Allow time to respond.** After you request FMLA certification, give employees at least 15 calendar days to

submit the paperwork. If the employee's medical certification is incomplete or insufficient, specify in writing what information is lacking. Allow seven days to cure the deficiency.

3. Investigate the certification if you doubt the need for leave. Under the updated FMLA regulations, you can directly contact the employee's physician to clarify the medical certification. Who can make that call? An HR professional, a leave administrator (including third-party administrators) or a management official, but not the employee's direct supervisor.

4. Require (and pay for) a second opinion if you're still not convinced. Use an independent doctor that you select, not a doctor who works for your organization. If the two opinions conflict, you can pay for a third and final, binding medical opinion.

Use FMLA Calendar to manage intermittent leave

Employees who take FMLA intermittent leave can wreak havoc with work schedules, because their conditions can flare up at any time. All too often, an employee's sudden intermittent leave absence leaves the office or shop floor short-staffed. But there are legal ways to curtail intermittent leave.

One of the easiest: Use the calendar-year method to set FMLA leave eligibility.

It's the simplest way to calculate FMLA eligibility. Under the calendar-year method, eligible employees who have met the FMLA's required 12 months of service and 1,250 hours of work are entitled to 12 unpaid weeks *during any calendar year*.

Here's how it works: Sometime during the calendar year, an employee submits documentation showing she will need FMLA intermittent leave for a chronic condition. If she is eligible for leave at that time, she can take up to 12 weeks of intermittent leave until the end of the calendar year. Then the process starts again.

If, on Jan. 1, she hasn't worked 1,250 hours in the preceding 12 months, she's no longer eligible—and won't be eligible again until she hits 1,250 hours.

Ask the Attorney with Nancy Delogu



We're suspicious of some intermittent FMLA leave—is it worth it to investigate?

Reader Question: What steps can be taken if suspected abuse of intermittent FMLA leave exists? For example, needing the leave often on Fridays, etc. The health care provider certification states 'time off as needed for flare-ups.'

Nancy Delogu, Esq.: Suspected abuse of intermittent FMLA leave is one of the more frustrating employment

issues because it is so difficult to prove the abuse, and even suggesting that abuse may be a problem may give rise to a claim of FMLA retaliation or interference. By law, employers may not interfere with, restrain, or deny employees the right to exercise or attempt to exercise any rights provided by the FMLA, which may include refusing to authorize FMLA leave, or discouraging an employee from using such leave when he or she is entitled to do so.

Nevertheless, employers have been able to successfully defend claims of interference or retaliation when they acted on a bona fide belief that FMLA leave was not being used for its intended purpose. For example, in one case, the court dismissed the plaintiff's FMLA claims based on evidence that he went camping while on FMLA leave that had been granted to care for his father. In another case, the court dismissed the plaintiff's FMLA claims where the employer presented evidence from a private investigator that the plaintiff was not utilizing FMLA leave for the day to take his mother to physical therapy. In doing so, the court noted that whether the plaintiff actually took his mother to physical therapy was irrelevant. The court, rather, found that plaintiff's termination was justified because the employer reasonably believed that the employee took fraudulent FMLA leave. In *Scruggs v. Carrier Corp.*, the Seventh Circuit Court of Appeals affirmed a grant of summary judgment for an employer that had an "honest suspicion" that plaintiff was not using his intermittent leave to care for his mother and, therefore, did not interfere with his FMLA rights by firing him.

In many of the cases addressing terminations for fraud in FMLA leave, the employer hired a private investigator to determine whether the employee was in fact abusing the leave. In other cases, reports from co-workers, customers, or even postings on social media sites showing the employee doing something other than approved has been relevant. On the other hand, be aware that some activities may not be inconsistent with the leave, even if the employee appears to be doing something other than resting at home. For that reason, if you do decide to check up on an employee you believe may be abusing leave, you should take care to act reasonably and respectfully, and ideally consult with counsel before you decide to take adverse employment action.

How liberally can intermittent FMLA leave be split?

Reader Question: "Can an employee use a few hours of FMLA leave per day, breaking up her doctor-recommended two full days per medical episode? The employee indicated in one absence that a piece of furniture collapsed on her and then due to her FMLA issue, she was weak and couldn't come to work." – *Mary, Ohio*

Nancy Delogu, Esq.: An employee need not take all of the intermittent leave for which she is authorized, but only so much as she needs to care for herself on a particular occasion. I cannot tell if you think this employee is overdoing it and not taking the time off she needs, but if that is the case, and you are unsure whether she is able to work safely at times, you may be able to ask for additional information from her physician—not in connection with her FMLA leave, but as an assessment of whether she is able to work safely, without posing a direct threat to herself or others and with or without a reasonable accommodation as permitted by the Americans with Disabilities Act.

Because the interplay between the ADA and the FMLA can be complex, it would be wise to consult with your agency's labor and employment counsel to ensure compliance.

To be clear, however, you do not have the right to ask the physician to re-certify her FMLA leave if the original certification is clear and there is no reason to believe that returning to work before the two-day estimated need for an absence has expired. In cases like these, the certifying physician must estimate what an employee may need in terms of time off, but is not expected to know with certainty; two days off may be his or her best estimate of the maximum amount of time away likely to be needed.

A common FMLA question: Intermittent leave for a spouse's care?

Reader Question: "An employee has requested intermittent leave so she can call out to stay with her husband if he has an asthma attack. Do we have to grant it?" - *Vernon, Alabama*

Nancy Delogu, Esq.: Yes, if the employee is otherwise eligible (has worked the requisite hours) and his or her spouse has a serious health condition that occasionally needs care, the employee can request intermittent FMLA leave to care for his or her spouse.

Employees often grow concerned that their need to miss work to care for a spouse (or other covered family member) will lead their supervisor to consider them unreliable or lacking commitment to the job, and in that circumstance, it is probably best for all parties that the employee claims the FMLA entitlement before, rather than after, the absences lead to adverse employment action.