

Intermittent FMLA leave management: The legal way to prevent abuse

The Family and Medical Leave Act (FMLA)'s intermittent leave rules consistently rank near the top of human resource management headaches. A recent [Littler employer survey](#) found 65 percent of respondents reported managing intermittent FMLA leave was their most difficult HR challenge. Intermittent FMLA leave abuse, especially in industrial workplaces, can wreak havoc with production schedules. Employees who call off with flare-ups conveniently occurring on Mondays or Fridays create co-worker resentment and chaos. But take heart. There are ways to manage intermittent FMLA leave in ways that follow the law and rein in leave abuse.

Intermittent FMLA leave explained: Private sector employers with 50 or more workers and *all* public employers must provide eligible workers with FMLA leave. FMLA leave, including intermittent leave, may be paid or unpaid, depending on the employer's existing paid leave policies. Employees with 12 months of service who have worked at least 1,250 hours during the past 12 months are eligible. Thus, even part-time employees (averaging about 24 hours per week) can take FMLA leave, including intermittent leave.

Eligible employees may take up to 12 weeks FMLA leave for:

- The birth, adoption or foster care placement of the employee's child;
- To care for a spouse, child, or parent who has a serious health condition;
- For the employee's serious health condition if unable to perform the essential functions of his or her job; or
- When a spouse, child (of any age) or parent is a military member on or called to active duty and the employee needs time to arrange child care, attend military ceremonies, spend time with military member on leave or attend to legal or financial matters. Up to 26 weeks is available if the military member is seriously injured or ill.

Employees usually take FMLA leave in a solid block of time. But employees can also take FMLA intermittent leave for a single qualifying reason by either working a reduced schedule or calling off as needed. Intermittent FMLA leave is available for the employee's own medical condition or to care for a spouse, child or parent for a single qualifying reason. Employers *may*, but are not required to, provide intermittent leave for a qualifying birth, adoption or foster care placement. For example, an employer may approve a part-time work return for a new parent but does not have to.

Managing intermittent FMLA leave: Intermittent FMLA leave is leave in separate blocks for the same condition. Employees who want a reduced schedule or intermittent leave when a single, qualifying medical condition flares up must request it. As the employer, you can insist the employee's health care provider certify the need for intermittent leave. He or she then estimates how often and for what block of time the employee will be absent. For example, an employee undergoing cancer chemotherapy may need three blocks of half-days intermittent FMLA leave per week for six weeks.

You can insist that an employee on intermittent FMLA leave requiring regular medical treatments work with you to schedule them. The employee must schedule those treatments to minimize disrupting the employer's

operations. You can even transfer the employee to another job if that helps manage absences better. Just make sure the temporary assignment pays the same and provides the same benefits.

Combating FMLA intermittent leave abuse: Workers taking intermittent FMLA leave presumably do so because they or their loved ones need periodic care, rest and recuperation. That doesn't mean that some won't take advantage of their employer. You can combat this with common-sense, but legal tactics. Try these:

- **Stay-put rule:** Some employers effectively manage intermittent and other sick leave by adopting a company-wide "stay put" rule. The rule states employees who are sick are expected to stay home or attend medical treatments, and nothing else. Smart employers then enforce the rule with random check-ins. If the employee isn't home or at a medical provider receiving treatment, they discipline them for breaking the rule.
- **Re-certify:** Another practical way to counter intermittent FMLA leave abuse is to insist on regular re-certifications. That way, employees understand they must see their healthcare providers regularly. This clarifies that an intermittent leave certification isn't a get-out-of-jail card for any unexpected absence. Department of Labor (DOL) rules clarify that for chronic health conditions lasting more than a year, employers can demand a new certification yearly. For shorter durations, employers can require a new certification when the initial period is up and the employee asks for an extension.
- **Keep count:** The DOL FMLA leave certification form includes an estimate of the duration and frequency of absences related to the underlying condition. For example, a health care provider may state the employee likely will need a day off four times per month. Keep track and make sure the employee remains within the estimate.
- **Track total FMLA leave usage:** Remember that for most employees, 12 weeks of FMLA leave, including intermittent FMLA leave, is the limit per year. Include every absence for a covered reason in your count. Don't forget to designate the absence as FMLA leave and let the employee know what she's used and when she has no more FMLA leave left.

Intermittent FMLA leave for Depression

Congress wanted to provide job security for workers with serious health conditions when it passed the FMLA. It also wanted to protect disabled workers from discrimination via the Americans with Disabilities Act (ADA). Together, intermittent FMLA leave and the ADA protections help workers suffering from depression obtain and maintain employment. Employers, however, need to make sure that workers aren't unfairly using intermittent leave they aren't entitled to. It may be far too easy for a worker to call up and say he's missing work today because he's depressed. One way is to use the ADA to your advantage.

First, make sure the employee obtains an intermittent FMLA leave certification from his healthcare provider. Since depression may also be an ADA covered disability, find out if the employee is requesting reasonable accommodations. A healthcare provider may suggest practical accommodations eliminating intermittent leave absences. For example, the employee might be able to work from home if a depressive episode is interfering with concentration. If insomnia is a symptom, a reasonable accommodation of a later start may eliminate an all-day absence.

Second, remind the employee that he's subject to any call-off rules already in place. You can and should discipline employees who don't call off as required even if they're on FMLA intermittent leave.

Finally, as with other intermittent FMLA leave use, check that the worker isn't exceeding the estimated absence count. If he is, get another certification.

Intermittent FMLA leave for Migraines

In most cases, migraine headaches meet the FMLA's definition of a chronic serious health condition. These

conditions must continue over an extended period of time and may cause episodic periods of incapacity. Migraines are more severe than regular tension headaches, often affecting sight. Sufferers may also experience nausea and vomiting, which can limit the ability to start or finish a scheduled shift.

Medical providers diagnose migraines by symptomology and that is where the FMLA abuse problems lie. Symptoms are often self-reported. There's no definitive diagnostic test that tells a doctor the patient is having a migraine. Plus, stress may trigger symptoms, making it more likely that an employee may be absent during busy times at work. And some employees may simply use the diagnosis to skip work for other, unrelated reasons.

Employers who suspect FMLA abuse do have some options. First, they should require employees to provide certification from their health care provider. The certification should specifically diagnose the condition. To qualify as a chronic condition, the employee must see a health care provider at least twice a year.

Employers should also examine the pattern of absences for signs of abuse. While migraines can be triggered by stress, they generally occur randomly. If the headaches start occurring regularly on Mondays and Fridays, it should raise a red flag.

Always check the certification for anticipated migraine frequency. If the employee claims the headaches are occurring more frequently or your tracking reveals absences in excess of the certification estimate, you can request a new one.