



## **FMLA Survival Guide 2016 Edition**

### **Intermittent Leave**

- An Overview
- Eligibility
- Calculation
- Managing and Curbing Abuse

## ***I. Introduction***

An employee's use of intermittent leave can be the number one frustration that employers face under the Federal Family and Medical Leave Act (FMLA). When the need to use intermittent leave time is ostensibly unforeseeable and no advance notice is provided of the days when such rights will be exercised, the employer is often at a loss. From an employer's perspective, the FMLA provides no recognition of any hardship experienced by the employer that comes from the exercise of FMLA leave, which can be a particular challenge with intermittent leave rights. Unlike laws such as the American's 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 certain obligations just as they comply with minimum wage and overtime laws.

We can help however. We have prepared this Survival Guide to provide a general overview of the FMLA, its eligibility requirements, the calculation of intermittent leave, and best practices for monitoring use and curtailing abuse. We hope this guide strengthens your oversight of FMLA leave and reduces the negative impact that such leave has on your workplace.

## ***II. Eligibility***

### **a. Covered Employers:**

- i. Private-Sector employer with 50 or more employees and 20 or more work weeks in the current or preceding calendar year, including a joint employer or a successor in interest to a cover employer;
- ii. Public agency, including a local, state, or federal government agency, regardless of the number of employee's it employs; or
- iii. Public or private elementary or secondary school, regardless of the number of employees it employs.

### **b. Eligible Employees:**

- i. Work for a covered employer;
- ii. Has worked for the employer for at least twelve months;
- iii. Has at least 1,250 hours of service for the employer during the twelve month period immediately preceding the leave; and
- iv. Works at a location where the employer has at least 50 employees within 75 miles.

- c. Leave Entitlement-** Eligible employees may take up to twelve work weeks of leave in a twelve-month period for one or more of the following reasons:
- i. The birth of a son or daughter or placement of a son or daughter with the employee for adoption or foster care;
  - ii. To care for a spouse, son, daughter, or parent who has a serious health condition;
  - iii. For a serious health condition that makes the employee unable to perform the essential functions of his or her job; or
  - iv. For any qualifying exigency arising out of the fact that a spouse, son, daughter or parent is a military member on covered active duty or called to covered active duty status.

An eligible employee may also take up to 26 work weeks of leave during a “single twelve-month period” to care for a covered service member with a serious injury or illness, when the employee is the spouse, son, daughter, or parent, or next of kin of the service member.

Under some circumstances, employees may take FMLA leave on an intermittent or reduced scheduled basis. That means an employee may take leave in separate blocks of time or by reducing the time he or she works each day or week for a single qualifying reason. When leave is needed for planned medical treatment, the employee must make a reasonable effort to schedule treatment so as not to unduly disrupt the employer’s operations. If FMLA leave is for the birth, adoption, or foster placement of a child, use of intermittent or reduced scheduled leave requires the employer’s approval.

### ***III. Calculation of Leave Under the Family and Medical Leave Act***

#### **a. Leave Entitlement and Increments of Leave**

- i. FMLA leave may be taken in periods of whole weeks, single days, hours, and in some cases even less than an hour. The employer must allow employees to use FMLA leave in the smallest increment of time the employer allows for the use of other forms of leave, as long as it is not charged against the employee for more than an hour. If an employer uses different increments for different types of leave (for example, accounting for sick leave in fifteen minute increments and vacation leave in one day increments), the employer must allow FMLA leave to be used in the smallest increment used for any other type of leave. Similarly, if an employer allows for use of leave in different increments during specific times of the day (for example, requiring a one hour increment of leave at

the start of the shift and using fifteen minute increments for leave at other times), the employer must use the same increment for the FMLA leave at those specific times of the day. An employer may always allow FMLA leave in shorter increments than used for other forms of leave but no work may be performed during any period of time counted as FMLA leave.

#### **b. Calculation of Leave Use**

- i.** Only the amount of leave actually taken may be counted against an employee's FMLA leave entitlement. Where an employee takes FMLA leave for less than a full work week, the amount of FMLA leave used is determined as a proportion of the employee's actual work week. The amount of FMLA leave taken is divided by the number of hours the employee would have worked if the employee had not taken leave of any kind (including FMLA leave) to determine the proportion of the FMLA workweek used. For example, an employee who normally works 30 hours a week but works only 20 hours in a work week because of FMLA leave would use 1/3 of a week of FMLA leave. An employer may convert the FMLA leave usage into hours so long as it fairly reflects the employee's actual work week.
- ii.** Time that an employee is not scheduled to report to work may not be counted as FMLA leave. If an employer temporarily stops business activity and employees are not expected to report for work for one or more weeks (a school that closes two weeks for winter holiday, or a plant that closes for a week of repairs), the days the employer's business activities have stopped do not count against the worker's FMLA leave.
- iii.** When a holiday falls during the work week in which an employee is taking a full week of FMLA leave, the entire week is counted as FMLA leave. However, when a holiday falls during a week when an employee is taking less than the full week of FMLA leave, the holiday is not counted as FMLA leave, unless the employee was scheduled and expected to work on the holiday and used FMLA leave for that day.
- iv.** When an employee's schedule varies so much that the employer is unable to determine how many hours the employee would have worked during the week the employee takes FMLA leave, the employer may use a weekly average to calculate the employee's FMLA leave entitlement. The weekly average is determined by the hours scheduled over the 12 months prior to the beginning of the leave and includes any hours for which the employee took any type of leave.

- v. Required overtime hours that are not worked by the employee because of an FMLA-qualifying reason may be counted as FMLA leave. However, voluntary overtime hours not worked due to an FMLA-qualifying reason may not be counted as FMLA leave.
- vi. In a situation where it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to begin or end work mid-way through a shift, the entire period the employee must be absent is designated as FMLA-protected leave and counts against the employee's FMLA entitlement. The period of the physical impossibility is limited to the period when the employer is unable to permit the employee to work prior to a period of FMLA leave or return the employee to the same or equivalent position after a period of FMLA leave due to the physical impossibility. This rule applies only to situations where it is truly physically impossible to return the employee to work after an FMLA-qualifying absence, for example, a railroad conductor whose FMLA leave prevents him from boarding the train before it leaves for its scheduled trip.
- vii. FMLA leave is unpaid. However, an employee may request, or an employer may require the employee, to use accrued paid vacation leave, sick leave, personal time, etc. for some or all of the FMLA leave period. An employee must follow the employer's normal leave rules in order to substitute paid leave. When paid leave is used for an FMLA-covered reason, the leave is FMLA-protected.

#### ***IV. Managing and Curbing Abuse of Intermittent FMLA Leave***

##### **a. Adopt Best Practices to Better Manage Intermittent Leave**

- i. To take intermittent leave, the employee need only provide a certification that there is a medical need for such leave.
- ii. While longer FMLA leaves are relatively straight forward, the employee who takes small increments of FMLA leave sporadically generates administrative headaches for employers and may raise concerns about the employee's abuse of intermittent leave.
- iii. The FMLA offers a number of tools, many of which are not widely adopted, that employers can use to discourage abuse and better manage intermittent leave. Here are some of the best strategies for getting a strong grip on this troubling problem:

**1. Question the original certification.** There are a number of opportunities for an employer to insure that a certification calling for intermittent health-related absences is sufficient, valid and supports the need for intermittent leave. When an employee submits a certification for a chronic condition that will flare up and require intermittent leave such as asthma or migraines for example, the HR professional reviewing the certification should consider these options:

- When a certification has entries missing or is vague or ambiguous, you may ask the employee to provide complete and sufficient information. The request must be in writing and must specify the reason the certification was considered incomplete or insufficient. The employee then must provide the additional information within seven days. If the employee fails to provide the information, leave may be delayed or denied;
- You may contact the health care provider to insure that he or she actually prepared the certification, and to clarify handwriting or the meaning of a response, but you must use a Human Resource professional, health care provider, leave administrator or management official to make the contact. The employee's direct supervisor may not be the one who contacts the health care provider;
- During this process be careful not to request more information than what is required to authenticate or clarify the form.

This process can also be used at the recertification stage as well as with an initial certification.

**2. Ask for a second opinion.**

- Employers who have reason to doubt the validity of an initial certification may ask for a second opinion. The physician may be of the employer's choosing but cannot be one the employer employs on a regular basis. It is the employer's responsibility to pay for the second opinion. If the first and second opinions differ, you may require the employee to see a third health care provider, again at the employer's expense. The third provider's opinion is binding. Although there are a number of opportunities to ask for recertification of an employee's serious health

condition, you may not seek second or third opinions on recertification.

**3. Insure that all absences related to the condition are accounted.**

- The job of managing intermittent leave is not over after an employee submits a certification that calls for sporadic health-related absences.
- Employers must be certain that all absences related to the condition are counted against the employee's FMLA entitlement, while at the same time insuring that they are not counted against the employee under a no-fault attendance policy.
- In a large organization, front-line supervisors must be the eyes and ears of the organization and must pass along information about FMLA-covered intermittent absences to Human Resources. This, in turn, requires employers to train supervisors to recognize absences that may be covered by the FMLA.

**4. Require employees to follow your paid leave policy.**

- Employers may require that employees use up paid leave time for their intermittent FMLA absences. We recommend that all employers include such a requirement in their FMLA policies and enforce the expectation that employees must exhaust paid time off during FMLA. This prevents the situation where employees can take paid leave after their FMLA leave expires and thereby extend a leave of absence beyond the FMLA entitlement.

**5. Request recertification.**

- FMLA regulations offer a number of opportunities to seek recertification of the need for FMLA leave, including intermittent leave. Unless there are changed or suspicious circumstances, these rules of thumb apply:
  - Employees may be asked for recertification any time they seek to extend an existing FMLA leave;
  - For long-term conditions or conditions that may require sporadic absences, an employer may request recertification every 30 days in connection with an absence;

- If the employee is taking a solid block of leave for more than 30 days, the employer may ask for recertification if the leave extends beyond the requested leave;
- If the employee is out on a leave that has been certified to extend for more than six months, the employer may seek recertification every six months; and finally,
- Employers may ask for a new certification at the beginning of each leave year.

**6. Follow up on changed or suspicious circumstances.**

- Employers should always keep tabs on the use of FMLA and may want to pay special attention to patterns of intermittent leave usage. Employers may seek recertification more frequently than 30 days if:
  - i. The circumstances described by the existing certification have changed; or
  - ii. The employer receives information that casts doubt on the employee's stated reason for the absence or on the continuing validity of the certification.
- "Changed circumstances" include a different frequency of duration of absences, increased severity, or complications from the illness. The regulations allow employers to provide information to the health care provider about the employee's absence pattern and ask the provider if the absences are consistent with the health condition.
- "Information that cast doubt on the employee's stated reason for the absence" may be information you receive (possibly from other employees) about activities the employee is engaging in while on FMLA leave that are inconsistent with the employee's health condition. The example provided in the regulations is an employee playing in the company softball game while on leave for knee surgery.



**A note of caution:**

- Employers who receive information from co-workers about an employee's actions while on leave must be certain the information they receive is credible and that the reporting co-worker does not have a personal vendetta against the person on leave. We recommend that our clients independently verify information received from co-workers before taking action or requesting recertification for suspicious circumstances.

**7. Control the way the employees schedule plan treatment**

- Employees may take intermittent leave for treatment, therapy and doctor visits for serious health conditions. Pertinent regulations require that employees schedule those absences for planned medical treatments in a way that least disrupts your operations.
- When you receive a request for this type of intermittent leave, communicate with employees about the frequency of the treatment, the office hours of the health care provider and ways the employee may be able to alter the schedule to cut down on disruptions.

**8. Consider temporary transfers.**

- If the need for intermittent leave is foreseeable, the employee may be transferred during the period of the intermittent leave to an available alternative position for which the employee is qualified and better accommodates the reoccurring periods of leave.
- The alternate position must have equivalent pay and benefits, but does not have to provide equivalent duties.
- If the employee asks to use leave in order to work a reduced work schedule, you may also transfer the employee to a part-time role at the same hourly rate as the employee's original position, as long as benefits remain the same.
- Alternatively, you may allow the employee to work in the employee's original position, but on a part-time basis. If you adopt this option you may not eliminate benefits that would otherwise not be provided to part-time employees, but may proportionately reduce benefits such as vacation

leave if it is the employer's normal practice to base the benefits on a number of hours worked.

**b. Closing Comments**

This overview cannot entirely eliminate the cases where employees take advantage of the intermittent leave regulations--probably nothing can do that. Now, you can better manage this thorny issue and put into place best practices. If you would like us to review your FMLA policies to help cut down on abuse, or to conduct a more comprehensive audit of your current employment policies and practices, give us a call.