



The Practice of Excellence



FMLA and COVID-19 ... What do we do?

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Family & Medical Leave Act “FMLA”

- This Act provides eligible employees up to 12 weeks of job-protected leave annually to use for:
 - Pregnancy
 - Prenatal care
 - Serious health conditions of the employee or his/her immediate family
- An employee must physically work:
 - 1,250* hours (average of 25 hours per week) during the 12 months prior to the leave
 - Work at a location where at least 50 employees are employed within 75 miles
 - Worked for 12 months within past 7 years

*1250 hours is actual hours worked (excludes vacation, sick time, etc.)

“Serious Health Condition”

- Illness, injury, impairment or physical or mental condition involving:
 - Inpatient care for any length of time
 - Continuing treatment by a health care provider
 - Absence greater than 3 days with
 - Two visits to a health care provider or
 - One visit and ongoing treatment
 - Pregnancy or prenatal Care
 - Chronic condition (e.g. asthma, migraines, fibromyalgia, anxiety, depression)
 - Must see provider at least 2 times per year

Non-Qualifying Conditions

- Generally, unless complications arise, these do not qualify as serious health conditions:
 - Common cold
 - Stomach bugs
 - Ear aches
 - Headaches (non-chronic migraines)
 - Routine dental or orthodontia problems

Designation of FMLA

It is employer's responsibility to determine if leave is FMLA related

Employees do not have to ask for FMLA or even mention the FMLA

Failure to consider and designate leave properly is a violation of the law

Failure to send paperwork timely for FMLA is a violation



Forms for leave

- Employers can request medical certification from a health care provider
 - Always request a certification
 - Certification can come from a doctor, nurse practitioner, chiropractor, midwife, etc.
 - WH-380E for own illness
 - WH-380F for care of family member
- Must notify employee that certification is required – 5 days to send notice to employee and employee has 15 days to return form
- Provide eligibility notice and rights/responsibilities at same time as certification (WH-381)
- Once certification is returned, employer must send second notice confirming leave (WH-382 Designation Notice)
- If no certification is returned, may count time missed as an absence



Certification

- HR (**NOT** employee's direct supervisor) may contact health provider to:
 - Authenticate: verify information completed and/or authorized by health care provider
 - Clarify: understand handwriting or meaning of a response; no additional information may be requested beyond what is required by the certification form
- Second and third opinions (at employer's cost)
 - If employer questions the validity of the complete certification, the employer may require a second opinion
 - If the first and second opinions differ, employer may require a third opinion that is final and binding

Recertification

No more often than every 30 days and with an absence

More frequently than every 30 days if:

- The employee requests an extension of leave, or
- The circumstances of the certification change significantly, or
- Employer receives information that casts doubt on the reason for leave

Employer may deny FMLA until certification is received

FMLA



Employer's duty to obtain enough information to determine if absence is covered by FMLA



Do not counsel or discuss FMLA in any evaluations, discipline or any other document



Do not discuss burden due to absence



Still must follow call-in policy

Employer Requirements

1

Notify employees of their rights to FMLA leave (point out policy in company handbook)

2

Display FMLA poster

3

Continue health benefits at the same level as before the start of FMLA leave

4

Reinstate the employee to the same or an equivalent position upon conclusion of the FMLA leave

- Required covered employers to provide eligible employees with paid sick and expanded family medical leave for certain COVID-19 related reasons
- No longer in effect
- Applied to leave taken between April 1, 2020 and December 31, 2020
- Employers who chose to provide such leave between January 1, 2021 and September 30, 2021 may be eligible for employer tax credits
- Only to the extent that the leave would have satisfied the requirements of the Emergency Paid Sick Leave Act (EPSLA) and the Expanded FMLA

Families First Coronavirus Response Act (FFCRA)

Types of FMLA Leave

- FMLA provides employees with unpaid, job-protected leave
- May be taken in three ways:
 - Continuous leave
 - Intermittent leave
 - Reduced schedule leave

Intermittent Leave

- Leave that is taken in separate blocks of time for a single, qualifying medical or family reason
- Employees can request hours off work instead of days or weeks
- Intermittent leave counts toward the 12-week entitlement
- Examples:
 - Periodic treatment and medical appointments
 - Prenatal exam, morning sickness, and other pregnancy related conditions
 - Time off to recover from a serious illness
 - Time off for flare-ups of a chronic condition

What Can Intermittent Leave be Taken For?

To recover from his or her own serious health condition

To care for a family member with a serious health condition

To care for covered service member with a serious injury or illness

A qualifying exigency arising out of a family member's military deployment

Employers may permit employees to take intermittent leave for the birth of a child, or placement of a child for adoption or foster care, but are not required to do so

‘To Care For’

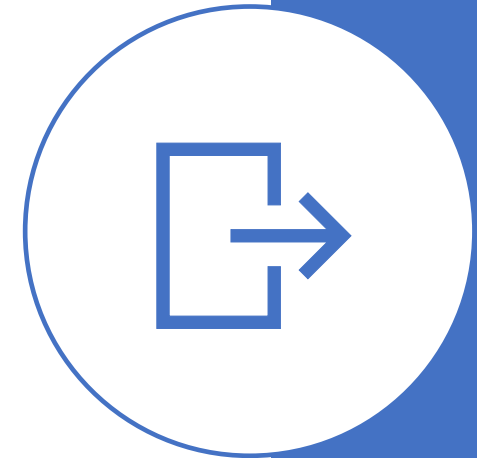
- “To care for” a family member with a serious health condition includes “to make arrangements for changes in care”
- Includes taking leave to help make medical decisions on behalf of a hospitalized parent or to make arrangements to find suitable child care for a child with a disability
- An employee may “make arrangements or changes in care,” even if that care does not involve a facility that provides medical treatment
- U.S. DOL has opined that a parent’s need to attend Committee on Special Education/Individualized Education Program meetings addressing the education and special medical needs for his/her children is a qualifying reason for taking intermittent leave

Employee's Responsibilities for Submitting a Request for Intermittent Leave

- An employee must make a reasonable effort to schedule planned medical treatment so that it does not “unduly disrupt” operations
- An employee needs to provide an intermittent leave request via a certification within 15 days of an employer's request
 - Provided by the employee's health care provider

Scheduling of Intermittent Leave

- If an employee needs leave intermittently for planned medical treatment, then the employee must make a reasonable effort to schedule the treatment so as not to disrupt the employer's operations
- Not unreasonable for the employer to request that the employee seek treatment after work
- If not possible because of doctor's schedule, employer can still ask employee to schedule treatment at the least disruptive time for the employer
- Employees must provide at least 30 days advance notice before FMLA leave is to begin if the need for leave is foreseeable



No Advance Notice

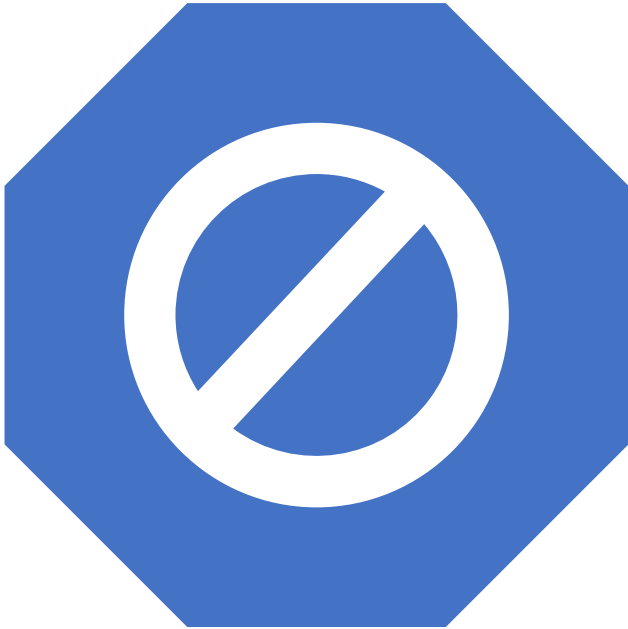
- When the need for intermittent leave is unforeseeable, the employee is required to give notice as soon as practicable under the circumstances
- If the employee can establish that it was impossible to know that a need would arise, this type of notice is timely and appropriate under the rules
- Where most issues arise



Counting Intermittent Leave

- Intermittent leave reduces the total amount of leave only by the amount of time actually taken off
- Employer may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave
- FMLA does not specifically state how many hours are in a workweek
- Workweek includes "all time during which an employee is required to be on the employer's premises"
- Example:
 - Employee works 40 hours per week
 - $12 \times 40 = 480$ hours FMLA
 - Subtract any intermittent leave from total hours





Actions Prohibited by the FMLA

- Do not make pre-hire inquiries regarding the need for FMLA leave
- Do not ask for a doctor's note for each use of intermittent FMLA leave
- Do not interfere with an employee's rights under the FMLA
- Do not retaliate against employees who exercise their rights or file FMLA complaints
- Managers and officers violating the requirements of the FMLA may be held individually liable for violations of the law.

Best Practices for Managing Intermittent Leave



- **Have a Point Person**
 - Administering FMLA can be a lot simpler when one person handles it for the organization
 - Proper training
 - Stay updated on legal and regulatory developments
 - Ability to call employment law counsel

Best Practices for Managing Intermittent Leave

- **Create Policies and Procedures:**
 - Have written policies and forms for employees and managers
 - Can make administration easier
 - Helps ensure compliance
- **U.S. Department of Labor provides several forms:**
 - A good start
 - Want to build on these and make them fit your company's needs

Best Practices for Managing Intermittent Leave



- **Be sure FMLA applies**
 - Don't be too quick to approach every medically related leave as FMLA
 - Examples:
 - Not covered employee
 - May be covered under ADA instead
- Get as much information about how often and under what circumstances the employee is entitled to take off

Best Practices for Managing Intermittent Leave

- **Educate and Communicate**
- Regular communication between everyone involved is critical to managing intermittent leave
- Employees also need to understand how the FMLA works and what's required of them
- Have an open dialogue
- Pay special attention to communications when supervisors or managers are involved
 - Both managers and employees should track time off and inform HR when leave is taken
 - Issues can arise when either party loses track of leave or if employees don't notify supervisors about time off until after they have begun taking it



Follow FMLA's Employee Notice Requirements

- Understand basic intermittent leave notice requirements in order to develop intermittent leave process for your workforce
- For foreseeable leaves (scheduled surgery, medical treatments):
 - Employees must provide 30 days' notice, or provide notice as soon as practical under the circumstances
- For unforeseen leaves (emergency surgery, medical treatment due to an accident or severe illness):
 - Employees must provide documentation as soon as is practical

Enforce Call-in Procedures

- Employers have the right to enforce their regular call-in procedures when an employee is claiming an absence under intermittent leave
- When employees call in to report a leave, make sure to obtain sufficient information to determine whether the leave qualifies for FMLA leave:
 - What are the specific reasons for the absence?
 - What job duties is the employee unable to perform?
 - Is the employee going to see a physician?
 - Has the employee previously taken a leave for this condition?
 - When did the employee first learn that they'd need to be off work?
 - When does the employee expect to return to work?

Track Use Carefully

- Proper tracking enables employers to provide just the right amount of FMLA leave their employees are entitled to
- Can also help detect patterns or trends that may suggest instances of misuse
- Don't just focus on tracking when an employee is on leave – also important to track how time away from work is logged

Tillman v. Ohio Bell Telephone Company

- Employer became suspicious of employee's intermittent leave for a chronic back condition as it routinely occurred on Fridays, weekends and around holidays
- Employer conducted investigation and employee was terminated for fraudulent use of intermittent FMLA leave
- Court upheld the employee's termination, despite the medical certification, b/c insufficient evidence to support employee was entitled to FMLA leave on day in question, especially given evidence to the contrary.

- Ensure an employee's certification is complete and provides sufficient information to understand the employee's leave requirements
- If it is not complete, responses are vague or unresponsive, or there are questions as to whether the form was completed by the healthcare provider:
 - Request the employee to obtain the missing information
 - Clarify the unclear responses
 - Authenticate the certification
- If employee fails to provide missing information, the certification is incomplete and leave may be denied

Require Completed Medical Certifications

Ask for Recertifications

Graham v. BlueCross BlueShield of Tennessee, Inc.

- Employee requested intermittent leave because of her migraines
- Subsequently missed 28 consecutive days at work, which significantly exceeded the frequency and duration listed on her certification
- Employer requested a recertification and the employee never provided
- FMLA leave was denied and the employee was terminated
- Employee brought FMLA interference claim against the employer
- Court upheld the employer's action indicating that the "plaintiff's certification did not entitle her to unfettered FMLA leave."
- Employer followed proper procedure by asking for a recertification because the employee's usage pattern changed dramatically.



Consider Obtaining a Second (or Third) Opinion

- If an employer doubts the validity of a certification, the employer can request a second opinion at a provider designated by the employer
- The second opinion has to be completed at the employer's expense
- If the second provider doesn't agree with the initial certification, then a third opinion can be sought
- Third opinion serves as a tiebreaker
- The third provider must be designated by both the employer and the employee, and the opinion of the third provider is final and binding

Scenario

- Employee with 2 kids and completed FMLA paperwork specifying that mental support and transportation would be needed for child's appointments 1-2 days month. Employee feels FMLA applies any time child needs mental support for the day. We interpret as mental support for days when they have an appointment

Suggestion

- If the certification from the health care provider deems mental support and transportation would be needed for 1-2 days month, that is when the FMLA leave would be applicable
- Could have the employee obtain a recertification their children need more support/if deviating from what original certification provides for (i.e., more than 1-2 days per month)

Scenario

- Do we hold firm to what is specified on a form for number of days out of office? For days in excess of what is specified, do we count it as a non-FMLA occurrence?

Suggestion

- Need to obtain more information before designating as non-FMLA
- If the employee's condition has changed from the original certification, may request the employee to submit a recertification
- If employee does not submit, may count as non-FMLA occurrence

Scenario

- Employee turned in FMLA paperwork signed by doctor stating she had excessive sleepiness and severe headaches and needed to be out 1-2 days/month. A few months later, employee turned in FMLA paperwork signed by same doctor stating that she now needed to be out 8-10 days/month. Called provider and assistant verified. How do we challenge when it seems ludicrous or fraudulent?

Suggestion

- An employer has the right to contact the employee's health care provider to clarify and verify a medical certification.
- If an employer has reason to doubt the validity of a medical certification, an employer may require the employee to obtain a second opinion, at the employer's expense, at a designated health care provider.
- Must have good reason to require second opinion. Mere disagreement with the first doctor is not usually enough.

Questions?

