

PREVENTING FMLA INTERMITTENT LEAVE AND REDUCED WORK SCHEDULE ABUSE

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Preventing FMLA intermittent leave abuse is not for the faint of heart. It takes determination, organization, and a systematic approach: first to the requests and, ultimately, to the absences that flow from the employer's approval of leave. Regrettably, employers get the intermittent leave problem they deserve. Ignore the problem or manage it passively and intermittent leave will be expensive and disruptive to business operations. However, those employers who address it firmly and fairly will be rewarded with lower costs of operation. In short, intermittent FMLA leave abuse can be prevented and controlled. Are you ready to protect your business? Are you ready to exercise your rights under the FMLA and

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reduce your Company's compliance cost? If so, read on.

PAYING ATTENTION TO EACH ABSENCE

Too many employers ignore employee absences or employees who leave early or arrive late. To those employees, the "message" is an invitation to intermittent leave abuse. Conversely, those employers who call each employee on the first day of an absence to inquire about their well-being and meet with each and every absentee on the day they report back to work to determine whether these absences are likely to be repeated and whether the absence was for the qualifying condition stated in the medical certification, sends a message of vigilance. Absentees appreciate an employer genuinely interested in their welfare and often respond by reducing absences because they feel wanted.

Reduce absences and intermittent leave abuse and your reward is less HR issues and greater cost savings. In turn, saved dollars increase operational efficiency.

CONTROLLING ABUSE BEGINS WITH A CAREFUL REVIEW OF THE MEDICAL CERTIFICATION

The first step in controlling intermittent leave abuse is to review carefully the medical certification. In California and a few other states, you may not be provided access to medical information, other than duration. Incomplete medical certifications generally arise when the employee's health care provider "conveniently" omits something that might be detrimental to the employee's leave request. Incomplete certifications should be returned to the employee. The employer should inform the employee that incomplete medical certifications cannot be approved and therefore the employer will give the employee a "grace period" to return a completed certification or FMLA leave will be denied. If the completed certification is suspicious (for example, completed in two different handwritings or two different colored inks or where the medical diagnosis doesn't make sense), the employer should next obtain the employee's permission to have the employer's health care provider contact the

employee's health care provider to "clarify" the medical conclusions stated in the certification.

Accepting all medical certifications at face value is an invitation to FMLA abuse. Careful scrutiny helps prevent abuse. It won't take much of your time, but it will save you money. Even in California, where medical information is limited to the expected date of leave duration or date of delivery for pregnancy, you can clarify the information to demonstrate your interest in preventing abuse.

TAKE ADVANTAGE OF YOUR OPTIONS

Every time the employer is confronted with an employee request for intermittent leave or reduced work schedule (supported by a completed medical certification), the employer must decide whether to:

- 1) seek a second medical opinion (prohibited in a few instances such as California);
- 2) grant leave with temporary transfer to an available alternate job; or
- 3) keep the employee on his regular job with approval for intermittent leave or reduced work schedule.

Second opinions are usually confined to cases where the employer suspects fraud or the medical certification is otherwise questioned. Used judiciously, the employee will understand the employer's determination to manage FMLA situations to prevent abuse.

BALANCE YOUR NEEDS FOR OPERATIONAL EFFICIENCY AGAINST THE EMPLOYEE'S NEED TO ADDRESS HIS OR HER MEDICAL CONDITION

Protecting employee rights to intermittent leave or reduced work

schedule requires a balancing act between protecting the employee's statutory rights to FMLA leave, and the employer's need to maintain efficient business operations.

Under some circumstances, employees may take FMLA leave intermittently—which means taking leave in blocks of time, or by reducing their normal weekly or daily work schedule.

- If FMLA leave is for birth and care or placement for adoption or foster care, use of intermittent leave is subject to the employer's approval.
- FMLA leave may be taken intermittently whenever medically necessary to care for a seriously ill family member, or because the employee is seriously ill and unable to work.

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When intermittent leave is needed to care for an immediate family member or the employee's own illness, and is for planned medical treatment, the employee must try to schedule treatment so as not to unduly disrupt the employer's operation.¹

RECOGNIZE YOUR RIGHTS TO PROTECT OPERATIONAL EFFICIENCY

When intermittent leave is needed to care for an immediate family member or the employee's own illness, and medical treatment can be planned, the employee must try to schedule treatment so as to not unduly disrupt the employer's operations.

In cases involving intermittent leave or reduced work schedule requests that cannot be scheduled to avoid disruption to operational efficiency, the Regulations provide in 825.204:

[T]he employer may require the employee to transfer temporarily,

during the period the intermittent or reduced work schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position.

This is governmental recognition of the employer's right to maintain operational efficiency. Faced with an employee's request for intermittent leave or reduced work schedule, the employer should balance its needs for operational efficiency against the employee's need to be absent, whether the absence be planned or unplanned. The employer should approve the intermittent leave or reduced work schedule (reduction of the number of hours worked per week or per day) for the amount of time specified in the medical certification provided by the employee's health care provider. However, the employer may require that the time off be scheduled in a manner that least disrupts operational efficiency or the employer may use its right to temporarily transfer the employee to a job that less interferes with the employer's right to maintain operational efficiency and better accommodates recurring periods of leave than does the employee's regular position.

THE PROPOSED SOLUTION

In the case of planned intermittent or reduced work schedule absences, the employer should conduct a balancing test discussed below. In the case of chronic conditions—absences that will by their very nature be unplanned—the proper employer response to an employee's request for intermittent leave or reduced work

schedule is to conduct a balancing test. If the employer concludes that its operational needs outweigh the employee's requested needs, the employer may temporarily transfer the employee to an available position for which the employee is qualified. Likewise, if an employee is asked to "try" to schedule his or her planned absences in a way that does not unduly interfere with operational efficiency and the result is that the employee's scheduling "try" is unsuccessful, there should be a conference held between employee and manager. Therein, the employee should be asked to "try" harder to schedule planned absences in a way that no longer interferes with operational efficiency or the employer will exercise its right to temporarily transfer the employee to an available alternate position. In this situation, it is important to remember that while FMLA leave cannot be denied where the employee is unable to schedule planned absences in a manner that does not unduly disrupt the employer's operations, the employer, nonetheless, retains the right to temporarily transfer the employee to an available alternate position even after the employer has initially approved either FMLA intermittent leave or reduced work schedule.

REMEMBER—IT IS A BUSINESS DECISION

Controlling intermittent leave abuse is fundamentally a business decision.

Too many employers view intermittent leave abuse as an HR problem when, in reality, it is a business problem. In this day of "lean" companies, every absence becomes a cost factor. Every CFO and every location manager

knows what is "in the budget" for attendance related issues—be it extra people, extra overtime, or extra cost to move people around to cover for emergency absences. But, from a business standpoint, not every situation is critical to cost control.

Any manager should be able to identify positions where an absence will involve minimal cost and inconvenience and other positions where an absence is most costly. Yet, confronted with absences caused by intermittent leave abuse, the manager loses sight of the business cost but instead thinks of a temporary transfer solution as an HR problem. It is not. Nothing is more a business issue than exercising the employer's right to temporarily transfer an employee requesting intermittent leave to an available alternate job. Too many managers fail to account for the effect on business operational efficiency. Yes, management may temporarily transfer an employee "certified" for FMLA intermittent leave and whose absences can better be accommodated by a transfer even if those absences have only a minimal effect on operational efficiency.

And, where management cannot think of a position where a temporary transfer best protects the business, think again! Every employer, when push comes to shove, can "create" a position where the transferred employee's absences are less disruptive to operational efficiency. No cop-outs here! No excuses. Look around and figure out where to temporarily transfer the employee to a position that less disrupts company operations. If you do so, you win! Don't say that you cannot find a spot. Think how you can best protect the business. Find a

creative solution that will be valuable to the business.

CONSIDER THE PSYCHOLOGICAL IMPACT OF YOUR DECISION

Never ignore the psychological value of a temporary transfer to an alternate job for employees seeking intermittent leave or reduced work schedule. Employees respect a management that is firmly but fairly trying to run an efficient business. Moving a person for valid business reasons (i.e., increased efficiency) represents a management that is intent on doing the right thing for its business. Furthermore, because employees do not like to be moved, a temporary transfer policy will have added psychological value. When an employer acts to strengthen and protect its business, it is likely that the transferred employee will realize that regular attendance is an essential component of the regular job.

In the days when worker compensation abuse was prevalent, employers found that offering a temporary light duty job to a worker compensation claimant (and, to avoid setting an adverse ADA precedent, only to worker compensation claimants), was a good business practice. The temporary light duty assignment did not need to be to the employee's liking so long as the employee was qualified for the position. Under FMLA regulations, if the Employee has not used up his or her FMLA eligibility, he or she can refuse a light duty job offer and should be placed on FMLA leave; but if the Employee has exhausted his or her FMLA entitlement, the refusal of light duty work will likely result in the de-

nial of temporary disability or worker's compensation payments in most states.

In the Worker's Compensation context, the temporary light duty job could be menial, as long as the duties were not viewed as discriminatory or punitive. Employers who offered temporary light duty jobs in worker compensation situations often found that the employee, when faced with the option of accepting temporary light duty job (that, if refused could affect eligibility for continued temporary disability benefits) or "recovery", this choice often resulted in a spontaneous and miraculous recovery so he or she could resume his or her regular job on a full-time basis. Using the workers compensation lesson, it can be reasonably predicted that temporary transfer to an alternate job as a response to the employee's request for intermittent leave or reduced work schedule is likely to achieve a similar result. Many employees, faced with temporary reassignment, would rather get "well" and resume their regular job. Those genuinely needing intermittent leave or reduced work schedule will accept the employer's reasonable temporary transfer offer.

No person wants to be moved off his or her regular job to an alternate job. People do not like change. When confronted with the reality that the employer has opted to temporarily transfer the employee to an alternate job (not necessarily one to his or her liking), the intermittent leave abuser will quickly understand that the employer's action to preserve operational efficiency (i.e., temporary transfer to a position for which the employee is qualified but not necessarily one the employee pre-

fers) presents the employee with a choice: does he or she really need to be absent at times that disrupt the business? Will the temporary transfer that protects the business force the employee to re-consider his or her need for leave?

Moving an employee to an alternate job may be neither easy nor fun, but it focuses everyone's attention on the dynamics of the situation. From a psychological standpoint, the employer's willingness to discuss and address temporary transfer is a win/win: the employer teaches the employee about operational efficiency and the employee learns about the balancing of his or her statutory rights to FMLA leave against the employer's right to conduct its business without loss of efficiency. It is also good HR "best practices" to let the employee know the employer is serious about protecting its business.

For this reason, it is recommended that employers conduct the temporary transfer-balancing test each and every time an employee requests intermittent leave or reduced work schedule! Acting for business reasons makes sense. It will not be viewed as punitive or discriminatory, provided that each and every time an employee seeks intermittent leave, the balancing test is conducted. Then temporary transfers will occur only when it makes business sense.

HOW TO CREATE A TEMPORARY JOB

The alternative position does not have to have equivalent duties. The job need not be of the employee's liking but can be a job "created" or a vacant job that best balances the employee's need for recurring absences and the employer's compet-

ing need to maintain operational efficiency. Many employers pay daily overtime and the employee, by working overtime during the work week, can earn more even if absent on a work day during the week. If attendance is an essential element of the employee's job so that absences in that job will have an adverse effect on the employer's ability to run efficient operations, this is where the balancing test comes into play. The employer must decide whether to temporarily transfer the employee to an alternate job or to keep the employee in his or her regular job while allowing intermittent absences or a reduced work schedule. The alternate position selected must allow the employee to remain on the same work shift, should pay equivalent wages and benefits, and should not be punitive or discriminatory. But, a temporary transfer to a different job may better suit the employer's business needs than allowing absences in the employee's regular job that cause operational inefficiencies. In this situation, the employer can (and probably should) temporarily transfer the employee to a job of the employer's choosing. So long as the employee is qualified to perform the temporary job, the choice of job is up to the employer.

Whenever feasible, consideration should be given to choosing an alternative position that will be an extract of the employee's current job. Thus, there will be job duties the employee can perform that will allow the employer to conduct its business in a way that the employee's absences least interfere with operational efficiency. So long as the employer addresses its need to maintain maximum operational efficiency, it can temporarily transfer the employee

to an alternate job that he or she can perform without safety risk (whether to a job created for this situation or to an existing job).

Here is the key to what makes this approach work: if the employee refuses the offer of temporary transfer to an alternate job for which he or she is qualified, FMLA leave can be denied. With these dynamics, the employer can afford to be sensitive and compassionate to the employee's need for leave because where the employer's business needs for operational efficiency outweigh the employee's need for intermittent leave or reduced work schedule in his or her regular position, the employer can and should be willing to explain why temporary transfer is required to meet this situation. If the employee still refuses to accept the temporary transfer, his or her FMLA leave request should be denied. That's because a refusal to comply with the employer's decision for a temporary transfer to an alternate job means that the employee has failed to meet the employer's reasonable and consistently applied conditions for leave. After denying FMLA leave, the employer must next determine if

the employee qualifies for other company leave under its policies. If that too is denied, the employer can and should count the employee's subsequent absences against its regular attendance control policy. A full explanation of the business decision should be given and documented so that anyone reviewing the decision will recognize that the employer did not intend to create a situation that interferes with statutory rights as modified by the Regulations.

COMPARE EMPLOYEE LEAVE USAGE AGAINST THE LEAVE APPROVAL

If the employee's "usage" of intermittent leave (planned or unplanned) varies from what was initially approved in the medical certification, that variance constitutes a change in circumstances and entitles the employer to require that the employee's medical condition and need for continued leave be re-certified.

When the employee's medical needs no longer require intermittent leave or reduced work schedule, the employee should be restored to his or her regular job, if available, or to an equiv-

alent job with no loss of pay or benefits. It is a good HR practice for management to review periodically all temporary transfers so the manager can justify the continuation of each temporary transfer on a regular basis. While the length of temporary transfers under Company policy should be consistently applied, management needs a policy that is flexible enough to recognize exceptions requiring longer temporary transfers under the FMLA.

CORRECT USE OF COUNSEL CAN PROTECT AGAINST LITIGATION

To ensure that the treatment of the employee requesting intermittent leave or reduced work schedule is lawful, it is **STRONGLY ADVISED** that counsel be contacted before an employee is temporarily transferred or leave is denied. Similarly, counsel should be contacted when the job restoration issue arises.



NOTES

1. FMLA FACT SHEET (Employment Standards Administration Wage and Hour Division – Fact Sheet No. 028)