

A MANUFACTURER'S GUIDE TO CURBING INTERMITTENT FMLA LEAVE ABUSE

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One of the most frustrating issues for manufacturing employers to address is an employee's continued sporadic, and unpredictable intermittent absences taken pursuant to the Family Medical Leave Act ("FMLA"). FMLA intermittent leaves of absence have a tendency to wreak havoc on manufacturers' operations. Manufacturers rightfully complain that an employee's repeated FMLA intermittent leaves of absences effectively transform a full-time position into a part-time position, or leave the manufacturer "high and dry," especially when it's the only person in the plant who knows how to operate the widget making machine –and the manufacturer makes widgets.

By way of background, the FMLA allows employees to take 12 weeks of leave for their own or a family member's serious health condition. The leave can be taken in one block, over several stretches of time or intermittently. To take intermittent leave, the employee is required to provide a certification that there is a medical need for such leave.

While longer, continuous FMLA leaves are easier (relatively speaking) to plan for than sporadic intermittent leaves of absence, an employee's ability to take small increments of FMLA leave sporadically generally result in administrative (these do not qualify as a serious health condition under the FMLA, FYI) headaches for employers and raises concerns about employee abuse of intermittent leave. The FMLA offers a number of tools – many of which are not widely known unless recommended by experienced employment counsel – that you can use to discourage abuse of intermittent leave. Below are my recommended best strategies for curbing FMLA intermittent leave abuse.

Examine the medical certification to ensure it has been properly and fully completed. When a certification has missing entries or is ambiguous, you

may require the employee to provide complete and sufficient information. Your request must be in writing, specify why the certification is incomplete or insufficient, and provide the employee seven days to provide the additional information.

Another tool is the ability to contact the health care provider to ensure that he or she actually prepared the certification, and to clarify handwriting or the meaning of a response. But, the FMLA regulations make clear that the employee's direct supervisor may not be the one who contacts the health care provider; rather it must be a human resource professional, leave administrator or management official. During this process, be careful not to request more information than what is required to authenticate or clarify the form.

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If you have a legitimate basis to doubt the validity of an initial certification, you can ask for a second opinion. While you can choose the physician, it cannot be one the employer uses on a regular basis, or the owner's golfing/tennis buddy, and they must pay for the second opinion. If the first and second opinions conflict, you may require the

employee to see a third health care provider, also at your expense. The third provider's opinion is binding.

Manufacturers also must be certain that all absences related to the condition are counted against the employee's FMLA entitlement. Identifying FMLA absences is not simple, mainly because the employee does not have to even state the words "FMLA" in a request. If there is an existing certification, it is enough for the employee to notify the employer that he had a recurrence of the health condition covered by the certification. Thus, supervisors should be trained to notify human resources any time an employee is out for more than an extended period (i.e. more than three days) with an illness, particularly if the employee sought treatment from a physician during that time.

Adopt a policy that requires accrued paid leave to run concurrently with unpaid FMLA leave. Employees are less likely to abuse intermittent FMLA leave if they are required to use up their vacation/sick/PTO time each time they take leave. So, make sure include such a requirement in your FMLA policies and enforce the practice of using up paid time off during FMLA leave.

The FMLA standing alone would not allow you to request a doctor's note for every absence if there is a valid medical certification in place. But if your leave of absence policies require employees to sign a certification upon return from any leave of absence (medical or otherwise) that the leave taken was for the reason given, here, the serious health condition on the certification, you can require employee so sign such a certification after each intermittent leave.

Require employees to provide recertification when appropriate and necessary. You may request recertification (1) no more than every 30 days in connection with an absence or (2) when the minimum duration from a prior certification expires, if the minimum dura-



tion exceeds 30 days. You may request recertification more frequently if an employee asks for an extension of leave, circumstances change (e.g., an employee's absences aren't consistent with his doctor's prognosis), or you doubt the legitimacy of the employee's medical status (e.g., Monday or Friday absences). "Changed circumstances" include a different frequency or duration of absences or increased severity or complications from the illness. The regulations allow you 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 casts 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. Always attempt to independently verify information received from coworkers before taking action or requesting recertification for suspicious circumstances.

Employees may take intermittent leave for among other reasons, treatment, therapy, and doctor visits. Employees must schedule those absences for planned medical treatment 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 that the employee may be able to alter the schedule to cut down on disruptions.

If the need for intermittent leave is foreseeable, assign employees who are taking intermittent leave to alternative positions to cause less disruption. If an employee's continued intermittent absences interfere with your operations, they may be temporarily transferred to an alternative position until their FMLA leave is concluded. However, the transfer may not result in a loss of pay or benefits or be used to discourage employees from taking leave.

These tips won't entirely eliminate the problem of employees trying to take advantage of the intermittent leave regulations – probably nothing can do that – but they will help. ♦