

# INTERMITTENT FMLA LEAVE: A CONTINUING COMPLEX CHALLENGE

2018 Upper Midwest Employment Law Institute

Mary M. Krakow

# Introduction

- Intermittent:
  - Periodic and unplanned
  - Full or partial days of absence
  
- Applies to
  - Absence for a serious health condition,
  - But not parenting leave unless ER agrees; be consistent

# Tools for addressing intermittent FMLA leave

- 13 tools identified below

# Require a medical certification

- Use the DOL's FMLA forms:
  - Certification of Health Care Provider for Employee's Serious Health Condition
  - Certification of Health Care Provider for Family Member's Serious Health Condition

# Require a medical certification

- Employee's own illness/injury:
  - Key Questions: 6 & 7

# Require a medical certification

- Family member's illness/injury:
  - Key Questions: 5, 6 & 7

# Obtain a “Complete and Sufficient” Certification

- See the third section of the DOL’s Designation Notice

# Obtain a “Complete and Sufficient” Certification

- “Incomplete”:
  - One or more of the applicable entries have not been completed.
- “Insufficient”:
  - The information provided is vague, ambiguous, or non-responsive

# Obtain a “Complete and Sufficient” Certification

- “Authentication”:
  - Give the health care provider opportunity to confirm he/she completed or authorized the information
  - HR professional or management official but not employee’s supervisor

# Obtain a “Complete and Sufficient Certification”

- “Clarification”:
  - Give the health care provider opportunity to decipher his/her handwriting or to explain what the response means

# Request a second opinion

- If doubt validity of original certification:
  - Health care provider not expert on the alleged health condition
  - Content raises common sense suspicions

# Request a second opinion

- Cannot use health care provider the company regularly uses
  - Find appropriate provider
    - Expertise and Timing
- Company must pay for the second exam/opinion

# Request a second opinion

- If first & second opinion disagree,
  - Need third opinion
    - EE and ER must agree on the provider
    - ER again must pay

# Request recertification

- Every 6 months in connection with an absence
- Also—
  - The longer of every 30 days or minimum duration of the condition, or
    - Shorter if have specific reason

# Request recertification

- Potential reasons:
  - EE requests extension of leave
  - Circumstances of use have changed
    - Absent more often than specified
    - Pattern of use is suspicious (Monday/Friday)
    - Outside information raises suspicions

# Request recertification

- In a request
  - Provide record/pattern of absences
  - Ask if pattern necessitated by medical condition
  - Allow 15 days for response
  - EE pays

# Request a new medical certification

- For all intermittent leaves lasting beyond the designated 12-month period

# Request certification regarding ability to work safely

- FMLA: “Serious health condition” prevents EE from working
- ADA: “Disability” requires reasonable accommodation even while at work

# Request certification regarding ability to work safely

- Request this certification because
  - When EE is at work
  - Questions arise regarding EE's ability to work safely for him/herself and/or others
    - Specific behaviors/events suggest EE is unsafe

# Request a fitness-for-duty certification

- Must have checked the fitness-for-duty box on the Designation Notice
- May request 1x every 30 days if reasonable safety concerns exist
- Only may cover the FMLA serious health condition

# Enforce the FMLA's notice requirements and Company's Call-In Requirements

- If need is foreseeable, require 30 days' advance notice
- If need is not foreseeable, consistently enforce usual call-in procedures for unplanned absence or tardy
- Enforce needed discipline
- Be consistent

# Enforce requirements for use of paid time

- Salaried exempt:
  - FMLA allows deduction against salary for missed work time
- The company policy should specify
  - Mandatory use of paid time during FMLA
  - Elective use of paid time during FMLA

# Enforce requirements for use of paid time

- Be consistent on use of paid time
  - Enforce same requirements as for any absence

# “Reasonable effort” to unduly disrupt company operations

- Include requirement in FMLA policy
- Include requirement in any correspondence to the employee
- Enforce the requirement consistently

# Consider a transfer for intermittent leave for planned medical treatment

- Only in the case of planned medical treatment
  - EE may be temporarily transferred
    - Equivalent pay & benefits
    - Equivalent duties not required
    - Must not discourage EE from taking leave
    - Must not cause hardship to EE

# Track amount of intermittent leave taken

- Must allow EEs to take leave in smallest increment of time measurement used for other absences
- Count the amount of leave taken against employee's 12 workweeks

# Track amount of intermittent leave taken

- **Examples:**

- Regular 40/week: 480 hours FMLA

- Subtract time absent from 480

- Regular 50/week: 600 hours FMLA

- Subtract time absent from 600

# Track amount of intermittent leave taken

- **Examples:**

- Regular 40/week: 480 hours FMLA

- Subtract time absent from 480

- Regular 50/week: 600 hours FMLA

- Subtract time absent from 600

# Track amount of intermittent leave taken

- Can allow EEs to make up unpaid intermittent FMLA leave
  - For purpose of pay only; time missed still counts against total of FMLA used
  - For purposes of both pay and time; time missed does not count against total of FMLA used
  - Be consistent; best to include in policy

# Train managers/supervisors

- Can only comply with what they know
- Train them to contact HR

More Questions?

Thank You