

# Senior Living and Long-Term Care Blog

*Perspectives on the legal trends, regulatory policy and other issues facing the senior living and long-term care industry*



## Challenges in Managing Unplanned Intermittent Leave in the Senior Living and Long-Term Care Workplace

*By Joan E. Casciari*

One of the biggest challenges for employers in the health care world is managing unplanned intermittent leave. Providing care 24 hours a day in a senior living or long-term care environment makes this particularly difficult.

Pursuant to the Family and Medical Leave Act (FMLA), an eligible employee may take up to 12 weeks of leave in a 12-month period for a number of reasons, including the employee's own serious health condition or the serious health condition of a parent, child or spouse. For a full time employee, that equates to 60 work days, and if it is taken in smaller increments, an employee can have frequent absences that can be very disruptive. Using a rolling 12-month period to measure leave entitlement, as many employers do, further complicates the management of intermittent leave, as employees who want to game the system will be aware of when they have more FMLA coming to them. Further, while an employer may temporarily transfer an employee who needs intermittent or reduced work schedule leave to another position that better accommodates the absences, that is only applicable to absences for planned medical treatment. In most cases, those who abuse intermittent leave are taking off for incapacity, i.e., the inability to work, not for planned medical treatment.

If the employee meets the eligibility requirements for FMLA (12 months of service with the employer, at least 1250 actual hours worked in the 12-month period prior to commencing leave, and he/she is employed at a facility with 50 or more employees within a 75-mile radius) the employee may seek leave on an intermittent basis (which is typically for a chronic condition) if the need for such leave is "medically necessary." The determination of whether a condition qualifies as an FMLA serious health condition, as well as whether the need for intermittent leave is medically necessary, is made by the employee's health care provider. While there are certain rights that employers have to validate an employee's request for intermittent leave, as a practical matter, once the leave is certified to be taken intermittently, the employee, in effect, "self certifies" any absences taken under FMLA. The employer may require the employee to call in the FMLA-related absences, but employers may not require a "doctor's note" (called a fitness for duty certification under the FMLA) to support such intermittent leave except under very limited circumstances. Further, FMLA is an entitlement law, and does not have a hardship component like the Americans with Disabilities Act.

Below are some suggestions for helping to manage intermittent leave abuse.

1. Use a written leave request form that requires an employee to indicate how much leave he/she needs to take, and if leave is needed on an intermittent or reduced work schedule basis, the parameters of the need for leave. For example, if an employee indicates he/she needs time off 1-2 times per month in 1-2 day increments, this sets a baseline of up to 4 days per month to be taken for FMLA reasons.
2. Make sure the medical certification is filled out completely and legibly, and in particular, if the provider states that intermittent leave is needed either for medical treatment or due to incapacity, that the provider must also state the duration and frequency of the need for such leave. Do not accept certifications that state "life time," "indefinite," "unknown" or "cannot be determined." The provider is required to give an estimate of frequency and duration.
3. Make sure the medical certification provided by the employee's health care provider confirms entitlement to the leave the employee has requested in his/her application for leave.
4. If a certification form is incomplete, return it to the employee with a note indicating what is missing. Allow the employee at least 7 days to provide the missing information. The Wage and Hour FMLA form WH-382 contains a provision that can be used for this purpose.
5. Consider exercising your right as an employer to have a questionable certification authenticated. FMLA regulations permit an employer to require an employee to cooperate in the authentication process. 29 CFR 825.307(a).
6. Consider exercising your right to clarify a certification. Here, employer rights are somewhat limited, as clarification means "*contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response.*" 29 CFR 825.307(a). Further, an employer may not request additional information, the contact cannot be made by the employee's direct supervisor, and the employee may refuse to authorize the employer to clarify a certification. However, if an employee refuses to permit clarification and does not otherwise clarify the certification, the employer may deny the taking of FMLA leave if the certification is "unclear." 29 CFR 825.307(a).
7. Consider exercising your right to require a second opinion. Here, the employer must have "reason to doubt the validity of a medical certification." 29 CFR 825.307(b). The regulations do not expand on what that means, so an employer should be prepared to justify any request for a second opinion. Also keep in mind that once a "recertification" has been requested, a second opinion is not permitted. So make a decision early on to exercise this right. Court cases are split on whether a third opinion must be obtained when a second opinion differs with the first opinion.
8. Make sure that an employee who is certified to take unplanned intermittent leave is taking it in accordance with the frequency and duration as certified. If there is variance, you may require the employee to get a recertification from his/her provider validating any additional time off beyond the provider's initial certification. 29 CFR 825.308(b) and (c).
9. If there is a pattern of absence (e.g., Monday/Friday or the day before or after holidays or vacation) an employer may require the employee to have his/her provider render an opinion on whether the need for FMLA leave is consistent with the pattern of absences. 29 CFR 825.308(e).
10. If the terms of a collective bargaining agreement or state or local law govern an employee's return to work, those provisions may be applied. 29 CFR 825.312(g).
11. Although an employer is not generally entitled to a fitness for duty certification for each absence taken intermittently, an employer is entitled to such a note for absences up to every 30 days if reasonable safety concerns exist regarding the employee's ability to perform his/her job. 29 CFR 825.312(f).
12. Carefully scrutinize any request for FMLA that purports to allow an employee to take leave in very small increments or be late to work whenever there is a "flare up."
13. In extreme cases of suspected abuse, consider putting the employee on surveillance after checking applicable law and consulting legal counsel.

14. Do periodic audits of those taking intermittent FMLA leave and make sure certifications are up to date and complete. The best practice is to require re-certifications every six months if the employee continues to take leave. A new “annual” certification also may be required and this is significant because that new certification allows the employer to seek a second opinion.
15. Train your Human Resources team and management periodically on the FMLA and related laws.
16. Make sure your FMLA policy is up to date and clearly indicates to whom the request for FMLA is to be made. Further, make sure the required poster is posted, and you are using up to date DOL approved forms. In particular, an employer is required to provide notice of an employee’s rights and obligations under the FMLA (WH-381) and also to designate (or not designate) requested leave as FMLA-qualifying (WH-382).
17. If FMLA is managed by a third party administrator (TPA), make sure the TPA is following best practices.

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