

## Living with Leave Part I: Intermittent Leave

Note: We have developed our understanding of the assertions and concerns of various family and business groups from our reading of FMLA cases, from materials developed by the groups, and through individual conversations with group representatives. Where comments have appeared in writing, we have included at least one source for each concern or assertion, even if we have heard similar information from additional sources. For purposes of this chart, the term “family and labor groups” includes: AFL-CIO, D.C. Employment Justice Center, Labor Project for Working Families, National Partnership for Women and Families, and the National Women’s Law Center. For purposes of this chart, the term “business groups” includes: HR Policy Association (formerly LPA), National Association of Manufacturers, Society for Human Resource Management, and the U.S. Chamber of Commerce.

| <b>Issue</b>   | <b>Family and labor groups’ assertions and concerns (as we understand them)</b>   | <b>Business groups’ assertions and concerns (as we understand them)</b>   | <b>WF 2010 Comments</b>   |
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| <p>An employee may take intermittent leave, or may get a reduced leave schedule, when medically necessary.</p> <p>29 USC § 2612(b)(1)<br/>29 C.F.R. § 825.203(a)</p> <p>Employee has obligation to schedule foreseeable medical leave in a way that does not “unduly disrupt” the employer’s operations. Whether foreseeable leave is continuous or intermittent, the employee need give notice only one time.</p> <p>29 U.S.C. § 2612(e)(2)(A)<br/>29 C.F.R. § 825.302(e)</p> <p>When intermittent leave is not foreseeable, employee</p> | <p>Intermittent and reduced schedule leave provisions are particularly important for employees with chronic conditions and periodic flare-ups, as well as those who are required to undergo frequent treatments of short duration. (National Partnership)</p> | <p>The purpose of the intermittent leave provisions is laudable (e.g., to allow an employee to receive chemotherapy treatments, dialysis, etc.).</p> <p>In practice, however, the provisions are often abused and impede management’s ability to address absenteeism problems (e.g., the employee who claims to need leave to take his father to chemotherapy, but does not do so; the alleged migraine headache sufferer who comes in late every day; or the employee with the “bad back” who comes in late every Monday or leaves early every Friday). (LPA)</p> <p>These problems are compounded by the fact that employers have found the procedures available to</p> | <p>The committee reports focused on the need for intermittent leave for periodic medical treatment and for recovery from injury or illness, rather than for chronic conditions with periodic flare-ups.</p> <p>An employee who takes intermittent leave for a chronic condition must first establish a “medical necessity” for that form of leave. However, by definition, flare-ups are not foreseeable and hence can affect employer planning and management. In other words, while the “unduly disrupt” standard may work in the context of planned medical treatment it is of limited value in the case of intermittent leave for chronic conditions.</p> <p>It makes practical sense not to require that an employee with a chronic condition submit a new certification every time the chronic condition flares up. And the regulations do allow employers to request a new certification for intermittent leave when the employer has reason to doubt the validity of the certification. But this does not address a situation where an employee is <i>lying</i> about a flare-up of a <i>real</i></p> |

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| <p>must give notice within one or two working days of learning about the need for leave, except in extraordinary circumstances where such notice is not feasible.</p> <p>29 U.S.C. § 2612(e)(2)(B)<br/>29 C.F.R. § 825.303(a)</p> <p>An employer may require that the employee submit a health care provider's certification of the employee's or family member's serious health condition. In cases of medical conditions requiring intermittent leave, only one certification may be required – not a certification each time leave is requested. An employer may request a new certification for intermittent leave in any case where the employer “receives information that casts doubt on the validity of the certification.” But an employer may not ask for a second or third opinion on this recertification.</p> |   | <p>challenge the certification or to require a new certification to be inadequate. (LPA)</p> <p>Abuse leads to resentment by co-employees, who often have to pick up the slack for absent co-workers. (LPA)</p> <p>Replacement scheduling for employees taking unscheduled intermittent leave is difficult. (Chamber)</p> | <p>chronic condition.</p> <p>Note difference with ADA. Under the ADA, intermittent and/or reduced schedule leave would be a reasonable accommodation for someone with a chronic health condition or a need for scheduled medical treatments. But such accommodation is required only if it does not impose an “undue hardship” for the employer, which requires an individualized assessment of the particular needs of the employer’s workplace and the duties of the employee’s job position.</p> |

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| <p>29 U.S.C. § 2613<br/>29 C.F.R. §§ 825.305, 306, 307, 308</p> <p>The employer has the right to require an employee to get second and third opinions. These opinions must be paid for by the employer.</p> <p>29 U.S.C. § 2613(c), (d)<br/>29 C.F.R. § 825.307</p> |  |  |                         |
| <p>Employees can be charged only for the amount of leave actually taken. Leave can be taken in increments as short as one hour or less.</p> <p>29 U.S.C. § 2612(b)(1)<br/>29 C.F.R. §§ 825.205, 203(d)</p>  | <p>Protects employees from exhausting their FMLA leave by making sure they are not required to take more leave than necessary.</p> <p>Provisions also designed to help employers by ensuring that workers are not absent any longer than necessary. (National Partnership)</p> | <p>Extremely difficult to track/administer – for some companies, leave has to be tracked in increments as small as 6 or 8 minutes. (NAM)</p> <p>Many businesses do not even track time for exempt employees.</p> |                         |
| <p>Nothing in the FMLA may be construed to modify or affect any state or federal law</p>  | <p>The FMLA and ADA are two separate laws that create separate and distinct sets of rights for employees. So, the</p>  | <p>The lack of integration between ADA reasonable accommodation requirements, the FMLA intermittent leave/reduced</p>  |                         |

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| <p>prohibiting discrimination based on disability.<br/>29 U.S.C. § 2651(a)</p> <p>Employer must provide leave under whichever federal or state statutory provisions provide the greater rights to employees. If FMLA entitles employee to leave, employer may not, in lieu of such leave entitlement, require an employee to take a job with reasonable accommodation.</p> <p>29 CFR §§ 825.701, 702</p> | <p>reasonable accommodation of the ADA should not be imported to diminish an employee's rights under the FMLA.</p> | <p>schedule leave provisions, and state workers' compensation requirements regarding light duty is frustrating for employers. E.g., an employee is not required to return to work, even if a health care provider certifies the employee as able to return to work in a "light duty" position or with reasonable accommodations as long as the employee is still eligible for FMLA leave.<br/>(Georgetown CLE Panel, Spring 2004)</p> |                         |