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FMLA Intermittent Leave: Curbing Abuses

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One of the challenges facing employers subject to the Family Medical Leave Act ("FMLA") is managing unforeseeable intermittent FMLA leave. Not only must employers ensure that employees who are entitled to leave receive it, they must address possible staffing issues created by an employee's use of intermittent leave and correctly track the intermittent leave. Additionally, they may find it necessary to guard against the possibility of abuse of the leave entitlement. Those employers who suspect that some employees may be abusing FMLA leave have options to prevent that abuse; however, those options, if not properly used, may expose the employer to an FMLA interference claim.

Under the FMLA, an eligible employee is entitled to as many as twelve weeks of leave per year for a variety of reasons, including the employee's own serious health condition and to care for the serious health condition of the employee's spouse, parent, son, or daughter. Under certain circumstances, eligible employees are entitled to take FMLA on an intermittent basis. In contrast to a reduced-leave schedule, which is a change in the employee's schedule for a period of time, intermittent leave is leave taken in separate blocks of time due to a specific illness or injury, such as those with sporadic flare-ups. This may include a few hours off, or a day or a week off, at intervals as the employee's needs require, such as leave for medical appointments or leave taken over several days at a time spread out over six months for chemotherapy.

In order to safeguard the interests of employers and prevent abuses by employees, FMLA entitles employers to request medical certifications from an employee requesting leave. An employer may require that an employee's leave for a serious health care condition be supported by a health care provider certification. With respect to requests for intermittent

leave, the certification must include a statement of the medical necessity of intermittent leave, and in the case of a chronic condition, the likely duration and frequency of episodes of incapacity.

As a general rule, an employer may request recertification no more than every 30 days and only in those cases where the employee has actually been absent from work for the FMLA-covered medical condition. If the initial medical certification indicates that the anticipated duration of the medical condition will exceed 30 days, an employer must wait until the specified duration expires before requesting a recertification. However, regardless of the duration of the medical condition specified in medical certification, an employer may request recertification in less than 30 days if the employee requests an extension of leave or if there has been a significant change in the circumstances described by the previous certification, such as the duration or frequency of the absence, the nature or severity of the illness, or new complications. Additionally, an employer may be able to request recertification if the employer receives information that casts doubt upon the employee's stated reason for the absence for the remaining duration of the current certification.

Yet, careful attention must be paid to FMLA's regulations limiting how often and with what notice an employer may demand recertification, for those regulations may impact the application of seemingly neutral attendance policies. By way of example, many employers require an employee to submit notes from a physician or other treating health care professional to validate medical-related absences from work. While the FMLA and its regulations do not explicitly address an employer's policy requiring validation of a medical-related absence by way of a health care professional's note, at least one federal district court has found that FMLA regulations support a limit on medical verifications for certification and recertification. In that case, *Jackson v. Jernberg Industries, Inc.*, 2010 WL 60921 (N.D. Ill. 2011), Jernberg Industries' attendance policy required its employees to produce a doctor's note following each absence regardless of whether the absence was covered by FMLA. In the *Jackson* case, the employee's physician had previously provided a certification supporting the need for intermittent FMLA leave for one year. The *Jackson* court ruled that the continued requests for a doctor's note under the company's policy constituted an improper recertification of each intermittent leave of absence. The court concluded the FMLA regulations allow an employer that doubts whether its employee's absence is actually related to his FMLA-certified condition to request recertification but they do not provide for any other form of medical verifications.

Employer Options When Abuse of Intermittent Leave Is Suspected

Obviously, an employer's judicious use of the certification and recertification options is the most common method to prevent possible FMLA abuse. However, courts have upheld other, more serious options for employers. For example, in *Callison v. City of Philadelphia*, 430 F.3d 117 (3d Cir. 2005), the United States Court of Appeals for the Third Circuit tacitly

approved the following policies of the employer:

- A policy that required employees absent on sick leave to stay at home during working hours unless they leave home for a reason related to the cause of absence; and
- The institution of a neutrally-applied policy stating that employees may be subject to calls or visits by the employer.

In upholding these policies against an FMLA interference claim, the court noted that FMLA entitlements do not generally prevent an employer from instituting policies to prevent the abuse of FMLA leave, so long as these policies do not conflict with or diminish the rights provided by the FMLA. However, employers should be aware that institution of such stringent policies comes with its own set of risks, including a reduction in employee morale. There is also no guarantee that another court would agree with the Third Circuit.

Regardless of the policies an employer uses, employers and their employees will benefit by reinforcing the expectations and obligations of the employee while on FMLA leave by way of a written policy setting forth the consequences of failure on the part of the employee to adhere to the policy. Additionally, if an employee's pattern of purportedly FMLA-related absences are suspicious - for example, the employee's use of intermittent FMLA leave regularly falls on the day after or before a holiday, weekend day, or vacation - the employer may, by way of recertification, provide the employee's health care provider with a record of the employee's absence pattern and ask whether the leave pattern is consistent with the employee's serious health condition. Finally, it is important to remember that the FMLA does not make the employee immune to discipline for misconduct, including excessive absenteeism and/or FMLA abuse.

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