

Healthcare Employment Law

IN Brief

By: Greg Kult

Area of Concern: Perceived abuse of intermittent FMLA leave.

Having trouble managing intermittent FMLA leave?
Consider the following (all cites are to 29 CFR):

- Employers need not grant intermittent leave to be with a healthy newborn child or newly placed child (§§ 825.120-.121, .202)
- Intermittent leave because of the serious health condition of the employee or covered family member, or because of the serious illness or injury of a covered service member, need be granted only if “medically necessary” (§§ 825.202, .302)
- With healthcare provider approval, require employees who are on intermittent leave for planned medical treatments to schedule treatments so as not to unduly disrupt operations (§§ 825.203, .302)
- During periods of intermittent leave for planned medical treatment, employees may be transferred to alternative positions (with equivalent pay and benefits) which better accommodate intermittent leave (§§ 825.204, .120-.121)
- Where it is not possible for an employee on intermittent leave to begin or end work mid-way through a shift, the entire shift may be designated as FMLA leave (§ 825.205)
- Employers may require exempt employees to use accrued paid time off during intermittent FMLA leave (§ 825.207) and/or make intermittent FMLA leave by exempt employees unpaid (§ 825.206)
- Require employees to comply with established procedural requirements for requesting paid time off for otherwise unpaid FMLA leave (§ 825.207)
- Require employees to comply with usual and customary notice and procedural requirements for requesting leave (for example, providing notice to specific position/department, in writing, and following call-in procedures) (§§ 825.302-.304)
- If you need more information to determine whether leave is FMLA-qualifying, ask (§§ 825.302-.303)
- Require certifications for leave to care for a covered family member with a serious health condition, due to the employee’s own serious health condition, because of a qualifying exigency, or to care for a covered service member with a serious injury or illness, and notify the employee when the certification is insufficient (§§ 825.305, .309-.310)

- If the reason for the leave is the employee’s serious health condition, provide the health care provider with the employee’s essential job functions (§§ 825.123, .306)
- Make sure the health care provider has appropriate credentials (§ 825.125)
- Although employers are limited in the medical information that they may obtain for purposes of FMLA leave, they may obtain additional medical information as appropriate for issues such as worker’s compensation, paid disability/sick leave, and Americans with Disabilities Act (§§ 825.306-.307, .312)
- If the reason for leave is the serious health condition of the employee or the employee’s spouse, child, or parent, require re-certifications, and provide the health care provider with a statement of the employee’s absence pattern to confirm that the need for leave is consistent with such pattern (§ 825.308)
- Confirm employee eligibility in connection with the first absence in a new FMLA leave year. You may find that the employee no longer has actually worked at least 1,250 hours during the 12 month period immediately preceding commencement of leave and/or that there no longer are at least 50 employees employed within 75 miles (§ 825.110)
- If the reason for leave is the serious health condition of an employee or the employee’s spouse, child, or parent, require a new medical certification (subject to second and third opinions), not just a re-certification (not subject to second and third opinions), with respect to the first absence in a new 12 month leave period (§ 825.305)
- If the employee is on intermittent FMLA leave due to the employee’s own serious health condition, require periodic fitness for duty certifications in connection with an absence (no more often than every 30 days) if you have safety concerns (§ 825.312)

If we can help you better manage intermittent FMLA leave, please call.

***This briefing does not constitute legal advice.
Please see an attorney about any particular matter.**

Greg is a partner and a member of the firm’s Employment and Labor and Healthcare Groups. Since 1994, he has represented Indiana hospitals, physician practices, long term care facilities, and other healthcare employers and human services organizations in dealing with FMLA issues and a wide variety of other employment matters. A substantial part of his practice involves counseling and training management teams on compliance with the various employment laws that impact operations.