

**Fisher
Phillips**

Curing the FMLA Intermittent Leave Headache


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WHAT'S THE ISSUE?

- 2015 CIGNA study:
 - 66% of HR professionals reported issues with chronic abuse of FMLA intermittent leave.
 - 80% of HR professionals reported that tracking and administering FMLA intermittent leave was their most difficult challenge.
 - Unplanned absences can cost a 1,000 employee company \$4 million per year



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FMLA COVERAGE

- **Employer**
 - Private-sector employer with 50 or > employees in 20 or > workweeks in the current or prior calendar year
 - Public agency, including a local, state, or federal government agency, regardless of the number of employees it employs
- **Employee**
 - Has worked for the employer for at least 12 months;
 - Has at least 1,250 hours of service for the employer during the 12 month period immediately preceding the leave

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LEAVE ENTITLEMENT

- **Twelve workweeks of leave in a 12-month period for:**
 - the birth of a child and to care for the newborn child;
 - the placement with the employee of a child for adoption or foster care;
 - to care for the employee's spouse, child, or parent who has a serious health condition;
 - a serious health condition that makes the employee unable to perform the essential functions of his or her job



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LEAVE ENTITLEMENT

- **Twelve workweeks of leave in a 12-month period for:**
 - any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on "covered active duty;" or
- **Twenty-six workweeks of leave in a 12-month period:**
 - to care for a covered servicemember with a serious injury or illness if the eligible employee is the servicemember's spouse, son, daughter, parent, or next of kin (military caregiver leave).

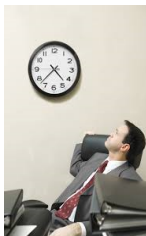


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INTERMITTENT LEAVE

- "Leave taken in separate periods of time due to a single illness or injury, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks."
 - 29 C.F.R. § 825.102



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WHAT LEAVE IS REQUIRED?

- An employer is required to grant intermittent leave when such leave is:
 - Medically necessary for the employee's own serious health condition
 - Medically necessary for the serious health condition of a child, spouse or parent
 - Medically necessary for the care of a covered servicemember with a serious injury or illness
 - A "covered active duty" qualifying exigency

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WHAT LEAVE IS REQUIRED?

- An employer may grant employees intermittent leave when such leave is needed for:
 - the birth of a child and to care for the newborn child



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THE ISSUES



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FACT SCENARIO

- Employee suffers from depression.
- Dr. certifies that the employee will have 4 episodic flare-ups every 6 months requiring intermittent absences.
- Employee has more than 4 flare-ups in the 1st month.
- After the 8th flare-up in the month, Supervisor sends the Dr. a fax asking to reconfirm that the Employee would only have 4 flare-ups per mo.
- Dr. says 4 means 4. Employee disciplined for the absences > the 1st 4 based on Dr. confirmation.

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QUESTIONING CERTIFICATIONS

- Incomplete or insufficient certification
 - Request to employee
 - In writing
 - Employee has 7 days to provide
 - After 7 days, employer can contact HCP
 - But not the immediate supervisor
 - Clarification
 - Request to HCP
 - Dates, duration, frequency
 - Authentication
 - Request to HCP

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ASK FOR A SECOND OPINION

- “An employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employer’s expense.”
 - employee gets leave provisionally
 - employer pays HCP
 - out of pockets; out of area travel
 - HCP cannot be employed on a regular basis by the employer
 - this process only applies to initial certification

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GET A THIRD OPINION

- “If the opinions of the employee’s and the employer’s designated health care providers differ, the employer may require the employee to obtain certification from a third health care provider, again at the employer’s expense.”

- final and binding
- jointly approved
 - cooperation required



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FACT SCENARIO

- Employee is in a car accident that results in a back injury.
- Dr. certifies that, for three to four years, Employee will have “1–2 day intermittent episodes of incapacity per month” due to injury.
- Employer requires employee to provide recertification of need for intermittent leave every 6 months.
- Employee is out 4 consecutive days due to flare up of back injury.
- Employer requires recertification even though last recertification was only 2 weeks prior.

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RECERTIFICATION

- Can request every 30 days/6 months for long-term conditions that require sporadic absences, with caveats
- Can request whenever circumstances change
 - duration
 - frequency
- Can request based on suspicious circumstances
- Can request at beginning of new FMLA year

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FACT SCENARIO

- Internal auditor suffers from migraines that incapacitate her for up to a week at a time.
- Dr. certifies her for FMLA intermittent leave.
- Internal auditor normally works 40 hours per week, but during audit time each year is required to work at least 48 hours per week.
- Internal auditor suffers a migraine during an audit week and is off the entire week.
- Employer charges internal auditor for one week of FMLA leave.

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COUNTING ABSENCES

- 29 C.F.R. § 825.205(b)
 - If an employee would normally be required to work overtime, but is unable to do so because of an FMLA-qualifying reason that limits the employee's ability to work overtime, the hours which the employee would have been required to work may be counted against the employee's FMLA entitlement.



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COUNT ALL ABSENCES

- Take advantage of FMLA tools
- Track and record leave usage
 - All intermittent leave should be accounted for
 - Use shortest increments for other types of leave
 - Don't allow more leave than needed
- Reevaluate eligibility
- Periodically audit intermittent leave takers

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FACT SCENARIO

- Employee has a spinal disorder that requires periodic doctor visits.
- Dr. certifies Employee as needing intermittent leave once every 60 days for treatment.
- Employee schedules all appointments on Fridays, normally on a couple of days' notice.
- Per policy, Employee is required to provide a doctor's note after each appointment to verify the reason for his absence.
- Employee fails to provide a doctor's note after an appointment and is given a verbal counseling.

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REQUIRE NOTICE



- Provide 30 day advance notice for foreseeable leave whenever possible
- Provide notice for unforeseeable leave as soon as practicable
- The employee must make a reasonable effort to plan the leave so as not to unduly disrupt the employer's operations
 - interactive process

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APPLY LEAVE POLICY

- Who has to call in
- When to call in
- Who to call in to
- Information required
 - reason
 - duration
- Consistency is key



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FACT SCENARIO

- Employer's policy provides that an employee on a leave of absence cannot:
 - "perform any other gainful employment or provide physical labor to operate any type of business enterprise for profit."
- Employee certified for intermittent FMLA for migraines is out 35 days in 5 months.
- City suspects abuse, puts private eye on the case, sees Employee running lawn business.
- Employee is fired for violating policy.

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APPLY CONDUCT POLICIES

- Moonlighting provisions
- Dishonesty provisions
- Fraud provisions
- FMLA is not a free pass
- Have to be consistent



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FACT SCENARIO

- A dispatcher is diagnosed with Crohn's disease.
- Dr. certifies that employee will need to be absent from work whenever the employee has a flare-up.
- Co. is short-staffed in dispatch and cannot accommodate such unpredictable absences
- Employee is transferred, against her will, to a clerical position with the same pay and benefits.

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TEMPORARY TRANSFERS

- The employer may transfer the employee temporarily to an available alternate position for which the employee is qualified provided the position has:
 - equivalent pay and benefits, and
 - better accommodates recurring periods of leave than the employee's regular employment position
- Alternate position does not have to include equivalent job duties
- Can only be for as long as leave is needed
- Only applies to foreseeable leave

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THE SOLUTIONS



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TAKE-AWAYS

- Require initial certification
- Question the certification
- Request recertification
- Count all qualifying absences
- Control the way the leave is used
- Apply your leave and discipline rules
- Consider transfers

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TRAIN SUPERVISORS

- Recognize patterns of abuse
- Apply policies consistently
- Communicate clearly
- Understand the legal consequences of their actions/statements



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Final Questions

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