

## FMLA on an Intermittent Basis

### Many Questions Arise About Shorter Segments of Leave

By George Raymond and Tara Avery

The Family Medical Leave Act of 1993 was created to assist with balancing the demands of the workplace and the time commitment of employees' personal lives. For private sector employers with 50 or more employees, the FMLA provides up to 12 workweeks (within a 12-month period) of unpaid medical leave to eligible employees for certain family and medical reasons.

Certain circumstances under the FMLA allow for leave to be taken in shorter segments. This is typically referred to as intermittent leave or leave on a reduced work schedule. Intermittent leave is usually defined as FMLA leave taken in separate blocks of time due to one qualifying reason. A reduced work schedule is defined as a change in an employee's schedule for a period of time, normally from full-time to part-time status. With either form of leave employees have the right to take leave in blocks of hours or days, as well as weeks.

Each particular circumstance will determine whether to apply intermittent or reduced schedule leave. For instance:

- Birth/placement of a child: In order for the employee to receive intermittent or reduced schedule leave, the employer and employee must both agree upon the leave. If the mother has a serious health condition in connection with the birth of her child or if the newborn child has serious health conditions, then the employer does not need to be in agreement with the leave
- Leave for a serious health condition: In cases where the employee or employee's spouse, child or parent has a serious health condition, intermittent or a reduced leave schedule may be taken "when medically necessary"

#### Determining need

Medical necessity is having an actual medical need for the treatments, as opposed to participating in voluntary treatments and procedures. The employee must also be able to provide proof that the treatments cannot be administered outside working hours or without taking a reduced schedule.

When taking intermittent or reduced schedule leave, the employee must attempt to take such leave at a time that will be the least disruptive for the employer's operations. At the employer's discretion, the employee may be asked to take a different position, with equivalent benefits and pay, to better accommodate the employer's leave schedule.

Intermittent leave is the most frequent issue raised under the FMLA by callers to our HRhelpline. One of the most frequent uses of intermittent leave is for migraine headaches. This condition not only causes problems for the employee who suffers from migraines, but also for the employer who must often adjust work schedules when an employee calls in without notice to advise that he or she has a headache and will not be in to work.

One question that is raised is how often can an employer request recertification of a condition that is the basis for

intermittent leave. The answer – it depends. The regulations specify that for intermittent leave, an employer may not request recertification in less than the minimum period specified on the original medical certification. If no time is specified on the original certification, then an employer could request recertification at any reasonable interval, but not more than once every 30 days.



George Raymond

#### Exceptions to the rule

However, there are two exceptions in which the regulations would allow a recertification in a time period less than 30 days or more often than the time period stated in the original certification. The first involves a significant change in the circumstances described in the previous certification (e.g., duration or frequency of absences, the severity of the condition, complications) and the second occurs if the employer



Tara Avery

receives information that casts doubt upon the employee's stated reason for the absence. Although the regulations do not address this particular point, if a certification would state something to the effect that the employee will suffer from this condition for the rest of his or her life, then the authors believe that an employer would be allowed to request a recertification on an annual basis.

Another issue that comes up involves exempt (under the Fair Labor Standards Act) salaried employees. Normally an employer is not allowed to dock the pay of a salaried employee for a partial day taken off from work without running the risk of losing the exemption. Under the FMLA, an employer may deduct the pay of a salaried employee for a partial day taken off pursuant to FMLA leave without affecting the employee's exempt status under the FLSA.

And finally, the regulations provide that there is no limit

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#### Helpline Offers Assistance

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However, if you are a member of the Indiana Chamber of Commerce, you may contact the Chamber's HRhelpline (317-264-6866) to discuss leave or other employment law issues.

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on the size of an increment of leave when an employee takes intermittent leave. However, an employer may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave, provided it is one hour or less. Therefore, an employee may not be required to take more FMLA leave than necessary to address the circumstances that precipitated the need for the leave unless he or she wants to take less than one hour.

### INFORMATION LINK

**Authors:** George Raymond is vice president of human resources, labor relations and civil justice for the Indiana Chamber of Commerce. Tara Avery is an HR specialist and government affairs assistant for the Chamber. Raymond can be contacted at (317) 264-6884 or **e-mail:** [graymond@indianachamber.com](mailto:graymond@indianachamber.com)