

DIFFERENT TYPES OF FMLA LEAVE DOL Topic: F¹

PART ONE OF THIS MEMORANDUM PROVIDES A SUMMARY OF QUESTIONS ASKED AND COMMENTS SUBMITTED IN RESPONSE TO THE DOL REQUEST FOR INFORMATION ABOUT THE DIFFERENT TYPES OF FMLA LEAVE.²

PART TWO OF THIS MEMORANDUM CONTAINS THE RELEVANT STATUTORY AND REGULATORY TEXT. PART TWO ALSO LISTS OTHER SOURCES CITED IN THE COMMENTS ABOUT THIS TOPIC.

PART ONE

The DOL requested information regarding different types of FMLA leave: scheduled, unscheduled, and intermittent. While the FMLA permits employees to take leave in a block, intermittently, or on a reduced schedule, intermittent and reduced schedule leave are allowed only in certain circumstances:

- With an employer's permission in the case of a birth of a child or placement of a child with the employee for adoption or foster care.
- When medically necessary to care for a spouse, child, or parent of an employee who has a serious health condition, or because of the employee's own serious health condition.³

With regard to the different types of FMLA leave, the DOL has asked for comments on four topics:

- Problems or Benefits Posed by Different Types of Leave
- Impact of FMLA Leave on Employers
- Employer Denial of FMLA Leave
- Employee Abuse of FMLA Leave

¹ This topic is discussed in the Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request For Information, 72 Fed. Reg. 35550 (June 28, 2007), available at <http://www.dol.gov/esa/whd/FMLA2007FederalRegisterNotice/07-3102.pdf>, primarily in Chapters IV and XI.

² The comments reviewed herein are from employers, employer organizations, employees, employee organizations, health care providers, and health care provider organizations. They reflect all comments posted on regulations.gov or available via a Google search as of May 8, 2007. More detailed descriptions of these comments are found in the "Digest of Comments Submitted in Response to the Department of Labor's Request for Information on the Family and Medical Leave Act," available at <http://www.law.georgetown.edu/workplaceflexibility2010/law/fmla.cfm>.

³ 29 U.S.C. § 2612(b).

ISSUE: Problems or Benefits Posed by Different Types of Leave

- **The RFI asked: Does the length of FMLA leave taken present different problems or benefits?** The RFI asked for specific comparisons between:
 - Scheduled FMLA leave vs. unscheduled FMLA leave; and
 - Intermittent leave vs. leave taken in one continuous block of time

ISSUE: Impact of FMLA Leave on Employers

- **The RFI asked: Is leave used differently based on factors like occupation or employee classification?**
- **The RFI asked: How do employers cover the work of employees on FMLA leave?** Is work coverage affected by the length of leave taken, amount of notice given, or the fact that the leave is scheduled, unscheduled, or intermittent?
- **The RFI asked: Do employers track early departures and late arrivals due to FMLA-qualified conditions?** If so, how? Is such leave counted against the employee's 12 weeks of FMLA leave? Under 29 U.S.C. § 2612(b)(1), only "the amount of leave actually taken" on an intermittent or reduced basis may count against an employee's FMLA leave. Employers have complained that this process is an administrative burden because employers must provide leave in increments equivalent to the shortest period of time used in their payroll system.⁴
- **The RFI asked: Is there any evidence of employers being forced to close or relocate their facilities as a result of employee leave patterns?**
- **The RFI asked: Is there an appropriate balance between an employer's absence control policies and legitimate employee use of unscheduled, intermittent leave?**

ISSUE: Employer Denial of FMLA Leave

- **The RFI asked: Are employers improperly denying FMLA leave?** If so, is such denial more common for certain types of leave?

⁴ 29 C.F.R. § 825.203(d).

ISSUE: Employee Abuse of FMLA Leave

- **The RFI asked: Is there evidence that employees are misusing FMLA leave? If so, how does any such misuse compare with other types of leave?** Employers have complained that employees have used intermittent leave to cover up for tardiness and personal days, for example.

EMPLOYER-SIDE COMMENTS

This topic is addressed by employers in their comments with great frequency. The only topic addressed more frequently is “serious health condition.” Employers often make comments about this topic in conjunction with comments about medical certification and communications between employers and employees. Many employers report that they have conducted internal surveys, most of which indicate that intermittent leave is difficult to administer and costly. Each bold-faced heading below encapsulates a particular type of comment from employers or employer organizations, and is followed by explanatory text describing the comment in more detail.

- **Problems or Benefits Posed by Different Types of Leave**
 - Most employers do not have difficulty with scheduled leave because notice of leave is provided in a timely manner, which allows employers to make plans to cover absences.
 - Unscheduled intermittent leave causes the most problems for employers because notice is often last minute and is sometimes given after the employee has already been absent from work. As a result, employers report being unable to schedule temporary workers to fill the gap and having to schedule absent employees’ coworkers to work overtime, leading to increased costs, decreased morale and resentment of the absent employees. This problem is compounded by alleged abuse.
 - The National Association of Manufactures (“NAM”) describes intermittent leave as an “economic nightmare” for employers.
 - Employers report that managing long-term absences is generally easier than managing short-term absences.
 - Some employers want the ability to permanently transfer employees who need unscheduled intermittent leave on an ongoing basis to a different position with equivalent pay and benefits. Currently, 29 C.F.R. § 825.204, explicitly allows employers to make such transfers only for individuals who need scheduled intermittent leave, and permits such transfers only on a temporary basis.

Different Types of FMLA Leave -- DOL Topic: F

EMPLOYER-SIDE COMMENTS

- **Impact of FMLA Leave on Employers**

- **Covering work** – Absences are usually covered by: (1) hiring temporary workers; (2) requiring coworkers to work overtime; (3) spreading work among other workers; or (4) otherwise rearranging other employees' schedules to provide coverage.

- A few commenters note that covering intermittent absences may force union employers to violate collective bargaining agreements (e.g., where overtime is dictated by seniority) to honor the FMLA.

- **Tracking Intermittent Leave** – Employers report that tracking intermittent leave is time-consuming, as a result of 29 C.F.R. §825.203(d), which allows employees to take leave in the smallest increments of time used by an employer's payroll system. In addition to the administrative burden, employers report that allowing leave in such small increments facilitates employee misuse of the FMLA to cover for tardiness.

- Employers' Suggested Changes:⁵ (1) Revise 29 C.F.R. §825.203(d) to require intermittent leave to be taken in half- or full-day increments; (2) impose limits on how much leave may be taken intermittently over a certain period; and (3) require documentation or a fitness-for-duty certification before returning to work after every intermittent leave absence.

- **Notice of Leave** – Employers report that the regulations governing notice frequently conflict with employers' internal notice requirements, forcing employers to abandon their own internal policies regarding notice.⁶

- **Employer Denials of FMLA leave** – Employers report three main reasons for denying leave: (1) the employer fails to recognize an employee is seeking FMLA leave; (2) the employee fails to provide timely or complete medical certification; or (3) the employer believes the employee's absence will cause an adverse impact on business.

- The National Coalition to Protect Family Leave ("Coalition") is concerned about judicial decisions that require employers to "read between the lines" to determine whether an employee needs FMLA leave and asserts that the burden should be on employees to clearly articulate that they are seeking FMLA leave.

⁵ At least one consulting group to employers specifically avoided commenting on increasing the minimum amount of time to a half day on the grounds that the DOL lacks the authority to reduce an employee's entitlement "beyond the amount of leave actually taken." See Hewitt Associates LLC comment, at p. 2, n. 2 (citing 29 U.S.C. § 2612(b)(1)).

⁶ See also Topic J, which relates to notice between employers and employees and contains the commentary and suggested changes for this issue.

EMPLOYER-SIDE COMMENTS

- **Employee Abuse of FMLA Leave**

- Employers allege rampant abuse of intermittent leave, supported in part by their observation that many employee absences for alleged FMLA-protected reasons occur on Fridays and Mondays or near scheduled holidays. Employers also report that other employees use the FMLA as a shield against the enforcement of attendance policies.
 - Some individuals complain that coworkers abuse intermittent leave.
- Employers report that employees with chronic conditions account for the lion's share of abuse of intermittent leave. According to employers, once employees are certified as having a chronic condition, such employees allegedly come and go as they please -- using their chronic conditions as excuses for tardiness and absence. Employers report that they are unable to verify whether an employee's chronic condition is truly the reason that leave is taken and that the checks against abuse in the statute and regulations -- medical certification, recertification and second opinions -- are inadequate.⁷
- Employers' Suggested Changes: Change the medical certification procedures.⁸ A few comments also suggest requiring medical certification for every intermittent leave taken. Other proposals include:
 - Allowing employees to take only a subset of their total FMLA leave allotment intermittently (*i.e.* only 12 days of FMLA leave can be used for intermittent leave per year).
 - Specifying the conditions that do and do not qualify for intermittent leave and removing migraines from the list of chronic conditions that qualify.
 - Amending 29 C.F.R. § 825.302(f) to require employees to meet intermittent medical leave needs outside of work hours where possible.

EMPLOYEE-SIDE COMMENTS

Employee organizations submitting comments declined to answer several of the questions posed in the RFI, citing lack of access to the information necessary to respond. Employee organizations report that there is no current reliable data source concerning the rate of

⁷ See also Topic K.

⁸ *Id.*

EMPLOYEE-SIDE COMMENTS

employee use of FMLA leave. Indeed, employee organizations state that no changes should be proposed before the DOL conducts additional research, scientific analysis, and study. They state that the DOL should not rely on the “unscientific” RFI process, when deciding whether to propose regulatory changes. Each bold-faced heading below encapsulates a particular type of comment from employees or employee organizations, and is followed by explanatory text describing the comment in more detail.

- **Problems or Benefits Posed by Different Types of Leave**

- Employees and employee organizations state that no changes need to be made to the current regulations as they provide an employee with flexibility to take short leaves of absence when needed to address a family situation or medical concern. Permitting employees to take leave in small increments also benefits employers because employees will only be absent from work for the specific amount of time that the employee needs.
- Employees and employee organizations emphasize the importance of intermittent leave. Employees who need to take leave to care for family members or because of their own medical conditions that only require attention for a short period of time need intermittent leave.
 - Intermittent leave is more relevant today as the “sandwich” generation will need leave to care for both children and elderly parents.
 - The National Partnership for Women and Families (“Partnership”) notes that there is limited data on whether FMLA usage differs by occupation or employee classification (*i.e.*, exempt or non-exempt). At the same time, the Partnership states that the FMLA has been important to workers in all occupations and classifications.

- **Impact of FMLA Leave on Employers – Tracking Intermittent Leave** – Employees and employee organizations state that requiring half-day absences would force employees to miss more work than necessary to address their medical or family care needs, have negative financial consequences for both employers and employees, and require employers to “cover” more employee absences than necessary. Also, they note that the Westat survey indicates that employers had no or only minor problems implementing intermittent leave.

- **Improper Denials of FMLA Leave** – Employees and employee organizations report that there is little data on this issue, but employees may file complaints against employers who violate the FMLA, including those who retaliate against employees who request or take leave.

EMPLOYEE-SIDE COMMENTS

- **Alleged Employee Abuse** – Employees and employee organizations report that there is no reliable empirical evidence that such abuse does in fact occur. Further, they state that any abuse that does exist should be addressed through discipline of individual employees. They also note that employers already have provisions in place to combat abuse. They state that Congress specifically designed the medical certification, second opinion, and recertification procedures to serve as checks against employee abuse.

PART TWO

THE APPLICABLE STATUTORY SECTIONS AND REGULATORY PROVISIONS RELATED TO TOPIC F HAVE BEEN EXCERPTED BELOW. THESE PROVISIONS WERE NOT NECESSARILY CITED IN THE RFI.

STATUTES

29 U.S.C. § 2612

. . . (a) In general

(1) Entitlement to leave - Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

- (A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.
- (B) Because of the placement of a son or daughter with the employee for adoption or foster care.
- (C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.
- (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee. . . .

(b) Leave taken intermittently or on reduced leave schedule

(1) In general - **Leave under subparagraph (A) or (B) of subsection (a)(1) of this section shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise.** Subject to paragraph (2), subsection (e)(2) of this section, and section 2613(b)(5) of this title, **leave under subparagraph (C) or (D) of subsection (a)(1) of this section may be taken intermittently or on a reduced leave schedule when medically necessary. The taking of leave intermittently or on a reduced leave schedule pursuant to this paragraph shall not result in a reduction in the total amount of leave to which the employee is entitled under subsection (a) of this section beyond the amount of leave actually taken. . . .**

29 U.S.C. § 2613(a)

In general - An employer may require that a request for leave under subparagraph (C) or (D) of section 2612(a)(1) of this title be supported by a certification issued by the health care provider of the eligible employee or of the son, daughter, spouse, or parent of the employee, as appropriate. The employee shall provide, in a timely manner, a copy of such certification to the employer.

REGULATIONS

29 C.F.R. § 825.117

For intermittent leave or leave on a reduced leave schedule, there must be a medical need for leave (as distinguished from voluntary treatments and procedures) and it must be that such medical need can be best accommodated through an intermittent or reduced leave schedule. The treatment regimen and other information described in the certification of a serious health condition (see § 825.306) meets the requirement for certification of the medical necessity of intermittent leave or leave on a reduced leave schedule. **Employees needing intermittent FMLA leave or leave on a reduced leave schedule must attempt to schedule their leave so as not to disrupt the employer's operations.** In addition, an employer may assign an employee to an alternative position with equivalent pay and benefits that better accommodates the employee's intermittent or reduced leave schedule.

29 C.F.R. § 825.203

(a) FMLA leave may be taken "intermittently or on a reduced leave schedule" under certain circumstances. **Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason...**

(b) **When leave is taken after the birth or placement of a child for adoption or foster care, an employee may take leave intermittently or on a reduced leave schedule only if the employer agrees...** The employer's agreement is not required, however, for leave during which the mother has a serious health condition in connection with the birth of her child or if the newborn child has a serious health condition.

(c) **Leave may be taken intermittently or on a reduced leave schedule when medically necessary for planned and/or unanticipated medical treatment of a related serious health condition by or under the supervision of a**

health care provider, or for recovery from treatment or recovery from a serious health condition. It may also be taken to provide care or psychological comfort to an immediate family member with a serious health condition.

(1) Intermittent leave may be taken for a serious health condition which requires treatment by a health care provider periodically, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy. A pregnant employee may take leave intermittently for prenatal examinations or for her own condition, such as for periods of severe morning sickness...

(2) Intermittent or reduced schedule leave may be taken for absences where the employee or family member is incapacitated or unable to perform the essential functions of the position because of a chronic serious health condition even if he or she does not receive treatment by a health care provider.

(d) There is no limit on the size of an increment of leave when an employee takes intermittent leave or leave on a reduced leave schedule. 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...**An employee may not be required to take more FMLA leave than necessary to address the circumstance that precipitated the need for the leave, except as provided in §§ 825.601 and 825.602.⁹

29 C.F.R. § 825.204

(a) If an employee needs intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment for the employee or a family member, including during a period of recovery from a serious health condition, or if the employer agrees to permit intermittent or reduced schedule leave for the birth of a child or for placement of a child for adoption or foster care, **the employer may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position.** See § 825.601 for special rules applicable to instructional employees of schools.

⁹ These regulations address applicable limitations for taking intermittent leave or leave at the end of an academic term for school employees.

(b) Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, federal law (such as the Americans with Disabilities Act), and State law. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave.

(c) The alternative position must have equivalent pay and benefits. An alternative position for these purposes does not have to have equivalent duties. The employer may increase the pay and benefits of an existing alternative position, so as to make them equivalent to the pay and benefits of the employee's regular job. The employer may also transfer the employee to a part-time job with the same hourly rate of pay and benefits, provided the employee is not required to take more leave than is medically necessary. For example, an employee desiring to take leave in increments of four hours per day could be transferred to a half-time job, or could remain in the employee's same job on a part-time schedule, paying the same hourly rate as the employee's previous job and enjoying the same benefits. The employer may not eliminate benefits which otherwise would not be provided to part-time employees; however, an employer may proportionately reduce benefits such as vacation leave where an employer's normal practice is to base such benefits on the number of hours worked.

(d) An employer may not transfer the employee to an alternative position in order to discourage the employee from taking leave or otherwise work a hardship on the employee. For example, a white collar employee may not be assigned to perform laborer's work; an employee working the day shift may not be reassigned to the graveyard shift; an employee working in the headquarters facility may not be reassigned to a branch a significant distance away from the employee's normal job location. Any such attempt on the part of the employer to make such a transfer will be held to be contrary to the prohibited acts of the FMLA.

(e) When an employee who is taking leave intermittently or on a reduced leave schedule and has been transferred to an alternative position, no longer needs to continue on leave and is able to return to full-time work, the employee must be placed in the same or equivalent job as the job he/she left when the leave commenced. **An employee may not be required to take more leave than necessary to address the circumstance that precipitated the need for leave.**

29 C.F.R. § 825.205(a)

If an employee takes leave on an intermittent or reduced leave schedule, only the amount of leave actually taken may be counted toward the 12 weeks of leave to which an employee is entitled...

29 C.F.R. § 825.217(a)

A "key employee" is a salaried FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed by the employer within 75 miles of the employee's worksite.

29 C.F.R. § 825.302(f)

In the case of intermittent leave or leave on a reduced leave schedule which is medically necessary, an employee shall advise the employer, upon request, of the reasons why the intermittent/reduced leave schedule is necessary and of the schedule for treatment, if applicable. The employee and employer shall attempt to work out a schedule which meets the employee's needs without unduly disrupting the employer's operations, subject to the approval of the health care provider.

MATERIALS CITED IN COMMENTS RESPONDING TO THE RFI¹⁰

Cases

- *Mulloy v. Acushnet Co.*, 460 F.3d 141 (1st Cir. 2006).
- *Hite v. Vermeer Mfg. Co.*, 446 F.3d 858 (8th Cir. 2006).
- *Brenneman v. MedCentral Health Sys.*, 366 F.3d 412 (6th Cir. 2004).
- *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869 (10th Cir. 2004).
- *Byrne v. Avon Prods., Inc.*, 328 F.3d 379 (7th Cir. 2003).
- *Liu v. Amway Corp.*, 347 F.3d 1125 (9th Cir. 2003).
- *Spangler v. Fed. Home Loan Bank of Des Moines*, 278 F.3d 847 (8th Cir. 2002).
- *Collins v. NTN-Bower Corp.*, 272 F.3d 1006 (7th Cir. 2001).
- *E.E.O.C. v. Yellow Freight System, Inc.*, 253 F.3d 943 (7th Cir. 2001).
- *Gilliam v. United Parcel Serv., Inc.*, 233 F.3d 969 (7th Cir. 2000).
- *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042 (6th Cir. 1998).
- *Hypes v. First Commerce Corp.*, 134 F.3d 721 (5th Cir. 1998).
- *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711 (7th Cir. 1997).
- *Price v. S-B Power Tool*, 75 F.3d 362 (8th Cir. 1996).
- *Vande Zande v. State of Wis. Dep't of Admin.*, 44 F.3d 538 (7th Cir. 1995).
- *Tyndall v. Nat'l Educ. Centers*, 31 F.3d 209, 213 (4th Cir. 1994).
- *Carr v. Reno*, 23 F.3d 525 (D.C. Cir. 1994).
- *Grosso v. Fed. Express Corp.*, No. 05-6128, 2006 U.S. Dist. LEXIS 91604 (E.D. Pa. Dec. 16, 2006).
- *Stevenson v. Hyre Elec.*, No. 04C7990, 2006 U.S. Dist. LEXIS 64043 (N.D. Ill. Aug. 24, 2006).
- *Lozano v. Kay Mfg. Co.*, No. 04C2784, 2006 WL 1083998 (N.D. Ill. Mar. 28, 2006).
- *Burnett v. LFW, Inc.*, No. 04C3835, 2005 U.S. Dist. LEXIS 32717 (N.D. Ill. Dec. 7, 2005).
- *Ross v. Kraft Foods North Am., Inc.*, 347 F. Supp. 2d 200 (E.D. Pa. 2004).
- *Kaylor v. Fannin Reg'l Hosp., Inc.*, 946 F. Supp. 988 (N.D. Ga. 1996).

¹⁰ Cases and materials cited in the RFI are excluded from this list. This list does not include surveys cited in reviewed comments.

DOL Opinion Letters & Guidance

- Dep't of Labor Opinion Letter, FMLA2004-2-A (May 25, 2004), http://www.dol.gov/esa/whd/opinion/FMLA/2004_05_25_2A_FMLA.pdf
- Dep't of Labor Opinion Letter, FMLA-101 (Jan 15, 1999), <http://www.dol.gov/esa/whd/opinion/FMLA/prior2002/FMLA-101.pdf>
- Dep't of Labor Opinion Letter, FMLA-90 (July 3, 1997), <http://www.dol.gov/esa/whd/opinion/FMLA/prior2002/FMLA-90.pdf>

Other Materials

- John Matejkovic & Margaret Matejkovic, *If it Ain't Broke...Changes to FMLA Regulations Are Not Needed, Employee Compliance and Employer Enforcement of Current Regulations Are*, 42 WILLAMETTE L. REV. 413 (2006).
- Mary Elizabeth Burke, SHRM, *FAMILY AND MEDICAL LEAVE ACT* (2003), www.protectfamilyleave.org/research/2003_SHRM_FMLA_Survey.pdf.