

## **INTERMITTENT LEAVE AND REDUCED SCHEDULE LEAVE UNDER THE FAMILY AND MEDICAL LEAVE ACT**

The Family and Medical Leave Act of 1993 (FMLA) permits workers who meet certain conditions to take up to 12 weeks per year of unpaid leave for medical or family care reasons.<sup>1</sup> This memorandum discusses the statutes, legislative history and regulations pertinent to intermittent and reduced schedule leave, as well as select case law.

To give workers not just the time but also the flexibility to balance the demands of work and family, the FMLA allows workers to take leave on **an intermittent basis** (e.g., a few hours per week to attend a standing medical appointment) or on a **reduced work schedule** (e.g., working a three-day week while recovering from cancer).

Generally, intermittent leave or reduced schedule leave is provided **when medically necessary** for an employee's own serious health condition or for caretaking of certain family members with serious health conditions.<sup>2</sup> In such circumstances, an employee need not obtain the prior approval of his or her employer to take such leave. By contrast, intermittent leave or a reduced schedule leave may be used for care related to the birth/adoption/foster care of a child only if the employer gives prior approval for such arrangements.

The **FMLA statute** authorizes intermittent and reduced schedule leave (though it defines only the latter), provides that employees taking such leave may be **charged only for the actual amount of leave they take**, requires notice and certification of leave, requires employees to schedule planned treatments in a manner **that does not "unduly disrupt"** the employer's operations (subject to health care provider approval), and permits **employers to transfer employees** needing such leave to alternative positions that better accommodate intermittent leave or a reduced schedule.

The **FMLA regulations** reiterate the statutory requirements and add additional rules **on implementation of intermittent and reduced schedule leave**, including defining intermittent leave, explaining how to demonstrate that leave is medically necessary, tracking leave in increments of one hour or less, requiring notice of leave only once in most circumstances, and allowing employers to "dock" pay for FMLA leave without having the employee lose exempt status under the Fair Labor Standards Act (FLSA) (which, among other things, requires overtime pay for employees who are considered non-exempt).

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<sup>1</sup> 29 U.S.C. § 2601 et seq.; 29 C.F.R. § 825.100 et seq. Title II of the FMLA, governing most federal employees, is not discussed here, nor are any special provisions governing employees of local education agencies.

<sup>2</sup> A "serious health condition" refers to an illness that requires either inpatient care or continuing treatment. For a full discussion of "serious health conditions" see Workplace Flexibility 2010, *Eligibility for Medical Leave Under the FMLA* (2004).

## ***The Statute***

The FMLA permits employees to take leave intermittently or on a reduced schedule basis when medically necessary for their own serious health conditions or to care for certain family members with serious health conditions.<sup>3</sup> Employers must approve intermittent or reduced schedule leave for reasons related to birth/adoption/foster care of a child.<sup>4</sup> The statute does not define “intermittent leave.” It defines “reduced leave schedule” as “a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee.”<sup>5</sup>

Employees may not be charged against their FMLA entitlement for intermittent or reduced schedule leave beyond the amount of leave they actually take.<sup>6</sup> When an employee requests intermittent leave, or reduced schedule leave, for planned medical treatment, the employer may temporarily transfer the employee to an available alternative position that better accommodates recurring absences or part-time employment.<sup>7</sup> The employee must receive the same pay and benefits in the alternative position that the employee received in the prior position.<sup>8</sup>

The employee is required to give the employer notice of his or her need for foreseeable intermittent leave, or foreseeable reduced schedule leave, at least 30 days before the leave is to begin.<sup>9</sup> If treatment requires the leave to begin earlier, the employee must give the notice “as practicable.”<sup>10</sup>

The burden is on the employee to make a “reasonable effort” to schedule foreseeable medical treatments (for himself or herself, or for a family member) in a manner that does not “unduly disrupt” the employer’s operations.<sup>11</sup> This scheduling is subject to the approval of the employee’s health care provider or the family member’s health care provider.<sup>12</sup>

Upon receiving a request for medical leave (continuous, intermittent, or reduced schedule), the employer may require a certification from the employee’s health care provider or the health care provider of the employee’s family member for whom caregiving is sought. (See *Workplace Flexibility 2010, Eligibility for Medical Leave*

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<sup>3</sup> 29 U.S.C. § 2612(b)(1). “Immediate family member” includes a spouse, child or parent, but not, for example, a parent-in-law or domestic partner. See 29 U.S.C. §§ 2612(a)(1), 2611(7),(12)&(13); 29 C.F.R. § 825.113.

<sup>4</sup> 29 U.S.C. § 2612(b)(1).

<sup>5</sup> 29 U.S.C. § 2611(9).

<sup>6</sup> 29 U.S.C. § 2612(b)(1).

<sup>7</sup> 29 U.S.C. § 2612(b)(2).

<sup>8</sup> *Id.*

<sup>9</sup> 29 U.S.C. § 2612(e)(2)(B).

<sup>10</sup> *Id.*

<sup>11</sup> 29 U.S.C. § 2612(e)(2)(A).

<sup>12</sup> *Id.*

*Under the FMLA (2004) for a general description of medical certifications and their required content.)*

When the employee has requested reduced schedule leave, or intermittent leave, because the employee has planned medical treatments for his or her own health condition, and the employer has in turn required a certification from the employee, the certification must include the dates on which such treatment is expected and the duration of the treatment.<sup>13</sup> When the employee has requested a reduced schedule, or intermittent leave, for his or her own health condition (but not for scheduled medical treatments), the certification must state that there is a “medical necessity” for such leave and must include a statement of the expected duration of the intermittent/reduced schedule leave.<sup>14</sup> There is no requirement that the certification set forth the “expected schedule” for such intermittent leave—presumably because there will be no set schedule for such leave. (For example, if the intermittent leave is required for flare-ups of chronic conditions.)

When the employee has requested a reduced schedule leave, or intermittent leave, in order to care for a family member with a serious health condition, the family member’s health care provider must state that the employee’s intermittent/reduced schedule leave is “necessary” for the care of the family member.<sup>15</sup> In addition, the certification must include a statement of the expected duration and schedule of the intermittent/reduced schedule leave.<sup>16</sup>

### ***The Legislative History***

Given the amount of practical energy expended on intermittent leave and reduced schedule leaves by human resource professionals since the FMLA’s passage, Members of Congress gave the issue relatively little attention. Committee reports accompanying the final FMLA bill enacted by the 103<sup>rd</sup> Congress contain only five paragraphs on general intermittent and reduced schedule leave requirements, one paragraph regarding intermittent or reduced schedule leave for planned medical treatment and one paragraph regarding medical certifications for intermittent or reduced schedule leave.<sup>17</sup>

These reports indicated that the committees focused primarily on two possible uses of intermittent leave—when an employee needs a few hours off per week to receive a medical treatment (e.g., chemotherapy or physical therapy), or when an employee suffers from a type of condition that requires a reduced hours (part-time) schedule for some period of time (e.g., while recovering from major surgery).

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<sup>13</sup> 29 U.S.C. § 2613(b)(5).

<sup>14</sup> 29 U.S.C. § 2613(b)(6).

<sup>15</sup> 29 U.S.C. § 2613(b)(7).

<sup>16</sup> *Id.*

<sup>17</sup> See H.Rep. 103-8(I)(1993), at 39, 41; S. Rep. 103-3(1993), at 23, 26. Two House committee reports accompanied the FMLA—one by the Committee on Education and Labor dealing with Title I of the Act, and the other by the Committee on Post Office and Civil Service, dealing with Title II. Because this memo focuses solely on Title I of the Act, all references to the House Committee Report refer to the report by the Committee on Education and Labor, unless otherwise noted.

Based on these intended uses, the reports emphasize two principles:

- ❑ Employees should be charged leave only for the time actually taken. The committee reports state “...an employee who takes four hours of leave for a medical treatment has utilized only 4 hours of the 12 weeks of leave to which the employee is entitled.”<sup>18</sup> Similarly, in discussing continuing treatment or supervision of a serious health condition, the reports specifically note that “[o]nly the time actually taken is charged against the employee’s entitlement.”<sup>19</sup>
- ❑ Employers should have flexibility to temporarily transfer employees needing intermittent leave, or a reduced schedule leave, to positions better suited for such recurring leave or part-time work (and employees should receive equivalent pay and benefits during the temporary transfer so that they are not penalized by the transfer).

In addition, the reports also indicate that the committees intended that employees support their requests for intermittent or reduced schedule leave in connection with planned medical treatments (like chemotherapy and physical therapy) with medical certifications covering the medical necessity, expected duration and dates of such leave upon request from the employer.<sup>20</sup>

The committees apparently believed that these provisions would adequately address any possible problems with intermittent or reduced schedule leave, even noting that employers would prefer this structure: “We anticipate that a reduced leave schedule will often be perceived as desirable by employers who would prefer to retain a trained and experienced employee part-time for the weeks that the employee is on leave rather than hire a full-time temporary replacement.”<sup>21</sup>

The minority views of the House report assailed the majority for giving employees “unrestrained discretion” as to when and how to take leave, “rendering employer workforce planning extremely difficult.”<sup>22</sup> Opponents of the FMLA also criticized the medical certification provisions based on the belief that the broad definition of the term “health care provider” would undermine any protection that certifications were supposed to offer employers. According to the minority, the lack of sanctions on employees who

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<sup>18</sup> H.Rep. 103-8(I)(1993), at 37; S.Rep. 103-3(1993), at 27. Similarly, when discussing the need to take intermittent leave for doctor’s visits related to the continuing treatment of a serious health condition, the reports again note that “[o]nly the time actually taken is charged against the employee’s entitlement.” H.Rep. 103-8(I)(1993), at 41; S.Rep. 103-3(1993), at 30.

<sup>18</sup> H.Rep. 103-8(I)(1993), at 37; S. Rep. 103-3(1993), at 27.

<sup>19</sup> H.Rep. 103-8(I)(1993), at 41; S. Rep. 103-3(1993), at 29.

<sup>20</sup> H.Rep. 103-8(I)(1993), at 39; S. Rep. 103-3(1993), at 26. The committee reports also explain the special notice requirements for intermittent leave. See *Workplace Flexibility 2010, Notice, Designation and Substitution of Leave Under the FMLA* (2004) for a discussion of these provisions.

<sup>21</sup> H.Rep. 103-8(I)(1993), at 37; S. Rep. 103-3(1993), at 27. The reports do not explain why employers would affirmatively desire a statutory mandate that requires them to provide part-time positions in such circumstances, rather than the continued capacity to choose for themselves whether to keep certain employees in part-time positions if that proved to be economically beneficial for the employer.

<sup>22</sup> H.Rep. 103-8(I)(1993)(Minority views), at 70.

failed to meet their “vague obligations” also undermined any protections the statute otherwise conferred on the employer.<sup>23</sup>

The legislative history (supplemented by conversations with participants in the process) also reflects a difference of opinion on how the law came to give employees the unilateral right to take a **reduced schedule leave** (subject to the other requirements of the statute) for their own serious health conditions or to care for family members with such conditions.

In the version of H.R. 1 introduced on January 5, 1993, the bill included separate sections on intermittent leave and reduced schedule leave. Under this version of the bill, the employee could ask for intermittent leave without receiving prior approval from the employer. The employer, in turn, could transfer the employee temporarily to an alternative position that would better accommodate recurring periods of leave.<sup>24</sup> With regard to taking a reduced leave schedule for any purpose, the employer and the employee were required to agree about such leave.<sup>25</sup> This was consistent with the language of the FMLA that had been introduced in the 102<sup>nd</sup> Congress, as well as the FMLA that had been introduced in the 101<sup>st</sup> Congress.<sup>26</sup>

By contrast, the version of the FMLA introduced in the Senate on January 21, 1993 (S. 5), collapsed the sections on intermittent leave and reduced schedule leave into one section. For both such types of leave, prior employer agreement was required if leave was to be taken for childbirth/adoption/foster care purposes and employer agreement was not required when the leave was “medically necessary” because of the employee’s own serious health condition or because of the employee’s caregiving responsibility to a family member with a serious health condition.<sup>27</sup> In this version of the bill, an employer was permitted to transfer an employee to an alternative position that better accommodated the need for either intermittent or reduced schedule leave.<sup>28</sup>

According to supporters of the FMLA involved in the legislative process, the intent was never to provide employers with a veto power over an employee’s need for reduced schedule leave in situations of medical need. Thus, the House Education and Labor Committee staff made what they considered to be a technical change to the bill to clarify

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<sup>23</sup> H.Rep. 103-8(I)(1993)(Minority views), at 70.

<sup>24</sup> H.R. 1 §102(a)(3)(B). H.R.1 available at <http://thomas.loc.gov> (last visited Oct. 21, 2004).

<sup>25</sup> H.R. 1 §102(b) read as follows:

“(b) REDUCED LEAVE- On agreement between the employer and the employee, leave under subsection (a) may be taken on a reduced leave schedule.”

<sup>26</sup> See Workplace Flexibility 2010, *Eligibility for Medical & Family Leave Under the FMLA: Development of the Statutory Text 1985-1993*, at 4 (H.R. 770), 5 (H.R. 2) (2004) (hereinafter *Statutory Text Development Chart*).

<sup>27</sup> S. 5, §102(b) read as follows:

“(b) LEAVE TAKEN INTERMITTENTLY OR ON A REDUCED LEAVE SCHEDULE.

(I) IN GENERAL -- . . . [L]eave [for an employee’s own serious health condition or to care for a family member with a serious health condition] may be taken intermittently or on a reduced leave schedule when medically necessary.”

<sup>28</sup> This version of S.5 was also a change from previous Senate versions of the bill. See *Statutory Text Development Chart*, p. 3 (S. 2488), p. 4 & 5 (S. 345 & S. 2973) and p. 6 (S. 5).

that prior employer approval of a reduced schedule leave for an employee's serious health condition or for caregiving associated with a family member's serious health condition was not required.<sup>29</sup> Thus, prior to the House Education and Labor Committee markup on January 27, 1993, H.R. 1 was rewritten to conform to the structure and language of S. 5 with regard to giving employees the right to take a reduced leave schedule for their own serious health condition, or to care for a family member with a serious health condition, without receiving the prior agreement of the employer (although the right is subject to the other requirements of the statute).

The minority members of the committee complained about what they perceived as the sudden removal of the employer's approval right for reduced schedule leave, asserting that its removal created "an entirely new troublesome issue under the legislation, never subject to hearings or otherwise considered, and markedly expanding employee leave rights to uncertain dimensions."<sup>30</sup>

During consideration of H.R. 1 on the House floor, Representative William Goodling (R-PA), the ranking minority member of the House Education and Labor Committee, offered an amendment to require employer approval of reduced schedule leave for an employee's serious health condition or for the employee's caregiving of a family member with such a condition.<sup>31</sup> Representative Goodling contested the view that the Committee's technical change had simply clarified what had always been the intent of the law. To the contrary, Representative Goodling asserted that "[t]he concept of reduced leave schedule never received any close analysis because the employer always had the right to say 'no.' That's not the case anymore."<sup>32</sup>

Despite Democratic control of the House, Representative Goodling's amendment passed in a close vote of 223-209.<sup>33</sup> The final bill, containing Representative Goodling's amendment, was approved in the House by a 221-204 vote.<sup>34</sup>

When the Senate received H.R. 1 from the House, it substituted the text of its own bill, S. 5, for the text of H.R. 1.<sup>35</sup> As noted, S. 5 already provided that employees had the right (subject to the other requirements of the statute) to take both intermittent leave and reduced schedule leave for medical leave purposes (of their own and for caretaking),

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<sup>29</sup> Personal conversation with Fred Feinstein; see also RONALD D. ELVING, *CONFLICT & COMPROMISE: HOW CONGRESS MAKES THE LAW*, 263-71 (Simon & Schuster 1995) (noting "technical change" made by Feinstein during drafting of the final bill, but referring to the FLSA docking rule provision (see *supra* p. 14) and not to the employer prior approval provision).

<sup>30</sup> H.Rep. 103-8(I)(1993)(Minority views), at 71.

<sup>31</sup> 139 Cong. Rec. H433 (daily ed. Feb. 3, 1993) (statement of Rep. Goodling). This was one of the three amendments made in order by the House Rules Committee, much to the surprise and chagrin of supporters of the FMLA. See Elving, *supra* n. 29 at 267.

<sup>32</sup> 139 CONG REC H439 (daily ed. Feb. 3, 1993) (statement of Rep. Goodling).

<sup>33</sup> 139 CONG REC H440 (daily ed. Feb. 3, 1993); Final Vote Results for Roll Call 17 *available at* <http://clerk.house.gov/evs/1993/roll017.xml> (last visited Oct. 21, 2004).

<sup>34</sup> 139 CONG REC H440 (daily ed. Feb. 3, 1993); Final Vote Results for Roll Call 19 *available at* <http://clerk.house.gov/evs/1993/roll019.xml> (last visited Oct. 21, 2004). Representative Goodling voted against passage of the FMLA.

<sup>35</sup> 139 CONG REC S1349 (daily ed. Feb. 4, 1993)

without getting prior employer approval. Senators Hank Brown (R-CO) and Nancy Kassebaum (R-KA) introduced an amendment to require employer approval of reduced schedule leave for medical purposes.<sup>36</sup> The amendment was tabled on a 59-39 vote.<sup>37</sup>

The Senate passed the FMLA by a vote of 71-27.<sup>38</sup> The House then approved the Senate's amended version of the bill.<sup>39</sup> By engaging in this "ping-pong" approach, a conference committee on the bill was avoided. Thus, the FMLA as enacted did not require employers to approve either reduced schedule or intermittent leave that was medically necessary for an employee's own serious health condition or for an employee's caregiving responsibilities to a family member with a serious health condition.<sup>40</sup>

### ***The Regulations***

The Department of Labor (DOL) promulgated regulations to the FMLA, as required by the statute. DOL issued proposed regulations in June 1993, accepted comments through December 1993, and issued final regulations in January 1995.

With regard to the purposes of and eligibility for intermittent leave or reduced schedule leave, the regulations basically follow the statute.<sup>41</sup> The regulations explain that intermittent leave, or reduced schedule leave, may be taken:

- When medically necessary for planned or unanticipated medical treatment for a serious health condition or for recovery from a serious health condition (or related treatment).<sup>42</sup> Consistent with the regulations' definition of "serious health condition," such leave can also be taken when the employee or family member is incapacitated by a chronic serious health condition, even if the individual is not receiving treatment from a health care provider.<sup>43</sup>

Voluntary treatments and procedures are not considered medically necessary (e.g., cosmetic surgery or treatment for acne).<sup>44</sup> Employees, upon the

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<sup>36</sup> 139 CONG REC S1340 (daily ed. Feb. 4, 1993).

<sup>37</sup> 139 CONG REC S1341 (daily ed. Feb. 4, 1993); U.S. Senate Roll Call Votes 103<sup>rd</sup> Congress - 1<sup>st</sup> Session available at [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=103&session=1&vote=00010](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=103&session=1&vote=00010) (last visited Oct. 21, 2004).

<sup>38</sup> 139 CONG REC S1349 (daily ed. Feb. 4, 1993); U.S. Senate Roll Call Votes 103<sup>rd</sup> Congress - 1<sup>st</sup> Session available at [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=103&session=1&vote=00011](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=103&session=1&vote=00011) (last visited Oct. 21, 2004).

<sup>39</sup> 139 CONG REC H568 (daily ed. Feb. 4, 1993).

<sup>40</sup> 139 CONG REC S1350 (daily ed. Feb. 4, 1993); 139 CONG REC H568 (daily ed. Feb. 4, 1993).

<sup>41</sup> 29 C.F.R. §§ 825.100, 825.203. In accord with the statute, intermittent or reduced schedule leave is not permitted after the birth or placement of a child for adoption/foster care unless the employer agrees or leave is taken in connection with a resulting serious health condition of the parent or child. 29 C.F.R. § 825.203.

<sup>42</sup> 29 C.F.R. § 825.117; 825.203(c).

<sup>43</sup> 29 C.F.R. § 825.203(c)(2).

<sup>44</sup> 29 C.F.R. § 825.117.

employer's request, must provide certification of the medical need for intermittent or reduced schedule leave.<sup>45</sup>

- To provide care or psychological comfort to an immediate family member with a serious health condition.<sup>46</sup>

Intermittent or reduced schedule leave needed to care for a family member covers both when the family member's condition is intermittent and when the employee is needed only intermittently (e.g., providing respite care for other caregivers).<sup>47</sup>

With regard to various rules for calculating the increments of intermittent leave and for determining the time period in which intermittent leave may be taken, DOL had no clear guidance from either the statute or the committee reports. The only explicit requirement in the statute was that employees could not have the total amount of their job-protected leave reduced because they were taking such leave in intermittent blocks or through a reduced hour schedule.<sup>48</sup> From this one statutory requirement, DOL subsequently developed a set of rules regarding intermittent leave.

For example, the statute set no minimum limit on the size of the increment of leave that an employee with a serious health condition could take. The committee reports also do not speak to the question of whether leave must be taken in certain minimum increments. Rather, the committee reports simply reaffirm the statutory point that employees may not have their total amount of leave reduced because they take leave in intermittent blocks. For example, if an employee takes two hours off for a doctor's appointment, the reports emphasize that only the time actually taken may be charged against an employee's FMLA leave entitlement—that is, the employee may be charged only for two hours of leave, not for a full day of leave.<sup>49</sup>

Thus, under the plain language of the statute, an employee can potentially take leave in increments of 15 minutes per day, assuming that the employee can demonstrate that such absences are medically necessary. Similarly, an employee who takes 2 hours and 15 minutes of leave to go to the doctor would be charged for that amount of time only, and not for three hours of leave.

In the regulations, DOL affirmed that, indeed, the statute places no limit on the size of an increment of intermittent leave or reduced schedule leave that an employee may take.<sup>50</sup>

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<sup>45</sup> 29 C.F.R. § 825.117. The treatment regimen and other information contained in a medical certification that the employee has a serious health condition is deemed to meet the requirement for certification of the medical need for intermittent or reduced schedule leave. *Id.*

<sup>46</sup> 29 C.F.R. § 825.203(c).

<sup>47</sup> 29 C.F.R. § 825.116(c).

<sup>48</sup> 29 U.S.C. § 2612(b)(1).

<sup>49</sup> See H.Rep. 103-8(I)(1993), at 41; S.Rep. 103-3(1993), at 30.

<sup>50</sup> "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." 29 C.F.R. § 825.203 (d). For example, an employee may take two

DOL also purported to allow employers to limit leave increments to “the shortest increment that the employer’s payroll system uses to account for absences or use of leave.”<sup>51</sup> However, at the same time, the agency required that this “shortest increment” be no more than one hour.<sup>52</sup> For example, if the employer’s payroll system accounts for absences by half days or by blocks of two hours, that employer must still allow employees to take leave in increments of one hour or less. (Given this “one hour rule,” it is somewhat unclear what DOL believed it was providing employers as a significant substantive matter by adding a reference to the employer’s payroll system.)

DOL maintained its “one hour or less” standard despite receiving several comments after issuing its interim regulations that the requirement would be too burdensome.<sup>53</sup> Most business commentators wanted a four-hour minimum increment.<sup>54</sup> DOL, however, believed that no minimum limitation could apply because there was “no basis in the statute for limiting the period of time for intermittent leave.”<sup>55</sup> DOL emphasized that both the statute and the legislative history provide that only the time actually taken may be charged against an employee’s entitlement, but they are otherwise silent regarding increments of time related to intermittent leave.<sup>56</sup> Based on this, the agency concluded that an “employer may not require leave to be taken in increments of more than one hour.”<sup>57</sup>

DOL also explained that, in the case of foreseeable leave, other employer protections in the statute sufficed to protect employers against abuse (e.g., the “unduly disrupt” and temporary transfer provisions).<sup>58</sup> Likewise, for unforeseeable leave, DOL believed it “unlikely” that an employee would have several short instances of intermittent leave that would meet the serious health condition definition.<sup>59</sup>

The committee reports were also silent on the question of whether a **limited time span** should apply for intermittent leave. Again, the situation that the committee reports focused on was one in which an employee takes leave for medical treatment for a specified serious health condition for four hours per day (i.e., 1/2 a workweek of leave per week). By ensuring that only the leave actually taken by the employee is counted, the employee’s FMLA leave entitlement is extended for 24 weeks, rather than the 12 week time span that forcing full-time FMLA leave would entail.

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hours off for a medical appointment, or might require a reduced schedule of only 4 hours of work per day over a period of weeks when recovering from heart surgery. *Id.*

<sup>51</sup> 29 C.F.R. § 825.203(d).

<sup>52</sup> “[A]n 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.” 29 C.F.R. § 825.203(d).

<sup>53</sup> 60 Fed. Reg. 2236.

<sup>54</sup> The Small Business Administration also sought this four-hour minimum on behalf of small businesses. See 60 Fed. Reg. 2236.

<sup>55</sup> 58 Fed. Reg. 31801.

<sup>56</sup> 60 Fed. Reg. 2201-2. DOL noted that charging more time than actually taken would unnecessarily erode the employee’s 12-week leave entitlement. *Id.*

<sup>57</sup> 60 Fed. Reg. 2201-2.

<sup>58</sup> 58 Fed. Reg. 31801.

<sup>59</sup> *Id.*

DOL was asked by business commentators to limit the available time span in which intermittent leave could be taken to six months. The rationale was that once leave could be taken in increments of one hour or less, the employee's FMLA leave entitlement might extend throughout a 12-month FMLA leave eligibility period. For example, if intermittent leave is taken for one hour per day (the equivalent of 5 hours per week), an employee would use 1/8 of a workweek of leave per week, and the employee's FMLA leave entitlement technically would extend to 96 weeks. (In reality, the employee's leave entitlement would end at the end of a 12-month (52-week) period and a new FMLA 12-month leave eligibility period would begin.) In any event, business commentators feared that employees would be able to create permanent part-time or intermittent-leave schedules for themselves, provided that their serious health condition required that type of leave, that the health condition persisted, and that other FMLA requirements were satisfied.

The agency, however, noted that the statute made no provision for limiting the time period over which an employee may take intermittent or reduced schedule leave. To the contrary, as the agency noted, the statute clearly states that employees may not be charged for more leave than they take. In light of that statutory provision, the agency felt it would be contrary to Congressional intent to create an exception to the 12-month leave eligibility period for this type of leave.<sup>60</sup>

The regulations also provide examples of how to calculate leave to ensure that only the amount of intermittent or reduced schedule leave actually taken is counted toward the FMLA 12-week entitlement.<sup>61</sup> For example, when an employee normally works part-time, the amount of leave to which an employee is entitled is pro-rated by comparing the employee's new reduced schedule with the employee's normal part-time schedule.<sup>62</sup>

DOL also applied Congress' intent that employees be charged only for FMLA leave actually taken on an intermittent or reduced leave basis to its guidance on counting periods of FMLA leave. For example, DOL applied this principle to demonstrate how various forms of intermittent or reduced schedule leave count against the 12-week leave entitlement:

- An employee who normally works five-day workweeks takes one day off as FMLA leave—only 1/5 of one of the 12 available workweeks of leave has been used.
- A full time employee switches to working half days using reduced schedule FMLA leave—1/2 workweek of leave is used each week. It will take the employee twice as long (i.e., 24 weeks) to use up the employee's full 12-week

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<sup>60</sup> 60 Fed. Reg. 2202. See also *Statutory Text Development Chart*, supra n. 26, at 1-3, documenting earlier versions of the FMLA with limited time spans for certain types of leave.

<sup>61</sup> 29 C.F.R. § 825.205.

<sup>62</sup> 29 C.F.R. § 825.205(b).

leave entitlement (assuming that no other FMLA-qualified leave is used in the period) than if the employee took full-time leave.

- A part-time employee who usually works 30 hours per week reduces his hours to 20 hours per week on reduced schedule FMLA leave – the employee uses 1/3 of a workweek (i.e., 10 of 30 hours) of FMLA leave each week and will take three times as long (i.e., 36 weeks) to use up his full 12-week leave entitlement (assuming that no other FMLA-qualified leave is used in the period).<sup>63</sup>

DOL also declined to base the FMLA leave entitlement on a standard 40-hour workweek. Rather, DOL explained that the FMLA entitlement is based on an individual employee's "normal workweek," whether greater than, less than, or equal to 40 hours per week.<sup>64</sup> This "normal workweek" controls in determining how much leave is used when an employee switches to a reduced leave schedule,<sup>65</sup> and in determining whether FMLA leave applies to overtime requirements.<sup>66</sup>

### *Notice*

The FMLA notice regulations further interpret the statute and specify the following:

- *Burden to designate leave on employer:* The employer is responsible for designating leave (intermittent or otherwise) as FMLA leave and for notifying the employee of the FMLA designation.<sup>67</sup>
- *Only one notice from employer:* For intermittent or reduced schedule leave, only one such notice by the employer is required unless the leave circumstances have changed.<sup>68</sup>
- *Certification requirements:* With respect to intermittent and reduced schedule leave for serious health conditions, the employer may also request certification and recertification of the medical condition, as appropriate.<sup>69</sup>

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<sup>63</sup> 58 Fed. Reg. 31801; 60 Fed. Reg. 2203. DOL also explained that a part-time employee's intermittent or reduced schedule leave is counted on a pro rata basis and that when an employee's schedule varies from week to week, the average weekly hours worked during the 12 weeks prior to the start of the FMLA leave is used to calculate an employee's "normal" work schedule. *Id.*

<sup>64</sup> 60 Fed. Reg. 2203.

<sup>65</sup> *Id.*

<sup>66</sup> 60 Fed. Reg. 2202. If an employee's normal workweek is more than 40 hours or a workday is greater than 8 hours, the time the employee does not work that would otherwise be mandatory overtime may be charged against the employee's FMLA leave entitlement if an FMLA-qualifying reason for leave exists, but if overtime is required on an "as needed" basis or is voluntary, the unworked overtime may not be charged to the FMLA leave entitlement. In addition, an employee is not subject to disciplinary action for being unable to work overtime as a result of limitations contained in a medical certification obtained for purposes of the FMLA. *Id.*

<sup>67</sup> 29 C.F.R. § 825.208(a)

<sup>68</sup> *Id.* The designation must be based solely on information from the employee or the employee's spokesperson (e.g., if incapacitated), and the employer should inquire further when information is insufficient to make the FMLA-qualifying determination. *Id.*

DOL applied the FMLA's general medical certification requirements to intermittent leave. DOL explained that a description of the treatment regimen provided by a health care provider in a standard medical certification form would "normally" meet the requirement for certification related to intermittent or reduced schedule leave.<sup>70</sup> DOL did not offer any examples of when a standard certification would not satisfy the intermittent leave certification requirements.<sup>71</sup> DOL also declined to require that a health care provider make the exclusive decision regarding the need for intermittent leave, relying instead on the standard medical certification form for intermittent leave to ensure that the health care provider made the determination.<sup>72</sup>

- *Employee notice requirements for foreseeable and unforeseeable leave:* The employee must provide the employer notice of the need for foreseeable intermittent or reduced schedule leave only one time.<sup>73</sup> The employee must, however, inform the employer as soon as practicable if dates of scheduled leave change or are extended, or were unknown.<sup>74</sup> For unforeseeable leave, the employee must give the employer notice of the need for leave as soon as practicable under the circumstances (in the case of medical emergencies, written advance notice under employer policies is not required).<sup>75</sup>

In addition, in a 1999 DOL opinion letter, DOL clarified that an employer's attendance control policy could not require an employee to provide notice of the need for intermittent leave sooner than the FMLA required notice without running afoul of DOL regulation 29 C.F.R. § 825.302(d).<sup>76</sup> This regulation prohibits an employer from disallowing or delaying an employee from taking FMLA leave as long as the employee has given timely verbal or other notice even if the employee has failed to follow internal employer notice requirements.<sup>77</sup>

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<sup>69</sup> See 29 C.F.R. §§ 825.305, 825.306 & 825.308. An employer may not require a "fitness for duty" report when intermittent leave is taken. 29 C.F.R. § 825.310(g). See Workplace Flexibility 2010, *Eligibility for Medical Leave Under the FMLA* (2004).

<sup>70</sup> 58 Fed. Reg. 31800.

<sup>71</sup> DOL noted an absence of legislative history on this provision, which was added as a technical amendment just prior to passage of the FMLA in the Senate.

<sup>72</sup> 60 Fed. Reg. 2197.

<sup>73</sup> 29 C.F.R. § 825.302(a).

<sup>74</sup> *Id.*

<sup>75</sup> See 29 C.F.R. §§ 825.303(a), 825.305-308.

<sup>76</sup> See DOL Opinion Letter FMLA-101 (January 15, 1999).

<sup>77</sup> 29 C.F.R. § 825.302(e). In order to manage problems with intermittent leave takers, the employer to whom DOL responded in its January 15, 1999 letter wished to modify its attendance control policy to require an employee to report within one hour after the start of the employer's shift that the employee is taking FMLA intermittent leave unless circumstances beyond the employee's control preclude such notice. (The FMLA permits the employee generally to give notice one to two days later. 29 C.F.R. § 825.303) The employer indicated that the attendance control policy would not be used to grant or deny FMLA leave, but would negate the application of § 825.302(d) to the policy. DOL disagreed, finding that the modified policy, if implemented, would violate FMLA notice provisions and would also interfere with an employee's FMLA rights, in violation of the law. DOL did offer the employer suggestions for managing FMLA intermittent leave provisions, noting that the law requires a demonstration that the medical treatment can best be accommodated through intermittent leave, requires employers and employees to

### *Transferring Employees Needing Intermittent or Reduced Schedule Leave*

An employer may temporarily transfer an employee needing foreseeable intermittent or reduced schedule leave to an available alternative position, with equivalent pay and benefits (though not necessarily equivalent duties) if the employee is qualified for the alternative job and the job better accommodates recurring absences.<sup>78</sup> The employer must place the employee in the same or an equivalent job upon return from leave.<sup>79</sup> Employers must not use transfers to discourage employees from taking leave (e.g., transferring an employee from the day shift to the graveyard shift).<sup>80</sup>

DOL, when issuing its interim final regulations, reiterated Congress' intent that the temporary transfer provisions offer flexibility to employers without harming employees (i.e., employees were guaranteed equivalent pay and benefits in the alternative position).<sup>81</sup> It is interesting to note that DOL articulated this intent to “do no harm,” even though the employee need not agree to the transfer, and no limitations applied to the type of position to which the employee could be transferred (e.g., a managerial employee could be transferred to a less senior position, provided that equivalent pay and benefits were offered).<sup>82</sup>

### *Scheduling That Does Not “Unduly Disrupt” Employer Operations*

An employee who is planning medical treatment must consult with his/her employer and make a reasonable effort to schedule the leave so as not to “unduly disrupt” the employer's operations.<sup>83</sup> If an employee neglects to consult with the employer, the employer may initiate the discussion.<sup>84</sup> Similarly, when an employee needs medically necessary intermittent or reduced schedule leave, the employer and employee must attempt to work out a schedule that meets the employee's needs without “unduly disrupting” the employer's business.<sup>85</sup> In both cases, the schedule is subject to health care provider approval.<sup>86</sup>

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attempt to work out a schedule that does not “unduly disrupt” the employer's operations, and permits the employee to transfer the employee needing intermittent leave to an alternative position that better accommodates recurring absences. *Id.*

<sup>78</sup> 29 C.F.R. § 825.204. Such transfers must comply with all applicable federal and state laws and collective bargaining agreements. 29 C.F.R. § 825.204(b). The regulations also provide examples of how an employer may alter existing positions and benefits and pay structures to permit such transfers. 29 C.F.R. § 825.204(c).

<sup>79</sup> 29 C.F.R. § 825.204(c).

<sup>80</sup> 29 C.F.R. § 825.204(d).

<sup>81</sup> 58 Fed. Reg. 31801.

<sup>82</sup> *Id.* Collective bargaining agreement provisions or other pertinent law like the Americans with Disabilities Act may impact the validity of such transfers. *Id.*

<sup>83</sup> 29 C.F.R. § 825.302(e).

<sup>84</sup> *Id.*

<sup>85</sup> 29 C.F.R. § 825.302(f).

<sup>86</sup> 29 C.F.R. § 825.302(e)&(f).

DOL acknowledged the operational concerns of employers regarding the “unduly disrupt” scheduling process.<sup>87</sup> Nonetheless, DOL found that health care providers, not employees, generally control the determination of the existence of the serious health condition (a prerequisite to FMLA leave), the timing of medical treatments and thus the leave schedule.<sup>88</sup> Given this, DOL concluded that denial or delay of intermittent leave would be inappropriate, unless a health care provider agreed to reschedule medical treatments for which intermittent leave was needed. In addition, while acknowledging the fact-specific nature of the test, DOL concluded that it would not be reasonable for an employer to request an employee to schedule planned medical treatments outside normal work hours when scheduling treatment during work hours would not “unduly disrupt” operations.<sup>89</sup>

### *FLSA Exempt Status*

The regulations permit an employer to “dock” the pay of exempt employees (those not eligible for overtime pay under federal law) when they take unpaid intermittent or reduced schedule FMLA leave without losing the employee’s exempt status under the Fair Labor Standards Act (FLSA).<sup>90</sup> In other words, employees who are not otherwise eligible for overtime pay will not become eligible (e.g., become “non-exempt” employees) simply because they take unpaid intermittent or reduced schedule leave under the FMLA and their paychecks are reduced for this unpaid time.<sup>91</sup> For FMLA-eligible, FLSA-exempt employees who take intermittent or reduced schedule leave, the employer need not keep a record of actual hours worked if the employer and employee agree in writing on the employee’s normal schedule of average hours worked each week and maintain this record.<sup>92</sup>

### *The Cases*

The courts have wrestled with the concepts of purpose and eligibility with respect to intermittent leave. The discussion below highlights some of the more litigated issues regarding intermittent leave.

#### ***1. For what purposes can an employee take intermittent leave or reduced schedule leave?***

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<sup>87</sup> 60 Fed. Reg. 2226.

<sup>88</sup> *Id.*

<sup>89</sup> 60 Fed. Reg. 2198, 2226.

<sup>90</sup> 29 C.F.R. § 825.206(a).

<sup>91</sup> Recently, DOL issued new regulations regarding exempt and non-exempt status. See 69 Fed. Reg. 22122 (April 23, 2004)

<sup>92</sup> 29 C.F.R. §§ 825.500(f) & 825.110. DOL clarified that while employers could “dock” the pay of FLSA-exempt employees without jeopardizing the employee’s exempt status under the FLSA, employers could not make such hourly deductions under other leave programs (e.g., state leave programs or the employer’s own internal leave policies) in the absence of FMLA applicability without losing the employee’s exemption. See 60 Fed. Reg. 2204.

Intermittent leave generally must be used for reasons related to serious health conditions.<sup>93</sup> In *Hodgens v. General Dynamics Corp.*, the First Circuit held that intermittent leave may be used for doctor visits to diagnose and/or to treat a serious health condition.<sup>94</sup> The court found this to be the case even if the intermittent absences occurred before the consecutive absences required for the FMLA entitlement (provided that the requirement for more than three consecutive days of incapacity under the definition of “serious health condition” was satisfied at some point).<sup>95</sup>

In *Hodgens*, an employee suffered from atrial fibrillation, but required numerous physician visits to make this diagnosis and rule out other serious diagnoses, such as angina.<sup>96</sup> The First Circuit explained:

It seems unlikely that Congress intended to punish people who are unlucky enough to develop new diseases, or to suffer serious symptoms for some period of time before the medical profession is able to diagnose the cause of the problem. Indeed, one reason for taking “intermittent leave” under the FMLA would be to visit the doctor for purposes of diagnosis and treatment, even if the employee does not take leave for the periods in between such visits. It would seem that Congress intended to include visits to a doctor when the employee has symptoms that are eventually diagnosed as constituting a serious health condition, even if, at the time of the initial medical appointments, the illness has not yet been diagnosed nor its degree of seriousness determined.<sup>97</sup>

In addition, as set forth in the chart below, several district courts have indicated that employees need not be completely incapacitated to take intermittent leave. Rather, the fact that an employee needs leave because he/she cannot perform a specific job does not preclude the employee from participating in other life activities like shopping, eating lunch or visiting bars while on intermittent leave. As a district court in Iowa stated: “The FMLA contains no requirement that an individual on intermittent medical leave must immediately return home, shut the blinds, and emerge only when prepared to return to work.”<sup>98</sup>

### Select cases where courts broadly construed purposes of intermittent leave

Cite & Issue	Ruling
<p><i>Jennings v. Mid-American Energy Co.</i>, 282 F.Supp.2d 954 (S.D. Iowa 2003)</p> <p>29 U.S.C. § 2612,14-15; 29 C.F.R. § 825.216(a)</p>	<p>Finding question of fact as to whether employee with autoimmune disorder and rheumatoid arthritis causing hands to swell and making it difficult to use her computer was using leave for intended purpose and was able to perform the functions of her job during the times she was seen engaging in ordinary activities (e.g., shopped, attended baby shower and was generally up and about) while on intermittent leave.</p> <p>Denied summary judgment for employer.</p>
<p><i>Sabbrese v. Lowe’s Home Centers, Inc.</i>, 2004 WL 126091 (W.D.</p>	<p>Finding leave taken by diabetic employee, who needed regular food intake to maintain his blood sugar level and was feeling faint and took a lunch break without notifying his supervisor, may qualify as protected intermittent leave under the FMLA.</p>

<sup>93</sup> 29 U.S.C. § 2612; 29 C.F.R. § 825.203.

<sup>94</sup> *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 163 (1<sup>st</sup> Cir. 1998).

<sup>95</sup> *Id.*

<sup>96</sup> 144 F.3d at 156.

<sup>97</sup> *Id.*

<sup>98</sup> *Jennings v. Mid-American Energy Co.*, 282 F.Supp.2d 954, 961-62 (S.D. Iowa 2003).

Pa. 2004) 29 U.S.C. § 2612; 29 C.F.R. §§ 825.302; 825.303 & 825.800	Denied summary judgment for employer.
<i>Brunelle v. Cyro Industries</i> , 225 F.Supp.2d 67 (D.Me 2002) 29 U.S.C. § 2601; 29 C.F.R. § 825.302	Finding intermittent leave was medically necessary because employee conducted bedside vigil and assisted in medical-decision making for ill father burned in a fire, and, though employee was seen at a bar that night drinking with friends when he was technically available to work, he had been at hospital all day without sleep and would have had to work a 12-hour evening shift; court noted: “It is a reasonable inference that, while he was able to unwind with friends, he was not prepared to work.”  Denied summary judgment for employer

## 2. What must an employee show to demonstrate that leave is medically necessary?

Under the FMLA, intermittent or reduced schedule leave must be medically necessary.<sup>99</sup> As set forth below, the courts have generally interpreted “medical necessity” broadly to include such things as an employee’s medical visits to diagnose a condition or an employee’s participation in medical decision-making for an ill family member.

### Select cases regarding medical necessity for intermittent leave

Cite and Issue	Ruling
<i>Haggard v. Levi Strauss</i> , 2001 U.S.App. LEXIS 9886 (8 <sup>th</sup> Cir. 2001) (unpub.)  29 U.S.C. § 2612; 29 C.F.R. § 825.203(b)	Finding intermittent leave must be medically necessary and is not available merely because a physician clears the employee to work half days; employee took leave following an automobile accident, and physician’s note did not explain the medical necessity.  Affirmed judgment for employer.
<i>Caldwell v. Holland of Texas, Inc.</i> , 208 F.3d 671 (8 <sup>th</sup> Cir. 2000)  29 U.S.C. § 2612	Finding intermittent leave allowed for leave spent consulting doctors.  Reversed and remanded grant of summary judgment for employer.
<i>Hodgens v. General Dynamics, Corp.</i> , 144 F.3d 151 (1 <sup>st</sup> Cir. 1998)  29 U.S.C. § 2611; 29 C.F.R. § 825.114	Finding FMLA intermittent leave protected employee for absences when they were necessary to diagnose employee’s serious health condition and caused employee to be unable to perform his job; employee’s claim failed because he did not show sufficient evidence for summary judgment.  Affirmed grant of summary judgment for employer, no remand.

<sup>99</sup> 29 U.S.C. § 2612(b)(1).

<p><i>Brunelle v. Cyro Industries</i>, 225 F.Supp.2d 67, 77 (D. Me 2002)</p> <p>29 U.S.C. § 2601; 29 C.F.R. § 825.302</p>	<p>Finding employee satisfied medical necessity requirement for intermittent leave when conducted bedside vigil at father’s hospital bed and assisted with medical decision-making; “without a doubt, he ‘provided care or psychological comfort to an immediate family member with a serious health condition.’”</p> <p>Denied summary judgment for employer.</p>
<p><i>Kaylor v. Fannin Regional Hosp., Inc.</i>, 946 F.Supp. 988 (N.D. Ga 1996)</p> <p>29 U.S.C. § 2612; 29 C.F.R. § 825.114</p>	<p>Finding employee failed to meet test when did not adequately show medical necessity for routine follow-up visit that doctor said was not an emergency but was needed to renew prescriptions and make sure no other issues existed, and employer could have functioned at job that day.</p> <p>Granted summary judgment for employer.</p>

**3. What notice is required for intermittent leave and what does the “unduly disrupt” standard offer employers?**

The FMLA requires employees to give notice of the *need* for intermittent leave, and employers to give notice of the *designation* of leave as FMLA-qualified intermittent leave.<sup>100</sup> Courts have sought to define what constitutes valid employee notice when the need for leave is intermittent, and what obligations the employer has with respect to designation and notice of intermittent FMLA leave.

**a. What notice of intermittent leave is required from the employee?**

The FMLA requires the employee to give notice of the need for intermittent leave only once, unless circumstances change.<sup>101</sup> Employees must also attempt to schedule leave so as not to “unduly disrupt” the employer’s business.<sup>102</sup> The courts have wrestled with what constitutes valid notice of intermittent leave.

For example, one district court found that an employee need not request intermittent leave for a specific day when she had approval to take intermittent leave for a defined period of time that included the day she was absent, even if the absence, though FMLA-qualifying, was for a reason that was unrelated to the reason underlying her request for intermittent leave.<sup>103</sup> As set forth below, some courts have allowed cases to go to trial when the notice provided was less than clear; others have not.

<sup>100</sup> 29 U.S.C. § 2612(e); 29 C.F.R. §§ 825.208, 825.302-308. In one case concerning overtime pay under the FLSA that happened to involve accounting for time taken as intermittent leave, the Ninth Circuit ruled that FMLA leave is protected, regardless of notice by employers or employees; the employee’s condition, not the notice, defines the leave. *Rowe v. Laidlaw Transit, Inc.*, 244 F.3d 1115 (9<sup>th</sup> Cir. 2001). See also Workplace Flexibility 2010, *Designation, Notice and Substitution of Leave Under the FMLA* (2004).

<sup>101</sup> 29 C.F.R. § 825.302(a).

<sup>102</sup> 29 U.S.C. § 2612(e); 29 C.F.R. §§ 825.117, 825.302(e)&(f).

<sup>103</sup> *Miller v. AT&T*, 83 F.Supp.2d 700 (S.D. W.Va. 2000)(employee with attendance issues requested intermittent leave from January 21 to April 21 to take her husband to eye appointments and also requested and was approved for four specific absences to receive her own injections; employee fired after absence related to side effects of injection on day that was not specifically approved for absence related to injections, but which fell within January to April intermittent leave period approved to take husband to eye

## Select cases on notice of need for intermittent leave

Cite & Issue	Ruling
<p><i>Whitaker v. Bosch Braking Systems Division Of Robert Bosch Corp.</i>, 180 F.Supp.2d 922 (W.D. Mich. 2001)</p> <p>29 U.S.C. § 2612(a)(1)(D); 29 C.F.R. § 825.307</p>	<p>Finding pregnant employee who obtained medical certification that she could not work overtime due to morning sickness complications was required to take short term disability leave when she refused overtime and sued for difference in wages/bonus between 40-hour week pay and disability pay; employer “should have understood” the reasons for work restrictions prohibiting overtime in medical certification and doctor’s notes (pregnancy was not compatible with standing for 8 hours a day) or should have sought clarification through FMLA procedures rather than denying leave on basis that pregnancy was not a serious health condition (essentially finding medical certification was notice).</p> <p>Granted summary judgment for employee.</p>
<p><i>Zawadowicz v. CVS Corp.</i>, 99 F.Supp.2d 518 (D.N.J. 2000)</p> <p>29 C.F.R. § 825.302(a).</p>	<p>Finding genuine issue of material fact as to whether approval for intermittent leave applied prospectively and whether employee gave sufficient notice of need for FMLA leave; employee who had taken leave for various reasons in the past was granted intermittent leave to care for wife with back injury; employee believed approval was prospective for up to 26 weeks under employer’s policies, reported absences to his supervisor via voicemail, but did not state when absences were to care for his wife or for other reasons, and did not provide medical certification despite employer’s request.</p> <p>Denied summary judgment for employer.</p>
<p><i>Rocky v. Columbia Lawnwood Regional Medical Center</i>, 54 F.Supp.2d 1159 (S.D. Fla. 1999)<sup>104</sup></p> <p>29 U.S.C. § 2612(e)(2)(A)&amp;(B)</p>	<p>Finding employee with performance problems did not provide evidence she gave the requisite notice for her absences although employee discussed son’s illness with her supervisor who told her employer would “work with” her regarding her need to take time off; court found that “...regardless of the Plaintiff’s subjective beliefs, no rational jury could conclude that the Plaintiff had received the Defendant’s permission to be absent or tardy whenever and as often as she desired.”</p> <p>Granted summary judgment for employer.</p>
<p><i>Mora v. ChemTronics, Inc.</i>, 16 F.Supp.2d 1192 (S.D. Cal. 1998)</p> <p>29 U.S.C. §§ 2612, 2615, 2619, 2625; 29 C.F.R. §§ 825.112, 825.208, 825.300, 825.301, 825.302, 825.303, 825.305 (Interim Regulations)</p>	<p>Finding employee notice of need to take time off to care for son suffering from complications from AIDS sufficient when he called company nurse and informed her that his son had been diagnosed with AIDS, had a high fever and that he was needed to care for his son; court noted that leave may be taken intermittently if care responsibilities are shared with other family members as here, when employee did not provide assistance in each daily task necessitated by disease, but was pillar of emotional and psychological strength for his son when he was the only biological parent.</p> <p>Denied partial summary judgment for employee and employer; granted employee’s motion to strike some of employer’s affirmative defenses.</p>

### *b. What notice is required from the employer?*

appointments; court held absence should have been approved under FMLA when it fell squarely within time period of request for intermittent leave).

<sup>104</sup> Distinguished on factual grounds by *Moore v. United Int’l Investigative Servs.*, 209 F.Supp.2d 611 (2002).

Importantly, several courts have addressed the interaction of intermittent leave with the FMLA’s requirements that the employer designate and give notice to the employee that the leave qualifies as FMLA leave. In *Ragsdale v. Wolverine World Wide*, the U.S. Supreme Court invalidated a categorical regulatory penalty that refused to count leave as FMLA leave until the employer notified the employee that the leave was FMLA leave.<sup>105</sup> The *Ragsdale* Court specifically recognized that the failure of an employer to designate leave as FMLA leave could unlawfully “interfere” with an employee’s exercise of the right to take intermittent leave (e.g., if an employee is not informed that leave qualifies as FMLA leave or that intermittent leave is available, and the employee does not take it, employee may suffer the harm of exhausting his/her FMLA leave entitlement prematurely).<sup>106</sup>

As set forth in the chart below, several district courts have applied the *Ragsdale* standard to require employees to show that they were harmed by the failure of their employers to give notice of FMLA leave or the availability of intermittent leave (e.g., by showing that they would have taken intermittent leave in order to avoid exhaustion of their FMLA leave entitlement). See also *Workplace Flexibility 2010, Notice, Designation, and Substitution of Leave Under the FMLA* (2004).

**Select cases regarding showing of harm from employer’s failure to designate FMLA intermittent leave**

Cite & Issue	Ruling
<p><i>Conoshenti v. Public Service Electric &amp; Gas Company</i>, 364 F.3d 135 (3<sup>rd</sup> Cir. 2004)</p> <p>29 U.S.C. § 2615(a)(1); 29 C.F.R. § 825.220(c)</p>	<p>Finding issue of fact may exist as to whether employee had been prejudiced by lack of notice that leave was FMLA qualified, and citing <i>Ragsdale</i> proposition that an employee might act differently if aware that leave could be taken intermittently; employee with discipline problems who was injured in car accident and was out initially for two weeks, then later for shoulder surgery, was never told that leave qualified as FMLA leave, but was urged to stay out until he was “100%”; later requested FMLA leave on advice of union so employer delayed termination; was terminated after return from leave of over 4 months for violations of Last Chance Agreement related to discipline issues.</p> <p>Denied summary judgment for employer.</p>
<p><i>Sims v. Schultze</i>, 305 F.Supp.2d 838 (N.D.Ill. 2004)</p> <p>29 U.S.C. § 2612; 29 C.F.R. § 825.208</p>	<p>Finding under <i>Ragsdale</i>, employee could attempt to prove prejudice suffered from employer’s failure to designate leave as FMLA leave by claiming that he may have availed himself of the intermittent leave option to avoid prematurely exhausting his FMLA 12-week leave entitlement if he had been notified earlier of the FMLA designation; police officer took sick leave for arthritis, requested and was granted FMLA leave and was terminated for taking more than 12 weeks of leave.</p> <p>Denied motion to dismiss by employer.</p>

<sup>105</sup> 535 U.S. 81 (2002).

<sup>106</sup> 535 U.S. at 89-90.

<p><i>Whitney v. Wal-mart Stores, Inc.</i>, 2003 U.S. Dist. LEXIS 22629 (D.Me. 2003)</p> <p>29 C.F.R. §§ 825.203, 825.208</p>	<p>Finding that remedy under 29 C.F.R. § 825.208(c), providing that if employer fails to timely designate leave as FMLA leave, leave prior to designation may not be counted against 12-week entitlement, was unavailable after <i>Ragsdale</i>, where court invalidated penalty provision associated with notice provision; employee with heart condition and injury from fall took medical leave and was restricted to working only 40 hours a week and was told could not continue as manager; employer claimed he was not told by supervisor that he could take leave on a reduced schedule basis and thus was forced to take FMLA leave that he did not require, prematurely exhausting his entitlement</p> <p>Denied employee's motion for summary judgment on issue of employer's failure to advise him of reduce or intermittent leave possibility resulting in premature exhaustion of FMLA leave. Granted employer's motion for summary judgment as to liability for supervisor and Wal-Mart, and as to relief sought, otherwise denied.</p>
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**Select cases regarding failure to show harm from employer's failure to designate FMLA intermittent leave**

<b>Cite &amp; Issue</b>	<b>Ruling</b>
<p><i>Smith v. Blue Dot Services Co.</i>, 283 F.Supp.2d 1200 (D.Kan. 2003)</p> <p>29 C.F.R. § 825.700(a)</p>	<p>Finding under <i>Ragsdale</i> that employee had no valid FMLA claim even if employer had not told him about availability of intermittent leave when employee had not shown he would have taken less leave or intermittent leave if offered; employee returned to work two weeks after end of FMLA leave taken for work-related injury.</p> <p>Granted summary judgment for employer.</p>
<p><i>Hanson v. The Sports Authority</i>, 256 F.Supp.2d 927 (W.D. Wis. 2003)</p> <p>29 U.S.C. § 2615(a)(1)</p>	<p>Finding employee who resigned managerial position to take part-time position and claimed she was not told she could take intermittent leave instead did not show that knowing about the availability of intermittent leave would have affected her decision to resign when she had typed up resignation letter prior to meeting with benefits specialist who told her of possibility of intermittent leave.</p> <p>Granted summary judgment for employer.</p>

***c. What must the employee do in scheduling leave in order to avoid “unduly disrupting” the employer’s operations?***

Few cases address the parameters of the “unduly disrupt” standard. As set forth below, district courts that have reviewed scheduling of leave for medical treatment have concluded, for example, that if an employee does not act in good faith, the employee’s actions “unduly disrupt” the employer’s business. In contrast, when circumstances beyond the employee’s control affect the scheduling of the medical treatment, the employer’s business is not “unduly disrupted.”

## Select cases regarding “unduly disrupt” standard

Cite and Issue	Ruling
<p><i>Hopson v. Quitman County Hospital and Nursing Home, Inc.</i>, 119 F.3d 363 (5<sup>th</sup> Cir. 1997)</p> <p>29 U.S.C. § 2612(e)(2); 29 C.F.R. § 825.302</p>	<p>Finding that a change in the employee’s insurance coverage (discontinuing coverage for the procedure she needed and had requested future leave for) was a change in circumstances that could “override the thirty day notice requirement”; employee had requested leave while waiting for approval from insurer for surgery.</p> <p>Reversed and remanded grant of summary judgment for employer.</p>
<p><i>Kaylor v. Fannin Regional Hospital, Inc.</i>, 946 F.Supp. 988 (N.D. Ga 1996)</p> <p>29 U.S.C. §§ 2612, 2613, 2614, 2615, 2617; 29 C.F.R. §§ 825.114, 825.117</p>	<p>Finding employee failed to meet FMLA’s requirements when employee made no effort to reschedule medical appointment when learned that hospital employer would be short-staffed without him, and misled employer about whether he would be at work on day of appointment.</p> <p>Granted summary judgment for employer.</p>

### 4. May employers transfer employees needing intermittent leave?

As set forth in the chart below, courts have also affirmed the regulatory requirement allowing employers to transfer employees needing intermittent leave to alternative positions that better accommodate recurring absences. Likewise, when the need for intermittent leave ends, courts have required the employer to reinstate the employee to his/her original (or an equivalent) position, unless the need for intermittent leave is permanent (in which case the employer may permanently transfer, rather than reinstate, the employee).

## Select cases regarding transferring employees to alternative positions

Cite & Issue	Ruling
<p><i>Covey v. Methodist Hospital of Dyersburg, Inc.</i>, 56 F.Supp.2d 965 (W.D.Tenn. 1999)</p> <p>29 U.S.C. § 2612; 29 C.F.R. §§ 825.204, 825.214</p>	<p>Finding no FMLA violation when employee was permanently restricted by doctor to a four day workweek due to multiple sclerosis and employer transferred her to a position better able to accommodate reduced schedule, even if employee considered the new job demeaning.</p> <p>Granted summary judgment for employer.</p>
<p><i>Green v. New Balance Athletic Shoe, Inc.</i>, 182 F.Supp.2d 128 (D.Me. 2002)</p> <p>29 U.S.C. §§ 2612, 2614, 2615; 29 C.F.R. §§ 825.204, 825.208</p>	<p>Finding FMLA not violated when employer forced employee to work in a reduced schedule position upon return from leave, rather than waiting for employee to request the alternative position, when evidence showed that the employee could not have worked in a full time position and employee was not harmed by employer’s action; genuine issue of material fact remained as to whether employee received equivalent pay while in alternative position.</p> <p>Denied summary judgment for employer.</p>

**5. What if an employee cannot perform the essential functions of a job when not on intermittent or reduced schedule leave?**

The Seventh and Eighth Circuits have ruled that an employee who cannot perform the essential functions of the job while at the job is not entitled to intermittent or reduced schedule leave. For example, in *Hatchett v. Philander Smith College*, a case of first impression on FMLA intermittent leave, an employee suffered neurological and psychological injuries after being hit by a falling skylight while on a business trip.<sup>107</sup> She initially took full-time leave because she could not perform some of her job functions while recovering.<sup>108</sup> After efforts to arrange a part-time schedule or different position failed, she sued her employer for failure to reinstate under the FMLA.<sup>109</sup> The Eighth Circuit found that the employee was not entitled to intermittent leave when she would not have been able to perform the essential functions of her job while at the job because of her neurological and physical injuries (rather than because of her inability to work a full-time schedule).<sup>110</sup>

The court relied on the legislative history of the FMLA that “demonstrated that the FMLA protects an employee who must leave work, or reduce his or her work schedule, for medical reasons, as long as that employee can perform the job while at work.”<sup>111</sup> The court also relied on the job restoration provisions of the FMLA.<sup>112</sup> These provisions provide that an employee is not entitled to job restoration after FMLA leave if he/she cannot perform the essential functions of the job, because the employee would then be receiving more than he/she would receive if he/she had not taken leave, in contravention of the FMLA’s intent.<sup>113</sup>

As set forth below, the Seventh and Eight Circuits have applied the essential functions test to limit the use of intermittent leave when an employee cannot perform essential functions of the job.<sup>114</sup>

**Select cases regarding employees unable to perform essential functions of their job**

Cite & Issue	Ruling
<p><i>Spangler v. Federal Home Loan Bank of Des Moines</i>, 278 F.3d 847 (8<sup>th</sup> Cir. 2002)</p> <p>29 U.S.C. § 2612(e)(2); 29 C.F.R. § 825.214(b); 825.302, 825.303</p>	<p>Finding genuine issue of material fact as to whether employee’s notice of need for FMLA leave was adequate when employee with attendance problems indicated absence was for “depression again” and employer knew of history of depression, but finding that the FMLA does not provide an employee suffering from depression with a right to “unscheduled and unpredictable, but cumulatively substantial, absences” or a right to “take unscheduled leave at a moment’s notice for the rest of her career” as such a situation “implies that she is not qualified for a position where reliable attendance is a bona fide requirement...”</p> <p>Denied summary judgment for employer.</p>

<sup>107</sup> *Hatchett v. Philander Smith College*, 251 F.3d 670, 673, 677 (8<sup>th</sup> Cir. 2001).

<sup>108</sup> 251 F.3d at 673.

<sup>109</sup> *Id.*

<sup>110</sup> 251 F.3d at 673, 677.

<sup>111</sup> 251 F.3d at 677.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*, citing S.Rep. 103-3 at p. 3, 29 U.S.C. § 2614, and 29 C.F.R. § 825.214.

<sup>114</sup> No other circuits have discussed “essential functions” in the context of the FMLA.

<p><i>Collins v. NTN-Bower Corp.</i>, 272 F.3d 1006 (7<sup>th</sup> Cir. 2001)</p> <p>29 U.S.C. § 2612; 29 C.F.R. §§825.302, 825.303</p>	<p>Finding employee’s notice she was “sick” for two days inadequate to put employer on notice of need for FMLA leave, when she did not mention her depression, which was only severe enough to require her to be absent less than 10% of her working days; court stated, “Courts have been reluctant to read the FMLA as allowing unscheduled and unpredictable, but cumulatively substantial absences, when the Americans with Disabilities Act protects only persons who over the long run are capable of working full time...Collins is not suffering from an acute condition that will improve with time off; instead she asserts a right to take unscheduled leave at a moment’s notice for the rest of her life. This implies that she is not qualified for a position where reliable attendance is a bona fide requirement, and a person not protected by the ADA may be discharged.”</p> <p>Granted summary judgment for employer.</p>
<p><i>Reynolds v. Phillips &amp; Temro Industries, Inc.</i>, 195 F.3d 411 (8<sup>th</sup> Cir. 1999)</p> <p>29 C.F.R. § 825.214</p>	<p>Finding that employee was not entitled to FMLA protection from termination when his back injury prevented him from doing the essential functions of the job (lifting) even one full year after his injury (noting that employee may have been entitled to intermittent leave, but calling it irrelevant when employee would have been unable to perform the essential functions of the job even with reduced hours).</p> <p>Granted summary judgment for employer.</p>
<p><i>Johnson v. Moundsvista, Inc.</i>, 2002 WL 2007833 (D.Minn. 2002)</p> <p>29 C.F.R. § 825.300(b), 825.500(g)</p>	<p>Finding genuine issue of fact as to whether employee waitress whose Hepatitis C caused often sudden, intermittent episodes of illness requiring her to miss shifts, often with little notice, was terminated for using FMLA leave; court noted, but did not decide, whether FMLA entitlement applies when employee’s need for intermittent leave is expected to extend indefinitely, and job requires attendance, citing <i>Spangler</i> and <i>Collins</i>.</p> <p>Denied motion to dismiss by employer.</p>

**6. What must an employee show to be eligible for intermittent leave?**

Finally, while the FMLA permits intermittent or reduced schedule leave, employees must, of course, still meet FMLA eligibility requirements for leave. These requirements include working 1250 hours in the 12-month period preceding FMLA leave.<sup>115</sup> Occasionally, employees are denied their FMLA claims because they fail to meet such eligibility criteria. For example, one district court found that an employee who was terminated for repeatedly missing work to take a child with cerebral palsy and microcephalia to therapy was not covered by the FMLA when her leave commenced because she had worked only 1009.3 hours in the preceding 12 months.<sup>116</sup>

A district court in Virginia has also held that to take intermittent leave an employee must establish eligibility only the first time he/she takes an absence pursuant to an intermittent leave plan, not each time he/she is absent.<sup>117</sup> In *Barron v. Runyon*, a postal worker with attendance issues was terminated following 14 absences, 12 of which were absences needed to care for his wife who had a back injury.<sup>118</sup> The court determined that FMLA

<sup>115</sup> 29 U.S.C. § 2611(2).

<sup>116</sup> *Carabello v. Puerto Rico Telephone, Inc.*, 178 F.Supp.2d 60 (D.P.R. 2001).

<sup>117</sup> *Barron v. Runyon*, 11 F.Supp.2d 676 (E.D. Va. 1998).

<sup>118</sup> *Id.*

eligibility must be determined on the date leave commences.<sup>119</sup> The court determined that the key issue was whether the term “leave” encompassed all absences that together make up a period of intermittent leave (making eligibility determinable upon the first absence only) or whether the term “leave” simply meant absence (making eligibility determinable each time the employee was absent for the same reason).<sup>120</sup> The court chose the former definition of leave, finding that:

Adopting this latter position would render the term *intermittent leave* meaningless, essentially reading it completely out of the statute . . . . Leave that is taken intermittently must, by definition, comprise periods in which the employee is absent from work and periods in which the employee is present at work. The term denotes, then, a single set of many separate, yet related absences. Were this not so, and if each absence were deemed a separate period of leave, then there would be no such thing as intermittent leave: an employee who was absent for numerous, separate periods of *continuous* leave each time he returned to and then left work. In no sense would such leave be “intermittent”; it would, instead, be several separate and distinct periods of *continuous* leave. Yet the Act clearly contemplates otherwise, as it provides for both types of leave . . . . Thus, a series of absences, separated by days during which the employee is at work, but all of which are taken for the same medical reason, subject to the same notice, and taken during the same twelve-month period, comprises one period of intermittent leave. From this it follows that plaintiff must establish his eligibility only on the occasion of the first absence, and not on the occasion of every absence thereafter . . . .<sup>121</sup>

The court relied on the statutory requirement that an employee’s FMLA entitlement not be reduced because the employee takes intermittent leave, as well as the regulatory definition of intermittent leave as “FMLA leave taken in separate blocks of time due to a single qualifying reason.”<sup>122</sup> The court noted that “the employer could not deny the employee continued intermittent FMLA leave based on his failure to work the requisite number of hours if the only reason the employee fell below the minimum-hours requirement was because he took leave to which he was statutorily entitled.”<sup>123</sup> Finally, the court dismissed the employer’s argument that the court’s result would allow an employee to take leave basically “forever” as long as the first time leave was taken the employee had worked the requisite 1250 hours.<sup>124</sup> The court found that fear unfounded

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<sup>119</sup> 11 F.Supp.2d at 680.

<sup>120</sup> *Id.*

<sup>121</sup> 11 F.Supp.2d at 681.

<sup>122</sup> *Id.* The court noted in a footnote that leave taken in blocks of time for *different* medical reasons would not constitute “intermittent leave” and dismissed the employer’s argument that this would be an absurd consequence of the court’s interpretation, finding it instead a natural result of application of the statute. *Id.* at 682-83. The court also found support by analogy under 29 C.F.R. § 825.110(f), which provides that if an employer is covered by the FMLA on the date an employee takes his first absence as part of a period of intermittent leave, the employer continues to be covered by the FMLA for that employee during the employee’s leave period even if the employer would not be covered if coverage were determined at some later point in the leave period.

<sup>123</sup> 11 F.Supp.2d at 681.

<sup>124</sup> 11 F.Supp.2d at 682-83.

when the statute limits the twelve weeks of leave to a twelve month period, not indefinitely.<sup>125</sup>

## **CONCLUSION**

Proponents of the FMLA wished to design a law that would adequately address the needs of employees whose serious health conditions required them to take leave in intermittent blocks of time or whose health condition meant that they were able to work only part-time. In addition, they wished to ensure that this same flexibility existed when employees had caregiving responsibilities for certain family members with similar serious health conditions.

To accomplish these goals, the FMLA expressly authorized intermittent leave and reduced schedule leave for individuals who need such leave for childbirth/adoption/foster care purposes, as well as for medical and family leave purposes as defined in this memo. For the latter group of purposes, the statute gives the employee the right to take such leave when medically necessary and does not condition such a right on the employer's prior approval. Rather, in order to protect the employer's management needs, the statute requires that employees notify their employer 30 days in advance of their taking such leave, and if the leave is for scheduled medical treatments, to schedule such treatments in a manner that does not "unduly disrupt" the employer's operation. In addition, the statute permits employers to transfer employees using such leaves to alternative positions that can better accommodate recurring leaves or part-time work.

The statute also provides that an employee taking intermittent leave or reduced schedule leave may be charged only for the actual amount of leave taken. Based on this statutory requirement, DOL has fashioned several rules regarding the manner and time frame in which intermittent leave may be taken.

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<sup>125</sup> *Id.*