



Q&A Session for “Managing Complex FMLA Issues”
Webcast Presentation
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1: Can you have intermittent leave for an absence plus treatment type serious health condition or for the overnight stay in a hospital health condition?

A: You can qualify for FMLA leave in either circumstance. Even if the overnight stay in the hospital is for less than three days, it qualifies, as would any periodic follow-up medical appointments.

2: What if the employee's appointment is only for two hours but takes the entire day off. Is there any recourse?

A: That might become a disciplinary situation if you authorize leave for two hours (based on the employee's request) and require the employee to return to work after the appointment but he or she does not do so. Before doing so, however, you should discuss with the employee why he or she did not return to work or call in (there could be a medical reason for this related to the condition for which the employee is entitled to intermittent leave).

3: Does this apply to exempt and nonexempt when counting increments of hours for leave?

A: Yes. Both exempt and nonexempt employees are entitled to intermittent leave and the amount of leave is calculated in the same manner for both groups of employees.

4: Does this apply even if company timesheets allow time off in 1/2 day (e.g. 4 or 5 hours) increments only?

A: Under the FMLA Regulations, an employer may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences, provided it is one hour or less. An employee can not be required to take more FMLA leave than necessary to address the circumstance that precipitated the need for the leave.

5: How can an employer determine if the employee was late due to an FMLA issue vs. a late bus?

A: This is one of the most difficult aspects of dealing with intermittent leaves, frankly. All you can do is require the appropriate medical certifications, enforce consistently your call-out and other attendance policies, and be alert to potentially fraudulent circumstances.

6: Can an exempt employee who goes on FMLA be converted to a non-exempt position when she returns from FMLA?

A: An employee who returns to work from an FMLA leave is entitled to be reinstated to the same or an “equivalent” position except in limited circumstances. A non-exempt position would not be deemed to be equivalent to the exempt position the employee was in before he/she went out on leave.

7: Did you say transfer to another shift is acceptable?

A: Yes, in some circumstances. Under the FMLA, an employer may transfer an employee to an alternative position to accommodate some intermittent or reduced schedule FMLA leaves. The alternative position must have equivalent pay and benefits. An employer may not transfer the employee to an alternative position in order to discourage the employee from taking leave. Thus, a day shift employee should not be reassigned to the “graveyard” shift. However, depending on the employer’s operation, it may be possible to transfer an employee to another shift without running afoul of this requirement.

8: How does intermittent leave tie into salary continuation?

A: FMLA leave is generally unpaid; however, in certain circumstances, either the employee can elect or the employer can require the employee to utilize vacation, sick and personal time during an FMLA leave. Also, FMLA leave runs concurrently with any employer-provided benefits, such as salary continuation and short-term disability benefits.

9: I didn't think you could deduct less than a full day for an exempt employee....or are you keeping track of the hours and when they reach a full day deduct at that time?

A: The FMLA explicitly permits an employer to reduce an exempt employee’s salary for partial day absences caused by FMLA leave.

10: What is the best way to maintain the time off so you have exact reporting on the rolling calendar?

A: There is no correct way to do this; however, at a minimum, it requires extensive communication between the first-line supervisors and those in HR who are responsible for tracking attendance as well as accurate recordkeeping.

11: Any suggestions on how to handle employees who claim an inability to work overtime because of a serious health condition - is this a reduced work week request under the FMLA?

A: This could be such a request, depending on the number of hours the employee typically works.

12: An employee's med certification indicates migraines, we request doctors to indicate frequency & duration but the doctor states it cannot be determined. What else can we do?

A: The employer's health care provider can contact the employee's doctor to obtain clarification if the certification is vague (with the employee's permission). If the employer has reason to doubt the validity of the medical certification, it can obtain a second opinion at its own expense. It can also require recertification no more often than every 30 days.

13: Can you also deduct hours from an employee's vacation bank for intermittent leave under the FMLA (for exempt and non-exempt)?

A: Yes, as long as you do not require the employee to take more FMLA time than is necessary.

14: We have an employee using intermittent leave. The doctor's certification states the employee needs approximately 2 days per month off for treatment. The employee takes several days a month. The employee has attendance issues. What can we do?

A: Again, this is a very difficult aspect of FMLA compliance. If the employee gives an FMLA-related reason for each absence, then you can't count them toward discipline under a no-fault policy. However, other non-FMLA absences can be dealt with in the same manner you ordinarily would. An intermittent FMLA leave does not give an employee "carte blanche" to take off whenever he/she wants; they still have to let the employer know whether a particular absence is related to the condition for which they have been granted intermittent FMLA leave.

15: For birth, adoption, etc - what is considered intermittent? Ex: employee was only available primary caretaker at birth for 4 weeks and then after 2 months for 3 weeks?

A: An employer does not have to grant intermittent leave for birth and adoption (except for pre-birth medical appointments and conditions). If the employer is willing to permit an employee to take leave intermittently following childbirth or adoption, it should reach an understanding with the employee about the schedule the employee will follow.

16: I am told that associates do not have to give exact reasons for the call in. Is this true? IE I am calling in sick due to stomach pain vs. I am taking an FMLA day.

A: An employee has to provide the employer with sufficient information from which the employer can determine if the absence qualifies for FMLA leave. Merely saying I have a stomach ache is most likely not sufficient. On the other hand, the employee does not have to use any special “magic words,” such as “I need FMLA leave” or “I’m taking an FMLA day.”

17: You mention chronicling the instances of tardiness that are not FMLA qualified. Is this for discipline purposes?

A: Yes.

18: An employee secures a doctor's note that provides for time off as needed for something like 'stress'. No treatments are involved. Is this intermittent leave - taken with no real notice - required under the FMLA?

A: If no ongoing treatment is involved, then the condition may not qualify as a “serious health condition” under the FMLA. The DOL Regulations at 29 CFR §825.114 should be reviewed carefully to determine if the employee in fact has a serious health condition.

19: Can an employee later come back and claim an FMLA incident if it is not originally requested? Once they have been written up?

A: Under the FMLA Regulations, an employee must give the employer at least 30 days advance notice before FMLA leave begins if the need for leave is foreseeable, based on a planned birth or adoption or planned medical treatment. If this is not possible, then the employee must provide notice as soon as practicable, which ordinarily means at least verbal notice to the employer within one or two business days after the need for leave became known to the employee. Thus, an employee who does not request leave can not come back weeks later (when discipline is about to be meted out) and claim for the first time that the earlier absences were FMLA-related.

20: Shouldn't FMLA approval be obtained before intermittent leaves can be taken?

A: See response to question 19 .

21: Section 825.204 seems to limit transfers to planned medical treatment situations or intermittent bonding leave. Do you agree?

A: Yes.

22: In regards to eligibility for FMLA - if your HR database does not track hours worked - can you base it off of the employee's employment status for the previous 12 months? EX: Set up to work 40 / hours a week for that time frame.

A: The amount of intermittent leave the employee takes has to be calculated based on the employee's normal schedule. Employers have an obligation under the FLSA to track the number of hours worked by non-exempt employees. For exempt employees, the employer can most likely calculate intermittent leave as a proportion of the employee's normal number of work days in a week (e.g. an employee who misses 1 day per week is utilizing 1/5 of a week of FMLA leave).

23: Some intermittent absences will be documented such as a doctor's appointment. What about those that can not be practically documented-ex. an employee stays at home to care for a child. It seems we must take the person at their word. Correct?

A: If the employee states that he/she is out on a particular day for a reason that is covered by the intermittent leave certification, the employer must accept that reason unless it has specific information suggesting that the employee is absent on that occasion for another reason.

24: If an exempt employee is on intermittent leave, can we deduct from their salary, when they leave during key business hours for doctors appointments even if in total they work 40 hours during the week?

A: No; you can only dock an employee for time not worked. If he/she makes up the time by working at other times, they have worked a full week and can not be docked.

25: Would you please tell us where Ragsdale stands?

A: In Ragsdale v. Wolverine Worldwide, Inc., the Supreme Court invalidated a DOL regulation that required an employer to provide an additional 12 weeks of FMLA leave as a penalty for its failure to provide an employee with individual notice that the employee's leave was being counted as FMLA leave. However, the Court did not invalidate the DOL's designation regulations, which require an employer to designate leave as FMLA leave. Thus, employer should still make sure they promulgate and follow policies and procedures that are designed to comply with the notice and designation requirements of the Act. There has also been an increase in the number of "estoppel" claims brought by

employees claiming that the employer has misled them about their eligibility for FMLA leave or otherwise prevented them from exercising their FMLA rights.

26: Does disability insurance approval from carrier qualify as medical certification?

A: It could if the employer chose to accept it as such. However, the standard under a disability insurance policy – for the purpose of receipt of benefits – is likely not the same (and likely is more stringent) as a “serious health condition” under the FMLA. An employer can and should require the employee to have his or her health care provider complete a specific FMLA certification form. An employer should not rely on decisions and actions of its disability insurance carrier to determine whether to approve and designate an employee’s time off from work as FMLA leave. FMLA compliance is the employer’s obligation.

27: What if the employee has submitted to the company maintaining the STD claim, is it acceptable they send us the required documentation that the company holding the STD claim has verses having their doctor fill out two forms?

A: See response to question 26.

28: Mike stated that a health care provider contacts the health care provider for certification clarification. Can you explain that?

A: Under the DOL Regulations, the employer is not permitted to contact the employee’s physician directly; it must be done by a health care provider representing the employer (e.g. an “in-house” corporate physician, a doctor associated with an occupational health facility under contract to the employer to conduct physicals and other services, or an independent physician retained for this purpose).

29: When the employer seeks clarification is a HIPAA compliant release from the employee necessary?

A: Clarification of a medical certification regarding the employee can only be sought with the employee’s permission. While a HIPAA compliant release is not required of the employer under the FMLA (and employers, as such, are not governed by HIPAA), the employee’s health care provider (who is governed by HIPAA) likely will not provide clarification information to any third party about the employee in the absence of a HIPAA compliant release signed by the employee. .

30: We have requested clarification in writing and had the employee hand-deliver the document to their doctor. Is this ok?

A: Assuming the clarification request is from a health care provider, this should be an acceptable procedure.

31: What if the med cert states "undetermined" as the duration? Can you ask for re-cert every 30 days then?

A: You can request certification no more frequently than every 30 days where the minimum duration of a leave is not more than 30 days. Therefore, in this type of situation, the employer could grant the leave for a 30-day period and require the employee to seek an extension shortly before that 30-day leave period expires by submitting an updated medical certification supporting the need for continued leave beyond the initial 30-day leave.

32: Can we require that the fitness for duty cert show that the employee has no restrictions?

A: No; you can only require that the employee be able to perform the essential functions of his/her position. ADA requirements still apply, of course, to this assessment; thus, a requirement that the employee return to work without restrictions is risky. You can, however, ask that upon the return to work, the employee present a medical note or certification that states (i) the date the employee is medically released to return to work and (ii) *if* any medical restrictions or limitations are necessary upon the employee's return *that the employer should accommodate*, a description of those restrictions or limitations and the time period they are required by the employer.

33: In reference to your information about Recertification . . . For all intermittent requests, in most cases, give a once a year expiration date. We then expire their Medical Certification, and request that they complete another Medical Certification form either at that time or within a certain time period of their next occurrence. Can we continue to do this process?

A: This is generally acceptable, as you are in essence requesting recertification on an annual basis.

34: When would you ask for a recertification when the FMLA certification states indefinite length of time for intermittent leave?

A: Again, in this circumstance, you generally have the right to do so every 30 days. See response to Question No. 31.

35: If the employer does not employ a health care provider, who is allowed to contact the employee's physician?

A: Any physician retained for this purpose by the employer.

35: Can you force FMLA users to take their vacation first before using sick time in cases where the company provides paid sick time?

A: You can do so only if the FMLA leave is unpaid; if the employer provides sick pay, then the leave is not unpaid and substitution (e.g. exhaustion) of vacation benefits is not appropriate.

36: Does morning sickness qualify under FMLA for intermittent leave?

A: Yes.

37: Did you say that CA allows such leave even to a newly hired employee, e.g. employee hired only one month could get 4 months leave?

The California Pregnancy/Childbirth Disability Act (“PCDA”) provides for a leave in the event that an employee is disabled or otherwise medically precluded from working due to pregnancy, childbirth or a related medical condition for up to 4 months (88 workdays) to the extent the employee is actually disabled or medically precluded from working. Unlike the FMLA, or the California counterpart to the FMLA – the California Family Rights Act (“CFRA”) – there is no employment tenure or service requirements for eligibility.

38: Is PCDA leave paid leave?

No, unless the employer provides paid leave to its similarly situated employees who are disabled or otherwise medically precluded from working for a reason unrelated to pregnancy, childbirth or a related medical condition

39: Can an employer set a policy that requires an employee to request FMLA when the employee is out sick for a certain amount of consecutive days?

A: It is preferable to have a policy or practice that inquires as to whether a particular absence may be covered by the FMLA once an employee has missed at least three consecutive days of work. Note, however, that to constitute a “serious health condition,” the three days of incapacity need not be consecutive workdays. Thus, an employee who is absent on a Friday and a Monday and is otherwise incapacitated during the weekend, may qualify. Employers should be proactive in designating FMLA leaves and thus sending tentative FMLA notice and an FMLA medical certification form to employees who are absent a certain number of consecutive days is a good practice. Remember that an employee does not have to specifically state “FMLA leave” in order to qualify and that even if the employee does not request FMLA leave, the employer has the duty to designate time off as FMLA if it meets the statutory and regulatory definitions of a “serious health condition.”

40: Where does the presumption of disability in CA (6 weeks after non c section, 8 weeks after c section) comes from? Regulations/caselaw?

Regulations under California's State Disability Insurance program ("SDI"). While not binding on an employer under the PCDA, it is a convenient guide and is consistent with generally accepted medical standards. If an employer wants, it can require the employee to provide medical certification of the employee's period of disability following actual birth.

41: Are the CA employees REQUIRED to complete applications to get the CFRA?

No, but the employer can require the employee to provide information regarding the reason for the employee's absence sufficient for the employer to determine if the absence is for a CFRA-qualifying reason.

42: But it needs to be a "registered" domestic partner, right?

Correct, just as a spouse needs to be a "licensed" spouse. Accordingly, an employer should not require proof of domestic partnership of its California employees for any leave or benefit purpose *unless* it also asks for proof of marriage of its California employees for such purposes. California law prohibits discrimination on the basis of marital and domestic partner status.

43: If an employee is taking intermittent leave and is eligible for 12 weeks....do you take 5 days x 12 weeks to give you the total number of days = 60 days total, which would translate into 480 hours?

44: How is "child bonding" defined?

We tend to use the phrase, "child bonding," to distinguish it from the other type of family care leave situation -- where the employee's absence is due to the need to provide care, comfort or support to an immediate family member with a serious health condition. The child bonding situation presumes that the child does not have a serious health condition, and the employee's time-off from work is simply to be with, nurture and interact with the child. "Child bonding" is not defined by the FMLA or by the CFRA.

45: Please address retroactive designation. For ex., employee is out on & off for 6 mos. for a "minor" condition that line manager does not think serious, so the mgr never refers employee to FMLA Coordinator. Legal is pulled in (perf. issue) sees FMLA clock not officially begun.

A: FMLA leave can not be designated retroactively. If the line manager is aware of the facts (e.g. the reasons the employee is absent), his/her ignorance of the law is no defense. This is why training of front-line managers on FMLA issues is so critical. Not designating time as FMLA gives an employee the best of both worlds—he/she gets the

protected time off under the FMLA and still retains the right to take 12 weeks of future FMLA leave.

46: We are a California employer and currently use the DOL Medical Certification Form to be completed when employees request FMLA leave. Is this acceptable?

Yes and no. You can use the DOL's form of medical certification, Form WH-380, with all of your US employees *except* for your California employees. For your California employees, you must remove item numbered 4 which asks the health care provider to describe the "medical facts" supporting the certification.

47: Is there a letter template to inform individuals that FMLA has ended & employment has terminated?

A: The initial notice of FMLA leave should inform the employee when the FMLA leave will expire. Toward the end of the leave, the employer could send out a reminder notice. Alternatively, the initial notice of FMLA leave could place the burden on the employee to seek additional leave time before the FMLA leave expires or to return to work upon expiration of the FMLA leave. Remember, though, that the ADA, state law and individual employer practices may prohibit the employer from automatically terminating an employee upon the expiration of the FMLA leave. Thus, consultation with counsel in any termination based on attendance issues is recommended.

48: Can you confirm how much bonding time is under CFRA?

The same amount of time available under the CFRA for medical disability and/or family care -- 12 weeks in any rolling 12-month period, unless the employee has already used all of his or her 12-week CFRA leave entitlement during that 12-month period.

49: How does the FMLA coincide, if at all, with a workers comp claim and the employee is unable to perform their job due to the job injury?

A: FMLA leave can and should run concurrently with a workers' compensation leave if the employee is FMLA-eligible based on tenure, service hours and work location. Once an employer is on notice of the workers' compensation injury and the need for leave, consideration should be given to whether the absence will also constitute an FMLA leave.

50: I have been advised that CFRA would start once an associate's disability ends. So, a CA associates may receive a total of 18 weeks of protected leave (6 weeks of FMLA while on STD) and then an additional 12 weeks under CFRA. Is this correct?

No, unless the 6 weeks of disability is due to pregnancy, childbirth or a related medical condition. In that case, the 6 weeks was PCDA leave. Because the CFRA excludes pregnancy, childbirth or a related medical condition as a serious health condition," the

CFRA-eligible employee would be entitled to take an additional 12 weeks of child bonding leave under the CFRA.

51: If an employee is on FMLA leave for his own SHC and is nearing the end of the 12 weeks, is it okay to send a request for information to determine the expected duration of the leave beyond the 12 weeks?

Yes. When the 12-weeks of FMLA leave expires, the employer must then consider whether, (i) under its written or unwritten policies and practices, the employee will grant additional leave for medical reasons, and (2) under the ADA and applicable state reasonable accommodation laws, additional time-off will need to be granted as a reasonable accommodation for a continuing physical or mental disability of the employee. In order to apply its policies, and to comply with its ADA obligation to engage in a good faith interactive process with the employee to determine reasonable accommodation such a request is appropriate and lawful.

52: So with a CA employee having a baby, they would receive 12 weeks FMLA then additional 6 weeks with CA paid leave?

Not necessarily. However, if you are assuming that the California employee is disabled due to pregnancy, childbirth or a related medical condition for 12 weeks, then that 12 weeks would count as concurrent PCDA and FMLA medical leave. During that 12 week period of disability, the employee could have received California State Disability Insurance (“SDI”) benefits, administered by the California Employment Development Department (“EDD”).

After that 12-week period of PCDA/FMLA leave ends, the employee could then take up to an additional 12-weeks off from work as a child bonding leave under the CFRA. During the period that employee is not working due to being (e.g. “bonding”) with her newborn, she could have received California State Paid Family Leave (“PFL”) benefits. Like CASDI, PFL benefits are administered by the EDD and both have waiting periods. Despite the name, Paid Family “Leave,” eligibility for or receipt of PFL benefits does not entitle the employee to be absent from work with any kind of job protection. The employee must be eligible under and be granted a leave under the CFRA in order to have the job protected leave.

53: Re intermittent leave taken hourly - What if you have a full time exempt person who usually works 10 hours a day, 50 hrs a week, if that person takes intermittent leave - is she entitled to 50 hours x 12, e.g., total of 600 hours?

A: As noted earlier, an employer can only dock an employee for time not worked. Thus, if the employee makes up the intermittent leave time by working at other times, they have worked a full week and can not be docked, nor should any time taken off work count as FMLA time. However, if an employee is not able to perform all of the essential functions of the job, in light of the intermittent leave, then our recommendation would be for the employer and the employee to discuss how much of the employee’s workload the

employee can not accomplish during the duration of the intermittent leave period so that the employee's failure to get the job done will not "count against" the employee for performance purposes and, instead, will "count as" use of FMLA leave.

54: Can the Employer require the employee to complete an application for CFRA?

A: See response to question 41.

55: Please speak to the termination of an ee, for legitimate performance concerns, which is on intermittent leave. For instance, if the employee was on a perf improvement plan prior to FM leave & leave continues during PIP (w/adjusted expectations). Risk mitigators?

A: An employee has no greater rights to reinstatement from an FMLA leave than if the employee had been continuously employed during the FMLA leave period. The employer must show that the employee would have been terminated even in the absence of the FMLA leave. The employer must take care not to consider any of the FMLA-protected absences in the termination decision. Employers considering the termination of an employee immediately following an FMLA leave should do so only in consultation with counsel.

56: Does CFRA cover fathers or (equivalents) for baby bonding time?

Yes.

64: I understand that the company cannot request a blanket recertification. What about open-ended intermittent leave? Can a certification cover multiple years or is it acceptable to request a re-certification on an annual basis?

A: Such an annual recertification is generally permissible assuming the employee is still taking intermittent leave at the time the recertification is requested.

57: Our employee must work 40 hours before earning overtime, should time taken for FMLA be considered time worked and therefore credited to the 40 hours required before overtime?

A: This is not legally required. FMLA leave is not counted as time worked for FLSA purposes.

58: Can you address the scenario where the employer has not eliminated or filled a position but the work has been absorbed while the employee is on leave? What obligation if any is there when employee returns? Should this be communicated to the employee before they return?

A: The employer has a legal obligation to reinstate the employee to his/her position or an equivalent position upon the return from FMLA leave. While employee has no

greater rights to reinstatement from an FMLA leave than if the employee had been continuously employed during the FMLA leave period, the employer must show that the employee would have been terminated even in the absence of the FMLA leave. Where the employer's decision is based in part on the fact that the operation didn't suffer during the employee's absence, the employer will most likely be unable to show that the same decision would have been made even if the employee had not taken FMLA leave.