



Welcome to the "Managing Complex FMLA Issues" webcast

- Please dial in to the audio portion, 866-469-3239.*
**The line will remain silent until we begin the presentation.*
- The Q&A tab is available to ask the panelists questions.
- All attendees will receive a copy of the presentation.



Managing Complex FMLA Issues

Michael J. Ossip, Sarah E. Bouchard and Karen H. Peteros



Introductory Remarks

Michael J. Ossip

Today's Topics

- Managing intermittent or reduced schedule leaves
- Medical certification issues
- Relationship of leave and benefit entitlements
- Overlap with California Family Rights and Pregnancy/Childbirth Disability Acts (PCDA)



Managing Intermittent or Reduced Schedule Leaves

Sarah E. Bouchard

Managing Intermittent or Reduced Schedule Leaves

Intermittent Leave Is Not for Everyone

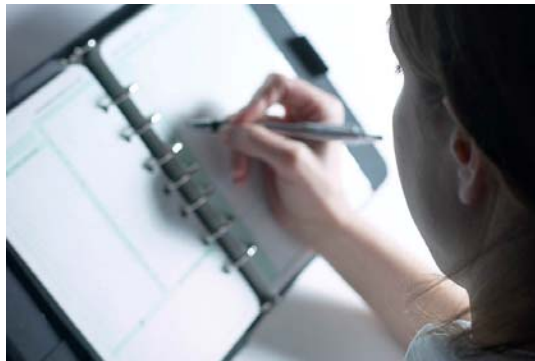
- Intermittent leave is only required when medically necessary for:
 1. Planned or unanticipated medical treatment;
 2. Recovery from treatment or serious health condition; or
 3. Providing care or psychological comfort to an immediate family member with a serious health condition.
- FMLA does not require an employer to grant intermittent leave for the birth or adoption of a child

Exception: Mother or child has a serious health condition; prenatal examinations

Managing Intermittent or Reduced Schedule Leaves

Scheduling Concerns

- There is generally no limit on the size of the increment of leave
(e.g. an employee can use two hours for a medical appointment; an employee cannot be required to take more FMLA leave than necessary).
- Only amount of leave actually taken can be counted toward 12 weeks of leave.
- Consistent recordkeeping is critical, particularly if an employee is subject to discipline for attendance.



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Managing Intermittent or Reduced Schedule Leaves

Considering a Transfer

- FMLA permits employers to transfer an employee to an alternative position with equivalent pay and benefits.

Note: Alternative position need not be equivalent in duties

- Flexibility in alternative duties does not mean that an employer can transfer an employee in an effort to discourage him or her from taking leave.

Managing Intermittent or Reduced Schedule Leaves

Making Pay Adjustments: Consistent Application Is Key

- FLSA-exempt employees paid on a salary basis
- FLSA-nonexempt employees paid on a fluctuating-workweek basis
- Exception limited to FMLA leave



Managing Intermittent or Reduced Schedule Leaves

Ability to Require Proof or Need for Reduced Schedule Leave

- Generally, employers cannot ask for additional information from an employee's healthcare provider once a complete certification is submitted.
- Abuse can occur if employees state that they are visiting doctors, therapists, etc., when in fact they are not.
- We recommend a neutral policy that requires notes documenting all healthcare provider visits.
- Policy must extend to non-FMLA absences as well.
- Cannot force an individual to go to the doctor to obtain a note for an absence where no visit is required.



Medical Certification Issues

Michael J. Ossip

Medical Certification Issues

Consequences for Failing to Comply

Employee

Courts have upheld discharge where employee has failed to provide requested notice.

- employee has 15 calendar days to submit; or
- at least one reminder to employee prior to discharge is recommended.

Employer

Courts have deemed absences to be FMLA-qualifying and not subject to attendance management where an employer is on notice of FMLA-qualifying illness and fails to designate.

Recommendation: Any discharge based solely on attendance issues should be reviewed carefully for FMLA compliance.

Medical Certification Issues

Initial Certification and Content

- The employer is entitled to seek clarification of an initial certification that is ambiguous and confusing.

Example: Employee suffers from diabetes and requests intermittent leave due to fatigue and poor circulation. Physician stated that leave could range from one-half day to one week and that expected episodes of incapacity could range from one to four days during each week.

- Court held that employer was justified in requesting clarification on the amount of time required for intermittent leave. *Rutschke v. Northwest Airlines, Inc.* (D. Minn. 2005).
- How can clarification be obtained?

Medical Certification Issues

Recertification

- “Blanket” recertification requirements may violate FMLA.

Example: Employee’s physician certified the need for intermittent leave for a period in excess of 90 days. Employer’s policy required an employee on intermittent leave to recertify the qualifying medical condition every 90 days.

- Court held that the employer’s “blanket” certification process did not comply with the regulations concerning recertification. *Harcourt v. Cincinnati Bell Telephone Co.* (S.D. Ohio 2005).



Medical Certification Issues

Recertification for Intermittent Leave Is Appropriate When . . .

- the minimum period listed on the certification has expired;
- the employee requests an extension of intermittent leave;
- circumstances described by the previous certification have changed significantly; or
- the employer receives information that casts doubt on the continuing validity of the certification.

Medical Certification Issues

Recertification Can Help You Police FMLA Abuse

Examples:

- *Patterned absences (Monday/Friday; end of the month)*
- *Intermittent leave starts occurring more frequently after employee is placed on a performance management plan.*



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Medical Certification Issues

Fitness-for-Duty Certifications

- An employer may have a uniformly applied policy that requires all similarly situated employees who take leave to obtain and present certification that the employee is able to resume work.
- Certification need only be a simple statement of an employee's ability to return to work.
- Employer may only seek fitness-for-duty certification of the particular health condition that caused the need for FMLA leave. No additional information can be requested.

Medical Certification Issues

Fitness-for-Duty Certifications (continued)

- A healthcare provider employed by the employer may ask the employee's physician for clarification of the employee's fitness to return to work.
- The initial notice to employees regarding their FMLA rights must advise the employee if a fitness-for-duty certification will be required for return to work.
- NO SECOND OR THIRD FITNESS-FOR-DUTY CERTIFICATIONS CAN BE REQUIRED.
- NO FITNESS-FOR-DUTY CERTIFICATION IS PERMITTED WHEN THE EMPLOYEE TAKES INTERMITTENT LEAVE.

Medical Certification Issues

Special Return-to-Work Rules Arising from Collective Bargaining Agreement

- A collective bargaining agreement can impose more burdensome return-to-work requirements than are permitted under the FMLA.

Example: Employer's return-to-work certification requires the employee to submit medical documentation outlining nature and treatment of illness, including dates the employee was unable to work and any medicines the employee was taking.

- Court determined that because these requirements were contained in a collective bargaining agreement, they did not violate the FMLA. *Harrell v. United States Postal Serv.* (7th Cir. 2006) (after rehearing en banc).



Relationship of Leave and Benefit Entitlements

Karen Peteros

Relationship of Leaves and Benefit Entitlements

Entitlement to an FMLA Leave Results In:

- Entitlement to be absent from work
- Entitlement to continue group health benefit plan coverage during the FMLA leave under same terms as if actively working

Note: *Entitlement to a paid time-off (PTO) benefit or to receipt of a wage-replacement benefit does not automatically result in a FMLA leave entitlement.*

Relationship of Leaves and Benefit Entitlements

Why Distinction Is Important . . .

- Eligibility standards may be similar but are not the same
- Erroneous or gratuitous designation of an absence as a FMLA leave when the employee is not FMLA-eligible cannot be a basis to deny an FMLA leave if the employee is later FMLA-eligible (i.e. during the same 12 months)
- Failure to designate and treat an absence in accordance with the FMLA can result in:
 - In advertent violation of FMLA
 - Entitlement to additional time off under FMLA

Sources of Confusion

“Substitute” Paid Leave Entitlements for FMLA Leave

- Means use of PTO benefits or receipt of wage-replacement benefits during a FMLA leave
- Employee must be independently eligible for FMLA leave under FMLA standards
- Employee must be independently eligible for use of the PTO benefit or receipt of the wage-replacement benefit under the terms of the governing personnel policy, insurance policy or benefit plan



Overlap with California Family Rights and Pregnancy/Childbirth Disability Acts (PCDA)

Karen Peteros

California Pregnancy/Childbirth Disability Act (CA PCDA) Leaves

Covered Employers:

Those with five or more employees

Covered Employees:

- Regular and temporary, full-time and part-time
- No employment tenure requirement
- No service hours requirement
- No worksite requirement
- No key employee provision



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CA PCDA Leaves

Qualifying Reasons:

- Employee is unable to work because of disability due to pregnancy, childbirth or a related medical condition.
- Needed time off for prenatal care, and inability to work due to morning sickness.

Medical Certifications & Recertifications:

- Employer may require certification if certification is required for medical disability due to non-PCDA reasons.
- Recertification upon expiration of original certification
- See CFRA medical certification standard.

CA PCDA Leaves

How Long?

- Up to four months (or 88 work days for full-time employee) to the extent *actually* disabled from working due to pregnancy, childbirth or a related medical condition.
- Presumption of disability:
 - Four weeks before due date,
 - Six weeks after non-C-section birth, and
 - Eight weeks after birth by C-section.
- Can be taken on an intermittent or reduced schedule/part-time basis.
- Can transfer employee to position that can better accommodate intermittent or reduced schedule/part-time absences.

CA PCDA Leaves

Relationship to FMLA Leaves:

PCDA leave will run concurrently with FMLA medical leave if employer designates the PCDA leave also as an FMLA medical leave.

CA PCDA Leaves

Unpaid Unless:

- Employer requires use of accrued paid sick time.
- Employee elects to use accrued paid vacation time or PTO.
- Employer has a policy or practice of continuing pay to employees medically disabled from working due to non-PCD reasons.

CA PCDA Leaves

Employee May Apply for CA State Disability Insurance (SDI) Benefits

- Employee applies to the CA Employment Development Department (“EDD”)
- Funded entirely by tax deduction from employees’ wages; employers do not contribute to SDI Fund

Employee May Apply for Wage-Replacement Benefits Under:

- Employer-sponsored group STD insurance plan
- Employer-provided pay-continuation program/policy

CA PCDA Leaves

Benefits Are Not Required Unless:

- PCDA leave is intermittent or reduced schedule/part-time such that employee continues work and meet benefit eligibility requirements;
- Employer has a policy or practice of continuing any or all employer-sponsored benefits to employees medically disabled from working due to non-PCD reasons; or
- Employee is eligible and employer designates PCDA leave also as an FMLA medical leave.



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CA PCDA Leaves

Upon Expiration of PCDA Leave \leq Four Months, Employee Is Entitled to Be Reinstated to:

- Former position, or
- Employment in a comparable position that is available (within 10 working days after RTW date) and for which the employee is qualified, if her former position has been eliminated

Note: Employee has no greater rights to reinstatement to another job than if employee had not been on PCDA leave.

California Family Rights Act (CFRA) Leaves

Covered Employers:

Same as FMLA

Covered Employees:

Same as FMLA

Qualifying Reasons:

Same as FMLA with some exceptions

Medical Certifications:

Same as FMLA with some exceptions

Designation:

Must give notice to employee of CFRA designation

Reinstatement Rights:

Same as FMLA



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CFRA Leaves

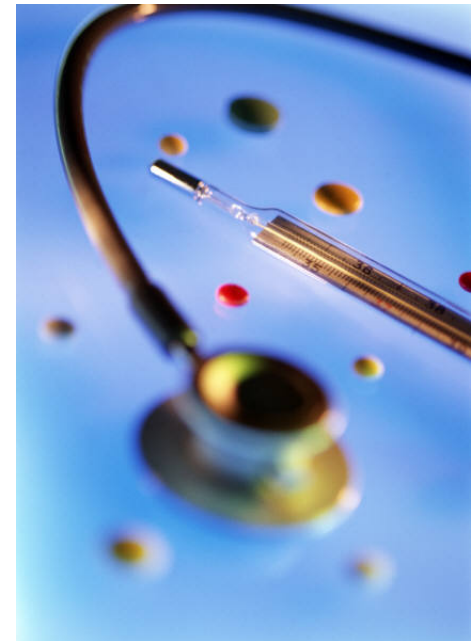
Qualifying Reason Differences from FMLA:

- **Medical:** Employee's own disability due to pregnancy, childbirth or related medical condition that is *not* a "serious medical condition"
- **Child Bonding:** Covers child of domestic partner
- **Family Care:** Covers domestic partner and child of domestic partner

CFRA Leaves

Medical Certification

- Employer can use same medical certification form as under FMLA except ***cannot*** ask for diagnosis
- If medical certification of need for family care leave is “sufficient,” it must be accepted; employer cannot request second opinion



CFRA Leaves

How Long?

- **All CFRA leaves:**
 - Same total time as FMLA - up to 12 weeks during 12-month period
- **CFRA Medical and Family Care** leave intervals:
 - Same as FMLA
- **Child Bonding** leave intervals are different than FMLA:
 - Must be taken for periods of at least two weeks
 - Can be taken for periods < two weeks on two occasions
 - Employer can agree otherwise

CFRA Leaves

CFRA Leaves Will Run Concurrently with FMLA Leaves *Except*:

- If **Medical** leave is due to employee's pregnancy, childbirth or related medical condition
- If **Family Care** or **Child Bonding** leave pertains to:
 - domestic partner
 - child of domestic partner

CFRA Leaves Will *Never* Run Concurrent With PCDA Leaves

CFRA Leaves

Unpaid Unless:

- Employer requires use of accrued paid sick time (Medical or Family Care)
- Employer requires use of accrued paid vacation time or PTO
- Employee elects to use these benefits even if not required to do so by the employer

CFRA Leaves

For Medical Leaves Employee May Apply for:

- CA state-sponsored SDI benefits through the CA EDD, and/or
- Employer-sponsored benefits:
 - STD insurance plan, or
 - Employer-provided pay-continuation program or policy

CFRA Leaves

For Family Care and Child Bonding Leaves Employee May Apply For:

- CA state-sponsored **Paid Family Leave (PFL)** benefits through the CA EDD
 - Funded entirely by tax deduction from employees' wages; employers do not contribute
 - Provides up to six weeks of partial-wage-replacement benefits (now, up to \$840/wk) to employees who are unable to work due to family care or child bonding reasons

CFRA Leaves

Benefits:

- **All CFRA Leaves:** Continue benefits same as under FMLA
- **CFRA Exception:** Employer is only required to continue group health plan coverage for total of 12 weeks for all FMLA and CFRA leaves within applicable 12-month period

FMLA – PCDA - CFRA Leaves

Examples:

- **CA Employee #1:** Employee is not FMLA/CFRA-eligible. Employee is disabled from working due to pregnancy before delivery (eight weeks) and due to C-section delivery (eight weeks), for a total of approximately four months.
- **CA Employee #2:** Same as Employee #1 except is FMLA/CFRA-eligible.

FMLA – CFRA – PCDA Leaves

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
EMPLOYEE #1 * <u>PCDA</u> : 6 wks - 4 mos											
EMPLOYEE #2 * <u>PCDA</u> : 6 wks - 4 mos * <u>FMLA Medical</u> : 12 wks				EMPLOYEE #2 * <u>CFRA Child Bonding</u> : 12 wks							

FMLA – PCDA - CFRA Leaves

Examples:

- **CA Employee #3:** Employee is FMLA/CFRA-eligible. Employee takes 12 weeks of child bonding leave in connection with birth of child by domestic partner (CFRA) and, within same 12-month period, also takes 12 weeks of medical leave due to a work-related injury (FMLA).
- **CA Employee #4:** Employee is FMLA/CFRA-eligible. Employee takes 12 weeks of medical leave due to non-PCD medical reason (FMLA/CFRA). Will not be eligible for family care or child bonding leave within next 12 months.

FMLA – CFRA – PCDA Leaves

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
EMPLOYEE #3 *CFRA Child Bonding: 12 wks							EMPLOYEE #3 *FMLA Medical: 12 wks				
EMPLOYEE #4 *FMLA/CFRA Medical: 12 wks											

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