

MANAGING LEAVES

ADDITIONAL Q&As



The following are Q&A related to this session. For additional information please contact the Total Compensation & Wellness office or visit the U.S. Department of Labor website at www.dol.gov

Q: What if there are additional criteria I believe should be looked at when determining which leaves to recertify?

A: Consult your Implementation Expert or Account Manager about Special Processes

Q: What do I do if I believe an Employee is abusing his/her leave?

A: Notify your account Manager and we will have an Tracking Intermittent Leave Expert review the Employee's leave

Q: What will happen to the Employee's leave if the new certification is less allowance than the previous one?

A: Time taken in the past will remain protected, but time taken in the future will be unprotected if it exceeds the approved time recertified.

Q: What if the Employee is out of FMLA (based on Union contract)?

A: The leave of absence is no longer covered by FMLA. Follow the union contract and contact Labor Relations regarding leave issues.

Q: Does the Employee have to give notice of an appointment?

A: An Employee must provide notice to WSU with at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable. If unable, give notice as soon as practicable. For planned medical treatment the Employee must consult with the employer and try to schedule the appointment at a time that minimizes the disruption to the employer.

Q: How can I verify if my Employee has an appointment?

A: Although you cannot require or request appointment cards you can verbally ask for appointment times/dates for foreseeable leaves.

Q: Is applying for FMLA required when an Employee is out sick for more than 3 days?

A: No

Q: How do I handle tenured Employees (AAUP)?

A: A tenure Employee is protected. Review the contract for specifics regarding leave requests.

Q: Can we use intermittent leave for more than what it is approved via FMLASource?

A: Intermittent leaves are usually for time off due to episodes (unplanned) or appointment/treatment (usually planned) and very specific to individuals. So the exact duration and use of Intermittent Leave is not predictable. The medical certification timeframe is a guideline, as no one size will fit all scenarios.

Q: What happens when their FMLA time exhausts, but they have medical documentation to extend the duration of a continuous leave?

A: The Employee must forward documentation to FMLASource to update their leave.

Q: How do I handle illness time and vacation banks once the Employee's FMLA expires?

Q: Does workers' compensation leave count against an Employee's FMLA leave entitlement?

A: It can. FMLA leave and workers' compensation leave can run together, provided the reason for the absence is due to a qualifying serious illness or injury and the employer properly notifies the Employee in writing that the leave will be counted as FMLA leave.

Q: Can the employer count time on maternity leave or pregnancy disability leave as FMLA leave?

A: Yes. Pregnancy disability leave or maternity leave for the birth of a child would be considered qualifying FMLA leave for a serious health condition and may be counted in the 12 weeks of leave so long as the employer properly notifies the Employee in writing of the designation.

Q: Does the Employee have to provide medical records for leave due to a serious health condition?

No. Employees do not have to provide medical records. The Manager/Supervisor may, however, request that, for any leave taken due to a serious health condition, you provide a medical certification confirming that a serious health condition exists.

Q. Is an Employee required to follow an employer's normal call-in procedures when taking FMLA leave?

A. Yes. Under the regulations, an Employee must comply with an employer's call-in procedures unless unusual circumstances prevent the Employee from doing so (in which case the Employee must provide notice as soon as he or she can practicably do so). The regulations make clear that, if the Employee fails to provide timely notice, he or she may have the FMLA leave request delayed or denied and may be subject to whatever discipline the employer's rules provide.

Sam has a medical certification on file with his employer for his chronic serious health condition, migraine headaches. He is unable to report to work at the start of his shift due to a migraine and needs to take unforeseeable FMLA leave. He follows his employer's absence call-in procedure to timely notify his employer about his need for leave. Sam has provided his employer with appropriate notice.

Certification of Need for FMLA Leave

Q. Do I have to give my employer my medical records for leave due to a serious health condition?

A. No. An Employee is not required to give the employer his or her medical records. The employer, however, does have a statutory right to request that an Employee provide medical certification containing sufficient medical facts to establish that a serious health condition exists.

Q. What if I do not want my employer to know about my medical condition?

A. If an employer requests it, an Employee is required to provide a complete and sufficient medical certification in order to take FMLA-protected leave due to a serious health condition.

Q. May my employer contact my health care provider about my serious health condition?

A: The regulations clarify that contact between an employer and an Employee's health care provider must comply with the Health Insurance Portability and Accountability Act (HIPAA) privacy regulations. Under the regulations, employers may contact an Employee's health care provider for authentication or clarification of the medical certification by using a health care provider, a human resource professional, a leave administrator, or a management official. In order to address Employee privacy concerns, the rule makes clear that in no case may the Employee's direct Supervisor contact the Employee's health care provider. In order for an Employee's

HIPAA-covered health care provider to provide an employer with individually-identifiable health information, the Employee will need to provide the health care provider with a written authorization allowing the health care provider to disclose such information to the employer. Employers may not ask the health care provider for additional information beyond that contained on the medical certification form.

Q. Can employers require Employees to submit a fitness-for-duty certification before returning to work after being absent due to a serious health condition?

A. Yes. As a condition of restoring an Employee who was absent on FMLA leave due to the Employee's own serious health condition, an employer may have a uniformly applied policy or practice that requires all similarly situated Employees who take leave for such conditions to submit a certification from the Employee's own health care provider that the Employee is able to resume work. Under the regulations, an employer may require that the fitness-for-duty certification address the Employee's ability to perform the essential functions of the position if the employer has appropriately notified the Employee that this information will be required and has provided a list of essential functions. Additionally, an employer may require a fitness-for-duty certification up to once every 30 days for an Employee taking intermittent or reduced schedule FMLA leave if reasonable safety concerns exist regarding the Employee's ability to perform his or her duties based on the condition for which leave was taken.

Q. What happens if I do not submit a requested medical or fitness-for-duty certification?

A. If an Employee fails to timely submit a properly requested medical certification (absent sufficient explanation of the delay), FMLA protection for the leave may be delayed or denied. If the Employee never provides the certification, he or she may be denied reinstatement.

Q: What does *in loco parentis* mean under FMLA?

A: *In loco parentis* is commonly understood to refer to a relationship in which a person has put himself or herself in the situation of a parent by assuming and discharging the obligations of a parent to a child with whom he or she has no legal or biological connection. It exists when an individual intends to take on the role of a parent. Under the FMLA, persons who are *in loco parentis* include those with day-to-day responsibilities to care for or financially support a child. Courts have indicated some factors to be considered in determining *in loco parentis* status include:

- the age of the child;
- the degree to which the child is dependent on the person;
- the amount of financial support, if any, provided; and
- the extent to which duties commonly associated with parenthood are exercised.

The fact that a child has a biological parent in the home, or has both a mother and a father, does not prevent an Employee from standing *in loco parentis* to that child. The FMLA does not restrict the number of parents a child may have. The specific facts of each situation will determine whether an Employee stands *in loco parentis* to a child. Examples of situations in which FMLA leave may be based on an *in loco parentis* relationship include:

- A grandfather may take leave to care for a grandchild whom he has assumed ongoing responsibility for raising if the child has a serious health condition.
- An aunt who assumes responsibility for caring for a child after the death of the child's parents may take leave to care for the child if the child has a serious health condition.

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- A person who will co-parent a same-sex partner's biological child may take leave for the birth of the child and for bonding.

Q: What may be required to document an *in loco parentis* relationship?

A: The employer's right to documentation of family relationship is the same for an individual who asserts an *in loco parentis* relationship as it is for a biological, adoptive, foster or step parent. Such documentation may take the form of a simple statement asserting the relationship. For an individual who stands *in loco parentis* to a child, such statement may include, for example, the name of the child and a statement of the Employee's *in loco parentis* relationship to the child. An Employee should provide sufficient information to make the employer aware of the *in loco parentis* relationship.

Q: Can we dock the pay of an exempt worker under FMLA intermittent leave?

A: Yes. Just as you'd dock the pay if they took FMLA leave, you can dock pay for FMLA intermittent leave. Just remember that the leave doesn't affect someone's exempt status. You may also change how you calculate certain benefits, such as accruing vacation time at a reduced rate. You may not touch medical insurance benefits, however. Can we ask exempt workers to surrender vacation time? If your company has a policy that someone must first use up all paid time off before using FMLA intermittent leave, then HR may require workers to surrender vacation time first. If you don't have such a policy, then under the FMLA it's up to the Employee to count the time. If workers come back early from FMLA intermittent leave, how do we count the time? Say a worker asks for three hours of FMLA intermittent leave, but only takes two and comes back an hour early. Can you count all three hours as leave? No, you can't require someone to take more FMLA intermittent leave time than they need. Teplinsky also says as a practical matter, it's probably not a good idea to discourage workers from returning to work early. - See more at: <http://rapidlearninginstitute.com/hric/intermittent-fmla-questions/#sthash.aaCM3L48.dpuf>

Q: Should we allow FMLA intermittent leave for migraine headaches?

A: Yes. While, chronic migraines are debilitating, they're also near the top of the list of FMLA intermittent leave abuse. The key to abuse-prevention: Remember that your company approves the FMLA intermittent leave certification, not the doctor, Teplinsky said. Get good, detailed info. Don't let the doctor get by with checking off the cryptic boxes on the DOL Internet form: "no duration," "intermittent," and "as needed." Instead, ask for details on the severity, the duration of the illness, the limitations, the effects on the job, and when FMLA intermittent leave will be needed. Then you can evaluate if people can work, how much, and when they can't. These details will help you weed out FMLA intermittent leave abusers. Note: You can ask for re-certifications every 30 days at the Employee's expense, and even more often if medical circumstances change or you have a good reason to suspect abuse. Good reasons would include a pattern of taking leave on Fridays and Mondays. Be wary of singling people out, however: That can look like retaliation. The key is to have a policy that's consistently enforced. - See more at: <http://rapidlearninginstitute.com/hric/intermittent-fmla-questions/#sthash.mmlth14q.dpuf>

Q: Is a doctor's care required for FMLA intermittent leave?

A: Yes. Here is a "tough-luck" scenario that illustrates the point. Two parents stay home with sick children. One child has a cold. The other child has an ear infection and is taking prescribed medicine. The first parent is ineligible for FMLA leave and the second one is eligible. Reason: The second child is under a doctor's care. - See more at: <http://rapidlearninginstitute.com/hric/intermittent-fmla-questions/#sthash.aaCM3L48.dpuf>

Q: What happens if we don't ask for re-certifications?

A: Your problems could snowball. Case in point: HR Managers at a Chicago business found 250 of 500 dock workers had certifications for FMLA intermittent leave, mostly for hard-to-disprove conditions: chronic migraines, back pain and soft-tissue injuries. Not only was the number of workers suspiciously high, but the certifications came from the same two doctors. The calendar told a story, too. Scheduling was a nightmare on Fridays, Mondays, and before or after holidays. HR saw the problem as temptation. By approving so many leave requests and not managing the certifications closely, HR had sent the wrong message. The solution: Re-certifications every 30 days. The union had to pay for the certifications, and the doctor's bills took their toll. Most requests for FMLA intermittent leave stopped, except for the few with legitimate medical issues. - See more at: <http://rapidlearninginstitute.com/hric/intermittent-fmla-questions/#sthash.aacM3L48.dpuf>

Q: An Employee needs follow-up treatments after surgery and asks to take intermittent FMLA — every other Friday afternoon. Do we need to let her leave early?

A: For the most part, the answer is yes but you do have some options. After you get her medical certification, you can ask for a second opinion to make sure she really needs leave. Then, ask if there's any reason she needs to get treated on Fridays — and have her give you verification from her doctor. If there's no medical reason to take leave at those times, you're allowed to ask her to schedule the treatments after work or on other days.

Q: We have an Employee on intermittent FMLA. At first, his absences were sporadic, but now he takes off frequently, always on Monday or Friday. What can we do?

A: Get recertification. Employers are allowed to ask Employees on intermittent FMLA to get certified every 30 days — or at any time, if circumstances change, or the company has reason to think something fishy is going on. According to a Department of Labor, a pattern of Monday/Friday absences is enough to warrant recertification.

Q: To curb abuse, we have Managers or HR reps call Employees on leave to make sure they aren't trying to use FMLA as a substitute for vacation time. Is that legal?

A: Yes. That can be an effective way to prevent abuse, and courts have found policies like that to be reasonable. In fact, some companies have even gone as far as hiring a private investigator to watch an Employee suspected of FMLA abuse and were able to win in court.

Q: If an Employee called in "sick" how do I code the time?

A: An Employee's time is initially coded Illness/Illness Continuation until the FMLA leave is approved and a decision letter has been received by the Supervisor or Business Affairs Officer (BAO). Once the leave is approved the code should be changed to the appropriate FMLA code. Corrected time sheet must be submitted to payroll.

Q: Can I ask an Employee why he/she is absent from work?

A: Under the FMLA, an Employee does not have to assert their FMLA rights; it is the Supervisor's responsibility to recognize that an absence may be FMLA-qualifying. An Employee does not have to reveal a diagnosis, but should give a general reason for the absence. (An Employee who is approved for more than one condition/reason must identify which approval the absence falls under.)

Q: An Employee has a serious medical condition. He was offered leave, but refused to take it. What do we do now?

A: That depends on the nature of his condition. If he qualifies for FMLA, and the condition prevents him from doing his job safely — or he presents a risk to himself or co-workers — you can make him take leave. Otherwise, forcing leave could cause problems. In one recent case, a company lost in court after putting an Employee on leave against his will. The court ruled his condition wasn't serious enough to qualify for FMLA and the Employee was still able to perform his job safely (Cite: *Wysong v. Dow Chemical Co.*). If you're in a situation where you don't need to put the Employee on FMLA, make sure you document the fact that leave was offered and denied — that'll come in handy if the Employee later claims he was denied FMLA.