THE
NATIONAL LAW REVIEW

Struggling with Intermittent FMLA Leave

Wednesday, January 26, 2011

Article By Vedder Price
Thomas G. Hancuch

Litigation / Trial Practice
Labor & Employment
All Federal

It's not unusual. An employee calls in one day, and he reports that he has kidney stones. He says the pain is so great that he has to stay home. He tells you that he has had the condition for a while but was too embarrassed to talk about it. When he comes to work the next day, he tells you that he's probably going to have to call in or come in late a few more times until he's better. What do you do?

By now, the general requirements of the Family and Medical Leave Act (FMLA) are well known to employers. One issue, however, that continues to challenge employers (and lawyers, too) is how best to manage an employee who takes intermittent FMLA leave for his or her own serious health condition, or the serious health condition of a family member. This includes occasional leave for doctors' appointments for a chronic condition, treatment (e.g., physical therapy, psychological counseling,chemotherapy), or temporary periods of incapacity (e.g., severe morning sickness, asthma attack).

Here are some things to keep in mind when dealing with intermittent leave requests and to help limit abuse of this type of leave:

Don't Be Fooled

Intermittent leave doesn't mean that your employees may start showing up late to work and just say it's for intermittent FMLA leave. They have to follow your normal FMLA approval process. Where the need for leave is unforeseeable, an employee must provide notice as soon as possible and practical, taking into account the circumstances of the situation. It should be practical for an employee to provide notice of the need for FMLA leave either the same day or the next business day after becoming aware of it. Moreover, you should establish and enforce reasonable call-in and attendance policies for all absences, as the FMLA provides that employees on FMLA leave must follow the employer's usual and customary call-in procedures for reporting an absence.

If the intermittent leave is foreseeable, the employee must give you 30 days' notice. If they give fewer than 30 days, you may delay the leave until at least 30 days after the date you actually receive notice. But be sure your policies or postings alert employees that they must provide the 30 days' notice for foreseeable leaves and enforce the advance-notice role for all leaves, not just FMLA leave. And remember that you may not deny an employee's permission to take FMLA leave if they don't give the proper notice—you may only delay it.

An employee is not entitled to take intermittent leave for the birth, adoption or placement of a healthy child, unless the employer agrees. Of course, if the child has a serious health condition, then FMLA leave must be permitted if all the other requirements are satisfied.

Get a Certification

This is your best weapon in preventing intermittent leave abuse. There must be a medical need for intermittent leave, and a certification is the proof of it. Be sure to give the employee written notice designating the leave as FMLA and explaining his or her rights and responsibilities. You have five business days to do this. An employee must secure a medical certification for the leave and return it to you within 15 calendar days, unless it is not practicable under the circumstances despite the employee's good-faith efforts.

If the certification makes a blanket statement, like, “Intermittent leave should be provided,” ask for more concrete details. Often, doctors are in a hurry and will not fill in the certification completely or they provide vague or unreadable information. If you get a certification that’s not complete, vague or nonresponsive, advise the employee in writing what additional information or clarification is needed. The employee has seven calendar days to get the certification fixed and return it to you. If the resubmitted certification is insufficient, you may deny FMLA leave protection until a sufficient certification is obtained. A certification that is not returned at all means the employee has no FMLA protection.

You may also require that a certification set forth the reasons for the work restrictions, why the employee cannot do his or her job except intermittently (or on a reduced schedule), and the likely duration the intermittent leave will be necessary. You may also seek an estimate of the frequency and duration of the episodes of incapacity. In fact, you may wait to approve the leave until you have this information.

Remember, you may not request additional information from the healthcare provider directly, other than for clarification and only after you have given the employee a chance to fix the certification. However, if you get the employee’s permission, you may have a company doctor or nurse or a human resources employee speak with the employee’s doctor in an effort to better understand the condition, the need for leave and possibly scheduling treatment around work. Just like with any FMLA leave situation, you may seek a second and third opinion if you have doubts about the certification.

Each time the employee uses the intermittent leave, make a limited inquiry about the reasons. You’re entitled to verify that it’s for the reasons stated in the original certification. You generally may request recertification of the employee’s condition every six months. The employee has to pick up the cost of the recertification. You may ask for a recertification sooner if things start to change with the intermittent leave. For example, if the employee requests an extension of the intermittent leave or reduced schedule, or if the duration or frequency of the absences changes significantly (e.g., if the certification gives the employee one or two days off for migraines, but the employee starts taking four days). You may also seek a recertification if new information casts doubt on the employee’s reasons for the leave or the validity of the certification.

You Have Some Negotiating Power

A need for intermittent leave does not mean an employee suddenly gets to set his or her own new work schedule. An employee seeking intermittent leave or a reduced schedule for purposes of foreseeable treatment or medical procedures, including office visits, must make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer’s operations. Employees may be required to consult with their employers prior to the scheduling of treatment in order to work out a schedule that best suits the needs of both the employer and the employee. If the employee fails to make a reasonable effort to do this, the employer may start the discussion and require the employee to make proper arrangements.

The clarified certification information from the healthcare provider about the need and schedule for intermittent leave gives you the information you need to have this conversation. Use it to create a schedule that the employee will stick to—if possible. This will cause less confusion and problems in the long run. This includes having the employee try to schedule appointments or treatment during off-duty time or on his or her days off. Depending on the employee’s health condition, it may not be possible to create this much certainty in the situation. But you have the right to try.

You may also temporarily transfer an employee during the period of intermittent leave or reduced schedule to another position for which the employee is qualified and better accommodates recurring periods of leave than does the employee’s regular position if the leave is for scheduled medical treatment. Of course, the position may not be punitive and must have equivalent pay and benefits. Once the FMLA leave is over, the employee must be reinstated to the same or an equivalent job as he or she had before the leave request.

Keep Records

As with the usual FMLA leave situation, employers should record all intermittent FMLA leave taken. This includes time for doctor’s appointments prior to the birth of a child or retroactive designation of days taken off that should have been for FMLA reasons. You want to be sure you know how much leave has been taken, you’re recording it all against an employee’s allotted leave, and you’re not being taken advantage of by employees hoping to take more leave than permitted. You may retroactively designate leave as FMLA leave as long as you inform the employee and it does not cause them harm.

FMLA should be “accounted for” in increments no larger than the shortest period of time accounted for other types of leave, as long as that is not greater than one hour. And, if the employee takes half a day off, you need to let them come back to work for the other half. There are exceptions for certain industries like airline or train

employees who cannot return to their job halfway through the day.

If the employee has exhausted any paid leave, an employer may dock the employee's pay for the intermittent absences, including for salaried exempt employees, without destroying the exemption. While employees are entitled to ask you how much FMLA leave they have exhausted while on intermittent leave, they may not ask any more often than every 30 days and only if they actually took leave during that time period. If you tell them verbally how much FMLA leave they've exhausted, be sure you follow up in writing. Here's another reason it's important to keep these records—if an employee doesn't work 1,250 hours in the leave year, then he or she is not eligible for FMLA leave the next year.

Supervisors and Human Resources Employees May Be Individually Liable

As if the threat of a lawsuit or Department of Labor complaint were not enough of an incentive to take the steps necessary to ensure that your company is complying with the requirements of the FMLA, a recent decision from the U.S. District Court for the Eastern District of Pennsylvania should grab your attention, as well as the attention of other managers and supervisors. In *Narodetsky v. Cardone Indus., Inc.*, the court held that the FMLA's definition of "employer" was broad enough to encompass the actions of a president and CEO, a human resources director, a human resources representative, a benefits manager and a plant manager, holding all five liable under the Act.

The facts are instructive, if for no other reason than to show how individual managers may find themselves in hot water when handling an FMLA claim. After the plaintiff was diagnosed with a leg injury that required surgery, his wife called the company's benefits manager and requested short-term disability leave for him. Shortly thereafter, members of the human resources department conducted a forensic search of the plaintiff's computer, uncovering an e-mail he allegedly forwarded to a former employee in violation of company policy. Three weeks later, the human resources director, human resources representative and plant manager terminated the plaintiff for sending the prohibited e-mail. The plaintiff filed suit, claiming he was terminated for requesting FMLA leave and alleging that members of the human resources department searched his computer with the goal of finding a reason to justify his termination.

In evaluating the merits of personal liability under the Act, the court noted that other circuits had upheld liability where the individual in question had authority to hire or fire the plaintiff or had sufficient control over the terms and conditions of the plaintiff's employment. According to the court, in the present case, all five individual defendants exercised sufficient control to warrant personal liability under the Act. The president and CEO had operational control over the company; the human resources director and representative and the plant manager had authority to fire employees, as evidenced by their presence at the plaintiff's termination meeting; and the benefits manager participated in the decision to terminate the plaintiff. Thus, all five were personally liable under the Act.

The *Narodetsky* court is not alone in upholding personal liability; the two circuit courts that have considered the issue have opined that individuals working in the private sector may be held liable as employers under the FMLA. *See Mitchell v. Chapman*, 343 F.3d 811, 827 (6th Cir. 2003) ("This Court has interpreted the [Fair Labor Standards Act's] 'any person who acts, directly or indirectly, in the interest of the employer' language to impose liability on private-sector employers. The presence of identical language in the FMLA tends to support a similar finding.") (internal citations omitted); *Darby v. Bratch*, 287 F.3d 673, 681 (8th Cir. 2002) ("[T]he plain language of the statute . . . includes persons other than the employer itself."). Lower courts have also come to the same conclusion. *See, e.g., Cantley v. Simmons*, 179 F. Supp. 2d 654, 658 (S.D. W.Va. 2002) ("[I]ndividual liability is permitted under the FMLA."); *Richardson v. CVS Corp.*, 207 F. Supp. 2d 733, 741 (E.D. Tenn. 2001) ("The majority of courts that have considered the issue have found that individuals can be subject to liability under the FMLA."); *Morrow v. Putnam*, 142 F. Supp. 2d 1271, 1275 (D. Nev. 2001) ("[T]he plain language of the FMLA clearly contemplates individual liability.").

In light of these and other cases, employers are advised to proactively limit FMLA liability for their employees by, for example, including only necessary personnel in employment decisions and training human resources personnel on the litigation risks. Employers should also review their insurance policies to ensure that liability coverage extends to managers and other key personnel. Employees named as individual defendants in an FMLA lawsuit will expect indemnification from the company and require access to their own legal counsel. Any settlement between the company and the plaintiff should also address claims against individual managers. Failure to extend protection to individual managers, therefore, could result in substantial personal damages to the employee and strained relations within the company.

Source URL: https://www.natlawreview.com/article/struggling-intermittent-fmla-leave