The Family and Medical Leave Act and Intermittent Leave

The Family and Medical Leave Act, ("FMLA") is applicable to the following:

- Private sector employers with 50 or more employees, public agencies, and public and private elementary and secondary schools;
- The employee must be employed by a covered employer, have worked at least 12 months for that employer; have worked at least 1,250 hours of service during the 12 months before leave begins; and be employed at a work site with 50 employees within 75 miles.

Within that framework, there are specified reasons for requested leave. Employees may request leave for the birth or placement of a child for adoption or foster care, or to care for a spouse, son, daughter, or parent with a serious health condition, or the employee's own serious health condition. And finally, for illness, injury, impairment or physical or mental condition involving inpatient care, *or continuing treatment by a Health Care Provider ("HCP")*. The treatment must be for an incapacity of more than three consecutive, full calendar days that involves either: Treatment two times by an HCP (first in-person visit within seven days, both visits within 30 days of first day of incapacity) or treatment one time by an HCP (in-person visit within seven days of first day of incapacity), followed by a regimen of continuing treatment (e.g., prescription medication). It is within this category that intermittent leave arises, which typically poses the most difficulties for Ohio's employers.

An employee is entitled to take intermittent or reduced-schedule leave for an employee's or qualifying family member's serious health condition when the leave is medically necessary, a covered service member's serious injury or illness when the leave is medically necessary, and a qualifying exigency arising out of a military member's covered active duty status. Notably, leave to bond with a child after the birth or placement must be taken as a continuous block leave unless the employer agrees to allow intermittent or reduced-schedule leave.

Employees should be advised that intermittent leave or leave on a reduced schedule must be medically necessary due to a serious health condition or a serious injury or illness. An employee must advise the employer, upon request, of the reasons why the intermittent/reduced leave schedule is necessary and of the schedule for treatment. In that regard, an employee must give 30-day's notice for intermittent leave that is foreseeable, or as much notice as practicable, typically within one or two business days. If the need for intermittent leave is unforeseeable, an employee must give notice as soon as practicable under the facts and circumstances of the particular case. An employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. The employee and the employer will work out a schedule for such leave that meets the employee's needs without unduly disrupting the employer's operations, subject to the approval of the health care provider.

Taking intermittent or reduced-schedule leave does not affect the total amount of leave available under the FMLA. Only the time actually taken is charged against the employee's available leave. In calculating the amount of leave, an employer must use the shortest increment the employer uses to account for other types of leave, provided it is not greater than one hour. The shortest increment may vary during

different times of day or shift. Additionally, required overtime not worked may count against an employee's FMLA entitlement.

Should the employer desire, upon notice of intermittent leave, the employer may seek a second or third opinion. The employer has the right to ask for a second opinion if it has reason to doubt the certification. The employer will pay for the employee to get a certification from a second doctor, which the employer will select. The FMLA permits the employer to designate the health care provider to furnish the second opinion.

The employer may deny FMLA leave to an employee who refuses to release relevant medical records to the health care provider designated to provide a second or third opinion. If the employee does not attempt in good faith to reach agreement, the employee will be bound by the second certification. If necessary to resolve a conflict between the original certification and the second opinion, the employer will require the opinion of a third doctor. The employer and the employee will mutually select the third doctor, and the employer will pay for the opinion. This third opinion will be considered final. The employee will be provisionally entitled to leave and benefits under the FMLA pending the second and/or third opinion.

An employer may also seek recertification of FMLA leave, including intermittent leave. An employer cannot request recertification more often than every 30 days and with an absence. If the minimum duration on the certification is greater than 30 days, the employer must wait until the minimum duration expires. In all cases, an employer may request recertification every six months with an absence. An employer can request recertification more frequently than every 30 days if the employee requests an extension of leave, or circumstances of the certification change significantly, or an employer receives information that casts doubt on the reason for leave. Additionally, employers may request a new medical certification each leave year for medical conditions that last longer than one year.

An employer may also consider temporary transfers when intermittent leave is foreseeable. An employer may transfer an employee on intermittent leave to an available alternative position for which the employee is qualified and that better accommodates the recurring periods of leave. Notably, the alternate position must have equivalent pay and benefits, but does not have to provide equivalent duties. The transfer must comply with federal and state laws, as well as any applicable collective bargaining agreement. A part-time role is also an option. Again, the employer will still need to pay the same hourly rate and provide the same benefits. When an employee returns from leave, the employee must be placed in the same or equivalent job as he or she had when the leave started.

Intermittent leave consistently arises as one of the most frustrating aspects of the FMLA for Ohio's employers. It is important to watch the initial requests for intermittent leave as they are presented. Should the requested leave concern suspicious symptoms or arise from a suspicious physician, a second opinion should be considered. Once the leave is approved, the employer is required to approve that leave should the request mirror the approved restrictions or absence as initially addressed.

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