

How to Manage Intermittent FMLA Leave



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Executive summary

The Family and Medical Leave Act of 1993 is a federal law that grants eligible employees the right to take up to 12 weeks of job-protected unpaid leave to deal with their serious health condition or that of a close family member. In addition, the FMLA provides unpaid leave to workers for reasons related to a family member being called to active military duty or to care for injured service members.

The U.S. Department of Labor administers and enforces the FMLA.

The FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons. The law provides leave for three specific situations:

- **Birth or adoption:** Employees can take FMLA leave following the birth, adoption or foster care placement of a child.
- **Self-care:** Employees who suffer from a serious health condition may take up to 12 weeks of unpaid FMLA leave.
- **Care for a spouse or immediate family member:** Employees may take FMLA leave to care for a spouse, parent, child or other immediate family member with a serious health condition.

Congress amended the FMLA in 2008 to cover employees with family members serving in the armed forces. It allows time off for an employee to attend events associated with the military service of the employee's spouse, son, daughter or parent on active military duty or called to active duty as a member of the National Guard, military reserves or regular armed forces. Employees can also take FMLA leave to care for a seriously injured or ill-covered service member.

Any private-sector employer with 50 or more employees working within a 75-mile radius of the “work site” and “engaged in commerce” must comply with the FMLA. Most public employers and educational institutions must also comply.

Employees are eligible for FMLA leave if they have worked:

- For their employer at least 12 months
- At least 1,250 hours over the past 12 months
- At a location where the organization employs 50 or more employees within 75 miles.

Employees must meet all three conditions to be eligible to take FMLA leave.

Many employees take their FMLA leave in continuous blocks of 12 weeks. However, the law also allows employees to take leave in smaller increments to attend doctor’s appointments for themselves or a family member or when their own or a family member’s serious health condition flares up.

This is known as intermittent FMLA leave. Employees may take intermittent leave for just a few days or even just an hour. For that reason, intermittent leave is one of the most difficult aspects of the FMLA to manage.

Managing intermittent FMLA leave

Employees often take FMLA leave in a solid block of time. However, employees can also take FMLA intermittent leave for a single qualifying reason by either working a reduced schedule or calling off as needed.

Intermittent FMLA leave is available for the employee’s medical condition or to care for a spouse, child or parent for a single qualifying reason.

Employers may, but are not required to, provide intermittent leave for a qualifying birth, adoption or foster care placement.

For example, an employer may (but is not required to) approve a part-time return to work for a new parent, allowing unpaid FMLA leave for hours not worked. This is the only circumstance in which an employer can refuse to approve intermittent leave if the employee is otherwise entitled to it.

Intermittent leave is one of the most difficult aspects of the FMLA to manage. That's especially true when the employee is approved for intermittent leave for a condition that flares up both regularly and unpredictably. Often, medical certifications for intermittent leave will include an estimate of the number of times during a typical week or month the employee will need off. That places a burden on supervisors to plan for absences they know are coming, even if they don't know exactly when they will happen.

Intermittent leave is also the form of FMLA leave that employees are most likely to abuse.

Employers can and should insist that employees taking intermittent FMLA leave use your usual call-off procedures when they miss work. Discipline employees who don't call off as required.

Common reasons for intermittent leave

Employees can take intermittent leave for many reasons:

Recurring health issues. While some employees may need to take large chunks of time to address a health issue, others may need to take a little time off here and there. For example, an employee undergoing chemotherapy might need to take a day or two off each week. Health conditions like that may require reduced hours and sporadic days off. In addition, some health conditions may leave employees unexpectedly unable to work, requiring them to call off.

Caring for someone with recurring health issues. Similarly, if a family member needs care, an employee may need intermittent leave to take them to doctor's appointments or to care for them at home.

Prenatal care. Prenatal care can be a qualifying reason for intermittent FMLA leave. Expecting mothers need to attend appointments, could feel unwell at times and may be under doctor's orders to restrict their work and hours.

This is especially true if there are pregnancy-related complications. With the passage of the Pregnant Workers Fairness Act, prenatal time off for conditions related to pregnancy may require reasonable accommodations.

Birth of a child. After childbirth, both parents may take intermittent leave to care for and bond with their child. However, they are only entitled to take 12 weeks of unpaid leave as one block of time. If both parents work for the same employer, they are limited to a total of 12 weeks of leave for bonding.

An employer is not required to allow intermittent leave in this situation, but they may choose to do so. An employee's entitlement to FMLA leave for birth and bonding expires 12 months after the date of birth, adoption or foster placement.

Adoption or foster care. FMLA leave may be taken before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed. For example, the employee may be entitled to FMLA leave to attend counseling sessions, appear in court, consult with his or her attorney or the birth parent's representative, submit to a physical examination or travel to another country to complete an adoption before the actual date of placement.

Think of this time as equivalent to the time off an expectant mother would take before giving birth, for doctor's appointments and the like.

An employer is not required to allow intermittent leave after the child is adopted or placed, but they may choose to do so.

An employee's entitlement to FMLA leave for the placement of a child for adoption or foster care expires 12 months after the placement.

Other conditions warranting intermittent leave

Depression. Together, intermittent FMLA leave and ADA protections help workers with depression remain employed.

Make sure the employee obtains an intermittent FMLA leave certification from his or her health-care provider. Since depression may also be an ADA-covered disability, find out if the employee is requesting reasonable accommodations. A health-care provider may suggest practical accommodations that eliminate the need for intermittent leave. For example, the employee might be able to work from home if a depressive episode is interfering with concentration. If insomnia is a symptom, a reasonable accommodation of a later start may eliminate an all-day absence.

Migraines. In most cases, migraine headaches meet the FMLA's definition of a chronic serious health condition. The condition typically continues over an extended period and may cause episodic periods of incapacity.

Migraines are more severe than regular tension headaches, often affecting sight. Sufferers may also experience nausea and vomiting, which can limit the ability to start or finish a scheduled shift.

Require employees to provide certification from their health-care provider. The certification should specifically diagnose the condition. The certification should also specify how often the migraines are expected to occur and how long they will typically last.

To qualify as a chronic condition, the employee must see a health-care provider at least twice a year for the condition.

Addiction disorders. Drug and alcohol addictions are serious health conditions, as well as disabilities under the ADA. Treatment often includes periodic hospitalization for complications or relapses, as well as regular counseling sessions and medication checks. Addiction-related absences would qualify for intermittent leave.

Managing sporadic intermittent leave

Intermittent FMLA leave is taken in separate blocks for the same condition. Employees who want a reduced schedule or intermittent leave when a single, qualifying medical condition flares up must request it.

As the employer, you can insist that the employee's health-care provider certify the need for intermittent leave. He or she then estimates how often and for what block of time the employee will be absent. For example, an employee undergoing chemotherapy may need three blocks of half-day intermittent FMLA leave per week for six weeks.

You can insist that an employee on intermittent FMLA leave requiring regular medical treatments work with you to schedule them. The employee must schedule those treatments to minimize disrupting the employer's operations. You can even transfer the employee to another job if that helps manage absences better. Just make sure the temporary assignment pays the same and provides the same benefits.

Allowable time increments

Eligible employees may take FMLA leave in increments as small as the employer's payroll system will capture, provided the minimum increment is not greater than one hour.

Moreover, an employer may not use an increment greater than the shortest period used for other forms of leave. For example, if you account for sick leave in 30-minute increments, but vacation in one-hour increments, you must count FMLA leave in, at a maximum, 30-minute increments.

You should also note that when employees take intermittent leave or leave for fractions of a day or week, you must convert weeks into hours of leave based on the number of hours the employee usually works in any week. For example, an employee who regularly works a five-day work week and eight hours per day is entitled to 480 hours of leave—that is, 12 weeks times 40 hours per

week. A worker who works a four-day week and eight hours per day is entitled to just 384 hours of leave—that is, 12 weeks times 32 hours per week. A worker who normally works 20 hours of overtime plus a 40-hour workweek would be entitled to 12 weeks times 60 hours, or 720 hours of leave.

Recently, the DOL issued an opinion letter on using intermittent FMLA leave to limit the length of the regular workday. An employer that required all workers to work daily overtime asked the DOL whether it had to reduce its regular 10-hour shifts to accommodate a worker's serious health condition on a daily intermittent-leave basis to an eight-hour shift. The DOL said yes, daily intermittent leave can be used to reduce a worker's daily scheduled time permanently if the worker has sufficient FMLA leave to do so. The DOL also said the worker's hourly entitlement depended on his regular 10-hour schedule and therefore was entitled to 600 hours of FMLA leave.

Carefully track intermittent leave

Tracking time off is a key component of managing intermittent leave. Employers may count leave in the smallest unit that their time-tracking system allows for non-exempt, hourly employees.

For exempt employees, leave can be taken in increments as small as one-half days. FMLA regulations allow employers to reduce pay for unpaid leave without destroying an employee's exemption under the Fair Labor Standards Act.

Whatever time measurement is used, it's still a fractional portion of a day. Employers are responsible for keeping track of the total amount of leave used. Inform employees of the amount of leave they have available at the start of each leave period.

Stay on top of intermittent leave certification

Managing FMLA intermittent leave can be vexing, but employers do have tools available. One of the most important is the FMLA certification process.

As with FMLA leave taken in one block, employees who request FMLA intermittent leave must give you notice—at least 30 days in advance when the need is foreseeable. When it's not, they must notify you “as soon as practicable.”

Certify and schedule the leave

Don't accept intermittent leave requests at face value. The FMLA allows you to demand certification from a doctor that an employee needs FMLA leave. You can request a new medical certification from the employee at the start of each FMLA year. You're also entitled to ask for a second or third opinion (at your expense) before granting FMLA leave.

When employees have chronic conditions and certifications that call for intermittent leave, attempt to work out leave schedules as far in advance as possible. It's legal to try to schedule FMLA-related absences, but you can't deny them if scheduling ahead of time proves not practical.

For example, an employee who is on intermittent FMLA leave for migraine headaches sees his doctor once every six weeks for a drug infusion to reduce the number of headaches. Those appointments are intermittent leave but can be scheduled in advance, with notice to the employer. However, the employee should also be able to call off and take intermittent leave when the medication doesn't prevent a migraine.

When a worker requests intermittent leave or a reduced schedule for foreseeable medical treatment, you can require the employee to try to schedule the treatment so that it's least disruptive to your business, such as making appointments after work. But you can only ask the employee to go so far.

While the ADA gives you some leeway by not requiring you to provide an accommodation if it creates an “undue hardship” on your business, there’s no such standard for FMLA leave. Simply put, FMLA leave for those who qualify is an entitlement. You can’t refuse FMLA leave when workers are entitled to it or force them to return early from an injury for light-duty work.

Immediately nail down the expected frequency and duration of FMLA intermittent leave. Request a medical provider’s estimate of how often the employee will need time off. You also can wait until the provider gives you that estimate to approve intermittent leave.

4 certification steps

There are four steps for certifying intermittent leave requests:

- 1. Ask about the specific condition.** Medical certification must relate only to the serious health condition that is causing the leave. Don’t ask about the employee’s general health or other conditions.
- 2. Allow time to respond.** After you request FMLA certification, give employees at least 15 calendar days to submit the paperwork. If the employee’s medical certification is incomplete or insufficient, specify in writing what information is lacking. Allow seven days to address it.
- 3. Investigate the certification** if you doubt the need for leave. You can directly contact the employee’s physician to clarify the medical certification. An employee’s direct supervisor cannot make this call. It must be done by an HR professional, a leave administrator (including third-party administrators) or a management official.
- 4. Require (and pay for) a second opinion** if you’re still not convinced. Use an independent doctor who you select, not a doctor who works for your organization. If the two opinions conflict, you can pay for a third and final, binding medical opinion.

Use the official DOL FMLA forms

When managing FMLA documentation, don't do it yourself! The best practice is to use the latest forms on the Department of Labor's FMLA web page rather than creating your own forms. Here's a list of currently available DOL FMLA forms:

- General FMLA rights poster
- Eligibility Notice
- Rights and Responsibility Notice (note that this and the eligibility notice are included on the same form)
- Designation Notice
- Medical Certification Forms. There are five different certification forms, depending on the reason for the leave request. These can be accessed here for individual download.

You may seek recertification

What happens if employees use their initial FMLA certification to take intermittent leave in a noticeable pattern of Friday and Monday absences? Or the employee is taking far more intermittent leave than the certification estimates they will need? You can seek recertification to verify the person's continuing need for time off.

A recent DOL opinion letter says that a pattern of Friday/Monday absences counts as information that casts doubt on an employee's stated need for FMLA leave. That means you can seek recertification more frequently than every 30 days if the request is made in connection with an absence.

Use the calendar-year method

Employees who take FMLA intermittent leave can wreak havoc with work schedules because their conditions can flare at any time. But there are legal ways to curtail intermittent leave. One of the easiest is to use the calendar-year method to set FMLA leave eligibility.

There are four ways to calculate an FMLA year:

- 1. The calendar-year method** is the simplest. Eligible employees are entitled to 12 unpaid weeks during any calendar year. Eligibility resets Jan. 1. However, this potentially allows an employee to take 24 weeks of continuous unpaid leave if the timing is right. This could happen if leave commenced 12 weeks before the end of the year and the employee still needed leave beginning Jan. 1. They could take 12 weeks of leave at the end of the first year and another 12 weeks at the beginning of the second year.
- 2. The fixed 12-month year method** is based on any fixed 12-month "leave year" the employer chooses, such as the employer's fiscal year or the employee's anniversary date. This method also allows the potential for continuous leave up to 24 weeks if the timing is right.

3. **The single 12-month period method** begins on the first day the employee takes leave and ends 12 months later. This method is the only one you can use for military deployment exigency leave, even if you use another method for other FMLA leave.
4. **The rolling 12-month calendar method** measures backward from the date an employee first takes FMLA leave. To use this, you must add up all FMLA leave the employee has taken in the past 12 months and subtract that total from the 12-month allotment. This is sometimes referred to as the look-back method and requires a continual recalculation of leave each time some is taken.

Employers get to choose which time-tracking method to use.

For managing intermittent FMLA leave, the calendar-year method is often the most advantageous for employers. Here's why.

Using the calendar-year method

Sometime during the calendar year, an employee submits documentation showing she will need FMLA intermittent leave for a chronic condition. If she is eligible for leave at that time, she can take up to 12 weeks of intermittent leave until the end of the calendar year. Then the process starts again.

If, on Jan. 1, she hasn't worked 1,250 hours in the preceding 12 months, she's no longer eligible for FMLA leave, and won't be eligible again until she hits 1,250 hours.

Caution: Whatever calendar method you use to determine FMLA usage, you must use the same method for all employees. And if you want to change the method for calculating FMLA leave, you must give employees at least 60 days' notice *and*, during the transition, employers must use the method that provides the most benefit until the next benefit year begins.

When intermittent leave is and isn't a right

Employees are not always entitled to take intermittent FMLA leave. While some of these examples were discussed above, this section specifically outlines when employees have a right to take intermittent leave, and when it can only be taken at the employer's discretion.

Employees can always take intermittent leave in the following circumstances:

- The employee has a serious health condition that makes the employee unable to perform the functions of his or her job. A serious health condition under the FMLA involves at least three full, consecutive days of disability and at least two visits to a health-care provider.
- To care for a spouse, child or parent who has a serious health condition.

COVID 'long haulers' and intermittent leave

The coronavirus pandemic left hundreds of thousands of Americans with lasting aftereffects. A study of about 1,700 patients who were hospitalized with COVID-19 shows 76% suffered at least one symptom months after they were discharged. The condition is sometimes called long COVID; those who have it sometimes call themselves COVID long haulers.

Reports indicate that some COVID long haulers have heart and lung damage. Still others suffer from depression, anxiety, memory problems, fatigue and other potentially long-lasting consequences. As yet, we don't have any estimate on how many patients will suffer permanent COVID-related disabilities, but there surely will be many. We also know that many patients are reporting that their symptoms persist and happen sporadically.

That means it's very likely employers are facing more requests for FMLA leave, including intermittent leave, associated with past COVID-19 infection or even recent infections. Employers should review their leave policies and make sure that each request is properly handled.

- When a pregnant woman requires time for prenatal care or other related medical needs.
- Any qualifying exigency arising out of the fact that the employee's spouse, child or parent is a military member on covered active duty.

In the following circumstances, intermittent leave can be taken at the employer's discretion:

- Leave for either parent after the birth of a child. Typically, this must be taken in one block; however, an employer may choose to permit intermittent leave.
- The placement with the employee of a child for adoption or foster care. Typically, this must be taken in one block; however, an employer may choose to permit intermittent leave.

When mental health challenges require FMLA leave

Employees dealing with mental health challenges may have an FMLA serious health condition. Serious mental health conditions often require taking intermittent FMLA leave. For example, a depressed employee may periodically request permission to come to work late when his symptoms are most severe, using intermittent FMLA leave to account for the missing hours.

Make sure the employee understands he must get a certification from his medical provider explaining the need for intermittent leave. The doctor should estimate how often intermittent leave will be necessary and for how long. If you have call-off rules, explain that these need to be followed. Have him call in as he would for any other absence, but report that the late arrival or absence is intermittent FMLA leave.

FMLA leave abuse and how to spot it

FMLA leave is vulnerable to employee abuse. Sometimes that abuse is obvious, as when an employee on intermittent leave always has flare-ups on Fridays or Mondays. Other times, the abuse is not so easy to spot—as when a friendly doctor rubber stamps an FMLA certification request.

It is perfectly legal to discipline employees who abuse FMLA leave. However, employers should proceed with caution. Even if it appears that an employee is misusing his FMLA leave, you must make discipline or termination decisions based on a rational review of the facts, including the doctor's certification. Additionally, courts have concluded that demanding more than medical certifications without some reasonable suspicion of leave abuse can constitute interfering with an employee's FMLA rights. When in doubt, check with your attorney.

11 steps to sniff out suspicious FMLA cases

Use of the medical certification process is the biggest weapon employers have in combating FMLA abuse. It gives you the right to obtain information from the employee's physician about the ailment and, at least for the first certification, to obtain a second or third opinion from an independent physician.

1. Obtain a medical certification for each request for leave due to a serious health condition. It's important that your sick leave or attendance policy requires a doctor's certification for all absences of three or more days for the leave to be excused. If there's no such requirement and you intend to require paid leave to run concurrently with FMLA leave, you might not be able to require a medical certification, which is the first step in an anti-fraud program.

2. Enforce a policy denying the leave request if an employee fails to submit certification within 15 days. In each instance, assess any appropriate penalties for failure to be at work.

3. Examine the certification closely to ensure it's been properly and fully completed. Many doctors will hastily complete the form. In some cases, they'll intentionally leave some sections incomplete to remain "truthful" while accommodating the desires of the patient/employee for leave.

If the medical certification is incomplete, specify in writing what information is lacking and allow the employee at least seven days to cure the deficiency. If the employee fails to do so, deny the leave request. Of course, if the medical certification doesn't support the existence of a serious health condition, you should deny the request.

4. Require a second opinion if the circumstances are even slightly suspicious and it's an original certification. Employers must pay costs associated with obtaining a second opinion.

5. Once the certification is approved, make a limited inquiry each time the employee requests more leave, particularly in the case of intermittent leave. The goal is to determine whether the leave is for the same qualifying reason.

6. Watch the schedule of absences closely in cases of intermittent leave to determine whether a suspicious pattern develops (e.g., immediately before and after weekends or days off) or whether there's a change in the frequency or timing. Such actions could suggest a change in condition that enables you to request a recertification.

7. Request recertifications as often as the law allows. The frequency of recertification permitted will differ depending on the type of leave and the type of serious health condition.

8. Require accrued leave to run concurrently with FMLA leave when allowed by law. When an employee realizes that taking leave today will affect future vacation time, he or she is more likely to take FMLA leave only when the need is legitimate.

9. Ask the physician to verify that the medical certification is exactly as he or she signed it and has not been altered.

10. Inquire about the intended method of transportation if an employee requests to leave work early because of their serious health condition. If the employee can't work, perhaps an ambulance is needed.

11. Aggressively pursue potential fraud, and if concrete evidence of fraud is discovered, take appropriate disciplinary action. Always follow up on reports from fellow employees or other sources that the employee does not need leave.

Final note: Even if these actions uncover no fraud, your efforts will still reap dividends.

Once employees become aware that you intend to use these tools to detect fraud, employees otherwise inclined to take advantage of the FMLA will wait until a legitimate need arises.

Q&A: Tricky Intermittent Leave Scenarios

Complex definitions of family

Q “I have an employee whose stepdaughter (over age 18 but lives at home) has been diagnosed with cancer. He will need to assist with taking care of the other kids, as well as driving her to doctor’s appointments. Does this qualify for intermittent leave since the stepdaughter is over 18?”

A Your question highlights how complex modern families are and how the DOL has tried to clarify who is entitled to FMLA leave to care for family members.

Normal, routine childcare is not a covered reason for leave under the FMLA. However, an employee may be eligible for FMLA leave to take step-grandchildren to medical appointments for a serious health condition if the employee has an *in loco parentis* relationship with those children. As to the stepdaughter, while

she was a minor, the EEOC recognized the stepdaughter as a son or daughter. Her current condition—cancer—likely qualifies as a serious health condition requiring treatment. If her condition renders her “incapable of self-care because of a mental or physical disability” at the time FMLA leave would begin—regardless of when the disability began—then the employee would be able to take FMLA leave to care for her. DOL has a list of requirements that must be met for an adult child to be considered incapable of self-care that can be accessed at <https://www.dol.gov/agencies/whd/fmla/faq/adult-child>

Establishing call-in procedures

Q “Our FMLA certifications always say from the medical provider, “up to x amount of times per week plus x amount of episodic incapacitation.” Since the moments of incapacitation can be spontaneous (allegedly) does that mean they can basically come and go as they please? When you say, set up call-in procedures, when they are sporadic, there is nothing we can do, right? They are protected as long as they claim they told us as soon as practical?”


A You can hold workers to your normal call-off process as long as everyone has to follow that process. Generally, intermittent leave will be unforeseeable unless it is being used for scheduled medical appointments related to the underlying condition. In that case, the employee should be able to provide the regular 30-day notice.

For example, if a worker has a certification for intermittent leave for migraine headaches and a regular six-week standing appointment for two hours of drug infusion as part of their treatment, you would be due 30 days’ notice. However, on those days the worker has a sudden migraine, they would only be required to follow your normal call-off procedure. Of course, if the migraine starts at work, they would follow whatever rule you have for leaving before a shift is over.

Updating health forms

Q “How often does the healthcare provider form need to be updated for intermittent FMLA chronic conditions?”

A If the healthcare provider says the chronic health condition is permanent and indefinite and will last more than six months, you may request a new certification every six months—in connection with an absence. DOL also says that if the frequency of absences far exceeds the estimate provided by a health-care provider, the employer may request a recertification. That’s also true if there is a suspicious pattern of absences such as frequent Friday/Monday absences.



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