Controlling FMLA intermittent leave abuse through call-in & notice requirements

The Family and Medical Leave Act (FMLA) and its accompanying regulations contain notice requirements for both employers and employees. Recently, there have been a number of court cases where employers have been granted summary judgment on FMLA claims.

These cases involve employees who did not follow the employer's procedures requiring the employees to call in to both the employer and an outsourced absence management provider when requesting or taking FMLA leave. Employers may want to consider reviewing their call-in procedures (both internally and for their outsourced absence management provider) to help cut down on abuse of FMLA intermittent leave.

29 CFR § 825.302—Foreseeable leave.

For foreseeable leave, employees must provide at least 30 days' advance notice. If 30 days is not practicable, employees must provide as soon as practicable. The Department of Labor (DOL) defines "as soon as practicable" to mean "as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case." The DOL's regulations also indicate that employers may require an employee to comply with the employer's usual and customary notice and procedure requirements for requesting leave, absent unusual circumstances.

29 CFR § 825.303 —Unforeseeable leave.

The DOL regulations indicate that when the approximate timing of the need for leave is not foreseeable, an employee must provide notice to the employer "as soon as practicable under the facts and circumstances of the particular case." The DOL regulations also state that when the need for leave is not foreseeable, an employee must comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances.

"Unusual circumstances." The regulations provided that "unusual circumstances" may excuse an employee's failure to follow notice procedures. As an example, an employee is unable to comply with the employer's policy that request for leave should be made by contacting a specific number because on the day the employee needs to provide notice of his or her need for FMLA leave, there is no one to answer the call-in number and the voice mail box is full. The good news for employers, however, is that the DOL regulations make clear: "When an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied."

Recent cases involving outsourced Absence Management providers.

In 2017, there have been seven federal court decisions where employers were granted summary judgment on FMLA and other claims on the ground that the employers' notice procedures included a requirement that the employee contact his or her manager and the outsourced management provider, and the employee failed to do so.

1. Duran v. Stock Building Supply West, LLC (9th Cir. 1/12/17).

This was a case decided under the California Family Rights Act (CFRA), which is the California version of the FMLA. The employee told HR that he wanted to take leave to care for his ailing

66% of HR professionals deal with chronic abuse of intermittent leave.[1] Strict call-in and notice requirements can not only offer employers legal protection but can also help reduce the abuse of intermittent leave.

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father. The HR representative responded in an e-mail and advised him that "to request any leave" he had to fill out the employer's Leave of Absence (LOA) form and obtain certification through the employer's third party absence management provider. The employee never filled out the LOA form or applied for leave through the outsourced absence management provider.

2. Alexander v. Kellogg USA, Inc. (6th Cir. 1/4/17).

The employee was approved for intermittent leave. His employment was terminated for excessive absenteeism. He argued that some of the absences were FMLA protected. The court disagreed because the employer had a notice requirement that obligated employees who had been approved for FMLA intermittent leave to call the outsourced absence management provider within 48 hours of an absence that the employee wanted to designate as intermittent leave. The court concluded that it was undisputed that the employee was aware of the requirements of the leave policy but did not follow it on four separate occasions.

3. Scales v. FedEx Ground Package System, Inc. (N.D. Illinois 1/24/17).

The employee notified FedEx's HR department that he was going to have hip replacement surgery. However, he did not contact the outsourced absence management provider to initiate the FMLA leave process even though he had been advised that he needed to do so. The employee made several excuses for his failure to contact the outsourced provider including that he did not recall receiving the external absence management provider's leave request form. However, the court noted that the form was referenced in (and attached to) an e-mail that HR sent to the employee. The court observed that the employee had responded to the e-mail. The court also pointed out that given his role as a manager, the employee was familiar with the process for requesting and administering FMLA leaves because he was involved in communications with regard to employees who requested FMLA leave.

4. McKenzie v. Seneca Foods Corporation (W.D. Wisconsin 3/27/17).

The employee was approved for intermittent leave for Lyme disease. The employer's FMLA policy required employees to notify both the employer and the external absence management administrator on the same day that the intermittent absence occurred or the next business day. On a number of occasions, the employee notified her employer but did not notify the external absence management provider until days, weeks or months after the absence. The court said that since the employee presented no evidence of unusual circumstances justifying her failure to provide timely notice to the external provider, it was not FMLA interference for the employer to include these absences when assessing "points" for unapproved absences under its attendance policy. The court expressly stated that requiring the employee to notify two individuals—one at the employer and one at the external absence management provider—was a reasonable requirement and did not interfere with employee FMLA rights.

5. Acker v. General Motors, LLC (5th Cir. 4/10/17).

The employee was approved for FMLA intermittent leave and was required to contact (1) the internal GM absence call-in line at least 30 minutes prior to his start time and (2) the external FMLA leave call line by the end of the normally scheduled work shift. On a number of occasions, he failed to call the FMLA leave line, and he was subject to disciplinary action under GM's attendance policy, including that he was placed on unpaid suspensions from work. The employee still worked for GM and brought suit to recover damages for the unpaid suspensions. The court concluded that he was properly subject to discipline for these absences, even though the employee testified that his disability caused him to experience severe disorientation, blackouts, grayouts, and extreme fatigue. The court observed that the employee presented no evidence that he was experiencing any of these symptoms or that there were other unusual circumstances on the days that he failed to call the FMLA leave line.

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6. Garrison v. Dolgencorp, LLC (W.D. Wisconsin 12/06/17).

The employer's handbook, which was issued to the employee upon hiring and available online, directed employees to notify their supervisor and immediately call the employer's outsourced leave management provider to request leave time. The employer was successful in winning a summary judgment dismissing the FMLA interference claim, in part due to the employee's failure to provide evidence that she gave adequate notice of her need for leave. In finding that the employee failed to give adequate notice, the court cited her failure to comply with the usual notice requirements, meaning she did not call in her leave to the outsourced leave management provider per the handbook or supervisor's instruction to do so.

7. International Brotherhood of Electrical Workers local 1600 v. PPL Electric Utilities Corporation (E.D. Pennsylvania 12/22/2017).

The employee challenged the employer's leave policy requiring employees to call an outsourced leave management provider to report time in addition to calling the direct supervisor. The employee argued that the FMLA regulations only permitted employers to use the same notice procedures for FMLA leave as they do for ordinary leave (ie: Sick time). The court held that while the FMLA regulations permit the employer to adopt a singular call-out policy for all time, employers are also permitted to include additional notice requirements for reporting FMLA leave, such as calling an outsourced leave management provider.

What should employers do?

That depends. Some employers do not want to have a corporate culture that requires strict adherence to call-in requirements for purposes of taking FMLA leave. Indeed, some employers want to help employees get their leave requests filed. Interestingly, the regulations recognize that such workforces exist, and contain a provision explicitly stating that employers can waive the notice requirements.

However, especially with regard to intermittent leaves, effective notice requirements can help reduce the abuse of intermittent leave.

If notice is not required, employees may feel at liberty to justify unexcused absences after the fact on the ground that they were FMLA protected.

If employers are interested in being able to point to failure to follow call-in requirements as a ground for denying FMLA leave and taking disciplinary action, they should bear in the mind the following:

1. The notice procedures should be in writing and be clear.
2. There needs to be clear evidence that the employee was aware of the notice procedures. To that end, the notice procedures should be communicated in writing in as many ways as possible, including employee handbooks, employee websites, approval letters, and direct e-mail messages.
3. The notice procedures need to be enforced on a consistent basis. If employers waive the notice procedures for some employees but not others, they are at risk for a selective enforcement claim.
4. Employers should be willing to carefully evaluate whether "unusual circumstances" exist to justify a failure to follow the notice procedures.

It may be useful for an employer to review and update its call-in procedures even if it is not certain that it intends to vigorously enforce them. These call-in requirements can deter FMLA abuse.

1. HR BenefitsAlert, "The Top 8 Ways to Stop Intermittent FMLA abuse," August 13, 2016.