

Managing Intermittent FMLA Leave to Support Your Manufacturing Operations

By Corey Donovan Tracey

September 18, 2020

Meet the Authors



Corey Donovan Tracey

(She/Her)

Principal

(216) 750-0404

corey.tracey@jacksonlewis.com

Related Services

Disability, Leave and Health
Management
Manufacturing

Manufacturing employers depend on employees being in the right place at the right time. Yet, compliance with applicable leave laws requires possible disruption. Intermittent leave law may be the most challenging.

What is an employer to do when confronted with the additional strain on staffing often imposed by intermittent Family and Medical Leave Act (FMLA) absences or leave abuse?

While most employees are truthful and use FMLA leave legitimately, there are some who submit to the temptation of abusing that right, with callouts for non-FMLA related absences or failure to follow established procedures for FMLA use. These sporadic and often unpredictable absences with little to no notice wreak havoc on production schedules and can lead to coworker resentment, particularly in these unprecedented times. At the same time, many manufacturing employers feel they have few options for curtailing intermittent leave abuse, given the employee-friendly nature of the FMLA and fear of costly legal claims.

While employers must be careful to respect employees' FMLA leave rights and grant leave accordingly, employers can effectively manage employee intermittent FMLA leaves and curb potential leave abuse. The following are some measures employers should consider:

- *Develop comprehensive FMLA policies, procedures, and forms.* These documents help ensure employees understand the “rules” for FMLA use and how to clearly request leave. They also may deter abuse by showing employees the employer takes administration of FMLA leave seriously and will hold employees to these valid processes.
- *Carefully review and follow up all medical certifications.* Insist on complete (every question answered) and sufficient (without any vague, ambiguous, or illegible answers) certifications before designating leave as FMLA-qualifying. Request clarification and authenticate certifications, if necessary. Certifications that are ambiguous or lack critical information later can cause uncertainty surrounding the employee’s leave and hamper an employer’s efforts to manage leave effectively within the law.
- *Require employees to work with you to schedule planned medical treatments during non-working, or less disruptive, hours.* Employees are required to schedule planned medical treatments to be least disruptive to an employer’s operations. If an employee regularly schedules medical appointments for 1:00 p.m. and then is out the rest of the afternoon such that half a day’s work is lost, an employer may inquire whether a different timing may work, such as early morning or late in the afternoon or evening, when the impact to production operations may be lower.
- *Consistently maintain and enforce call-in procedures.* Under the FMLA, an employee is required to comply with the employer’s “usual and customary and usual notice and procedural requirements for requesting leave, absent unusual circumstances.” 29 C.F.R. § 825.302(d). Many manufacturing employers have implemented attendance policies or procedures requiring, for example, notice of an absence at least one hour

before a shift starts. Some require employees to report absences to a specific number or person. As long as an employer has communicated such requirements to employees and consistently enforce them with all employees, an employer may deny FMLA leave (and issue discipline or discharge employees) if employees fail to follow those procedures, absent extenuating circumstances.

- *Exercise the right to recertify.* An employer may seek recertification of an employee's FMLA leave any time: (1) the employee requests an extension of FMLA leave; (2) if the circumstances under the prior certification have changed significantly (*e.g.*, duration or frequency of the absences); or (3) when the employer obtains information that casts doubt on the stated reason for the absence or continuing validity of the certification. 29 C.F.R. § 825.308(c). Thus, when an employer sees, for example, a pattern of Friday and Monday absences to extend the weekend, or the employees' absences exceed the frequency or duration stated on the certification, recertification allows the employer to confirm the leave is truly FMLA-qualifying, question the employee's healthcare provider on the pattern, and potentially delay or deny leave. As a leave management tool, recertification also puts the employee on notice that the employer is aware of the employee's leave use and is watching that use to ensure compliance, which may act as a deterrent to abuse.

While these measures will not eliminate all potential intermittent leave abuse, or even the everyday challenges posed by employees' lawful FMLA use, when properly employed, they can help manufacturing employers gain some consistency and control over intermittent leaves to more effectively manage their production operations. Employers should consult with legal counsel before implementing any strategies to ensure application consistent with the law.

Please contact a Jackson Lewis attorney if you have questions or need guidance handling these and other workplace issues.

©2020 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on labor and employment law since 1958, Jackson Lewis P.C.'s 1000+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged, stable and diverse, and share our clients' goals to emphasize inclusivity and respect for the contribution of every employee. For more information, visit <https://www.jacksonlewis.com>.