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USE ABUSE

of the

Family and Medical Leave Act

What Workers and Employers Say

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**Use and Abuse of the
Family and Medical Leave Act:
What Workers and Employers Say**

James Sherk

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INTRODUCTION

Requiring employers to provide employees with unpaid leave when they or a family member have a serious medical condition appears both compassionate and commonsense. Parents should not have to fear losing their job when caring for their child during a life-threatening illness, and they would hardly be productive if they were working. To help workers “balance the demands of the workplace with the needs of families,” Congress passed the Family and Medical Leave Act (FMLA) in 1993.¹

The act requires companies with more than 50 workers to provide eligible employees with up to 12 weeks of unpaid leave a year when they or an immediate family member have a serious health condition, or after the birth or adoption of a child. Employers must reinstate the worker at the end of the leave, and may not discipline or fire employees taking FMLA leave.

On paper these requirements seem sensible, and the act has helped many families in difficult times. However, the consequences of legislation rarely are limited to their intended effects. The Family and Medical Leave Act is no exception. The act—and especially the regulations implementing it—has been misused by some employees to shirk their responsibilities at work. These employees have used the act in ways that harm their coworkers, customers, and employers.

Because companies cannot punish workers for taking leave under the FMLA, irresponsible employees have found they can use the act to skip work without consequences. They have claimed FMLA leave to avoid undesirable shifts or to excuse unannounced absences or tardiness. In other cases, employees take FMLA leave for ailments that are far from “serious medical conditions.” When this happens, their work is often dumped on coworkers or left undone. This is not what Congress intended.

On December 1, 2006, the Department of Labor’s Employment Standards Administration/Wage and Hour Division undertook a review of the Family and Medical Leave Act. Part of this review included a Request for Information that invited the public to provide information about their experience with the Act and comment on its effectiveness. These comments are now publicly available at the Department of Labor. This report draws on these public comments to document how the act has been abused and has fallen short of Congress’s original intentions. In particular:

- The definition of a “serious medical condition” is so vague that employees can take FMLA leave for almost any reason.
- Irresponsible employees use FMLA leave to avoid discipline for arriving late to work.
- Other workers use the leave to avoid working undesirable shifts.
- FMLA leave use increases on Mondays and Fridays, and on days when vacation requests were denied.
- Some employees openly boast that they use FMLA leave to take off work at will and without consequences.
- When workers misuse FMLA leave to take unannounced vacations, coworkers must pick up the slack, forcing them to work extra shifts or mandatory overtime.
- This abuse of leave hurts employee morale and teamwork in the workforce.
- Misuse of FMLA leave severely disrupts business operations. In the cases of public safety workers, such those in intensive care units or 911 dispatching centers, it endangers the public.
- Many companies have ended their attendance rewards programs because the act forced them to treat employees who misused FMLA leave as having perfect attendance.

1. 29 U.S. Code Chapter 28, Section 2601(b)(1).

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- The act makes it very difficult for employers to communicate with doctors to find out how incapacitating their employees' illnesses are, or what alternative work they could perform.
- The certification forms are vague and confusing and poorly understood by both doctors and employers.
- The record keeping and paperwork required by the act are heavy and expensive burdens on employers.

Congress should pass legislation to correct such abuses and restore the act to its original purpose. Changes could include allowing employers to require workers to take leave in half-day increments and to count FMLA leave against attendance bonus policies. Congress also should make it easier for employers to verify the seriousness of an employee's condition and strictly define a "serious medical condition" so that routine conditions such as a cold or stress are not used to justify leave.

Experience with the FMLA shows that laws can have significant unintended consequences, even when they are passed with the best of intentions. Congress should take this lesson to heart when considering similar laws.

The following compilation of examples from the Department of Labor's Request for Information offers insight into the effects that the FMLA truly has.²

2. All examples are obtained from the public comments submitted to the Department of Labor's Request for Information concerning the Family and Medical Leave Act, which are available for viewing via the public docket of the Wage and Hour Division of the Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Document numbers included in the footnotes are those which the Department of Labor assigned to the publicly available comments. Names of organizations or private comments have been included when available.

CHAPTER 1

Vague Definition of a Serious Health Condition

The Family and Medical Leave Act allows employees to take leave for “serious medical conditions.” However, the act provides doctors with little guidance about what qualifies for leave under the act.

Irresponsible employees thus look for doctors who will certify them as having “serious medical conditions” even when they could continue working without difficulty. Workers have had routine conditions like colds, stress, or even an injured toe certified as serious medical conditions. Some workers take additional days off work so that their condition will meet the qualification for “serious.”

Congress intended the FMLA to provide relief to workers with real health problems—not as a get out of jail free card for employees to evade their obligations at work. Congress should consider the problems that the vague definition of “serious medical condition” has created in the workforce.

- Kevin McCarthy from the Kalamazoo Human Resource Management Association explains how undefined periods of leave can create problems for employers. “Many certifications for intermittent leave list the period of the need for the leave as ‘indefinite’ or ‘permanent.’ In such situations, the employee will never have to ask for an extension of the intermittent leave. Unless the employer receives good information that the individual’s medical circumstances have changed significantly or that the need for an intermittent leave is no longer valid, the employee will never have to submit a recertification. In the types of abusive situations discussed above, this is a major problem. Placing a limit on the length of time a medical certification is valid, such as 90 days, would be very helpful in assisting employers to deal with this abuse.”³
- Sue Sumler from the Manufacturers’ Alliance/MAPI explains the problems caused by a vague definition of serious health condition. “Because the definition of a ‘Serious Health Condition’ is vague, almost anyone can find a physician to certify that they have a chronic condition that meets the definition. Many of this company’s intermittent leaves are for migraine headaches. The physician certifies that migraines may occur at any time. Some employees approved for leave for migraine headaches miss four-five days a month and more. For some, it appears that FMLA has given them an extra 60 days off work.”⁴
- Rae Vann, writing on behalf of the Equal Employment Advisory Council, cites examples of abuses from the lenient definition of serious health condition. “One EEAC member company informed us that some employees have boasted about staying home for three days or more, seeing a doctor or other health care provider, and convincing the provider to give them a prescription so that the time off is protected under the FMLA. Other employees at the company who were out sick for legitimate reasons later confessed that they stayed out of work for an additional day or two so their sickness could qualify as a serious health condition.”⁵
- James Sherman from Wessels & Pautsch, P.C. explains how unclear FMLA is concerning what qualifies as a serious health condition. “[A]n individual had a bad cold. Normally that would not be considered an FMLA-qualifying serious illness. However, the person was seen in the clinic twice, and the Certification of Health Care Provider had wording that indicated it was a ‘more severe’ situation. Our impression

3. Doc. 10035A, Kalamazoo Human Resource Management Association and McCarthy Smith Law Group.

4. Doc. 10063A, Manufacturers’ Alliance.

5. Doc. 10107A, Equal Employment Advisory Council.

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is that the wording of what constitutes a serious health condition opens the door to an employee seeking treatment that may not have been necessary so as to have their absence ‘covered’ and therefore not subject to disciplinary action if the person violates a formal attendance policy. We’ve also seen situations where it’s been pretty obvious that the person knows the ‘system’ well and uses it to get what I like to refer to as a ‘free ride’ in respect to a company’s expectations of attendance.

This is another example from a company represented by Wessels & Pautsch, P.C.: “Our concern with FMLA would be that employees with migraines or fibromyalgia...are classified as having a serious medical condition if they go to the doctor a couple of times and are on a regimen of treatment which is prescription drugs. Their doctor completes FMLA forms and the employee takes A LOT of time off and we can’t touch here. Then we have to go through the employee to ask if this time is excessive. We had the employee take a list of the dates the employee was absent which included a lot of Mondays and days following holidays and the doctor said that this was normal for her condition. With having 60 days, the employee can take a day or more a week and still be within the guidelines. Then other co-workers have to pick up the slack and do not understand why management does nothing about her excessive absenteeism. This is VERY frustrating and not what I think FMLA was intended for.”⁶

- Tamara Domeyer from Exelon Business Services, speaking on behalf of their represented companies about the vague definition of a serious health condition, submitted the following comments about FMLA. “Exelon receives an overwhelming number of certifications for employees who have migraines and all of whom work in the same department. The providers report no objective clinical basis for determining that the employees have serious health conditions that incapacitate them from working but rely, instead, on the employees’ subjective complaints of pain, blurred vision, light sensitivity, and nausea. The providers report that the employees take both preventative medication to prevent a migraine from occurring and medication at the onset of a migraine to reduce the duration of a migraine. Yet, the employees’ health care providers consistently report that, when the employees have a migraine, the employees will be incapacitated from one to three days. Coincidentally, bargaining unit employees in this particular area of the company are eligible to receive paid disability benefits for absences of three scheduled working days or less due to illness without providing any medical documentation to support the absences. Some providers report that episodes of incapacity may occur once a month; even more providers report that episodes of incapacity may occur two to three times a month (for a total of six to nine working days). Exelon receives similar information from providers regarding employees with asthma, hypertension, degenerative disc disease, and arthritis. Employees covered by these certifications are taking medication for their conditions or receiving treatments of some sort (such as cortisone injections or physical therapy) but, according to their providers, these employees still have long-term recurring episodes of incapacity lasting one to three days, occurring anywhere from one to three times a month (up to seven times a month, in some cases).”⁷
- Tricia Miller from Bendix Commercial Vehicle System LLC explains the need for a better definition of “serious health condition.” “I have had difficulty interpreting and applying the DOL’s expansive definition of ‘serious health condition.’ For example, in 1995, the DOL issued an opinion letter stating that if an employee had been sick for more than three days, the employee would not qualify for FMLA protection if the employee was merely suffering from a common cold without complications. However, in 1996, the DOL issued a new opinion letter stating that employees who were ill with a common cold or the flu would be entitled to FMLA protection, provided the employee met the test set forth at 29 C.F.R. section 825.114. If the DOL would define ‘serious health condition’ more clearly, HR professionals would not have to debate whether the flu, the common cold or an earache is covered.”⁸
- Kevin McCarthy explains that doctors often feel an allegiance to their patients and are overly lenient in their diagnosis. “It is an incredibly common occurrence for health care providers, especially those with

6. Doc. 10140A, Wessels & Pautsch, P.C.

7. Doc. 10146A, Exelon Business Services.

8. Doc. 10079A, Bendix Commercial Vehicle System LLC.

a long-term relationship with a patient, to authorize the individual to be absent from work when he/she is perfectly able to work. One of KHRMA's members had a situation in which a family doctor certified that a receptionist needed to be absent from work for four weeks because of an injured toe. Another has discovered situations in which employees have convinced health care providers to sign off on four days of absence, in order to enable the employee to qualify for FMLA leave, when the health care provider originally authorized two or three days off. In yet other instances, health care providers have offered to authorize absences of a duration greater than requested by the employee-patient. Many medical certifications are suspect.”⁹

- Paul Dunn from the WIX Allen Plant explains that oftentimes medical certifications for FMLA are signed for non-serious health conditions. “Make it [FMLA] for a **serious health** condition. I have people that use it as extra vacation. It is not difficult to get a Doctor to write a note putting you out to meet the requirements of the law. It would be more difficult if they had to diagnose a specific health condition. As written it is nightmare to administer and people abuse it constantly because of their attendance problems.”¹⁰
- Katie Jones from the Pennsylvania Turnpike Commission explains that opinion letters released by the Department of Labor have clouded the definition of a serious health condition. “We believe that opinion letters dated April 7, 1995 and December 12, 1996 should be abolished. Cold, flu, and other common ailments were not included in the original definition of a serious health condition. These opinion letters only expanded and confused the original definition of a serious health condition.”¹¹
- Tom Norton of US Tsubaki in Massachusetts provides examples of leave related to stress and depression. “We have an employee in Chicopee who refused to do the job his supervisor assigned him to—not because of safety or other legitimate reason. It was because he ‘didn’t like that job’. When the Operations Manager told him that he had to do that job or receive discipline, he said ‘I’m going home on FMLA’. He did go home and we did issue discipline (written warning) to him the following day. He called the Dept. of Labor in Boston and they told him (and me) we couldn’t issue discipline to him because that would induce or trigger his FMLA for stress and depression. That is basically a ‘no win’ situation for the company.”¹²
- Norton also explains how the criterion for a serious health has morphed. “The most popular ‘disease’ these days is stress or depression. I don’t have to tell you how easy it is to get a doctor’s excuse to stay out for stress or depression. We currently have approx. 10 employees who have that certification from a doctor.”¹³
- Kathleen Pontone of Miles & Stockbridge, PC explains the negative impacts of FMLA. “Such a loose definition makes the FMLA a target for misapplication and abuse. Because of the confusion surrounding the definition of ‘serious health condition’ and the fear of violating FMLA policies, many employers feel compelled to either guess what the Department of Labor and courts will deem ‘serious’ or approve all FMLA leave requests received as long as a physician willingly completes the certification form. Employees with histories of chronic absenteeism or other workplace misbehaviors often use a vaguely defined ‘serious health condition’ certification to leave work and prevent their employer from taking disciplinary action against them. Such blatant abuse of the Act burdens employers and leaves well-intentioned employees and managers in attendance with additional work and stress.”¹⁴
- Jeffery Peterson from Delphi explains how vagueness concerning the health condition can lead to inefficiencies. “Certification forms are often returned incomplete, or with vague or contradictory information that suggests the health care provider did not understand the form or the FMLA’s requirements. The regulations currently provide that a health care provider representing the employer may contact the employee’s

9. Doc. 10035A, Kalamazoo Human Resource Management Association and McCarthy Smith Law Group.

10. Doc. 5115, WIX Allen Plant. Emphasis in original.

11. Doc. 10092A, Pennsylvania Turnpike Commission.

12. Doc. 5241A, US Tsubaki of Massachusetts.

13. Doc. 5241A, US Tsubaki of Massachusetts.

14. FL79, Miles & Stockbridge, PC.

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health care provider to obtain clarification, but only with the employee's 'permission.' Although this type of doctor-to doctor conversation is the most efficient way to obtain clarification, the required permission is frequently refused, particularly in those cases where improper FMLA use is suspected.”¹⁵

- Luis Villarruel from the Hancock Physician Network says that some patients seem to want FMLA protection because of absence problems rather than a medical condition. “In my experience it is used mainly by problem employees needing to justify their chronic absences. Other patients/employee with similar if not worse conditions do not seem to utilize it. Through litigation it is used in as little as 15 minute increments, used in my experiences by employees to arrive to work late.”¹⁶
- Suzanne Kilts feels that the term “serious health condition” should be redefined and explains why. “The term so frequently used in FMLA ‘Serious Health Condition’ should be changed to the ACTS Law, meaning ‘A Any ‘C’ Condition ‘T’ That ‘S’ Suits. These are examples of actual serious health conditions that we have had. An employee’s wife who suffers from migraine headaches has an attack after he calls her at his lunch time. The same employee gets a call from his wife shortly after his machine has a mechanical problem he doesn’t want to repair. The same employee again has his work assignment changed to an area he dislikes and a short time later he receives another call from his wife. Another intermittent employee’s girlfriend goes home on vacation and an hour later his condition causes him to have to leave. This same individual can’t be given time off so he can attend modeling classes so he files for FMLA and gets it. One night while he’s off for an FMLA call off he text messages a fellow employee from a bar rubbing it in to him that he’s working and the FMLA employee is enjoying a drink. Another case of abuse comes from an employee on the second shift who states that he can’t start at his regular starting time of 3PM on a specific day. He’s approached as to why he is unable to report to work and he said that the day he is going to be late he has to take his wife for a doctor appointment at 9AM. He is questioned why he still can’t be on time for work and he states in order to get some sleep plus he wants to take his kids out Halloweening before he comes in to work.

“As long as the FMLA employee has vacation time remaining we can charge them a vacation day for their absence. Its amazing how clean of record they can keep until they have used up their vacation. On our intermittent FMLA employees, we have had several occasions where the employee does not call in for his FMLA absence until minutes before their shift start. Our Plant/Corporate personnel departments provide very little guidance as it’s very plain to see they are scared stiff of possible law suits. Just last week I had an FMLA call off at 9:05AM in the morning. That’s 2 hours and five minutes after their shift is to start.”¹⁷

- Ginger-Lee Rasler from AM General LLC explains how liberal medical certifications can breed abuse. “There have been certifications turned in approving an employee for up to every day each month for sinus infections. Moreover, in every case that we have questioned the authenticity or asked for recertification if they have gone outside the scope of the current certification, the physician has increased the amount of time off work per episode of incapacity.”¹⁸
- A person wishing to remain anonymous submitted the following comments concerning the difficulties of administering FMLA and the abuse that comes with it. “The most difficult portion of FMLA to administer and interpret is the determination of a Serious Health Condition. As an example, I had an employee request FMLA for their adult sibling. After several questions, the employee was determined not to be in parentus locus. So she was denied her request to care for her brother (who is married and has surviving parents) with a serious health condition because ‘Brother’ does not fall within the immediate family member definition in FMLA. Rightfully so. She then turns around a week later and claims she is requesting FMLA for a serious health condition for herself. Depression and mental instability due to the trauma caused by her brother’s accident. We had given her 2 weeks time off (some of it even unpaid) prior to

15. Doc. 10225A, Delphi.

16. Doc. 4992, Hancock Physician Network.

17. Doc. 5204, Suzanne Kilts.

18. Doc. 10073A, AM General LLC.

her FMLA request. However, she then wanted to extend it even longer because she wanted to be with her brother and did not have the vacation time saved up to do so.”¹⁹

- Linda Reed voices the frustration that many employers are dealing with when conditions appear to be temporary and only reoccur when employees are able to re-qualify for FMLA. “It’s very frustrating to see the number of employees that take extensive leaves for such things as migraines, stress, back problems, depression. . . . There are also a number of employees that take intermittent leaves for the same reasons. They continue these leaves year after year. After all, it merely takes a certification from your doctor to get excused from work for days or weeks at a time. The odd thing is, when their 12 weeks ends, or their pay ends, they no longer need to miss any work.”²⁰
- Cynthia Fox of Southwest Airlines Company explains how relatively minor medical conditions can lead to major abuse. “Examples of minor conditions that have qualified under the absence plus treatment provision of section 825.114, at Southwest, include: sinusitis, sore throat, headaches, sprains, laryngitis, ear infections, allergies, gastritis and bronchitis. The DOL itself lists several of these same conditions as examples of minor conditions that are not serious health conditions. See 29 CFR §825.114(c). One Southwest employee had intermittent FMLA approved for sinusitis on the basis of episodes that could occur up to 16 hours/day, 7days/week. This same employee took intermittent FMLA leave 35 times over a 7 month period usually in time increments of less than 8 hour shift. It is the absence plus treatment provision of the DOL’s serious health condition regulation that is often used by those seeking unscheduled, intermittent FMLA leave for minor conditions.”²¹
- Daniel Finerty from Krukowski & Costello gives an example of an employee who was certified for a medical condition he did not have. “The evidence of abuses discussed among the Human Resource profession is almost legend. For example, take the case of the employee approved for intermittent leave, who took family and medical leave-designated leave and was found during that time working on his car at home. During the course of making the repairs, the employee attempted to remove a battery that was stuck from under the hood of the car—so stuck in fact, that one could visually see the employee bouncing the front end of the car up and down in order to remove the battery. It suffices to say that if leave was truly needed and/or if the condition was as had been certified, these gymnastics would have been physically impossible.”²²
- Fortney Scott from the National Association of Manufacturers provides examples of abuse from manufacturing companies represented by the Association. “One automobile parts manufacturer in Ohio reports that FMLA medical certification forms have been received for leg cramps, warts and crying spells. The case law under the FMLA is replete with numerous similar instances. It is no surprise, then, that most NAM members believe there is no requirement for a serious medical condition at all; rather, the FMLA has, to quote one manufacturer, become ‘a blank check to be absent.’

“A manufacturing employee was approved for intermittent leave under FMLA for migraine headaches. He claimed he was using FMLA for ‘therapy.’ After an unusual pattern of absences, the company took the time to observe his activities. His ‘therapy’ proved to be deer hunting.

“An employee was certified for chronic hypertension. His ailment seemed limited to Mondays and Fridays. However, the employee admitted that during his absences, he was not seeking medical treatment but was rather receiving ‘care’ at his girlfriend’s house.

“A manufacturing employee on the night shift was approved for intermittent leave for migraine headaches. The company then learned that he also had a second job driving a school bus. The employee would often drive a bus early in the morning, even though he was not able to work for his entire shift the night before ‘due to migraines.’

19. Doc. 4997.

20. Doc. 5009, Linda Reed.

21. Doc. 10183A, Southwest Airlines Company.

22. Doc. 10185A, Krukowski & Costello.

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“An employee with a chronic illness missed over 30 days in a calendar year, almost all on Monday or Friday. On most days off, he was observed driving his ATV on his farm.

“A manufacturing employee was approved for intermittent leave under FMLA for migraine headaches. He has missed work for 12 of the last 15 Mondays.

“An employee has a medical certification on file for a chronic kidney stone problem. She misses blocks of days, either Monday and Tuesday, or Thursday and Friday, allegedly due to pains from the kidney stones. However, the employee admits she has received no treatment for the condition or the pain after her initial episode. In 2005, 45 days of work were missed. Irrate co-workers report her absences coincide with her partner’s days off.”²³

- The manager of a nursing unit submitted anonymous comments on the abuse and hardship that FMLA creates. “Family Medical Leave Act is extremely vague in identifying specific disease entities that qualify under ‘chronic illness.’ Did you really intend for an employee who has a MD indicate ‘menstrual cramps’ or ‘migraines’ as a chronic condition to be excused from work for 12 weeks annually? This law is abused on a regular basis leading to excessive absenteeism. I manage a nursing unit, so when staff members fails to report to work, I must replace with another employee. The hospital is forced to pay overtime negatively impacting hospital operations. As the hospital is already subject to annual budget cuts from Medicaid and Medicare, this law is just one more contributor to demise of community hospitals across the country. The government intended to protect people who were being unfairly treated by employers but, the law is manipulated daily. The government should not be empowered to force human resource policies on private employers. If the law is to continue, it must be subject to major revisions.”²⁴
- Allison Gehling from Select Health provides examples of the abuse of FMLA. “Unclear, or competing guidelines on the definition of ‘serious health condition’ allows for abuse. An example of abuse of the FMLA occurs when employees are placed on disciplinary action for attendance issues. Claiming that the disciplinary action is stressful, employees then ask their doctors to certify them for intermittent FMLA due to their ‘stress’ disorder. With the FMLA protection in place, employees can continue to violate their department attendance policies without consequence.”²⁵

23. Doc. 10229A, National Association of Manufacturers.

24. R161.

25. FL131, Select Health.

CHAPTER 2

FMLA Leave Used to Excuse Tardiness

Is oversleeping a serious medical condition? What about having to walk several minutes from the back of the parking lot? Some irresponsible workers misuse the Family and Medical Leave Act to avoid the consequences of showing up to work late. They obtain a doctor's certification for a chronic condition and will claim they need FMLA leave when they run late in the morning. At times this means calling in from their car, or as they walk in from the parking lot. Others claim a single minute of FMLA leave to avoid clocking in late. These workers have no medical reason for showing up to work late; they simply want to avoid discipline for tardiness.

Congress never intended for workers to misuse the act this way. Companies have good reasons to require workers to show up on time. Late arrivals can disrupt production, inconvenience customers, and hurt morale. Companies that have problems with tardiness should be able to reward workers for showing up on time and discipline them for arriving to work late. Yet irresponsible workers now use FMLA leave to avoid punishment for tardiness.

- Wendy Nutt from GM Mirage explains that FMLA appears to increase tardiness of employees. “Allowing leave in small increments fosters abuse relative to attendance and tardiness policies. For example, we regularly have employees call in and report that they will be ‘fifteen minutes’ or ‘thirty minutes’ late because of their FMLA illness. Clearly, we question an employee calling from their car while on route to work to suggest that they are going to be fifteen minutes late as a result of their serious health condition, yet they are able to work a full shift once they arrive. Employees call in indicating that employee will be tardy (15 minutes or 30 minutes) because of their FMLA condition.”²⁶
- F. Scott Page from Seyfarth & Shaw Attorneys LLP further makes the point that FMLA appears to be linked with tardiness because there is no recourse for employers. “[O]nce a medical certification is submitted and the leave approved, many employees on FMLA leave claim that questionable tardiness and absences are attributable to the chronic health condition of the employee or covered family member. We have numerous instances in which employees who are a few minutes late for work claim that they are tardy because of their chronic condition and protected by FMLA leave.”²⁷
- Sue Sumler from the Manufacturers’ Alliance noted that many of their member companies’ employees regularly “claim FMLA intermittent leave to excuse tardiness. FMLA leaves increase when attendance policies are tightened up.” Speaking further of employee abuses, MAPI says of one of its member companies that “[t]he company views persons involved in this kind of abuse as marginal employees, yet it believes they cannot be terminated because of the FMLA protections that are probably being abused.”²⁸
- Cynthia Fox of Southwest Airlines Company comments on how employees use FMLA to excuse their tardiness for work. “The regulations currently allow employees to take intermittent leave in the shortest time increments recognized by their employer’s payroll system, of less than one hour. 29 CFR §825.203(d). At Southwest, this time increment is three minutes. This facilitates abuse by some employees, who use this to cover tardies, oversleeping, alarms not going off and the like. They show up to work late impacting our operation and their co-workers, and unfairly use the protections of FMLA to gain an excused late arrival, rather than a tardy under the attendance rules. This is also unduly burdensome to administer for employers.”²⁹

26. Doc. 10130A, GM Mirage.

27. Doc. 10132A, Seyfarth & Shaw Attorneys LLP.

28. Doc. 10063A, Manufacturers’ Alliance.

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- Allison Michael gives an example of the ridiculousness of having to account for FMLA by the minute. “Our Company can track hours worked to the second. This drives people to call in ‘FMLA’ at 5:58 and clock in at 6:01 in order to excuse a one minute tardy in some instances. The fact that they used ‘FMLA’ as the reason for the tardy protects them and the Company is unable to issue discipline. This is very frustrating for us, because they are calling us from the parking lot. If the employee is running late he/she has to park in the back part of the lot and it will take him/her a few minutes to get to the gate and clock in.”³⁰
- Rebecca Dent from the Employers Association of New Jersey comments on how the FMLA is used to cover for tardiness rather than for legitimate health concerns. “Some employees use small periods of intermittent leave as an excuse for lateness, making an employer’s attendance control programs a sham and impairing general morale. An employer has no viable means of verifying that a ‘period of incapacity’ exists. The employee is not required to seek treatment from his health care professional, and the employer has limited recourse for clarification. If the employer requires a recertification, seeking further explanation, then the employer has tied his own hands for any further options as second and third opinions may not be required for recertification 825.308(e).”³¹

29. Doc. 10183A, Southwest Airlines Company.

30. Doc. 5168, Collidge Wall Co. LPA.

31. Doc. 10119A, Employers Association of New Jersey.

CHAPTER 3

FMLA Used to Avoid Undesirable Work

Many jobs involve shift work and tasks that are less desirable than others. Night shifts, overtime, and holiday weekends are generally unpopular times for employees to work. However, some organizations require 24-hour operation, and employers must hire workers to work at undesirable times. When a train needs to leave at 3 a.m., an order needs to be completed for a customer, or 911 emergency operations must be manned day and night, someone has to work.

Employers have found ways to spread the burden fairly, through seniority, shift rotation, etc. The Family and Medical Leave Act undermines an employer's efforts to create a fair system for its workers. FMLA allows workers with medical certifications to call in whenever they wish for up to 12 weeks a year. Unscrupulous employees have used this protection to convert variable schedules to a Monday through Friday workweek, make full-time positions part-time positions, avoid mandatory overtime, skip night shifts, and leave work if assigned undesirable tasks. This use of FMLA is unrelated to serious health conditions and is being abused to obtain protections that were not intended by the law.

- Mary Anne Gibbons from the United States Postal Service explains how FMLA undermines absence control. “The Department has acknowledged in its request for comments ‘that the regulations and administrative details required by them may work in combination to allow certain employees to attempt to evade legitimate absence control policies.’ Given the large number of postal employees who seek FMLA protection, we have experience[d] several occasions when significant number of employees in a given office or facility submit certifications stating that they cannot work overtime. Consequently, all the other employees must now work even more overtime to compensate for their peers’ absence. Eventually, though, many of these employees then submit their own certifications for overtime exemption. The result is an office or shift where there are no, or very few, employees who can work overtime.

“A more extreme, but still real-life, example of a case where a second opinion is warranted involves a physician whose certification states that the employee needs treatment for an unspecified medical treatment three times a year. He states she must be absent for this treatment for ‘two weeks in July, the week of Thanksgiving and the week between Christmas and New Years.’ He also states that such a treatment schedule is needed for the duration of her employment. Requests for clarification are ignored until eventually, the physician submits an irate note charging the postal service with ‘interference with patient treatment’ and second guessing his opinion. Yet, given that in the Postal Service these particular weeks constitute prime vacation periods and are awarded on a seniority basis, it is not unreasonable to question the validity of the employee’s need for medical treatment during those times.”³²

- David Berg representing the Air Transport Association of America explains the difficulties of covering undesired shifts. “Unfortunately, FMLA can be manipulated to convert employees’ otherwise variable schedules into a Monday-to-Friday routine, and/or to avoid weekend assignments. For example, one member airline has found that 80% of FMLA usage by airport operations workers occurs in conjunction with a weekend. At another airline, use of FMLA routinely doubles every August as summer vacations linger and then drops by 50 percent in September. Likewise, passenger carriers routinely see increased FMLA use by flight attendants who are scheduled to work the Thanksgiving and Christmas holidays. As

32. Doc. 10184A, United States Postal Service.

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a result, airlines are forced to overstaff their reserve systems, in some cases by several hundred paid reservists, at holiday periods in order to maintain scheduled flight operations.”³³

- Charles Einsiedler from the Maine Pulp & Paper Association explains other problems that FMLA creates. “The intermittent leave provision of the FMLA has, in practice, enabled full-time employees to maintain part-time schedules. In addition, it has excused employees from working any mandatory overtime, even when overtime is required for their positions. This is so because there is no limit, other than the 12 week entitlement, to the number of times an employee may take intermittent leave. As a result, a full time employee may take off one day a week each and every week of the year and never exhaust his or her FMLA entitlement. Similarly, an employee in a position requiring mandatory overtime may, in fact, never work that overtime because he or she takes those hours as FMLA leave each week, again never exhausting his or her entitlement in any 12-month period.”³⁴
- Sue Sumler of the Manufacturers’ Alliance, writing on behalf of one of the group’s represented companies, noted employees appeared to be using FMLA to avoid certain shifts. “It appears that a number of people misuse FMLA leave at another member company, particularly intermittent leave, to miss undesired shifts. This company has had a history of employees taking several days off during the week on unpaid FMLA leave and then working overtime on Saturday or double time on Sunday to make up the lost wages. Many employees have used the FMLA excuse to get out of working a required shift.”

Sumler also noted that one member company stated that “[m]any [employees] use intermittent leave in coordination with their vacation so as to give a longer excused leave, or on Fridays to get a longer weekend if they are not working overtime.”³⁵

- Wendy Nutt from GM Mirage explains that FMLA is used to avoid undesired assignments. “Employees request FMLA time off after arriving at work when they are assigned a station, task, or function that is not to their satisfaction.”³⁶
- Tom Norton of US Tsubaki tells of some of the abuses of FMLA that his group deals with. “We have some employees who take off hundreds of hours per year—480 hours for FMLA—plus hundreds more for other reasons. The net result is some employees who only work about half a year... We also have a hand full of employees who have the ‘Friday/Monday syndrome’. I’m sure you know what that is, but I’m not sure what we can do about it.

“We also have about ½ dozen employees who use FMLA when they don’t like the job their supervisor assigned them to, when they are mad at a fellow employee or if it is hot in the plant that day.”³⁷

- Jill May from The Miami Valley Human Resource Association explains that “The guidelines for intermittent leave are too lenient. While this creates difficulty covering the work that needs to be done, it also seems to contribute to abuse of family medical leave. Intermittent leave seems to be linked to employees being restricted from working overtime and an increase of Monday/Friday absences.”³⁸
- A source wishing to remain anonymous explains how employees use FMLA to avoid undesired shifts. “An issue that I have seen more often than we should is Intermittent FMLA. Employees regularly take unscheduled leave for a day, half day or other variations until they have exhausted 90 days. This can go on for a year. Managers have recognized that these employees are taking advantage of this when there are assignments that employees do not want to do, i.e. in Corrections, they take it at the end of a regular eight hour shift to avoid working their occasional required two shifts. Currently, we have an employee that exercised this option mid-December until January 17, 2007 to avoid pending termination.”³⁹

33. Doc. 10160A, Air Transport Association of America.

34. Doc. 10191A, Maine Pulp & Paper Association.

35. Doc. 10063A, Manufacturers’ Alliance.

36. Doc. 10130A, GM Mirage.

37. Doc. 10044A, U.S. Tsubaki.

38. Doc. 10156A, The Miami Valley Human Resource Association.

39. R109.

- Michelle Bohna from the Merix Corporation explains how intermittent leave can be used to obtain desired work times. “We have had an employee who came in tardy, nearly everyday by only 2 to 10 minutes, and said it was from a sleeping disorder and covered under FMLA. When we tried to adjust her schedule to better accommodate the condition, she didn’t want to because it would not allow her to get off at her earlier time. Employees usually invoking intermittent leave never exhaust their FMLA entitlement so it is just an ongoing issue that starts over every leave year. Allows employees to ‘pick’ what jobs they want to do.”⁴⁰
- Janet L. Bartlemay from Association of American Railroads tells of the impact of FMLA leave on the railroad industry. “In the railroad industry, workers from the railroad’s pool or extra board are called in roughly two or three hours before they are needed (as prescribed in the pertinent labor agreement). Unfortunately, a railroad worker so inclined can use the existing regulatory scheme to repeatedly use very small increments of FMA leave to avoid unwanted assignments—disrupting railroad operations and unfairly impacting his or her co-workers. For example, a worker could call in to the railroad at 1:00 a.m. and take FMLA leave (e.g., for a chronic migraine), thereby preventing the railroad from assigning him or her to a 3:00 a.m. train run (or whatever assignment that worker may find unpleasant). That same worker can then call back a short period later (as soon as the worker feels that he or she has safely avoided that assignment), knowing that he or she would be assigned a later train run—thus obtaining a more favored assignment at a ‘cost’ of only an hour or two (or less!) of FMA leave. The opportunity for this type of misuse would be greatly reduced if the employer were permitted to count the entire missed trip as FMLA leave.

Bartlemay also goes on to explain how FMLA is manipulated to avoid certain shifts. “Another large railroad employer similarly reports FMA usage in one craft significantly higher than in other crafts (17 percent of the employees in the one craft using FMLA leave, as compared to 3.5 percent use among all other employees). In the craft with the high usage, employees do not have a regular schedule but instead are on call, and the employer does not require the worker to substitute paid leave for FMLA absences of less than 12 hours (because the employer does not grant paid leave in smaller increments). Data show the following related to the craft with the higher FMA leave on this railroad: (a.) most absences in this craft are in increments of less than 12 hours; (b.) the rate of FMLA leave in this craft is disproportionately higher on weekends and holidays; (c.) the use of FMA leave increases throughout the course of the calendar year (as the availability of paid leave decreases); and (d.) regional variations are significant (with 15 percent of the employees in Portland, Oregon taking FMLA leave during the first half of 2006, while only 5 percent of the workers in Kansas City and only 2 percent of the workers in Denver taking leave during that same period).”⁴¹

- Dennis Sharp submitted his personal opinion concerning the abuses of FMLA. “Employees commonly refer to FMLA as the Friday - Monday Leave Act for obvious reasons. Intermittent FMLA is being completely abused.”⁴²
- Allison Michael writing for Coolidge Wall LPA Inc. on behalf of one of their Ohio manufacturing clients explains how FMLA is being used to obtain vacation time. “Intermittent absences are out of control. Employees come in and ask for vacation. If the Company cannot accommodate the vacation request, the employee immediately says ‘OK I will be leaving at such and such time and using FMLA time.’ Also, the employees work until they receive their paychecks and then say they are leaving and using FMLA time as soon as they get their checks.”⁴³
- Amy Todd of WRCA stated that FMLA abusers often miss a lot of work at the beginning and end of the work week. “We have several employees who are certified under FMLA for the condition of migraines.

40. Doc. 10062, Merix Corporation.

41. Doc. 10193A, Association of American Railroads.

42. Doc. 2596, Dennis Sharp.

43. Doc. 5168, Coolidge Wall LPA Inc.

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The doctors have confirmed this condition and have listed that they will need to take off on an as needed basis, which leaves it wide open. Most of these employees are taking medication for their condition, yet seem to miss an extraordinary amount of time each year. In two specific cases that we have at our organization they show a pattern of missing at the beginning and end of a work week. We have questioned the employees and doctors about this, only to be told that the occurrence of the migraines can't be predicted and it is not known why they tend to occur at this time."⁴⁴

- Kathryn Curley from AIG explains that employees appear to be using FMLA to get time off to which they are not entitled. "An employee requested 12 weeks FMLA to care for her husband who was going to FL 1/1- 3/31. She was needed to assist him with medication preparation and some ADLs [activities of daily living]. She was able to work prior to leaving for FL by assisting him before & after work, but as he was going to their winter home she 'had' to go with him to continue assisting him with these daily activities. "Many employees request several consecutive weeks of FMLA to care for parents who live outside the country. The Certification Form provides clinical facts to indicate the parent needs assistance with ADLs. The fact is these employees request the same 3 months out of work each year to 'go home' to care for the parent. The requirements do not allow us to ask how the parent copes the remainder of the year. "Employees routinely submit Certification Forms for a chronic illness with expectations of absence of 2-3 times per month. Only after a few months do we see the pattern that each absence is a Monday or Friday and request clarification from the Provider. By then the employee has likely enjoyed several long weekends. With the inability to do a Second Opinion on re-certifications, we must depend on the treating Provider to clarify exact expectations."⁴⁵
- Greinilda Anistead from Cardone FML explains how many of their immigrant workers appear to be using FMLA for extended vacations to their home countries. "A very large portion of our population at CARDONE Industries consists of immigrants. We hire a large number of Indians, Albanians, Haitians, Hispanics and others. We currently have an issue with high absenteeism due to FMLA being used to extend vacation to visit their countries. "FMLA has poor controls in place. The employer faces poor controls in processing documentation with very little integrity as attending physicians in other countries are paid to process fraudulent paperwork."⁴⁶
- Vikki Brueggeman of Zimbrick, Inc., provides an example of an employee using FMLA to get preferred work hours. "It is highly suspicious when an employee is required to leave 2 hours early on Fridays and arrive 4 hours late on Mondays for a mental health issue. Leaving early on Fridays is because the employee experiences extreme stress during the rush hours commute to her home. Is this really what the regulation intended? Employers don't control where employees live. If the employee is stressed out over the commute then she should move. We have another employee where the job requires an average 43 hour week. However, the employee is conveniently on intermittent leave to reduce his work schedule to 37 hours per week because the long hours are causing him stress."⁴⁷
- Michael Henry of the County of Los Angeles provides a similar example of abuse. "In another one of our cases, an employee requested one day a week for vacation until her retirement in December 2007. The employee's request was denied. The employee then requested FMLA leave one-day per week until her retirement for psychiatric treatment of job related stress. We find cases like this when an employee either does not want to work a certain shift or is not given time off."⁴⁸
- A commenter wishing to remain anonymous explains how employees use FMLA to avoid unwanted overtime. "I worked in a 24 hour a day manufacturing facility for 25 years. The Family Leave abuse is much

44. Doc. 2692A, WRCA.

45. Doc. 10085A, AIG.

46. Doc. 10131A, Cardone FML.

47. FL125, Zimbrick, Inc.

48. FL72, County of Los Angeles.

worse than is being reported. I saw (daily) employees invoke FMLA in order to avoid being forced into overtime, avoid facing discipline action due to absenteeism and even used to make time for second jobs. This law is sucking the blood out of American manufacturing. No wonder we are losing jobs overseas.”⁴⁹

- Vicki Spaulding of Akers Packaging Service, Inc., explains how employees use FMLA to get additional personal days off. “We are a small employer with approximately 140 employees. The FMLA regulations have created a ‘nightmare’ for our company. We have had several employees take intermittent FMLA leave. Any time they do not want to come in to work—whether they are sick or just want to go fishing for the day—they call off and ask for an FMLA day. Any time they are not allowed a day of vacation (because of lack of enough required notice, or due to seniority), they call off FMLA. Anytime we place them in a job in our factory that they do not want to do, they go home sick using FMLA. We have had an employee request a week of vacation during the holidays and the request was denied because we had so many other employees off. Then the employee just called off for the entire week using FMLA, and then went on her vacation to Florida.”⁵⁰
- Roger Wapner from the East Bay Municipal Utility District explains how employees are using FMLA to obtain essentially part-time jobs. “An employee can change their employment from a full time to a part time position by having their doctor certify they have a serious medical condition that requires them to take every Friday off. This situation can be ongoing with a yearly medical recertification. The FMLA entitlement bypasses the ADA review (and in California the more expansive FEHA process) that would examine whether the essential duties of the job are getting accomplished with this type of schedule reduction. We have had only 2 employees in this situation but anticipate additional applications in the future.
“A more frequent concern is when employees obtain a medical certification for an ongoing condition that might flare up at any unknown time. We have sometimes experienced this as an open-ended entitlement for unscheduled vacation and tardiness with problem employees.”⁵¹
- Melissa Dunn from the Blackhawk Community Credit Union says that the credit union, like many other companies, suffers from loss of employees on Mondays and Fridays in particular. “Everyday we have call ins from employees that use intermittent leave. While I believe that for some this leave is important to care for their health or health of a loved one but unfortunately in many cases major abuse is suspected. I currently have 3 employees that call in intermittent FMLA leave on Monday’s and Fridays only. More often than not when an employee has run out of sick days they start calling in intermittent FMLA leave. I have been told by our attorney that proving abuse is difficult and expensive and in many cases it is easier for employers to put up with the suspected abuse. To say the least this is very frustrating.”⁵²
- Phyllis Lewandowski of The McGuire Group, Inc., cites one example of an employee manipulating FMLA so that he would not be moved to a less desirable shift. “I recall one specific employee who used his intermittent FMLA quite regularly (average of one day per week). This employee worked on our 11 p.m. to 7 a.m. shift, which has the least amount of staff assigned to this shift. Accordingly, when he called to report his (weekly) absence, it placed a huge burden on the facility. We suggested that he transfer to the 7 a.m. to 3 p.m. shift. This shift has the largest amount of staff. An absence on this shift has less of a staffing impact. Of course, we were unsuccessful in our hope of a voluntary change of shift, and we are not permitted to force the issue. Our hands our tied, co-workers become frustrated at having to work short-handed, and the cycle continues.”⁵³
- Sara Ricker explains that the most common time to use FMLA is around holidays. “Employees with intermittent leave abuse the system. They can call in sick any time they like and claim it is covered under FMLA. It is amazing how many employees need FMLA days the day before or after a holiday and there

49. R156.

50. Doc. 5121, Akers Packaging Service, Inc.

51. Doc. 5183, East Bay Municipal Utility District.

52. Doc. 17, Blackhawk Community Credit Union.

53. Doc. 110, The McGuire Group, Inc.

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is absolutely nothing we can do about it. Employers need a better way to verify medical conditions and more guidelines on what a serious medical condition is.”⁵⁴

- Jean Thompson from The Endoscopy Center explains what a hardship it is to have employees come in late and leave early. “Intermittent leave is a nightmare. Employees can come and go as they choose. It is even harder to control when the leave is for an employee’s family member. Employees make the decision and tell the employer when they will be off. Abuse comes into play when an employee uses this to come in late or leave early at a whim.”⁵⁵
- Marian McDowell from AT&T provides more testimony that FMLA is used for vacation or time off rather than a serious health condition. “Abuse uncovered by Asset Protection ranges from forged medical certifications to using leave for vacation or to take a day off with a co-worker or significant other. There have also been cases involving employees who take FMLA leave and are found to be working elsewhere or managing their own business.”⁵⁶
- A commenter who wishes to remain anonymous submitted the following statement concerning the use of FMLA for vacation-related leave. “Many employees abuse this Law. Some get certifications (WH380) from doctors they know and can get any type of wording they want on the WH380. They tell the doctor the duration and how many times they need to take off. A lot of times they call off FMLA before or after their non-schedule day so they can take couple of days, especially if they are going on vacation or a Holiday week-end.”⁵⁷
- A plant manager who wishes to remain anonymous submitted the following statement concerning the use of FMLA for vacation-related leave. “I work for Unified Western Grocers (Formerly Certified Grocers. of Calif, LTD). I am the plant manager in their main distribution center in Commerce. We have been plagued by the capricious use of FMLA by a segment of our union population. People are using migraines as a reason to NOT work overtime on any given day and miss work days at will. One of our people has diabetes and has gone years with missing every Monday, because he couldn’t get his eating habits right on the weekend. A three day weekend, every week. We have FMLA for tendonitis in the forearm. I have that condition and weight train. I have told him to get the same compression bands that I use, he prefers time off at will. We have FMLA because someone’s child has tubes in their ears, pretty common, but he misses, especially in the summer. Since they have to give up vacation time for FMLA days missed, they schedule their vacations early in the year, and take FMLA later when there is nothing left to take. Good intentions crafted this law, but the abuses are HUGE.”⁵⁸
- Karen Pickett from Discover Vision discusses how employees play the system to get desired time off. “From the viewpoint of someone who has dealt with FMLA both from an H.R. and operational viewpoint in a company of approximately 250 employees, the experience has been that 50% to 75% of all using the act for time off have learned how to ‘play the system’. As a company with generous paid time off benefits who requires employees to use paid time off prior to time off without pay, some employees using FMLA have learned how to use their paid time off benefits and then apply for FMLA for questionable reasons resulting in excessive absenteeism knowing their jobs are protected by FMLA. Some have used a child’s legitimate illness to gain FMLA time and then used the time for a family vacation. People with knee injuries have used FMLA to take the full 12 weeks off their sit-down jobs while others with similar injuries have been off work for 6 weeks and returned. For the 25% to 50% of employees using FMLA for legitimate need, any responsible company would work with those employees on their time-off needs without FMLA.”⁵⁹

54. Doc. 163, Sara Ricker.

55. Doc. 200, The Endoscopy Center.

56. FL32, AT&T.

57. R12.

58. R163.

59. Doc. 205, Discover Vision.

- David Cummins from Clow Valve Co. gives an example of how blatant the abuse of FMLA can be. “Here is a typical case in point: a male who worked on our weekend shift went to our company doctor during the week who certified this employee to be suffering from ‘depression’ and needed to be off work 6 weeks. I questioned the doctor, who said it was his determination that the employee needed to be off work completely and could not work for 6 weeks. The next day this employee came to my office and thought he could come back to work but might need to take off at any time depending how ‘emotional’ he became. I told him the doctor said he wasn’t allowed to work for 6 weeks. Upon hearing that, this employee said he would just have to make his living gambling at a local casino for the next 6 weeks. This employee also had attendance problems and his girlfriend had allegedly thrown him out of her house. People saw him moving out when he was on FMLA Leave. (I understand just because a person can’t work doesn’t mean they can’t move their living quarters.) This employee met with me and the doctor after not working for 2 weeks. He had convinced the doctor to allow him intermittent leave. During the conversation this employee said, ‘now if I need some time off, I don’t have to come to work. Right?’ I said would that be for doctor visits? He said no, just in case I have an emotionally bad day.”⁶⁰
- Thomas Norton, who works at a manufacturing company, explains how FMLA has been abused by employees. “We have an employee in Chicopee who refused to do the job his supervisor assigned him to—not because of safety or other legitimate reason. It was because he ‘didn’t like that job’. When the Operations Manager told him that he had to do that job or receive discipline, he said ‘I’m going home on FMLA’. He did go home and we did issue discipline (written warning) to him the following day. He called the Dept. of Labor in Boston and they told him (and me) we couldn’t issue discipline to him because that would induce or trigger his FMLA for stress and depression. That is basically a ‘no win’ situation for the company.”⁶¹
- Scott Titzer from Infinity Molding and Assembly Inc. provides examples of abuse of FMLA in the company. “Recently this regulation has morphed into a legal means to take time off from work without the need to follow their employer’s guidelines. Some examples are:
 - Take time off from work 4 hours at a time to take a non dependent family member to a doctors appointment.
 - Take a day off work each week for a headache—most weeks.
 - Take a day off work for cramps.
 - Immediately start taking time off on the first eligible day for FMLA (employee had no previous attendance issues their first year)”⁶²
- Tricia Miller from Bendix Commercial Vehicle System LLC explains that conditions covered by FMLA often do not appear until an employee gets into trouble because of excessive absences. “FMLA does not allow missed time to be counted against attendance. Although, there are employees who truly use the FMLA for its intended purposes, we have employees who are believed to abuse the intermittent FMLA. It is amazing the number of employees who get themselves into attendance trouble and then come back to us stating they have a condition such as migraine headaches, back pain, irritable bowel syndrome, etc. and they get a doctor to complete a certification. Once approved the employees that have had a history of attendance problems, their missed time under FMLA sky rockets. These employees can wake up late for work and call in and say they missed because of their FMLA where others are upheld to a strict attendance policy. If employees having approved FMLA don’t want to work a required overtime day, they call in FMLA...
“We have many coworkers of employees that have intermittent FMLA tell us that the employees are using the FMLA time for things other than their illnesses (shopping, out for breakfast, cover over sleeping, when have other plans). We have had people take FMLA and miss a whole day of work, but they go to college courses, paid by the company, that night because there was a test or a presentation due. We have had employees tell us that one coworker takes time off because he wants to buy the new video

60. Doc. 92, Clow Valve Co.

61. Doc. 10044A, Manufacturing Company.

62. Doc. 10033A, Infinity Molding and Assembly Inc.

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game that came out or that he simply takes the time to stay home and play video games. We have employees who don't miss any work for extensive periods of time because they have used all their FMLA allotment, but once they get some time back, they are missing again."⁶³

- Jill Bodensteiner from the University of Notre Dame explains how employees take advantage of FMLA by taking days off as FMLA leave when that is clearly not the reason for the leave. "The primary problem with intermittent leave is that, once an employee is approved for such leave by the University's Office of Human Resources, the employee can call his/her supervisor at any given time and say 'I'm not coming in today—it's FMLA.' The supervisor does not have the time, information or resources available to make a determination as to whether that day's absence is actually for an FMLA-approved reason. The Office of Human Resources has neither the time nor the staff to field all FMLA or other 'sick day' calls at the University. As such, the employees have discovered a gap in knowledge on the part of the University and as a result they abuse intermittent leave endlessly. Indeed, the hours actually taken as 'FMLA-approved leave' consistently exceed the hours suggested by the physician in the medical certification."⁶⁴
- Jim Kyger representing Printing Industries of America, Inc., provides some of the common complaints that they receive from member companies. "One member of PIA recent [sic] told us that once employees became aware of FMLA intermittent leave, 30 percent of employees in one of their key departments were using it. Not surprisingly, heavy use of FMLA intermittent leave was used around company-recognized holidays. Serious overtime costs were incurred and friction among employees resulted. Other common complaints from PIA members include the following:
 - Unforeseen, intermittent FMLA was used for days that were previously denied as requested vacation days.
 - Unforeseen, intermittent FMLA leave was taken by an employee and it was later discovered that he had taken a vacation with his spouse to Ireland.
 - Unforeseen, intermittent FMLA leave was taken by an employee who was later found to be attending professional baseball games each day that leave was taken.
 - Unforeseen, intermittent FMLA leave is often taken when overtime is scheduled for the qualified employees."⁶⁵
- Becky Brabeck provides an example of how absurd abuse can be. "There are those that are honest, then there are those who consider it an additional 12 weeks of vacation per year, using it for non-FMLA reasons but calling in to work and claiming it is FMLA. Co-workers have volunteered to us that, for instance, an employee who claimed she couldn't come in to work because her asthma was acting up, was actually at the bar and smoking! Another employee, we found, used her FMLA time to stay home and study for a test."⁶⁶
- Patrick Mok submitted the following statement concerning an employee using FMLA for vacation time "Abuse of FMLA is rather widespread. I had an employee who requested a 6 week vacation and was turned down due to the length of the request. He turned around got his friend who is an infectious disease doctor to write a note saying he must be off work due to a problem of his leg. He ended up going to Southeast Asia rain forest and had a vacation there. This went on and off for 3 years every time he wanted an extended vacation, he just asked his friend to write a note."⁶⁷
- Sally Burnell, who works for the state of Indiana, provides an example of an employee who used FMLA to avoid working undesirable shifts. "Employee with depression submitted a certification stating she needed a three-day/week schedule: Tuesday, Wednesday, and Thursday. She had regularly scheduled therapy appointments on Wednesday and wanted those charged to FMLA leave in addition to Mondays and Fridays, thereby actually resulting in a schedule of less than three days/week, because she had

63. Doc. 10079A, Bendix Commercial Vehicle System LLC.

64. Doc. 10248A, University of Notre Dame.

65. Doc. 10328A, Printing Industries of America, Inc.

66. Doc. 104, Becky Brabeck.

67. Doc. 4697, Patrick Mok.

another job that required travel over the weekends. Employee was told there was no medical necessity identified for that specific schedule and that Wednesdays would have to be one of the two weekly FMLA leave days. The employee submitted a new doctor's statement that she needed to be off continuously for the next twelve weeks."

Burnell goes on to explain how FMLA is often used to avoid disciplinary action rather than because of serious medical conditions. "The most common reason cited for FMLA leave is the employee's own condition, not that of a spouse, child or parent, and the number one reason is stress or depression either independently or as a companion to / exacerbation of other medical condition(s). The State has generous leave policies that do not require the types of information necessary to determine whether the absence is for a serious health condition or a minor one. Therefore, many employees quietly exhaust their accrued paid leave balances and then inform management of a condition that qualifies for FMLA leave thereby compounding the amount of available authorized leave and avoiding disciplinary action for attendance / punctuality issues."⁶⁸

68. Doc. 10244A, State of Indiana.

CHAPTER 4

Suspicious Leave Patterns

Congress intended the Family and Medical Leave Act to enable employees to take time off work to attend to family or medical concerns. It was never intended to allow workers to leave work at will and suffer no consequences. But many employers and coworkers have found that this is exactly what has happened. While many employees use FMLA leave responsibly to care for family members or in times of serious illness, other employees have highly questionable FMLA leave patterns.

Employers have found that FMLA leave requests spike on Mondays and Fridays, as well as on the first day of hunting season. Employees with perfect attendance records suddenly develop chronic conditions when they become eligible for medical leave—although these health problems are not in evidence when they have used up all of their FMLA leave time. Other employees have taken medical leave when they are assigned to work weekends, leaving more work for their coworkers to manage. One employee obtained a doctor's certification stating that she had to leave several hours early on Friday afternoons because negotiating rush hour traffic was too stressful. Many employees have used—or misused—medical leave in highly suspicious ways.

- Sue Sumler, writing on behalf of one of companies represented by the Manufacturers' Alliance, explains some of the suspicious patterns associated with misuse of FMLA related leave. "It appears that a number of people misuse FMLA leave at another member company, particularly intermittent leave, to miss undesired shifts. This company has had a history of employees taking several days off during the week on unpaid FMLA leave and then working overtime on Saturday or double time on Sunday to make up the lost wages. Many employees have used the FMLA excuse to get out of working a required shift."

The Manufacturers' Alliance also noted that in another of its member companies, "[m]any [employees] use intermittent leave in coordination with their vacation so as to give a longer excused leave, or on Fridays to get a longer weekend if they are not working overtime."⁶⁹

- Timothy McConville with Willcox & Savage, Attorneys at Law, notes the difficulty employers face in handling unscheduled absences due to FMLA's burdensome policies. "Employers frequently struggle with unpredictable, unscheduled intermittent leave for employees who have chronic conditions that can flare up suddenly and for unspecified duration. . . Fifty-three percent of our survey respondents reported that they experienced problems when workers taken [sic] unscheduled intermittent leave under the FMLA. With regard to the frequency of intermittent leave problems, twenty-five percent of the survey respondents reported that they often have challenges related to unpredictable use of intermittent leave, and an additional twenty-two percent reported that they sometimes have challenges regarding such leave. Sixty-nine percent of survey respondents reported challenges in obtaining adequate notice from the employees of their need for FMLA leave, specifically including intermittent or reduced schedule leave, and thirty-one percent said they experience this problem often."⁷⁰
- Wendy Nutt with GM Mirage also reports abuse of FMLA so that employees can take vacation time that would otherwise have been denied. "Employees request extra days off, early outs and/or vacation time and are denied, then subsequently call off and use intermittent FMLA time for the same dates." Further, "Employees engage in a pattern of calling in for FMLA leave on days immediately preceding and following scheduled days off (e.g. call offs for FMLA leave on Friday/Monday)."

69. Doc. 10063A, Manufacturers' Alliance.

70. Doc. 10088A, Willcox & Savage.

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This employee also observes suspicious patterns with respect to their tipped job classifications: “Employees request FMLA time off after arriving at work when business is slow,” or conversely, they “use intermittent FMLA to work only the dates when employees know that business levels will be high.”⁷¹

- Juanita Beecher of ORC Worldwide explains how FMLA is used as a convenient tool to take additional unauthorized vacation without penalty. “[S]ome ailments like asthma and migraines tend to affect employees only on weekends, early on Monday or late on Friday afternoons. The employers feel that their hands are tied in these ‘chronic’ situations that allow an employee to ‘just say FMLA and no-show.’”⁷²
- Randel Johnson of the U.S. Chamber of Commerce further confirms employee abuse of FMLA for what should be vacation days. “Among [companies represented], absenteeism attributed solely to FMLA leave on any given day was estimated to be about 5 percent, and at least one employer overstaffed by 10 percent to accommodate the absence rate due solely to FMLA leave. However, many managers reported that certain types of days, including the day after Super Bowl Sunday or the first day of hunting season, had much higher absentee rates for those employees with an FMLA medical certification. There was a high degree of consistency in high absentee rates linked to specific holidays reported across companies and industries.”⁷³
- Scott Langelin from Briggs & Stratton explains the costs the company has incurred because of FMLA. “This facility had an average of 1,060 hourly employees with about 875 being eligible to take FMLA (336 female and 536 male). That same facility reports usage of 25,413 hours of FMLA during the first 9 months of 2006. THAT AMOUNTS TO AVERAGE WEEKLY ABSENCE HOURS OF ABOUT 650. For the same 9 month period, similar high volume of intermittent leave in another facility with 800 hourly employees accounted for 16,800 hours.”⁷⁴
- Beth Kirschbaum with Union Pacific Railroad explains that many employees routinely take FMLA time off during holidays and weekends, coincides with the busiest times for their industry. “The rate of train and Engine Service FMLA use is disproportionately higher on weekends and holidays compared to weekdays. Again, there is no medical explanation for a higher rate of FMLA use on weekends and holidays among these employees. The only explanation is that TE&Y employees are required to be available to work on weekends and holidays when typically the rest of the population is engaging in leisure activities. However, weekends are often Union Pacific’s most critical time for servicing customers and when manpower is typically stretched thinnest due to vacations and other absences affecting crew availability. Again, when management puts a moratorium on granting paid leave on weekends and holidays due to labor shortages, FMLA use goes up because the company cannot restrict an employee’s access to FMLA leave under most circumstances.”⁷⁵
- Anna Dancy of the South Central Human Resource Management Association provides examples of patterns of behavior that suggest abuse. “This is primarily a problem with respect to unscheduled intermittent leave for chronic conditions. Our members report the following obstacles: (a) employees with a permanent chronic condition obtain a medical certification renewal of that condition every 12 months, and can then be absent up to 60 days each year with no consequences, a situation that continues for their entire tenure with their employers; (b) employees with such medical certifications who exhaust their 60 days of absence become ‘miraculously cured’ for the remainder of the 12-month period and are not absent, until the next 12-month period starts and they renew their medical certifications; (c) employees with non-FMLA attendance problems who have received discipline for those absences suddenly develop a chronic condition requiring intermittent leave so that they can avoid further disciplinary action; and (d) employees who request vacation or personal time off, but are denied because of business needs, suddenly have a chronic condition requiring intermittent leave and call in with an ‘FMLA absence’ on the day(s) they originally requested as vacation.”⁷⁶

71. Doc. 10130A, GM Mirage.

72. Doc. 10138A, ORC Worldwide.

73. Doc. 10142A, Chamber of Commerce of the United States of America.

74. FL37, Briggs & Stratton.

75. Doc. 10148A, Union Pacific Railroad.

- Beth Kirschbaum from Union Pacific Railroad explains the historical trend of FMLA use. “Data collected over the past three years reveals a general upward trend of FMLA use throughout the calendar year among Training and Engine Service employees with January being the month of least usage and December the highest. Again, there is no medical explanation to support this observable pattern of use. However, employees’ use of available paid leave such as vacation and personal leave decreases throughout the year as employees deplete their paid leave banks, leaving FMLA leave as the only ‘excused’ manner of taking time off under the company’s attendance policy. Therefore, FMLA leave increases even though there is no reason to believe employees or their family members become more ill as the year progresses.

“Data also shows that FMLA use among Train and Engine Service employees varies disproportional from one location or region to another, again without medical explanation to support this variance in use. The percentage of Train and Engine Service employees in the Portland, Oregon area, for instance, who use FMLA leave in the first half of 2006 was approximately 15%. However, less than 5% of employees in the Kansas City, Missouri area used FMLA leave in the same time period while only 2% of employees in the Denver, Colorado area used FMLA leave. There is no reason to believe employees and their families are any more likely to suffer from serious health conditions in Portland versus Kansas City or Denver.”⁷⁷

- Tom Norton with U.S. Tsubaki explains that workers will misuse FMLA to avoid being penalized for frequent tardiness and unexcused absences. “Some employees use it as a ‘shield’ to protect themselves against the company’s Absenteeism Policy. When they get close to suspension or termination under the policy, then, all of a sudden, they go on FMLA. Some even brag to their fellow employees, ‘I’m not going to get fired, I’ll just go on FMLA.’ As a result, only two employees in the past 2 years have been terminated due to absenteeism.”⁷⁸
- Timothy McConville from Willcox & Savage, Attorneys at Law, defending employers regarding FMLA, explains the struggle employers have with intermittent leave. “Employers frequently struggle with unpredictable, unscheduled intermittent leave for employees who have chronic conditions that can flare up suddenly and for unspecified duration... Fifty-three percent of our survey respondents reported that they experienced problems when workers taken [sic] unscheduled intermittent leave under the FMLA. With regard to the frequency of intermittent leave problems, twenty-five percent of the survey respondents reported that they often have challenges related to unpredictable use of intermittent leave, and an additional twenty-two percent reported that they sometimes have challenges regarding such leave. Sixty-nine percent of survey respondents reported challenges in obtaining adequate notice from the employees of their need for FMLA leave, specifically including intermittent or reduced schedule leave, and thirty-one percent said they experience this problem often.”⁷⁹
- Troy Cash from North Carolina State University College of Veterinary Medicine gives an example of exceptional abuse of FMLA and the hardship it caused. “A co-worker in my department, Ms. Patricia Hogan, was granted FMLA about three months ago after complaining of an off-duty back injury. Since that time she appears to have fully recovered, but continues to take liberal amounts of intermittent FMLA leave (usually conveniently taken on Fridays and Mondays to allow for 3-day weekends). She is in essence working part-time, receiving full-time benefits, and due to the FMLA crutch, her employer is not authorized to hire anyone into her position which is in dire need of a full-time, reliable employee to fill this one-deep position. Ms. Hogan’s attendance record at N.C. State is deplorable and she has been on the verge of being terminated on numerous occasions for failure to report to work, sleeping on the job, etc. After more than 7 years employment, and with her leave balances in both vacation and sick leave categories exhausted, she embarked on further scamming the system by applying for and being granted FMLA. Now she merely has to say her back is hurting and regardless of the fact that she has no

76. Doc. 10136A, South Central Human Resource Management Association.

77. Doc. 10148A, Union Pacific Railroad.

78. Doc. 10044A, U.S. Tsubaki.

79. Doc. 10088A, Wilcox & Savage.

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leave available, she's allowed to come and go as desired. I feel that she is receiving preferential treatment by the administrators here at the College of Veterinary Medicine to avoid terminating her employment and that her actions are a complete sham.”⁸⁰

- An employee with Nebraska Furniture Mart of Omaha, Nebraska, gives an example of how another employee grossly misused the FMLA policy to conveniently shorten his work hours every month. “Here at Nebraska Furniture Mart we had a unique case in 2006. One of our employees contacted the Human Resources Department in January 2006 regarding FMLA coverage for his asthma. He has just met his one-year anniversary and was eligible for FMLA coverage. However, prior to his anniversary he had exhausted his paid time off (PTO) for his asthma condition. He had missed so much time that he was receiving disciplinary action per our attendance policy. He was advised by HR that he needed to obtain certification from his health care provider to be covered under FMLA. When HR did receive his certification it indicated that the time the employee could miss was “undetermined, but could be up to six days per month.” Upon receiving this, HR was somewhat concerned. The reasoning was that the employee had already missed a lot of time due to the asthma condition and created a hardship for the company in terms of productivity. The amount of time indicated by the physician seemed unreasonable under the circumstances of already poor attendance and productivity. The employee was advised by HR to not take this as an invitation to miss six days each month. From that point on until December 2006 the employee did take six days of FMLA leave each and every month, at the beginning of each month, until coverage was exhausted. Since then, and until the time of this documentation (January 19, 2007), the employee has missed only one day of work. It is our belief that this was a ‘chronic’ health condition that didn’t require an extensive amount of FMLA leave, if any at all, as asthma is a condition that can be and should be controlled by other means than just missing work for so many days a month. The other issue was that this employee took all six days of FMLA leave at the beginning of each month. Not sporadically during the month and not at a limited pace, it was always six days. This issue, obviously, was abuse on the employee’s part because now, since his FMLA leave has been exhausted, he has had good attendance.”⁸¹
- Maryann Schaller of the Schaller Corporation provides an instance of how an employee uses FMLA leave in order to complete work in his other capacity as a farmer. “We also find our employees using this legislation as extra unpaid vacation time. It seems awfully coincidental that certain employees always take roughly the same time period off every year. An example would be an employee, who is also a farmer according to his co-workers, who typically has Family Medical Leave paperwork brought in during planting and harvesting months in our state.”⁸²
- Christine Bogdan, an employee with Pleasant Holidays, LLC, illustrates how other employees misuse FMLA to avoid disciplinary action due to frequent unexcused absences. “We believe that intermittent FMLA is abused regularly. Employees who have a demonstrated poor attendance record and come close to termination will request an intermittent leave for a condition that has never been mentioned before. Most healthcare providers will check the appropriate box as a chronic condition requiring periodic treatments on the Health Care Provider Form.”⁸³
- Jill Cook with Cummins, Inc., notices employees who conveniently take FMLA leave to extend weekends, as well as cover up tardiness, when they have otherwise used up all of their vacation/sick leave. “It has been our experience that some employees apply for FMLA leave, often for short-term illnesses, after their sick leave has been exhausted to avoid disciplinary action for attendance problems. We have also suspected abuse of the FMLA when there is an observable spike of FMLA leave on Mondays, Fridays and on the first day of deer hunting season.

“Compliance with the intermittent leave option has been exceptionally challenging because the regulation stipulates that leave may be taken in increments that correspond to the employer’s payroll system.

80. FL89, NC State University College of Veterinary Medicine.

81. Doc. 10066A, Nebraska Furniture Mart.

82. Doc. 10260A, Schaller Corporation.

83. Doc. 10322A, Pleasant Holidays, LLC.

Our payroll system allows for increments as few as three minutes, and one facility had over 200 incidents of three minute FMLA uses in 2005. We strongly suspect that our incidents of three minute FMLA leave are used to excuse tardiness rather than true FMLA leave.”⁸⁴

- Karen Zaugg from the University of Washington states that FMLA seems to be correlated with people who have performance-related problems. “All too often a reasonable person would perceive that employees can easily establish FMLA-covered intermittent leave when experiencing performance problems at work.
“Any supervisor or other management representative legitimately pursuing performance counseling or action finds the covered employee suddenly excused due to a migraine or breathing difficulty prompted by concern that performance is being addressed. If being at work is sometimes stressful and stress can have serious health consequences surely all persons who work for a living should have FMLA intermittent leave in force.”⁸⁵
- Kathi Miller with the Milwaukee County Transit System concludes abuse of the FMLA when employees take days off for chronic illnesses but never display symptoms at work. “Because of the relative ease with which intermittent leave certification for a self-reported chronic condition can be procured as well as the ease with which such leave can be taken, employees can and do abuse the right to such leave. It is not at all uncommon, for example, for employees who consistently take full days off because of chronic conditions such as migraines or irritable bowel syndrome to never experience any symptoms whatsoever, on days that they work, which might preclude them from completing their shifts.”⁸⁶
- John Aguine of Franklin County, Pennsylvania, states that some employees abuse FMLA to avoid disciplinary problems due to excessive absences. “It makes it more difficult for the employer to truly monitor attendance problems as some employees have turned to the protection the FMLA offers to guard them from abuse of the attendance policy. An example of this is we have employees who have an unknown medical condition until they have reached the number of occurrences that would result in a discipline. At that point, they apply for FML to protect themselves from the discipline. It is a fact that employees abuse the FML to be absent from work.”⁸⁷
- Carol Svensen-Smith from The Resource Center explains that employees are abusing the certifications for care of family members. “We have had a fair bit of problems with the provision for intermittent FMLA for care of family member. One individual has been using 50-60 days each year for over two years for care of a parent with serious health condition. The doctor has stated that care includes psychological comfort, etc., and the employee will call off work for such needs as ‘cleaning parents’ house’, ‘helping with canning food’, and other activities that could easily be done outside working hours. The last-minute calls for activities that need not be done during working hours has placed a substantial burden on the department. It would be helpful if regulations were tightened to diminish the potential for marginal use of FMLA time such as this. In this case, the other parent is well, living at home, and should have been able to attend to many of the needs for which the employee takes time, but we find no provision under the law by which this could be taken into consideration.”⁸⁸
- Kelly Liligenquist explains that abuse of FMLA is nearly impossible to combat. “As a human resource professional for a large corporation, it is extremely difficult to track intermittent LOA and know that it is being abused because of the lack of authority to justify the need of the leave. We know abuse takes place because our associates tell us so. They tell us that once a physicians certification is received, it’s basically a green light to use the leave as you choose. An employer basically has no right to question the validity of the leave once the certification is received with out the potential of litigation. For example, Monday-Friday call offs. If an employee says there is a legitimate need but how can the employer ask for

84. Doc. 10340A, Cummins, Inc.

85. FL17, University of Washington.

86. FL80, Milwaukee County Transit System.

87. FL59, Franklin County, Pennsylvania.

88. Doc. 5198, The Resource Center.

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proof? It is a publicly known fact that doctor shopping takes place until the certification is completed. There is extreme difficulty of pursuing disciplinary action once fraud is noticed and the legal ramifications of the effort to investigate fraud again falls on the employer.”⁸⁹

- JoAnn Shea from the Tampa General Hospital explains the abuse that takes place in the hospital. “Intermittent FMLA leave is difficult to manage in an acute care hospital setting and our hospital finds intermittent leave to be disruptive to our work environment. I estimate we have 50-75 employees at any one time abusing intermittent FMLA.

“Specific causes of concern include:

- Employees calling in the last minute for chronic illnesses such as migraines, children’s asthma, etc.
- Employees calling in three or four times per month, especially before or after days/weekends off.
- Employees calling in FMLA after being told they could not have a particular day off.
- Employees applying for intermittent leave after being written up for attendance or tardiness
- Employees calling in FMLA on holidays
- Employees calling in FMLA for non-FMLA related reasons
- Employees consistently coming in late or leaving early for ‘FMLA’ reasons

“Some examples of our FMLA issues:

1. Nurse in ICU calls in FMLA for depression. She tends to call in last minute and after her days off at least three or four times per month. Other staff have heard her say, I think I’ll call in FMLA tonight. She works night shift and the other staff have to work short when other ICU nurses are not available.
 2. Employee in our transfer center keeps getting migraines in the middle of the day and leaving early. Other staff have to take over her duties. She leaves early at least once per week and calls in FMLA at least twice per month.
 3. NICU nurse calls in FMLA for chronic back pain. Her med cert states she could miss up to five days for each exacerbation. She calls in three to four days at a time. She is an experienced nurse and difficult to replace. Her manager is very frustrated as she has heard that she calls in when she is not really having any problems.
 4. Respiratory Therapist, works 12 hour night shifts, calls in for fatigue 3-4 times per month after infusions from her hematologist. She refused to grant permission to contact her doctor. I find out that persons getting similar infusions don’t usually miss work. It is difficult to staff the night shift and we hear she calls in just because she wants to work part time, but doesn’t want to pay the higher health insurance costs that part time employees pay.
 5. On Christmas Day, we have at least five employees call in FMLA. Staff who are assigned to work or asked to stay for an extra shift get understandably upset.”⁹⁰
- Kim Riedlinger Wassim with North Dakota Society for Human Resource Management State Council explains that employers are “powerless” against abuse of FMLA by employees who, by their actions, cause staffing hardships and employee resentment. “A real world example submitted by a ND employer: A North-Dakota employer has a busy department among others, which contains only 11 employees. The employer trains employees of that department for six months to handle duties that include complex customer sales and representative calls. Due to the long training horizon, the employer finds it difficult to substitute temporary employees or employees from other departments.

“Of the 11 employees in the department, three experience migraine headaches and miss partial or full days of work with regular frequency. At times, all three workers have been absent on the same day and, unfortunately, some of the employees appear to use leave in place of planned vacation time or for conditions that do not qualify as serious health conditions. For example, one employee’s absences fall disproportionately on Mondays.

89. Doc. 5242, Kelly Liligenquist.

90. Doc. 5252, Tampa General Hospital.

“The employer pays overtime costs to coworkers to cover the unscheduled absences, but still the employer is often unable to meet work demands as a result of the absenteeism. Coworkers resent the employees on FMLA leave because the coworkers perceive the employees as receiving favorable treatment for substandard performance. In addition, the coworkers’ share the employer’s concerns that some of the employees take advantage of FMLA leave. The same employees who take FMLA leave for migraine headaches appear to take a significant amount of time off for other health problems as well, such as for colds and flu. These absences magnify resentment from coworkers who take little or no sick leave, and this employer spends a considerable amount of time preventing retaliation against the employees who do take FMLA leave.

“Although the employer has requested certification of healthcare provider forms to be completed by the medical providers, the forms do not assist the employer in anticipating staffing issues. The certifications state that migraines will be ‘occasional, sometimes frequent, and ongoing.’ This employer’s experience has been that the leave may be required at the beginning or end of the day, for a full day or several days at a time. Usually the employees do not notify the employer in advance about the length of leave needed.

“The employer feels powerless to challenge potentially abused FMLA leave because of the short and unpredictable nature of FMLA leave for migraine headaches. In fact, one of the employees has never shown any lingering signs of illness following leave for a migraine. Short of a doctor’s certification for every absence, the employer cannot verify FMLA abuses, and the Act limits recertification to no more often than every 30 days.”⁹¹

- Elizabeth Morin the Human Resources Director of Garrett Container Systems explains why they believe that employees are abusing FMLA. “I am the HR Director of a manufacturing company in Garrett County, Maryland. We employ 80 people, of which 70 work on the shop floor. Our most pressing problem with FMLA compliance has been with those who we believe have abused the law, in particular with intermittent leave. We have several diabetics, which we know is defined as a serious health condition. We have found that this has allowed them free reign of terror on the shop floor. Employees must be at his or her station to do the job so that production runs as scheduled and we get our products out on time. With several employees who have a condition which is defined as serious health condition, they have discovered they can decide they don’t feel well, blame it on the condition, say they have to see a doctor and then they get the rest of the day off.”⁹²
- Shellie Albright, an employee, notes obvious abuses of FMLA by fellow employees who conveniently take every Friday off. “The intermittent leave provisions are the most troublesome. We have had employees abuse this. We have had several employees whose doctors have stated that they need to take every Friday off. While this might make sense for a person receiving chemotherapy or something like that, this was due to diabetes.”⁹³
- Rebecca Wincell of Foley & Lardner LLP describes employees’ misuse of FMLA to extend weekends and avoid unwanted work. “We regularly see employees who call in each Monday as ‘FMLA’ or call in when they have a difficult assignment, it is clearly abuse of the system but the most often we can request an updated certification is every 30 days.”⁹⁴
- Eric Brandenburg, an employee, questions fellow employees’ use of FMLA to avoid work due to migraines. “I get migraines from time to time and they are quite severe. I manage to work (through) the event, but understand first hand the issue. We have a department of 14 associates and at one time 6 had FMLA for migraines or head aches. Did they talk within the group and train each other on how to describe what a migraine?? Each can get 90 day(s) straight leave or 60 + days intermittent leave. Naturally, intermittent leave is taken for migraines. If I went to my Dr. and told him that I had 60 migraines a year he’d have me in the hospital. There has got to be more flexibility to discuss the associates medical condition and absentee patterns with the Dr.”⁹⁵

91. FL90, North Dakota Society for Human Resource Management State Council.

92. Doc. 5200, Garrett Container Systems.

93. Doc. 4562, Shellie Albright.

94. Doc. 4711, Foley & Lardner LLP.

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- Christine Bogdan from Pleasant Holidays, LLC also provides an example of employee FMLA abuse. “An example of this, we have an employee who has a pattern of coming into work late. She had received warnings and was on her final warning. The employee then said that she has insomnia at nighttime which makes her late in the morning and requested an intermittent leave. The healthcare provider checked it off as a ‘chronic condition.’ The employee is now able to be late to work two to three times a week.”⁹⁶
- An employee wishing to remain anonymous explains the abuse observed while handling the Leave of Absence claims for a hospital. “I handle the processing of LOA for this hospital. The FMLA is one of the most abused laws that I have come into contact with. The employees know how to use the system and take full advantage of it. It’s hard to track when employees use the FMLA hours for intermittent leave. I believe it is often times used just for the employee’s convenience when they really do not need the time. Most times they could accomplish what they need to do after work hours. I would truly like to see the requirement tighten up on this and hopefully stop the on-going abuse. I believe that it is not being utilized properly and is not being used for its intended purposes.”⁹⁷
- Becky Brabeck, an employee, confirms that employers know that employees abuse FMLA leave to extend vacation days and further notes that doctor’s notes are not evidence of a true medical situation. “It is also quite interesting when we see someone who has had a condition for their whole life, can make it through their first year of employment with few absences, but as soon as they are FMLA eligible, they are missing a week a month! Or the employee that misses a lot of time around the weekends or the day before or after a holiday. These are definitely questionable cases but we can do nothing about it. Sure, we can ask the employee to bring a note to the doctor, asking him to comment about that, but since the doctor has no proof that this person was ‘playing hooky’ he is not going to say otherwise. Doctors are not going to hand a note back to the employee to give to the employer that says: ‘yes, I believe these absences are outside of the norm for her/his condition’.”⁹⁸
- Phyllis Buckelew with Lasko Products explains how employees use FMLA to extend vacations in their home country, which further complicates verification of FMLA absences. “Many of our employees are from Mexico and/or still have family there. They often request time off under FMLA for medical procedures they want to have done in Mexico. Or, they request time off under FMLA to care for a relative that lives in Mexico. Most of the requests come around our Vacation Shut-down in August and the Christmas & New Year holidays in the form of extended time off. They bring back letters from physicians confirming whatever reason they gave the company for needing the time off. We honestly believe most of the letters we receive are fakes, but there’s no way to prove it.”⁹⁹
- Scott Titzer with Infinity Molding & Assembly Inc. explains how some employees regularly use FMLA to get around employer absentee regulations. “Recently this regulation has morphed into a legal means to take time off from work without the need to follow their employer’s guidelines. Some examples are:
 - Take time off from work 4 hours at a time to take a non dependant family member to a doctors appointment
 - Take a day off work each week for a headache—most weeks
 - Take a day off work for cramps
 - Immediately start taking time off on the first eligible day for FMLA (employee had no previous attendance issues their first year)“These regulations in their current form allow an employee with proper paperwork from a physician to work 4 days weeks for an entire year without any consequences yet this puts an employer at a disadvantage due to a lack of coverage for this person.”¹⁰⁰

95. Doc. 4917, Eric Brandenburg.

96. Doc. 10322A, Pleasant Holidays, LLC.

97. R149.

98. Doc. 104, Becky Brabeck.

99. Doc. 178, Lasko Products.

100. Doc. 5192A, Infinity Molding & Assembly Inc.

- Vikki Brueggeman with Zimbrick, Inc., states that employees should not use FMLA to avoid the stress of a busy commute or full-time hours. “It is highly suspicious when an employee is required to leave 2 hours early on Fridays and arrive 4 hours late on Mondays for a mental health issue. Leaving early on Fridays is because the employee experiences extreme stress during the rush hours commute to her home. Is this really what the regulation intended? Employers don’t control where employees live. If the employee is stressed out over the commute then she should move. We have another employee where the job requires an average 43 hour week. However, the employee is conveniently on intermittent leave to reduce his work schedule to 37 hours per week because the long hours are causing him stress. If the employee can’t work the hours then he should get a different job. Is this what the regulation intended? Instead of signing the Physician Certification form the doctor should be counseling the employee to consider a career change.”¹⁰¹
- An unnamed employer notices that the same employees routinely take FMLA leave to avoid unwanted work duty or schedules. “An issue that I have seen more often than we should is Intermittent FMLA. Employees regularly take unscheduled leave for a day, half day or other variations until they have exhausted 90 days. This can go on for a year. Managers have recognized that these employees are taking advantage of this when there are assignments that employees do not want to do, i.e. in Corrections, they take it at the end of a regular eight hour shift to avoid working their occasional required two shifts. Currently, we have an employee that exercised this option mid-December until January 17, 2007 to avoid pending termination.”¹⁰²
- Phyllis Lewandowski of The McGuire Group, Inc., expresses frustration when employees use FMLA to extend vacation time. “Employees have intermittent FMLAs on file for issues such as migraines, asthma, child behavior problems and diabetes. We see many employees call to report their absence on the day before and/or after a holiday. Some employees call to report their absence on the day before and/or after their scheduled vacation time. We can clearly see patterns of abuse, but we feel our hands are tied. We see similar patterns on absences on the days surrounding pay day.”¹⁰³
- Ed Carpenter from the Tecumseh Power Company provides examples of the many abuses that have been dealt with at Tecumseh. “Is there any evidence of employees abusing FMLA? Certainly! As an employer, we see about 15% of our employees using FMLA and of that amount, about 25% are thought to be abusing the FMLA intermittent leave in order to avoid penalties incurred by our attendance system. It’s unfortunate that these employees make comments to other co-workers that they overslept, but tell us they had a migraine, morning sickness, or their back hurt and it’s covered under their FMLA that was certified for that reason. In fact, some employees now obtain cash awards under our perfect attendance award program because these absences can’t be held against them for a bonus for attendance.
“Before they figured out how to work the system under FMLA, they had numerous attendance problems. They were tardy due to oversleeping, traffic, not feeling good, and numerous other reasons. They also missed work when it snowed and took off on a lot of Fridays and Mondays after having a good weekend. Once they figured out that FMLA could be used intermittently, they have taken advantage of the benefit almost exclusively and they never miss for any of those reasons anymore. In fact, they now achieve perfect attendance and receive a bonus for good attendance. Unfortunately they brag to their co-workers about going out all weekend and staying up too long and oversleeping. They also use FMLA to be excused for not working overtime on many Saturdays or Sundays and then brag about going to the ball games of their children while other employees have to cover their workload. This is just one example of many I could share, but I think it demonstrates the need to make some changes.”¹⁰⁴

101. FL125, Zimbrick, Inc.

102. R109.

103. Doc. 110, The McGuire Group, Inc.

104. R123, Tecumseh Power Company.

CHAPTER 5

Openly Abusive Leave

Many employees blatantly abuse the Family and Medical Leave Act. They do not hide their misusing it as a “get out of work free” card. Intensive Care Unit employees have taken FMLA leave, and then called their coworkers from a hot tub to brag about having the time off. One worker took FMLA leave for a shoulder sprain that did nothing to prevent him from bowling 300 while off work. Other workers frequently use FMLA leave until they exhaust their allowance, at which point their health condition miraculously disappears and they show up for work regularly—until the next year, when their leave balances are restored and the cycle begins anew.

Irresponsible workers take FMLA leave for garage sales and hangovers, call off with migraines but are found laughing in department stores. Others brag to their co-workers that they get time off for fake illnesses. One worker took FMLA leave to attend court appearances without being punished for absence from work.

- Daniel Evans from AT&T submitted the following example of FMLA abuse. “A guy was arrested by a sheriff on a Friday. Dragged out in handcuffs from the warehouse. He called off on Saturday the following day. Then the following week, he called off on FMLA for the next 30 days. He had court appearances etc...and was not going to take points or lose his job over it. He even called in and told co workers that he left the state of Ohio and went down to Kentucky for a week to just get away. The Plant Manager lead him out of the plant on a Friday and he didn't question this guys use or APPROVAL of FMLA benefits? This is exactly why we have so many people applying. It's a regular party of them. This guy I'll call Mr. E laughs about it. He also encourages others to use FMLA anytime they want to. He tells them that a company 'can't @#!\$ with you when you call off FMLA, dude, they can't even question you about it' and encouraged someone else to abuse it.”¹⁰⁵
- Janie Libby, Vice-President of Human Resources for Dover Downs Hotel and Casino, has many employees who abuse the act. “Another example was the photo of an ‘injured’ employee who was unable to work for months due to a shoulder sprain, yet he was featured on the front page of the sports section of our local newspaper when he bowled a 300 game.”¹⁰⁶
- Sue Willman from Spencer Fane & Britt Browne LLP provides six specific examples of how FMLA has been abused at companies that the law firm represents. “Employee has chronic bronchitis and asthma. She is a smoker. She uses all or close to her 60 days of intermittent FMLA leave per year, by simply calling in and saying her bronchitis is bad and she can't work. The doctor has told her to quit smoking and stop going to the casinos (which she does frequently). She has not followed the doctor's advice. Should she be allowed to miss 60 days a year when she is doing nothing to ameliorate the very condition that causes her to need FMLA leave?

“Employee has performance problems and has been counseled on several occasions about unacceptable performance. Employee is told her job is in jeopardy and she needs to immediately improve. Employee then requests intermittent FMLA leave due to ‘anxiety’ and ‘workplace stress.’ Her doctor certifies that these conditions have arisen because of the employer counseling the employee about performance. The doctor states that the condition will continue until the employer reduces the stress in the workplace. The employee starts taking FMLA intermittent absences anywhere from 1-2 days per week.

105. Doc. 5239, AT&T.

106. Doc. 10278A, Dover Downs Hotel and Casino.

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“Employee asks for vacation time, one month in advance, for a particular Friday and Monday to go to car races out of town that weekend. The employer denies the request because the entire factory is working mandatory overtime every weekend for three months because of a large customer order. Two days after requesting the vacation, and still approximately a month before he wanted the vacation, the employee produces an FMLA intermittent leave request for migraines, which states that he will need to be absent several days a month for an ‘unknown’ period. A month later, on the Friday and Monday he wanted vacation (but was denied), he calls in sick with a migraine.

“Over the last two years, an employee has had various FMLA medical certifications on file for different chronic conditions. First, it was for arthritis. Then there was one for arthritis and resulting chronic back pain. Then there was one for arthritis, resulting back pain, and resulting migraines. Finally, there was one for fibromyalgia, in which the doctor stated that this condition covered all of the employee’s various ailments. These certifications have come from three different doctors. The employee appears to be ‘doctor shopping’ so that she can have a medical certification for intermittent leave on file at all times. All four of the certifications have stated that her condition(s) is/are permanent.

“An employee requests intermittent FMLA leave for long-term out-patient treatment due to alcohol addiction. The employee admits himself to an out-patient treatment facility in a city that is 3 hours away from the workplace. The treatment facility is, perhaps not so coincidentally, located near a prime fishing area. The employee is an avid fisherman and requests FMLA leave during a peak fishing season. The treatment itself requires the employee’s presence at the treatment facility for half days only, three times a week. The employer would like to treat only that time as FMLA time and treat the remaining part of each week as non-FMLA time. The employee, however, states the entire week should be treated as FMLA leave because he otherwise would have to commute 6 hours round trip several times a week if he didn’t stay in the city where the treatment facility is located. He further states that if he did commute, he wouldn’t be available for work anyhow because he would be traveling.

“An employee claims that she needs intermittent leave due to migraines. She requests a medical certification from her doctor, and her doctor certifies that she may need to be absent for 1-2 days each month. The employee, apparently dissatisfied with this certification, seeks a certification from a different doctor, who certifies that she may need to be absent 4-6 days a month. This second certification is dated one month after the first certification.”¹⁰⁷

- Douglas Duckett from the Ohio Public Employer Labor Relations Association voices concern over the abuse of FMLA. “Because of the scope of this problem, the law has become bitterly known in some circles as the ‘Sick Leave Abusers Protection Act of 1993.’

“Chronic abusers have learned to work the system, and the phrase ‘FMLA’ has become a ‘get-out-of-work-free’ card for far too many. It is essential to rein in this abuse, for its cost comes in more expensive and less effective public services, a shifting of burdens onto good employees who come to work regularly, and a cheapening of the noble concepts behind the law.”¹⁰⁸

- Janie Libby from Dover Downs Hotel and Casino provides more example of employee abuse of FMLA. “Here is an example of what occurs on a REGULAR basis. An employee requests a vacation at the last minute as she received an unexpected invitation for a week at the beach. The manager denies the request, citing the numerous others who were granted vacation for the week in question. The manager simply cannot afford to allow one more person to take that week off as it would incur overtime for others to cover for this one. This employee chooses to head to the beach anyway and calls the manager, citing only those magic words ‘FMLA’. In this true scenario, we were inconvenienced—as were the employees who had to work overtime to pick up extra hours to cover for this employee.”¹⁰⁹

107. Doc. 10133C, Spencer Fane & Britt Browne LLP.

108. FL93, Ohio Public Employer Labor Relations Association.

109. Doc. 10278A, Dover Downs Hotel and Casino.

- Katie Juanita Beecher from ORC Worldwide tells of a situation where an employee can come and go at will because of 28 FMLA certifications on file. “One employee has 28 FMLA certifications on file for various family members and conditions. These certifications have the effect of essentially exempting the employee from the attendance control program.”¹¹⁰
- Laura Barney explains the range of abuses that her company deals with because of FMLA. “We have approved intermittent leave for those with ‘chronic’ conditions including migraines, high blood pressure, or diabetes. Some individuals may have the flu or a common cold, but will call in and say that they have a migraine, high blood pressure, or diabetes so that their absence is protected and they are not disciplined for their poor attendance records. I am not writing about a person who misses a few days of work each year, there are individuals who miss well over 100 hours from work each year, and even more, with these kinds of instances. Then, there are those who simply call off and use their FMLA approved reason when they feel the need for a ‘mental health day,’ are tired, or their vacation request for that day was denied. This has caused an increase in the need for substitute coverage, raised overtime expenses, and has negatively affected employee morale. These situations happen frequently and our hands appear to be tied in managing them.”¹¹¹
- The Pennsylvania Turnpike Commission explains how it is nearly impossible to catch an employee abusing FMLA. “With FMLA leave, aside from waiting until an employee’s certification period is up to send them for a second opinion, or sending them to their doctor for a recertification, it is virtually impossible as an employer to discipline employees who abuse or misuse their FMLA leave without running afoul of the regulations.”¹¹²
- Karen Jensen from Coordinated Child Care of Pinellas, Inc., expresses frustration with dealing with FMLA. “The FMLA intermittent leave has been horribly miss-used by employees. The ‘substantially limits’ wording has been sorely abused and this ACT does nothing but create havoc for employers.”¹¹³
- Briggs & Stratton use the following case to illustrate the difficulty of exercising control over the use of intermittent leave once a health care provider has certified a need for an employee to care for a child or parent who has a serious health condition. “An employee obtained a Certification that she was needed to care for her father who suffered from depression. The employee soon developed a pattern of absences which suggested taking of ‘long weekends’. Her absences became more frequent accompanied by reports of her being seen shopping or in a restaurant when supposedly she was having to be constantly with her father. Finally, the company went to the expense of a private Investigator who obtained conclusive proof that she had not even seen her father on a date when she again had claimed leave to be with her ‘ailing’ father.”¹¹⁴
- Mary Nappenbergor, a WIC Program Director, explains her problems with abuses of FMLA. “As a WIC (Women, Infants and Children) Program Director in a local county Health Department in Maryland, I would like to share my experience with FMLA. I had an employee this year who used FMLA for a child with a chronic health condition and I feel that she abused the privilege.
“She filed FMLA forms for intermittent use of FMLA which allowed her to use her leave in very small increments. She would constantly leave the office on a moment’s notice saying that she had to go home because of her child’s medical condition without further explanation. There was no consistency as to when she was using her FMLA leave and she seemed to feel no obligation to be accountable for it. When asked to obtain additional documentation from her health care provider as to when she would need to take off and for how long, she accused her supervisor of prying in to her private life. Our office was constantly unmanned due to her absence and, because we could not predict when these absences would

110. Doc. 10138A, ORC Worldwide.

111. Doc. 4849, Laura Barney.

112. Doc. 10092A, Pennsylvania Turnpike Commission.

113. Doc. 14, Coordinated Child Care of Pinellas, Inc.

114. FL37, Briggs & Stratton.

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occur, we could not plan for coverage. Her attitude was that it was an entitlement owed her and we could not question her use of it.”¹¹⁵

- Sarah King, who works for Kaiser Permanente - Member Service Center, said she had high hopes for FMLA when it was first passed, but found that the good intentions of the law are offset by the abuse. “As a front line supervisor this is what I contend with on a daily basis. An employee secures intermittent FMLA due to migraine headaches, or some other reason. Each and every day an employee can be late, leave early, not come to work at all, and/or leave in the middle of the day due to his/her FMLA. The employees count the number of hours they are using so they rarely exceed their annual allotment. Physicians could care less whether the excuses are legitimate or ongoing or how they impact the work force and sign any paperwork to quickly expedite the office visit. Of the nearly 90 employees in the building where I work, 75% have FMLA. All of them use it intermittently in some form or another. The havoc this creates, particularly in an organization that provides health care where personnel is already at a shortage, is indescribable. The employees have come to see FMLA as another entitlement or benefit to employment and obtain it as soon! as their one year anniversary permits them.”¹¹⁶
- Bruce Schwartz of Jerith Mfg. Co., Inc., explains one particularly frustrating case of FMLA abuse. “Our ultimate bad FMLA experience concerns a worker who had asthma, which qualified as a ‘serious medical condition’. His doctor sent in a certification that this employee could not work when the temperature exceeded 80 degrees and the humidity was more than 80 percent. We actually had to chart the temperature and humidity in his work area.”

“This employee would leave early almost every day in the summer when we needed him the most. (We make ornamental fences so summer is when we are the busiest). He bragged to other workers about the fact that he did not have to work when it was hot, which caused a severe morale problem. It was so bad that the other hourly employees actually wanted us to fire him, because they felt he was not pulling his weight. Eventually he missed enough time in the fall, winter and spring that did not qualify for FMLA leave that he was terminated under our attendance policy.”¹¹⁷

- Maxine Russel from Edison Electric Institute explains the problem with intermittent leave that leaves it open for abuse. “Once qualified for intermittent leave, the employee is not required to provide a doctor’s note each time the employee is absent. The DOL regulations point out that an employee may not need to see a doctor each time he or she is incapacitated by a recurrence of a chronic serious health condition. In effect this allows an employee to be absent from work, with subjective symptoms such as chronic back pain, without verification of a doctor each time they miss work. There is no mechanism for employers to verify that a specific absence was caused by a previously certified FMLA condition.”¹¹⁸
- Maria DeMott from Meadwestvaco provides specific examples of abuse of FMLA. “To give you an idea of the abuse that is seen, I’ve had providers indicate that an employee could miss up to 15 days of work per month due to his/her migraines. Based on this evaluation I asked the company doctor to contact her provider and seek further clarification as the employee was only working 4-5 days per month.

“Questions regarding the need for disability were discussed with the employee’s provider however; he refused to change his mind. Independent Medical Examinations are options however; they can be timely and costly. The only awakening came when the employee failed to meet the eligibility criteria the following FMLA year. This became a true test of an individual’s need for FMLA, as all the sudden the employee’s migraines did not appear to hinder their attendance at work until the employee attained their eligibility again. With much attention to detail, via the company doctor we have been able to decrease the amount of time used however, question and wonder when the vicious cycle will end.”¹¹⁹

115. FL16, Harford County Health Department of Aberdeen, MD.

116. Doc. 4418, Sarah King.

117. Doc. 4530, Jerith Mfg. Co., Inc.

118. Doc. 10010A, Edison Electric Institute.

119. R103, Meadwestvaco.

- Christopher Miller from the Southern Company provides the following example of abuse. “The following example illustrates some of the problems at issue. Joe is a security guard at a power plant. The power plant schedules security guards on shifts at its various gates. Due to Joe’s seniority with his employer, he is able to choose the most desired shift, 6:00 a.m. to 2:00 p.m. This shift is the least busy shift with respect to traffic through the gate. Therefore, the power plant does not schedule more than one guard at a gate for this shift. Joe has chronic migraines and has been approved for unscheduled intermittent FMLA leave through a medical certification completed by his health care provider. The certification provides in part that Joe may need intermittent absences from work due to unpredictable migraines. Joe’s migraines tend to occur in the mornings with some warning, as his condition begins with a mild headache that worsens over an hour.

“Joe has a migraine in the morning at least one time a week that prevents him from reporting to his guard duties on time. He usually is able to report to work by 8:00 a.m., two hours after his normal start time. Prior to his shift, Joe does not and sometimes is unable to provide any notice to the power plant that he has a migraine and will not report to work on time. Accordingly, the power plant learns that Joe is not present at 6:00 a.m. at the beginning of his shift. Joe has a pattern of being late to work ‘due to his migraines’ on Saturday mornings, and thus the power plant suspects that some of Joe’s migraines could be caused by certain Friday night activities. However, there is nothing the power plant can do to verify the absences are legitimate, other than request recertification of Joe’s condition every thirty days, and such recertifications are not subject to review through a second or third opinion. See Section 825.308.

“Joe’s unscheduled intermittent absences cause the power plant to scramble and waste productive time to find coverage for the gate, since Joe is the only guard assigned to a particular gate on his shift and leaving the power plant unguarded would be unsafe for employees and the public at large. Often the power plant will call in another guard who is not scheduled to work to cover Joe’s absence, but this guard must leave once Joe reports to work two hours late. The power plant contemplated transferring Joe to another shift that has more than one guard assigned to the gate or to another position with the same pay rate and benefits. However, modifying duties or transferring Joe to a different position would only be allowed if his FMLA leave was based on foreseeable intermittent leave based on planned medical treatment. See Section 825.204(a). Moreover, because Joe is using on average two hours per week of FMLA leave, he will not exhaust his twelve weeks of FMLA leave during a twelve month period.”¹²⁰

- Barb Renner from Barnes Care explains the excessive abuse of FMLA. “Intermittent FMLA is blatantly abused with employees calling in sick or late when ever they please. Twelve weeks for a chronic condition is excessive. That is 23% of the year. With the broad definition of a serious health condition just about the entire work force could qualify. I have seen almost half of the employees at a factory with intermittent FMLA.”¹²¹
- Gail Washington with Metra Human Resources provides an example of where employees appear to be colluding to abuse FMLA. “[E]mployees with approved FMLA leaves are able to mark off work, with no consideration of the staffing requirements, forcing other employees that had prescheduled time off to come to work or even more importantly, leaving the department short of staff thus creating an impossibility for the department to meet their legally mandated maintenance obligations. One supervisor reported that he believes that some members of his staff conspired to ‘mark off’ work in a specific pattern so that nobody could be denied the day off. In this particular department, no less than five machinists are needed each day to perform the federally required daily maintenance of the train cars. There are 9 machinists on staff. Two machinists had pre-approved vacation days for that date SO they did not report to work. Early that morning two other machinists, with no approval, called off due to emergency personal business. At that point, the department still had enough machinists to handle the maintenance schedules. Shortly after the second group (the third and fourth machinists) marked off, two calls followed from employees with approved FMLA leaves. It was more than mere coincidence that the FMLA

120. Doc. 10293A, Southern Company.

121. Doc. 2071, Barnes Care.

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calls were the last received because their time off could not be denied. The department was unable to complete all of the required maintenance on that day.”¹²²

- Scott Langelin from Briggs & Stratton provides an additional example of employee abuse. “An hourly employee working third shift (start time of 11 p.m.) obtains a medical certification that she has suffered from migraine headaches for a number of years and the doctor allows that these incapacitating events may last 24 to 36 hours. When the employee called two hours before start of her shift for 4 consecutive days, reporting she could not work due to migraines, she was told that her absence exceeded that which was covered by medical certification. She came in the office the following day (no migraine), obtained another medical certification which was dutifully completed by her doctor who increased the frequency and anticipated duration of her migraine episodes. When she bumped up against the new limits, the doctor once again increased the estimated duration. The company utilized the second and third medical opinion route, obtaining a finding of much more restricted incapacity due to migraines. It was not long after that when the individual was discovered to have submitted an altered Medical Certification for which she was promptly discharged.”¹²³

- Lisa Birkdale submitted the following comments about FMLA abuse on behalf of Verizon. “As the following statistics illustrate, the use and evident abuse of intermittent FMLA leave at Verizon has increased over the last several years:

In Verizon’s Customer Financial Services Mass Market group, the use of intermittent leave has increased from 22% of eligible employees in 2004 to 30% in 2005 and 37% in 2006. Currently 58% of the total FMLA leave taken in this group is intermittent.

In the Florida Network Centers division of Verizon, 44% of the 370 employees had an intermittent FMLA certification in 2006.

Verizon’s Business Solutions Group experienced a jump from 28% of employees with intermittent FMLA certifications in 2005 to 42% in 2006.

In 2006, 70% of the FMLA leaves taken in the Verizon Domestic Telecommunications sector were taken for only one or two-day absences—highlighting again our concern about the Department’s regulations regarding what constitutes a ‘serious health condition.’

“Abuse of FMLA leave becomes evident through an analysis of the timing of leaves. For example, Verizon has experienced many cases where an employee with a near-perfect attendance record begins a pattern of excessive FMLA-related absences upon his or her one year anniversary of employment—the time employees become eligible for FMLA leave. Upon reaching eligibility, these employees will visit their doctor once, obtain a certification that allows them to call in without notice, and take the full 60 days allowed annually. Once the 60 days is exhausted, however, the health condition that supposedly led to the leave resolves itself, and the employee reverts to a near-perfect attendance record—until the next calendar year, when additional FMLA leave days become available and the cycle begins anew.

“Anecdotal evidence at Verizon also reveals that employees use FMLA intermittent leave when they are denied time off for business reasons. Too often, an employee whose request for vacation days has been denied will call in sick, using FMLA leave under their intermittent leave certification. Moreover, employees have used their leave in ways that are wholly inconsistent with their stated chronic health condition. On one occasion, two Verizon employees took FMLA leave for headaches. The employees were seen that same day shopping together, laughing and talking loudly in the aisles of a local store. Why doesn’t Verizon address these clear cases of abuse? Because the current regulations under the FMLA do not permit employers to do so in a meaningful way.”¹²⁴

- A representative from the PBG submitted the following evidence of abuse of intermittent leave by employees. “One PBG productions facility has a large employee population with aging parents with serious health conditions resulting in numerous approved intermittent leaves. Of the 400 employees, 357

122. FL77, Metra Human Resources.

123. FL37, Briggs & Stratton.

124. Doc. 10181A, Verizon.

are eligible for FMLA, 46 have been approved for FMLA, and 44 of the 46 employees are approved for intermittent FMLA leave. There appears to be a much greater use of FMLA leave by the hourly workforce than the salaried workforce, and more leaves taken by employees in operations/warehouse than in sales group. Examples of issues that arise:

“Employees call in just prior to their start time and notify management of the need for anywhere from 15 minutes to a day of emergency unplanned ‘FMLA’ with no explanation why the leave is needed such as ‘doctor appointment’, ‘need to care for family member’, etc. This particular disrupts the business, slows down production, sometimes involves temporary help to a coworker is needed to provide overtime. We are unable to quantify the financial impact on the business.

“Employees approved for intermittent leave to work overtime (sometimes double time) which creates employee morale issues.

“Workforce morale issues when employees believe a co-worker is abusing FMLA

“Tracking late arrivals/early departures and coordinating with payroll

“Another PBG facility employs mainly office workers. In 2006, of the 600 employees, 390 non-exempt and 135 exempt employees met FMLA eligibility requirements, 53 employees were approved for FMLA leave; of the 53 employees approved 49 were approved for intermittent leave. A total of 565 FMLA days were used at the facility and none of the FMLA time was used by salaried employees. Some of the struggles at this facility with unscheduled intermittent leave include:

Redistribution of work on a daily and sometimes hourly basis resulting in unplanned overtime for co-workers, or work not being done.

Tracking late arrivals/early departures requires additional resources

Employee morale issues when co-workers are apparently abusing FMLA

FMLA certification appears to increase once an employee has exhausted vacation/paid time off as well as when they are close to receiving discipline under the attendance policy.

FMLA increases during holiday periods, school breaks and inclement weather

Illness associated with FMLA certification appears to subside once employee exhausts 12 weeks, until they are eligible again then cycle reoccurs.

“As an example, an employee was approved for ‘as needed’ intermittent FMLA leave to care for her father with a serious health condition. ‘Congestive heart failure, anemia, renal insufficiency and diabetes’ was indicated on the medical certification form as the diagnosis. This employee took 39 intermittent leaves in 2006. Of the 39, 22 of the leaves were 5 hours or less, 17 were full days many of which fell on Mondays or Fridays. The HR manager suspected fraudulent leave and when employee requested time off again, the employee told the HR manager that she needed to care for her father who was visiting from out of state. The employee was asked what care she had previously been providing her father since he lived out of state. The employee said that sometimes she visited her father out of state and other times she was ‘shopping’ for him and would mail items to him. It is extremely difficult for an employer in this position since the employer may not contact the doctor’s office to ask if the reason for the absence is legitimate, and instead must seek recertification.”¹²⁵

- Kevin Smart from the Central Michigan University provides the following examples concerning the problems and abuses of FMLA.

“The University Library operates an inter-library loan service. This is a critical service for students as well as faculty. It supports research and learning by allowing faculty and student access to materials not part of our own holdings. The exacting nature of the work, coupled with very tight staffing and a very spare budget, provides virtually no opportunity to plan for extra or temporary help in the office. In 2004 and 2005 a clerk in this office—let’s call her ‘Ruth’—was certified for FML intermittent leave for asthma and migraine headache. The medical certification placed no parameters on frequency or duration of

125. Doc. 10095A, Pepsi Bottling Company of Somers, New York.

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leave. The determination of when leave was needed was left to the employee. ‘Ruth’ proceeded to exercise her intermittent leave rights on an ‘irregularly regular’ basis. In 2005 alone, she was absent 76 times under intermittent FML—and that was an improvement over the prior year’s absence frequency!

“Each of these absences was unscheduled and unanticipated. Each absence left the office no way to plan for temporary coverage. Her supervisor was occasionally able to steal time away from her other duties to deal with the most urgent customer service problems—but that’s no way to run a business. Customer service for faculty, students, and other members of the inter-library loan consortium suffered—and there was little the office could do about it. The office reported that some consortium members were considering canceling their library exchange relationship with our University because of the erratic service and delays in responding to exchange orders.

“From January 2005 through the end of October, ‘Ruth’ worked a full 40 hour week only 7 times. After her FML leave balance exhausted at the end of October, ‘Ruth’ did not miss another scheduled day during the balance of the calendar year. Her absences resumed in 2006 when her FML leave balance was restored.

“Building Services – Custodial Operations

The University employs 91 custodians to provide environmental support services on campus. These custodians are represented by a collective bargaining agent. One custodian—let’s call him ‘Roger’—has had an ongoing absenteeism problem that has been exacerbated by his use of FML intermittent leave. At various times Roger has been certified for FML leave for miscellaneous lower back problems, upper respiratory problems, and more recently for ‘panic attack/anxiety disorders.’ Each of these certifications has given control of the timing and duration of intermittent leave to Roger. He decides when he’s going to be out, and for how long. In 2004, Roger had 48 intermittent leave episodes. In 2005, the frequency jumped to 104 episodes. In 2006, the frequency dropped to 34 episodes, but the duration of each episode increased. Although Roger’s position was rated at 1.0 FTE, his absences resulted in an effective FTE of just over 55%.

“While Building Services has more flexibility in the use of temporary employees as compared to the Interlibrary Loan Office, the use of temporaries in a collectively bargained environment generates a tremendous recordkeeping burden on the employer. Temporaries have to be tracked on a daily basis, and their movement and assignment reported to the local union for monitoring purposes. This is time consuming and costly. In addition, while Roger is on FML, the University is covering not only his wages, but also the wages of his temporary replacements.

“Roger’s pattern of intermittent leave use is similar to Ruth’s. Both Roger and Ruth appeared to be very aware of the ‘hours worked’ requirement associated with FML eligibility. Once FML leave balances have been exhausted, these employees reported for work on a more regular basis.”¹²⁶

- Robert Berstler submitted a personal comment stemming from his experience as HR professional dealing with the abuses of FMLA. “The cases of gout, migraine headaches, irritable bowel syndrome, etc. were used mostly to get time off of work to do something unrelated to the chronic illness. Many times FMLA was used for garage sales, part time jobs, hangovers, or just when the employee didn’t want to work for a few hours or a day. When networking with other Human Resource professionals I found that all of them had the same issues taking place in their businesses.”¹²⁷
- Kim Bauman from Wyatt Early Harris Wheeler LLP speaks as an attorney for employers concerning the abuses of FMLA. “As private outside legal counsel to employers with multi-national locations, the biggest issue my clients face with the FMLA is the wide spread request of its employees to return to Mexico or their ‘homeland’ continents (mainly Asia and Africa) for 12 weeks to be with ailing family members (parents and children) when in fact the employee is simply using the FMLA as a basis to take 12 weeks

126. Doc. 4743, Central Michigan University.

127. Doc. 5162, Robert Berstler.

of unpaid vacation. The problem is exacerbated from the very difficult, unwieldy, and expensive validation procedures to try to determine whether the leave is genuine or not. Rather than violate any FMLA regulation or discrimination laws, the employers just let the employee go, only to later learn that it was a fraudulent request, followed up with a fraudulent Form WH-380.”¹²⁸

- An employee of a Fortune 500 company submitted the following anonymous comment concerning the abuse of FMLA. “When written I surely do not believe that the law makers intended it to be used as a free pass for an employee to can come and go as s/he pleases anywhere from being tardy or leave work early every day or using it to extend weekends and holidays. I can assure you that this is exactly how the majority of FMLA is used. To put things in perspective, I work for a Fortune 500 company. At my location we employ about 400 people. At any given time we have 50-70 active FMLA leaves, 80%-85% of them intermittent. That is well over 10% of our workforce. In the HR community FMLA is known by many names, among them: Friday/Monday Leave Act, Fakers and Malingers Leave Act, Frustrating/Madding Leave Act.....”¹²⁹
- Kathy Dorsey from the Lee County Government in Florida explains how FMLA intermittent leave is wide open for abuse. “Unscheduled intermittent leave makes it very easy for an employee to say ‘Oh, it was for my FMLA’ to excuse, for example, an unscheduled absence, a late arrival or early departure. And if the employee is a known chronic ‘earn and burn’ attendance problem, FMLA restrictions do not give the employer a good remedy to address that—or even verify it. Since FMLA has comprised my main function for the past 4 years, I can definitely say unscheduled intermittent FML is the most problematic leave issue that we face.”¹³⁰
- Sherry Myers of the Clark Material Handling Company provides a specific example of FMLA abuse. “An employee submitted FMLA paperwork to cover her absence associated with her diabetes. The employees Doctor states she will need intermittent leave to keep her diabetes in control. She told me when she requested the FMLA leave paperwork that she needed to apply for FMLA to cover those days when she wakes up and her sugar is out of control and she does not feel like coming to work. I am not confident that she does everything in her control to manage her diabetes. I have witnessed her purchasing Cokes (not sugar free or diet) and snacks from the vending machines which may have an effect on her sugar. Since she has been approved for FMLA leave she now has 60 days this year that she can just call in and say her diabetes will require her to stay home today.”¹³¹
- Paula Polyak from US Pipe provides two examples of abuse of intermittent FMLA. “I have an employee who is on intermittent leave due to his wife’s seizure disorder. These seizures can occur at any time, and can incapacitate her for anywhere from 24 to 72 hours. My employee is not required to provide any documentation that his wife had an episode. He is free to call at any time and report off FMLA. I know he is abusing FMLA because his co workers, his union brothers tell me he brags about taking off. HE even commented to a co-worker that he would not be in the next night because he was going to call out FMLA. He has provided appropriate documentation from a healthcare provider, and has regularly recertifies the need for leave. He is clearly taking advantage of a loophole in the law and abusing his legitimate need for leave.

“I have another employee who has FMLA for his father’s serious health condition, his mother’s serious health condition, his son’s serious health condition, and is currently off on FMLA for his own serious health condition. He is another abuser who also makes it public that he will use FMLA to get out of work. Again, he has provided appropriate documentation from a healthcare provider, and has regularly recertified the need for leave. I have his co-workers, his union brothers, and even the local Union President begging me to do something about the abuse. I have had 3 different labor lawyers look at these 2

128. Doc. 5163, Wyatt Early Harris Wheeler LLP.

129. R143.

130. Doc. 5465, Lee County Government.

131. Doc. 244, Clark Material Handling Company.

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cases, and each has told me that I am doing everything I can within the law. I have even explored the possibility of using a private investigator, but without any discernable pattern to the abuse, and the fact that there is no notice to the call off, it is very difficult to involve an investigator.”¹³²

- A commenter wishing to remain anonymous submitted the following account concerning the abuses of FMLA. “I supervise in a manufacturing environment where many people have it and abuse it. All supervisors here are astounded how people with FMLA can come and go as they please. One union employee calls daily stating he may be late or absent, FMLA, and he is never questioned. It’s a known fact he works two jobs and we work 10hr. days here. Others have it for family members who live outside the state, but call off FMLA and aren’t questioned. There are many excuses utilized by union employees here that are questionable. The language of the FMLA should be tightened up. I don’t want to see those who truly need it be turned down, yet I don’t want those who are merely trying to play the point system for attendance, use it as a ‘get out of work free’ pass.”¹³³
- David Laing from American Electric Power provides an example of employee abuse of FMLA. “Here is an example of how the statutory requirement has been undermined. Two employees from the same work group provided medical certification indicating that each suffers from anxiety/panic attacks, is being treated for the same, but will need intermittent leave in the future whenever she suffers such an attack. Shortly thereafter, each employee began taking off work, attributing each absence to anxiety/panic attack. Although the initial certification for each employee was facially valid, a fair minded employer would nonetheless expect a demonstration that the intermittent absence is in fact ‘medically necessary’—ie., the subsequent absences were actually related to the serious health condition cited in the original certification. However, the regulations foreclose such an inquiry.”¹³⁴
- Kris Gustaitis submitted her personal opinion on the hardship placed on employers because of FMLA. “FMLA has been abused by those who want to maintain their jobs and do just enough to keep them. Many employers are either non-compliant or are so generous with granting this leave as to not challenge the issue. Employers are getting killed with the inefficiencies and poorly constructed act. While in its theory it is a good idea. In the real world practice this is broken.”¹³⁵
- William Pilchak of Pilchak, Cohen, & Tice Law Offices of Auburn Hills, Michigan, explains the type of questions the office often receives from employers due to the abuse of FMLA. “The current regulations do not account for the fact that many employees are, indeed, out to abuse the system. It is the rare occasion that employers seek advice from us in situations where employees take leave for clearly legitimate reasons. In our practice, we rarely ever receive calls from our clients asking us ‘Do we have to let Sally off after she has her baby?’ or ‘Do we have to let Sam off work for a triple bypass surgery?’ Rather, the majority of our calls involve inquiries because an employee has turned in paperwork indicating that s/he needs intermittent leave for a condition that cannot be verified objectively (e.g., chronic fatigue syndrome, adult ADD, Epstein’s barr syndrome, migraine headaches, etc.) where the employee never provides any form of advance notice and systematically is absent under questionable circumstances. Some recognition must be made that subjective complaints resulting in Friday absences only cannot be medically supported and should be subject to a different standard with elevated scrutiny.”¹³⁶
- Valerie Chippi from Key Energy Services is frustrated by the lack of recourse against abusers of FMLA. “Stop making FMLA a get-out-of-work-free card for employees. The abuse of FMLA leave is unbelievable, and gets worse once an employee fails to comply with the rules and regulations and is returned to work without any kind of punishment or penalty.”¹³⁷

132. Doc. 1987, US Pipe.

133. R24.

134. FL28, American Electric Power.

135. Doc. 3409, Kris Gustaitis.

136. Doc. 10155A, Pilchak, Cohen, & Tice Law Offices.

137. Doc. 4758, Key Energy Services.

- Eric Brandenburg submitted a personal opinion from his experience with abuse at work. “FMLA is referred to as: The Friday and Monday Leave Act, and Forget My Last Absence Act. Sounds silly but it’s a serious problem with employers. My company employees 133 hourly associates, we averaged 2.3 associates on FMLA every day, 4897 hours of leave taken. Granted about 25% is actually justifiable. The regulation is so loose it is riddled with abuse.”¹³⁸
- Debra Wallen from American Airlines reports that some employees get FMLA for a medical condition and then take time off for other issues not covered by their medical certification. “Since there is no monitoring of a doctor, managers need more leeway when an employee calls in. Employees with FMLA should have to sign something when they get back to state that they took the FMLA for its intended purpose. We have employees with FMLA for depression (they tell us, we don’t ask), but call in with bronchial issues or the flu and we have no way to justify whether the FMLA was taken for its intended purpose.”¹³⁹
- Belinda Weiss submitted a comment based on her personal experience with abuse of FMLA. “Currently my fellow team members are taking advantage of this policy to take time off for non serious health conditions, and even taking time off for non illness related issues. For example, employees around the nation are using their FMLA time if they happen to be running late for work, or simply going home for the day if they just don’t feel like working the rest of their shift.”¹⁴⁰
- Cynthia Fox from Southwest Airlines discusses the loopholes and costs of FMLA to the company. “Abuse of FMLA has made coming to work optional for too many employees. It is neither anti-FMLA nor exaggeration to state that the current situation is a crisis. Far too many employee misuse unscheduled, intermittent FMLA leaves to set their preferred rather than assigned work schedules; to work shifts paying overtime but no show regular pay shifts; to get excused absences that would otherwise violate attendance rules; and to cover tardies or leaving shifts early with protected FMLA leave. When the FMLA has become known colloquially as the ‘Forgive My Latest Absence’ Act, it is time to close the loopholes. When Southwest’s employees themselves respond to an employee survey with unsolicited pleas to stop FMLA abuse, it is time for the DOL to reform the FMLA regulations and return the necessary balance to the FMLA that was intended by Congress in passing the FMLA.

“For the three workgroups representing 82% of FMLA usage at Southwest, the replacement staffing costs alone represent approximately \$20 million annually to Southwest. This includes cover for intermittent FMLA absences for Ramp, Operations and provisioning Agents, Reservations Sales Agents, and Flight Attendants. This estimate does not include overtime amounts paid to replacement workers, sick pay, or FMLA administration costs. For Flight Attendants, as is standard in the industry long before FMLA, Southwest utilizes Reserve Flight Attendants to work for absent Flight Attendants. Southwest estimates that it must employ and pay as many as 200 additional Reserve Flight Attendants each month to cover intermittent FMLA.”¹⁴¹

- Diane Forsythe from WBRMC relates her experience with abuse in her role as a manager. “As a manager of an ICU (Intensive Care Unit) it is imperative that staffing needs meet the demands. I currently have employees that utilize the Intermittent FMLA. One employee called off using the I-FMLA then called to brag that he was in a hot tub at a hotel. It becomes impossible to staff when you have multiple employees that can call off on a whim. It seems to be getting worse with more people deciding that this plan would be of great benefit to them. Although this was set up to be a benefit for those in need it has become a great burden to companies and hospitals throughout the country. We need clear regulations that will allow those that need it to obtain I-FMLA, but will help curtail the abusers.”¹⁴²

138. Doc. 4917, Eric Brandenburg.

139. Doc. 5233, American Airlines.

140. R50, Belinda Weiss.

141. Doc. 10183A, Southwest Airlines Company.

142. R15, WBRMC.

CHAPTER 6

Coworkers Must Pick Up the Slack

Congress passed the Family and Medical Leave Act to help workers balance their work and family obligations, but it is never that easy. When workers abuse FMLA leave, it does not hurt only their employer. It also hurts their coworkers.

Conscientious employees suffer because they are the ones who have to cover the work or work unscheduled overtime when a coworker abuses FMLA. The abuse of FMLA leave by employees who want to shirk their jobs or avoid unpleasant shifts forces their coworkers to work double shifts and unscheduled overtime. Conscientious workers have difficulty meeting their own deadlines when they must cover for coworkers out on leave. Others must cancel their vacation requests when employees use FMLA to take time off that they would not have otherwise gotten. Both workers and supervisors report that abuse of FMLA leave seriously hurts workplace morale.

The workers who are forced to pick up the slack must also listen to their coworkers' stories about how they used the Family and Medical Leave Act to get long weekends off. Conscientious employees feel animosity toward both their irresponsible coworkers and their employers for letting this happen. Few things hurt employee teamwork and cooperation as much as the knowledge that abusers are freeloading. This greater burden and mental stress causes many employees to burn out. The Family and Medical Leave Act has helped many families in need, but some employees have misused the act to unfairly burden others.

- Michael Henry from the County of Los Angeles gives an example of workers using FMLA to disrupt seniority and increase the need for double shifts. "For example, holiday time off for emergency responders and health care providers is generally granted based on seniority. An employee with less seniority than co-workers who was denied time off will bring in documentation to open an FMLA case to get the time off. In order for affected departments to continue providing services, other employees are requested to work double shifts."¹⁴³
- Richard Brennan from Foley & Lardner LLP discusses how FMLA forces coworkers to be away from their families when they have to cover for fellow employees who misuse leave. "For many of our manufacturing clients, and especially those which provide a high level of paid time off benefits, FMLA misuse creates a morale problem among the workers left to cover for those who are absent. Coworkers know that frequent FMLA users receive the same attendance bonus as those that come to work everyday and this creates added frustration in the workplace which may ultimately may harm productivity ... Unscheduled and frequent absences requires revision of staffing and manning plans. Coworkers are negatively impacted because they may be forced to work unscheduled overtime, which requires time away from their families and imposes burden on those who come to work."¹⁴⁴
- Douglas Duckett of the Ohio Public Employer Labor Relations Association notes that FMLA leave forces coworkers to work extra shifts and take additional time away from their families. "For example, nursing homes, law-enforcement agencies, and other operations with critical staffing often require employees using sick leave to call off at least two hours before their scheduled shifts to allow replacements to be secured. Without such notification, employers are forced to choose between inadequate coverage (and a genuine risk to the safety of others) or forcing co-workers to stay over for a second shift with no notice. Those employees, too, have families and personal needs to attend to."¹⁴⁵

143. FL72, County of Los Angeles.

144. Doc. 10129A, Foley & Lardner LLP.

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- Katie Jones of the Pennsylvania Turnpike Commission discusses how intermittent FMLA leave makes adequate scheduling impossible, forces other employees to cover extra shifts, and negatively affects morale. “Unscheduled leave—which usually means intermittent leave for our employees, is difficult to manage. Since the majority of our employees use intermittent leave for unscheduled absences, it is virtually impossible to manage the workforce and plan for adequate staffing. Our business operations are 24/7 and employees have often been required to work double shifts when another person has called in with an unexpected FMLA day. This causes resentment and morale problems.

“FMLA leave when abused/misused affects morale negatively. We have received phone calls from both employees and managers who are frustrated that an employee(s) at their work location call off for FMLA so they can be off for holidays and weekends. These call-offs may interfere with another employee’s vacation request, requiring them to come to work while another employee uses their FMLA. We have heard these type of holiday/vacation FMLA requests called ‘get-out-of-jail-free’ cards because there is no recourse that we have as an employer to enforce these types of abuses/misuses of leave. Employees will request a vacation day, and if that request is denied, they often call in sick for FMLA that day. Some employees have even bragged to others how easy it is to get the extra time off and how they use this time for vacation or other non-FMLA reasons.”¹⁴⁶

- Jeffery Peterson from Delphi Corporation discusses how FMLA frustrates coworkers who have to cover for others who are out on FMLA. “Delphi has repeatedly heard from employees and health care providers that they are frustrated by what they perceive to be FMLA abuse. Co-workers often feel disgruntled when they show up for work on a timely and regular basis, only to perform extra tasks to “cover” for an employee who is purportedly out on FMLA, but who is widely understood to be simply enjoying a day off. And health care providers tell us that they frequently feel pressured to certify the eligibility of their patients (who are, after all, the source of their income).”¹⁴⁷
- Jeffrey Jacks, an Ohio state employee, discusses how employees with poor work ethic use FMLA to shift work onto more responsible employees. “Perhaps the FMLA was originally intended for good use, however I believe that it is abused far and beyond for what it was intended. I am an Ohio State employee with 14 years of state service, and in a bargaining unit AFSCME. I have lost count on how many times I have heard fellow employees state that they are going to use their FMLA right to call off work whenever they feel like taking the day or in my case night off. They are bold about this and know that our employer can’t touch them because it is a federal law. This is shameful and demonstrates very poor work ethic on these employees part, and for the government to let them get by with it. This only shifts someone else’s workload to other staff members who otherwise would be doing their own jobs and who have met their responsibility, of showing up for work. I am tired of doing someone else’s job, and them not being held accountable for it, because this law protects these folks.”¹⁴⁸
- Tom Gallagher submitted his thoughts as an employee aware of FMLA abuse. “I work in the public sector. I know of a situation in my workplace where a peer is habitually taking unscheduled time off under FMLA without anyone being available to cover during this absence. The workload must be made up either through overtime or other employees picking up the slack. On the average this occurs 1 to 2 days every two weeks. Management has allowed her work to remain behind as accepted practice, and has not addressed the long term impact to the organization.”¹⁴⁹
- Rob Airaghi asserts that FMLA forces honest working people to take on the work when coworkers use FMLA leave. “I am a worker not an employer. A few co-workers severely abuse this entitlement. Taking maximum family leave, working in January and taking maximum leave again in February. The Company

145. FL93, The Ohio Public Employer Labor Relations Association.

146. Doc. 10092A, Pennsylvania Turnpike Commission.

147. Doc. 10225A, Delphi Corporation.

148. Doc. 4957, Jeffrey Jacks.

149. Doc. 5126, Tom Gallagher.

will not hire another worker to fill-in, so remaining co-workers must work unpaid extra time to do the work of the missing employee. This program is not fair to honest, working people.”¹⁵⁰

- Lynn Brady notes how FMLA burdens staff not on leave. “Intermittent FMLA impacts staffing most. Staff can call off at a moment’s notice, leaving a department short staffed. 12 weeks of intermittent time = 60 (8 hour days). I have staff that can miss 1 day per week and not annually exhaust intermittent leave. I have 16 staff and 4 have intermittent FMLA awards. This creates an unfair burden for staff that chooses to come to work. It is demoralizing and I am often asked what I can do about the abuse. My response is that this is a mandated federal program and that short of asking physicians to review a case, there is little that can be done.”¹⁵¹

- Amy Kingsland of Dane County, Wisconsin, explains how scheduled and unscheduled absences affect all other workers. “When it comes to scheduled vs. unscheduled leave time, several Dane County Departments function 24 hours per day, seven days per week and have to replace staff when they are absent. Often times this is at overtime pay. It is less difficult when the leave is scheduled and is for a period of time. Intermittent leave that is unplanned is very burdensome for these departments.

“Scheduled leaves are still a burden particularly for positions that work with clients. When an employee is gone for FMLA, another employee needs to pick up that person’s caseload. The caseloads in many areas are already too high without adding another caseload from someone who is absent. For example, our Economic Support Workers had an average of 450 cases (837 individuals) in 2006, so when a worker is on leave another (or several) employees caseload increases to cover their absence. This increase diminishes the ability of the employee to provide adequate services to families because they don’t have enough time. Leaves greatly affect morale in departments, especially when the other employees believe that the employee is abusing it.”¹⁵²

- Anna Dancy from South Central Human Resource Management Association contends that intermittent FMLA leave lowers morale when fellow employees are forced to take on extra work and hours. “Intermittent leaves create morale problems. When a medical emergency arises that causes an absence (e.g., a car accident resulting in an employee’s hospitalization), most employees are understanding. But when the absence is an unscheduled intermittent absence, the employees who are affected by it tend to become resentful that they have to perform an absent employee’s work or because the absence negatively impacts their own work (e.g., they miss a deadline because the absent employee failed to complete a related part of the project). There is a perception among many employees that other employees who take intermittent leave for chronic conditions are unfairly taking advantage of the FMLA and are absent more often than they really need to be.

“Morale issues also arise when an employee produces a medical certification stating that he/she is restricted from working more than 40 hours per week or from working weekends. If this is an employee who normally works a fair amount of mandatory overtime, it means other employees will have to absorb the overtime obligation.”¹⁵³

- David Berg of the Air Transport Association of America expounds the hardships created by FMLA for coworkers who do not have leave and must take on extra work that requires overtime hours, additional time away from their families, and disrupted holidays. “[A] small—but operationally significant—number of airline employees are regularly invoking the FMLA regulations to create undue hardship for not only their airline’s operations and the airline’s customers, but also their fellow employees. When employees fail to appear for work, often on short notice, citing unscheduled, intermittent leave or minor health conditions that should not provide protection from legitimate enforcement of attendance policies, it is their coworkers who are forced to stay overtime, cancel their own after-work plans, and/or take

150. Doc. 149, Rob Airaghi.

151. Doc. 4407, Health Information Services Record Quality & Maintenance.

152. Doc. 10001A, Dane County Government.

153. Doc. 10136A, South Central Human Resource Management Association.

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unexpected trips to ensure that the airline continues to operate. At many carriers, these suspect FMLA situations routinely occur hundreds of times a week. The result is disrupted lives for our attendance-oriented employees, unnecessary delays for our customers, and enormous overtime costs for the carriers.

“By applying an overly broad definition of ‘serious health condition,’ allowing unscheduled intermittent leaves at the employee’s discretion, and severely curtailing the use of traditional tools available to employers to enforce attendance policies or curb abuse (e.g., no fault attendance policies, doctor’s notes, perfect attendance incentives, etc.), the DOL has tied the hands of employers who are now forced to over-hire and over-schedule, require employees to work unwanted overtime (taking them away from their families, often at key times such as holidays, weekends, and summer vacations), and struggle with poor morale and loss of management control as employees see their coworkers misuse the FMLA to get additional (often paid) time off with no consequence.”¹⁵⁴

- Cynthia Fox from Southwest Airlines discusses how FMLA creates extra work for employees and offers several examples of their dissatisfaction with the act. “There is a menacing, intangible cost to abuse of intermittent FMLA: it wears out fellow employees who must cover shifts and trips for those abusing FMLA. It dampens workplace morale and teamwork, which is highly valued at Southwest. In 2006, Southwest employees responded to a confidential company-wide survey conducted by Mercer HR. At the end of the survey, employees were asked what one thing they would change about Southwest. In response, employees provided hundreds of unsolicited comments about FMLA abuse and its negative affect on morale. These are just a few examples of their comments:

I would make big changes with the misuse of FMLA...I have firsthand knowledge of people taking intermittent leave because they overslept or they have to be home because the roofer is coming over, etc.

Plead with the Federal Government to review FMLA laws and make them aware of the turmoil that FMLA abuse/loopholes cause....

Find a way to prevent all the misuse of sick time especially FMLA. This is costing our company loads of money and leaving the workload on all the employees who continue to work daily. We who are honest and have integrity feel taken advantage of.

Stop the FMLA abuse...It has the potential to bring our spirit and our company down.”¹⁵⁵

- Hugh Quill of the State of Ohio explains how FMLA overburdens coworkers and depresses morale. “Current FMLA regulations require an employee to give notice of the need for FMLA leave ‘as soon as is practicable,’ which usually means within a day or two of learning of the need for the leave... The practical application of the regulation has presented staffing challenges in the workforce, lead to employee morale issues, overburdened coworkers who are asked to cover the absent employee’s work, and generated ill feelings toward the absent employee.”¹⁵⁶
- Edward Cohen from Honda delineates how FMLA intermittent leave disrupts schedules and forces coworkers to take on extra work. “Unscheduled, intermittent leaves... disrupt the job rotation patterns. Consequently, because of the unscheduled leave, co-workers oftentimes must perform the same functions for longer and have their job rotation pattern disrupted. Honda entity surveyed its employees. The employee’s responses were telling: there was an overall dissatisfaction with the attendance reward program because employees who were not actually at work, but on FMLA leave, were still eligible. Consequently, this particular Honda entity terminated its attendance reward program because of the overall negative response of rewarding attendance bonuses to those who are not at work.”¹⁵⁷
- A source wishing to remain anonymous explains that coworkers are expected to absorb absent employees’ work. “Routine unscheduled intermittent leave is also a concern, as without notice or detailed infor-

154. Doc. 10160A, Air Transport Association of America.

155. FL103, Southwest Airlines.

156. Doc. 10205A, State of Ohio.

157. Doc. 10255A, Honda.

mation by the provider the employer is unable to make longer-term plans to accommodate the lack of productivity where otherwise coworkers are generally expected to absorb the absent employee's duties. As a result, when frequent, productivity as a whole may potentially suffer and certainly affects employee morale within the department.”¹⁵⁸

- Linda Wyatt of Edw. C. Levy Co. describes how FMLA leave negatively affects coworkers' health and forces them to work harder. “The burden of excessive absenteeism falls on co-workers who either have to work harder to produce the same amount, or work extra shifts, which takes away from their own family life. It also increases the company's overtime costs. This not only affects the health of the employees who are working harder, it also contributes to low morale. The number of employees misusing FMLA may be low for us, but the bleed off factor with the low morale issues, missed productivity schedules, unnecessary record keeping, increased overtime costs, and co-worker resentment is high.”¹⁵⁹
- Betsy Sawyers of Pierce County discuss how FMLA leave places a heavy burden on coworkers. “[W]here the employee's condition is such that the symptoms occur sporadically and unpredictably—because the need for leave is not ‘foreseeable’ the employee is not required to provide any advance notice to the employer—arranging for alternative coverage is often difficult if not impossible, places an undue burden on other employees who must cover the absences in lieu of their own responsibilities, and may cause lapses in the essential services we must provide.”¹⁶⁰
- Rita Cheng from the University of Wisconsin–Milwaukee contends that FMLA leave forces “double-duty” and lowers the morale of fellow employees. “When our blue-collar employees are absent, other employees who are present at work have to do ‘double-duty’ by completing the absent employee's duties as well as their own. This has an adverse affect on morale when employees have to do ‘extra’ work for others who are regularly out of the work place two or more days per month on unscheduled and intermittent leave.”¹⁶¹
- Jo Ellen Talos notes that intermittent FMLA leave does not allow companies to properly plan for adequate workers, thus forcing employees to take on extra work. “I have several concerns with administering FMLA - Intermittent leave - when a employee uses intermittent leave we as a company do not bring in additional help for this type of leave because this can not be planned. This puts a lot of extra work on the remaining employees which really creates a morale issues [sic] and fairness concerns by the employees.”¹⁶²
- JoAnn Shea from Tampa General Hospital reports the further hardships that FMLA leave places on hospitals that already tend to be short-staffed. “Abuse of intermittent leave places a burden on hospitals that are already short staffed and compromises the safety of our patients. It is difficult to find replacements on short notice, difficult to manage attendance and causes morale problems for the rest of employees who come to work consistently.”¹⁶³
- An employee wishing to remain anonymous comments on the extra work required because of FMLA abusers. “I work as an employee/optometrist for a very large HMO Kaiser Permanente in Southern California. I can't speak for any other department except my department location. We have at least 30% of the staff who call in weekly using 1-2 days a week for FML or whatever sick leave excuse they can come up with. Those employees have an anytime-use FML. It is such a burden on our full and demanding schedule for those of us who do NOT abuse the system.

“Please change the current system it is wrought with so many loop holes. Everyone knew there would be abuses. The abuses far outweigh the few it was intended for. Yes these employees use if all type of illnesses for all their family members. IT IS A JOKE and the abusers couldn't care less and in fact encourage

158. Doc. 10339A.

159. FL8, Edw. C. Levy Co.

160. FL97, Pierce County.

161. FL120, University of Wisconsin – Milwaukee.

162. Doc. 5053, Jo Ellen Talos.

163. Doc. 5252, Tampa General Hospital.

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others to follow suit and how to get away with the rules. They are laughing about it every day when they do come to work!!!”¹⁶⁴

- DeAna Buren from Autotime Time Champion explains that the extra work created by FMLA causes stress and resentment for coworkers. “Intermittent FMLA affects the employee’s productivity if they are not able to work a full day to produce the product needed to meet customer demands. Employees often do ‘double duty’ to cover a team member who is out on FMLA, which in turn causes stress and feelings of resentment. This is especially noted when a provider has restricted a team member to work only a couple of hours a day.”¹⁶⁵
- Cheryl Syke of MA Health Care gives an example of how FMLA creates extra work for other employees while not allowing her to address the problem with the employees on leave. “One example of this is migraine headaches. I have 2 people on my team of 8 who have physician approved intermittent FMLA coverage for migraines. This means that either of these people can leave early, come in late or miss entire days of work whenever they would like without any ability for me to manage their attendance. The other employees are left to do the work and I have no recourse. I cannot even take these absences into consideration when doing performance reviews. This really ties my hands in terms of my ability to manage my team and their workloads effectively.”¹⁶⁶
- John Aguire from Franklin County, Pennsylvania, gives an explanation of how FMLA hurts the morale and productivity of employees. “It has a negative impact on morale and productivity as employees in our 24-hour operations may be mandated to work overtime to cover the absence of a fellow employee who is on an unscheduled FMLA leave. This employee now is not as productive. Employee’s also feel they are getting shorted, as they cannot just call in and not get disciplined for it. Other employees also often see those on FML as ‘getting over;’ they usually have to pick up the extra work to cover for the absent employee.”¹⁶⁷
- Mary Morris from St. Mary’s Medical Center explains how FMLA protects poorly performing workers. “Frequent call-ins covered by FMLA has stepped on the morale of many managers and many faithful employees. I’m not sure the benefit FMLA has retained as many excellent workers as it has protected poor performing workers that would not have been permitted to miss work, except that they can get a certification completed by a physician.”¹⁶⁸
- Rebecca Dent of the Employers Association of New Jersey discusses how FMLA, used as an excuse for lateness, is an impediment to employers and degrades morale among workers. “Some employees use small periods of intermittent leave as an excuse for lateness, making an employer’s attendance control programs a sham and impairing general morale. An employer has no viable means of verifying that a “period of incapacity” exists. The employee is not required to seek treatment from his health care professional, and the employer has limited recourse for clarification. If the employer requires a recertification, seeking further explanation, then the employer has tied his own hands for any further options as second and third opinions may not be required for recertification 825.308(e).”¹⁶⁹
- Mary Chambers from WellSpan Health cites an example of employees using FMLA to unfairly work only part time with full-time benefits. “We have individuals who will be on an intermittent leave for the rest of their working lives because they have a chronic condition, such as migraine, but will never use 12 weeks of leave in a 12 month period, but are working part time, getting full time benefits. This is not fair or equitable to those who are working full time or to those classified as part time.”¹⁷⁰

164. R157.

165. Doc. 247, Autotime Time Champion.

166. Doc. 1380, MA Health Care.

167. FL59, Franklin County, Pennsylvania.

168. Doc. 10071A, St. Elizabeth Medical Center.

169. Doc. 10119A, Employers Association of New Jersey.

170. Doc. 10123A, WellSpan Health.

- Daniel Finerty of Krukowski & Costello explains how FMLA degrades employees' morale. " [I]t is common that morale problems begin to appear among the employees (collectively and individually) who are left to deal with an 'intermittent' abuser in their production area and have to continually pick up the slack; however, while this last group may perhaps receive some benefit via overtime as a result, the more common result is diminishing morale which often results in increased turnover."¹⁷¹
- Gail Washington of Metra Human Resources explains how FMLA allows approved employees to take the vacations time slots of other, more senior, employees. "Regarding bonding leave, the provisions that allow employees to take bonding leave within the first year of birth again place the FMLA-approved employees at an advantage over other employees whose vacation and time off is selected and approved based upon seniority. Newer employees, with less seniority, are able to usurp the earned vacation picks of tenured, more senior, employees. For example, an employee has a child in February, but waits until the week of Christmas or some other coveted holiday, to take bonding time. This is an unfair misuse of FMLA time and it clearly usurps the union seniority system. Employees should not be allowed to usurp the seniority system for bonding. Bonding time should be scheduled during periods in which the employees are eligible to take time off based upon their own seniority."¹⁷²
- Eileen Groves from the Association of Corporate Counsel discusses how a pattern of FMLA abuse creates morale problems for co-workers. "This can be particularly frustrating when the timing of the absences suggest that the employee could be absent for other reasons; for example, when there is a history of absences on Mondays and Fridays, before or after holidays, when mandatory overtime is scheduled or on days that have particularly nice weather. These types of absences create significant morale problems for other employees who are left to wonder whether they are being asked to pick up the slack for a co-worker who may be abusing the system. It can also encourage other employees to follow suit."¹⁷³
- Vikki Brueggeman from Zimbrick, Inc., discusses how FMLA demoralizes employees and destroys the sense of teamwork. "Nothing is more demoralizing to productivity as when one employee doesn't have to perform all of the essential functions of the job. To other employees it appears as if they're not a team player and not performing their fair share of the workload. It's always the 'icky' work that employees get excused from."¹⁷⁴
- Ann Mennell of Foley & Lardner LLP explains that abuse of FMLA causes friction between employees and harms productivity. "For many of our manufacturing clients, and especially those which provide a high level of paid time off benefits, FMLA misuse creates a morale problem among the workers left to cover for those who are absent. Coworkers know that frequent FMLA users receive the same attendance bonus as those that come to work everyday and this creates added frustration in the workplace which may ultimately harm productivity."¹⁷⁵
- A source wishing to remain anonymous reports that FMLA lowers morale and creates animosity in the work place. "This is very disruptive in a small company and has cost my company a lot of money to manage ... other employees see the farce and it creates animosity towards the employee taking the leave and also toward the employer for allowing it to happen ".¹⁷⁶
- Helen Adams from Dickinson Law reiterates the problems FMLA creates with unpredictable and unexplained leaves. "Unpredictable intermittent leaves can create morale problems among the other employees who are required to shoulder an extra burden when a coworker misses work on an intermittent and unplanned basis. This situation is further complicated by the fact that the employer cannot explain the situation to the co-workers due to confidentiality constraints."¹⁷⁷

171. Doc. 10185A, Krukowski & Costello.

172. FL77, Metra Human Resources.

173. FL31, Association of Corporate Counsel.

174. FL125, Zimbrick, Inc.

175. Doc. 10335A, Foley & Lardner LLP.

176. R43.

177. FL48, Dickinson Law.

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- Cherie Rickert from McHenry Elementary School discusses the morale issues associated with FMLA leave. “We have experienced morale issues comparing the amount of leave a school year only employee receives compared to a 12 month worker. As an example: a 12 month employee and a teacher both deliver on April 2nd. The 12 month employee’s 12 weeks would expire June 22nd. The teacher would use 45 days through the end of the school year, be off the summer months and take the additional 15 days of the 12 weeks at the beginning of the next school year. When it comes to childbirth/bonding, both workers would like to have the same length of time with their newborn.”¹⁷⁸
- Sheryl Steele of St. Andrews Management Service demonstrates how FMLA causes stress and degrades morale among staff members who have to cover for leave. “As a provider of long term care, I can tell you without hesitation that intermittent FMLA can play havoc with the provision of resident care. When staff is allowed to call in at the last minute, care may be stressed for the entire shift. Morale suffers among other staff trying to cover.”¹⁷⁹
- Doug Dorman of the Greenville Hospital System sheds light on how FMLA abuse negatively affects staff in the health care system. “Many employees on intermittent leave continuously cite emergent, non-foreseeable circumstances, fostering abuse of intermittent leave and making it difficult for us to staff areas including emergency rooms and operating rooms. Employers have no way to prevent abuse of this system. Employees can be gone as much as a day a week (with no advance notice) and have their jobs protected. Workers who have to pick up the slack resent their coworkers taking unfair but legal leave.”¹⁸⁰
- Lisa McDaniel from Kittitas Valley Community Hospital cites morale issues associated with FMLA-protected sick calls. “Those last minute sick calls that are protected under the FMLA create serious morale issues for the employees who are left holding the bag. This also leads to other employees feeling like they should be entitled to do the same.”¹⁸¹
- A human resource official comments anonymously on the negative morale effects of FMLA. “As a 20 plus year human resources professional, I have never experienced any issue that has had a more profound negative impact to the morale of my employees. The burden placed on them by the additional workload of associates who come and go as they please is a primary source of frustration and burnout for them. They are overwhelmed by the disgust they experience watching co-workers who abuse FMLA receive the same attendance rewards and bonuses that they do while at the same time being exempt from the same discipline that they are subject to if they fail to come to work.”¹⁸²
- Rebecca Wincell of Foley & Lardner LLP shares the frustrations with intermittent FMLA leave. “The area in which we see the most abuses is intermittent FMLA. Intermittent FMLA allows an employee to call in sick any time they want with no consequences. This makes it very difficult to staff appropriately and is very frustrating to the co-workers who see the abuse. FMLA regulations need to be clarified for intermittent leave and employers should be able to request physician’s notes for each day the employee is out. We regularly see employees who call in each Monday as ‘FMLA’ or call in when they have a difficult assignment, it is clearly abuse of the system but the most often we can request updated an certification is every 30 days.”¹⁸³
- An employee wishing to remain anonymous cites examples of leave abuse and the hardships it creates for other workers. “I think it is a good thing when used legitimately, however, I work in a unionized factory in Concord, N.C. where I have witnessed a lot of abuse. For example, someone may sign up to work a four hour block of overtime Monday through Thursday and when Friday comes around and they get forced to work over, they invoke FMLA to get out of the overtime. People are constantly calling in sick on Fridays and Mondays, using FMLA. This creates a hardship on the workers who come to work caus-

178. Doc. 4703, McHenry Elementary School.

179. Doc. 5261, St. Andrews Management Service.

180. Doc. 5287, Greenville Hospital System.

181. Doc. 666, Kittitas Valley Community Hospital.

182. R143.

183. Doc. 4711, Foley & Lardner LLP.

ing them to get forced over to cover for the ones using FMLA. They then come back to work and brag about what they did over their long weekend. This creates a morale issue, not to mention additional costs to the company. When you talk to management, the answer you get is always the same; 'There is nothing we can do about it because of the current FMLA laws'. It seems to me that the current laws are too easily abused and probably need to be restructured."¹⁸⁴

- Claudia Souba from Maintenance Engineering provides two examples of how employees on FMLA have negatively affected the morale of their coworkers. "Example # 1: We hired Jane Doe as an assistant supervisor for a busy sales related department. Due to personal issues Jane's punctuality and attendance were concerns early on but we tried to support her by allowing her some flexibility. Eventually Jane became protected by the FMLA and we requested medical certification (on the DOL form) to support her absences. Between her and her daughter, there were five (5) 'serious health conditions' for which we obtained certification. All were open ended in that the providers said they were chronic and ongoing and would require periodic absences. Jane's hours were changed (per her request) to better accommodate her issues and her responsibilities were lessened. Ultimately she was moved from a supervisory position (with supervisory compensation) to a one-half time clerical position (still at the supervisory compensation because of the FMLA mandates). Jane would oftentimes not be able to meet the half-time schedule but did manage to work enough hours to roll into a second FMLA year. The effect on Jane's department's work output and her co-workers was very negative and disruptive.

"Example #2: Department A had about ten (10) employees and three (3) of those had frequent absences due to migraine headaches. Some absences were for a full day and many were partial days. Sometimes all 3 were absent at the same time and the burden to the remainder of the department was very significant. Work output suffered as did the co-workers' attitudes. We had to continually monitor the situation to ensure that there was no retaliation by co-workers who were extremely angry and frustrated."¹⁸⁵

- Russell Samson from Iowa Association of Business and industry reports the morale problems created when coworkers have to cover for unexplained leaves. "Unpredictable intermittent leaves can create morale problems among the other employees who are required to shoulder an extra burden when a co-worker misses work on an intermittent and unplanned basis. This situation is further complicated by the fact that the employer cannot explain the situation to the coworkers due to confidentiality constraints."¹⁸⁶
- Paula Langton, an employee of the U.S. Postal Service who is eligible to receive FMLA leave, discusses her frustration with co-workers who use FMLA to abuse the system. "I work at the Postal Service and although it could be a good thing, it seems to me that many employees abuse the system. They just have their doctor fill out the form and then call in sick any time they don't want to work. Some even brag about it and suggest to others to do it. For instance, I have asthma, arthritis in my back, etc., none of my conditions has ever caused me to miss work, but legally, I could tell my doctor that I needed the paperwork filled out due to my back hurting, or whatever. Then once I get my case number, I could call in whenever I wanted blaming my back. I don't think the employees lie about illnesses, but they milk the system to stay home as much as possible. We have the same people on it year after year that call in all of the time. If they are that sick medically that they constantly miss work, then they should have to retire medically. Another thing is that our supervisors want us on FMLA rather than regular sick leave for FMLA doesn't count against them in sick leave hours (they want their bonuses). One year I missed a week of work due to having a severe case of flu. My supervisor gave me FMLA papers and wanted them filled out. My doctor wouldn't do it for the flu. This past year I had foot surgery and missed two weeks of work. I was told to file FMLA for it and I did. I haven't used it since and thought I shouldn't have had to file that. What I don't like is that the people who seem to be gone from work all the time can't get into trouble for it because of FMLA."¹⁸⁷

184. Doc. 195.

185. Doc. 4872, Maintenance Engineering.

186. FL49, Iowa Association of Business and Industry.

187. Doc. 188, Paula Langton.

CHAPTER 7

FMLA Misuse Disrupts Operations and Hurts Customers

Congress never intended the Family and Medical Leave Act to become a get-out-of-jail-free card to excuse skipping work. The chronic absenteeism that misused FMLA leave seriously disrupts business operations, hurting both employers and customers.

Many companies have been forced to hire full-time workers to cover employees out on FMLA leave. Others must hire temporary workers, who lack the expertise of the workers they replace. In other cases, employers force coworkers to work overtime or take more shifts to cover for the absent employees. Each of these methods of coping disrupts the workplace.

Hospitals, public schools, emergency rooms, 911 centers, intensive care units, and public transit systems have all had their operations disrupted by abusive FMLA leave use. Hospital staff have become exhausted covering for coworkers out on FMLA. Many have staff whose work is so specialized that they cannot use temporary workers as replacement. This is the case with one 911 center, five of whose seven day shift workers have FMLA certifications. When they take unannounced leave their exhausted coworkers must cover for them and make life and death emergency decisions. Abusive FMLA leave hurts employers and the public.

- Diane Forsythe, a Registered Nurse at the West Branch Regional Medical Center, worries about the level of care her organization can provide when employees abuse FMLA and miss work intentionally, leaving critical positions unfilled. “As a manager of an ICU (Intensive Care Unit) it is imperative that staffing needs meet the demands. I currently have employees that utilize the Intermittent FMLA. One employee called off using FMLA then called to brag that he was in a hot tub at a hotel. It becomes impossible to staff when you have multiple employees that can call off on a whim. It seems to be getting worse with more people deciding that this plan would be of great benefit to them.”¹⁸⁸
- Anne Kindness from Billings County 9-1-1 explains the hardship of FMLA on her workplace. “The work in the 9-1-1 Center is very specialized and requires hundreds of hours of training. I cannot hire ‘temps’ from an office service to replace absent employees. The majority of absences require that I hire overtime, and often, that overtime is forced on employees. Currently, five of the seven employees assigned to day shift are on FMLA. Three other employees in the division (of 27 employees) are also on FMLA and another three have recently submitted FMLA paperwork for approval. With one exception, these medical conditions have not required hospitalization. Instead, these employees are given free license to call in sick on a day-to-day basis. And they do. Frequently. The remaining employees are working an enormous amount of short notice overtime and are denied their own personal and family time in order to cover these absences. The number of overtime hours being worked leads to overtired people making critical life and death decisions in an emergency driven environment. In our division, FMLA is a four-letter word. No matter how minor your medical problem, it is easy to convince a physician to sign FMLA paperwork once you have explained that you work in a high stress environment like 9-1-1.”¹⁸⁹

188. R15, WBRMC.

189. Doc. 5193, Billings County 9-1-1.

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- Jan Woodham explains how hard it is to cope with the issues of FMLA in the health care industry. “FMLA issues and associated absences that stifle staffing far outweighed even the very difficult arena of recruitment. In healthcare it is even more critical as we must replace each and every patient care provider who is not at the bedside due to absenteeism. I am not saying all absenteeism is not legitimate, and I am sure this legislation was passed in an effort to protect employees’ jobs during critical illness of themselves and immediate family members. However, while the effort is well intended and may work for the appropriate few, the abuses far outweigh the advantages.”¹⁹⁰
- Eunice Montfort explains how intermittent leave wreaks havoc on the company’s ability to schedule work. “While I am sure that Congress meant well when they put this provision in the statute, it is a nightmare to try to comply with. We are a construction firm, and as such, we participate in the bid process to get our work. When we are awarded a contract, they generally are very specific about when the project must be completed, as well as the percentage of work that needs to be completed in 30, 60, 90 days, etc. Therefore, it is absolutely essential that we know from week to week which employees we can assign to what jobs. If we have employees who are on intermittent leave, they essentially can tell us at any time that they can’t work. We schedule them for a job that requires 10 skilled employees every day in order for us to meet the terms of the contract. The intermittent employee fouls everything up because we don’t know IF we can count on him or WHEN we can count on him. If the employee is going to be out for a month, two months, three months, we know how to schedule for that, but not when they can take leave in blocks of an hour at a time.”¹⁹¹
- Jill May from the Miami Valley Human Resource Association describes the shortages employers are experiencing due to FMLA. “Many respondents noted the difficulty employers have with covering for employees on intermittent leave or short periods of FMLA leave. When an employee is gone for portions of a day, a few days a week, or a day or two at a time, employers are typically forced to cover these absences with other employees or overtime. Hiring a temporary employee under such circumstances is not feasible. This is complicated by the fact that employees are permitted to take leave in tiny increments (e.g., 6 minutes or 15 minutes, depending on the employer’s payroll system). If employees were required to take full days or full weeks of leave, employers would be better able to plan coverage for those absences.”¹⁹²
- Eva Lynne Disbro from McKee Foods Corporation reports on the monetary cost to her company due to FMLA “We handle FMLA administration in-house and estimate that our three employee health service managers spend an average of seven total hours a week on FMLA issues. In addition, we have three administrative support people who spend almost full time on FMLA administration, for a total of about 100 hours each week. Based on current pay and benefits costs, we estimate that labor costs for administering FMLA is close to \$140,000.00 per year. And that doesn’t count the additional postage, dedicated voice mail boxes for FMLA reporting, and printing costs for the forms, etc. Those costs add another \$25,000 to \$35,000 per year.
“We spent almost \$1 million last year in temporary worker costs, most of whom were hired to fill in for people on leave. I don’t know how to determine the additional amount spent on overtime worked by other employees to fill in for people on leave and the value of lost productivity due to untrained employees filling jobs on a temporary basis.”¹⁹³
- Lorin Simpson from the Utah Transit Authority explains the hardship that FMLA has caused for public transit. “In the **public transportation industry**, our service (buses) **MUST** go out, on time, every time, no questions. Because of scheduled absences, **we must hire additional staff** to cover. Because of short notice unscheduled absences, **we must have multiple employees simply on paid standby** in order to cover the work immediately.”¹⁹⁴

190. Doc. 5116, Columbus Regional Health Care System Inc.

191. Doc. 10055A, Eunice Montfort.

192. Doc. 10156A, Miami Valley Human Resource Association.

193. Doc. 10196A, McKee Foods Corporation.

194. Doc. 1029A, Utah Transit Authority. Emphasis in original.

- Kaye Schultz from the Texas Parks and Wildlife Department is concerned over the perpetual intermittent leave. “We are concerned about situations where a chronic illness that qualifies as a serious medical condition results in the need for brief but ongoing absences. For example, an employee who suffers migraine headaches (unscheduled absences) or requires weekly medical appointments (scheduled absences) could use 8 hours of FML per week for an entire year without exhausting his or her leave entitlement and again be eligible for FML at the start of a new year based on having worked 1,250 hours in the past 12 months, resulting in ‘perpetual’ intermittent FMLA status. These situations effectively convert a full-time position into a part-time position and can result in severe staffing, workload and morale problems for departments with high volume and facilities with only a few employees.”¹⁹⁵
- Sandra Kennedy from the Retail Industrial Leaders Association explains how costly FMLA can be to companies. “Leaves taken on an intermittent, unpredictable basis are very costly to business on several levels. During one 12-month period, one facility with 944 employees received 922 requests for leave of absence. The administrative burden of processing leaves amounts to millions of dollars each year. Businesses must hire additional employees to fill in for those on intermittent leave, often necessitating overstaffing just to ensure minimal productivity. As an example, one division of a company employing office workers has 800 employees. Those employees collectively used 6,000 hours of FMLA leave in a 12-month period—the equivalent of three full time employees. The cost of overstaffing on a national basis is staggering.”¹⁹⁶
- James Duff from Dallas Area Rapid Transit describes the extra costs incurred because of FMLA. “The Dallas Area Rapid Transit (DART) has experienced a significant increase in FMLA utilization over the past four years. Employee FMLA absences increased from 1,965 workdays in FY 2003, to over 6,100 workdays in 2006. This 210% increase has resulted in substantial additional costs to the agency in overtime pay and lost productivity. This increase in unscheduled absences has caused DART to incur in excess of \$1,000,000 of additional labor expenses on an annual basis.”¹⁹⁷
- Cherie Rickert from McHenry Elementary School explains the difficulties of finding replacements for teachers who are on FMLA. “Schools do not have the luxury of assigning co-workers to pick up the slack, therefore we must hire substitute teachers to replace the new moms. It is a huge expense to schools and is an interruption in student learning.”¹⁹⁸
- Todd Morrow from Community Transit explains the costs associated with FMLA. “With our 600 employees, we manage approximately 200 FMLA cases annually. Many employees have multiple FMLA claims (several have had 10 or more claims). Some of these (about 10% of our work force) bounce back and forth between on-the-job injury claims and personal illness or injury claims. Even though we do run FMLA concurrently with other leaves, as permitted by regulations, the effect on productivity can be significant and the cost to monitor, intervene for recertification, obtain medical clarification and track absences against what has been authorized is also significant. We have three to four full time equivalent staff whose work revolves around this.”¹⁹⁹
- A source wishing to remain anonymous expresses his concern for the hardship that is placed on businesses because of FMLA. “Businesses pay for this POOR law in many ways.
Additional charges by doctors to complete the paperwork
Increased absenteeism resulting in additional staffing
Belligerent and threatening attitudes from poor performing employees
Thousands of dollars in attorney opinions
Consumption of staff time to track, file, and defend FMLA paperwork”²⁰⁰

195. Doc. 10253A, Texas Parks and Wildlife Department.

196. Doc. 10259A, Retail Industrial Leaders Association.

197. FL41, Dallas Area Rapid Transit.

198. Doc. 4703, McHenry Elementary School.

199. Doc. 5459, Community Transit.

200. Doc. 2689, Power Flame Inc.

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- Jim Callister from Achievement, PLLC explains the difficulty in finding replacements for highly qualified workers who take FMLA leave. “When a Speech Pathologist, Physical Therapist, Occupational Therapist, Special Educator, etc. goes out on a 12 week leave per the FMLA, we have to place their entire caseloads with other therapists. 9 times out of 10, our staff has very full caseloads so we have to hire replacement therapists to cover the maternity leave. Unfortunately, there are very few instances where anyone in this field wants to only provide for a maternity leave. We therefore have to hire these replacements full time. When the 12 week maternity leave is over, the therapist comes back to the same (or similar) position at the same salary. We can’t terminate the fill in because they wouldn’t have taken the job if it was temporary. Therefore, at the end of the 12 week leave, we would have 2 full time positions that we are paying for 1 caseload. It takes 2-4 months to rebuild another caseload and that’s not even a given!”²⁰¹
- Mary Morris of St. Elizabeth Medical Center explains how abuse of FMLA by employees ends up negatively affecting care for patients and morale of coworkers. “The chronic intermittent unscheduled leave taken with very little notice (call-ins) is the most disruptive to the hospital. We have patients that need care and other staff has to pick up when others do not report to work. It creates resentment and exhaustion when healthcare workers have to stay over to wait for replacements to care for patients.
It is a fact that employees are misusing FMLA. Co-workers will complain about seeing someone that frequently calls into work, out with peers for recreational activities or parties.
Frequent absences on Mon. or Fri.”²⁰²
- An anonymous source explains how FMLA is a large cost to employers. “Due to the unscheduled nature of intermittent FMLA leave, productivity is greatly impacted. The costs are many. Employers incur unexpected overtime costs, lost sales, missed deadlines, additional administrative costs and negative employee morale. From my experience, I can estimate that 30 intermittent FMLA leaves cost the company \$40,000 annually.”²⁰³
- Marge Strausbaugh, the City Manager of Mascotte, Florida, explains the difficulty of dealing with FMLA on a public budget. “As a public employer it is always very difficult when we have these types of budgetary constraints. We are required to maintain the best services for our tax-paying citizens and that requires employees, especially trained employees working on a daily basis. We work hard not to employ too many people while employing and training just enough people to do a top level job. This is more difficult when you are a smaller City and have a smaller workforce. There are often not enough workers left to fill in. Obviously as a Public Employer we want to reduce the burden to maintaining our level of service standards and to the budgetary constraints as much as possible.”²⁰⁴
- Robert Schneider from the City of Knoxville explains the cost of FMLA to public employers. “The raw cost in dollars is devastating. This is especially true within the public sector. Budgets in the public sector are notoriously thin and overtime, and the additional benefits due with overtime earnings, therefore bleeds the public coffers. Whether the excuses are valid or not, the cost to American taxpayer is exceptionally excessive because there is no profit margin in public service.”²⁰⁵
- Terri Ferraro from Agfa Corporation explains the difficulties in administering FMLA. “It is difficult to monitor & control productivity & absenteeism. This all feeds into the bottom line, which gets passed on to the customer in higher prices & then those employees left behind to do the job end up working harder, paying higher costs for their own needs & probably getting less rewards for it since management will exercise control where they can in the salary budget.”²⁰⁶

201. Doc. 161, Achievement, PLLC.

202. Doc. 10071A, St. Elizabeth Medical Center.

203. Doc. 10021A.

204. Doc. 182, City of Mascotte.

205. Doc. 192, City of Knoxville.

206. Doc. 5201, Agfa Corporation.

- Steve Mackell with Theraplay, Inc., explains how FMLA wreaks havoc on the management and effectiveness of his small business. “As a small business owner that employs primarily women (my wife and I own a Pediatric physical, occupational, and speech therapy rehabilitation practice), the FMLA puts undue financial pressure on our business. The reason is that when one of our employees goes out on FMLA we need to hold their position for 12 weeks and we choose to pay the employer share of their benefits. Most of these of our employees choose not to come back as fulltime employees and don’t let us know until the end of the 12 weeks. So this puts all patients in a state of flux since we need to hire temp labor to see these patients when our employee is out on FMLA. Then we are behind the 8 ball further because we are looking to hire a full time employee after the 12 weeks is up since they do not need to let us know their intentions. With the rising cost of healthcare and the continual supply and demand pressure of licensed PT, OT, and SLP therapists there has to be a remedy to this situation that is equitable to the small business owner.”²⁰⁷
- Alice Berquist, who works for Allina Hospitals and Clinics, worries about the impact of FMLA on patient care. “These provisions make it very difficult to ensure that the hospitals and clinics will be adequately staffed. The reason is that Allina may not discipline the employee for attendance reasons, and must wait until the employee has exhausted 480 hours of time away from work each 12 month period. It is not realistic to require an employer to provide coverage for employees who need to take this amount of unplanned leave before an employer can begin the disciplinary process. Yet, Allina has had to allow emergency room staff, surgical support staff, nurses, physicians and ambulance drivers to take this extensive, unplanned leave regardless of the impact on patient care.”²⁰⁸
- Barbara Rinaldi with Eastern Federal Bank explains how harmful FMLA is to the productivity of her company when employees can take weeks of leave, but the employer is not permitted to fill the position with a more reliable person. “A number of our exempt positions are single incumbent, and necessarily broad, covering two or three major functions or areas. It is virtually impossible to cover an absence under FMLA for more than a few weeks without placing undue burden on other employees who already are responsible for a number of functions, yet, if business necessity dictates that the position is filled, there is not a sufficient number of ‘comparable’ the employee may return to after the leave. Given the breadth of our positions, it is unlikely that we are able to fill the need with temporary staff, thereby holding the position for the incumbent.”²⁰⁹
- An anonymous contributor working in a health care facility is concerned about the detrimental effect of FMLA on adequately staffing the facility. “The provisions of the regulation have a crippling effect on operating a health care facility of under 140 employees. Approximately 12% of our employees were on FMLA throughout 2006 which equates to 144 weeks of un-worked time and the loss of productivity from almost 4 full time employees.
“As stated in the regulation, we must hold the employees position or a similar position. The negative effect is compounded when the employee does not return from FMLA with no meaningful recourse for the employer.”²¹⁰
- A Human Resources professional submitted an anonymous comment concerning the overall negative effects of FMLA. “[A]s an HR Manager, I believe there needs to be more done to reduce company liability. i.e., just recently we had an employee out on the full 12 weeks FMLA—due to bronchitis, she has company-sponsored medical and dental insurance and out of good faith, the company paid all her premiums. She only remitted insignificant amounts during this 12-week period, so we set up a payroll repayment plan for her. After 1 week she quit, owing the company nearly \$1,900.00 that we will not be able to recoup.

207. Doc. 197, Theraplay, Inc.

208. Doc. 641, Allina Hospitals and Clinics.

209. Doc. 1556, Eastern Federal Bank.

210. R16.

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“Additionally, more of the burden needs to be put on the employee as to notifying HR and completing the FMLA forms and maintaining contact with their respective companies. Another lesson recently learned: another employee out with a staff infection who was actually terminated by her supervisor for 3 days no call/no show. I in turn terminated her insurance benefits. 2 weeks later she called when she couldn’t get a prescription and explained that she was home sick. She still, after nearly 3 weeks, not contacted her supervisor.

“Also, rather than intermittent time of 1 hour, I suggest that that employees use 1/2 day increments, which are easier to track manually, as many companies, especially smaller ones do not have and cannot afford a \$100,000 HRIS software program.

“These situations create unnecessary recruitment burdens, impact daily operations, cost companies needless sums of money and make the companies more open to various costly and time-consuming lawsuits. This law is for the employee, thus the employee should take on more personal responsibility.”²¹¹

- David Kasper from Waste Management Inc. explains how hard it is to cope when employees do not come to work on time. “Perhaps the single greatest hurdle for WM is the tracking and management of intermittent time. Intermittent time is difficult to track and manage; in addition, fraud and abuse are more difficult to target. While those challenges exist for all employers, intermittent leave for hourly employees at WM direct impacts the bottom line. Since the regulation requires protected leave to be granted in small increments it impedes our ability to serve our customers effectively. For many of our hourly employees, their shifts begin and end not only at specified time but related to the beginning and ending of other employees’ shifts. For example a shift many begin at 4:00am with the intent that the truck will leave at 4:15am. Given this, tardiness and attendance (even if time is job protected) is of paramount concern at WM. Small increments of job-protected time away from work can frustrate other employees and undermine our attendance requirements since that time away is protected and therefore not counted against our attendance policy.”²¹²
- An anonymous employee stresses that FMLA reduces work productivity and timeliness. “For example, if an employee would miss 4-5 days a month due to depression and continue on a permanent basis, never exhausting a full 12 weeks of leave in a year, the employee would continue to be on an intermittent leave of absence forever.

“We had an employee in this situation whose role was to support other employees on clerical matters where duties were non-routine, ad hoc and time sensitive. Because employees relied on the employee on leave to complete work, and with the unpredictability of the employee’s leave, there were a number missed deadlines, miscommunication, etc, which caused us to investigate transferring the employee to a temporary position. Because this section seems to only address a temporary transfer for a foreseeable leave situation, we were left to believe we were unable to transfer this employee to an equivalent position.”²¹³

- Mike Crowell, an employee, believes FMLA is abused by employees and causes staffing problems for managers and coworkers. “FMLA is probably a good Act but I believe it is abused. The long term leaves are easy to administer. The single day and last minute absences are impossible to cover and impossible to operate a productive manufacturing facility. It has become so easy to report absences at the last minute it leaves no option for the production team but to lose effectiveness. If only there was a way to preplan these days. We should not gain a social benefit at the complete loss of the group that provides that social benefit. This Act needs to be amended to be more practical.”²¹⁴
- Betsy Sawyers with Pierce County, Washington, worries about the impact of FMLA abuse on coverage for emergency services. “Our employees are responsible for providing vital public safety services (law enforcement, fire protection, emergency management, 24 hour adult and juvenile detention facilities),

211. R47.

212. Doc. 10240A, Waste Management Inc.

213. R84.

214. Doc. 4157, Mike Crowell.

human services (civil commitments/mental health services, aging and long term care, emergency housing), justice services (superior and district court systems, probation department, prosecuting attorneys, defense attorneys), and general management of country facilities, technical services, and information services. All of these responsibilities must be carried out to serve the public on a daily basis. Many of our responsibilities require 24/7 coverage.

“In the cases where a physician has certified that the employee may need intermittent leave as his/her condition flares up, but the employee does not use a significant amount of leave at a time, the ‘12 weeks’ often stretches the duration of an entire 12 months and rolls over into another year for FMLA entitlement. In essence, the position is converted into a permanent part time position, without any ability by the employer to predict when the employee will actually be present.

“In addition, with the current provisions that allow FMLA leave to be tracked in the smallest payroll hour tracked (in our case, one-tenth of an hour), some employees have used their FMLA leave in an abusive manner as an excuse for tardiness. Frequently, a ‘backup’ employee must be called in on an emergency overtime basis to cover the tardiness.”²¹⁵

- Eileen Groves works with Association of Corporate Counsel and explains FMLA’s detrimental effect on workplace productivity. “For example, employees diagnosed with a chronic illness or other conditions that may require intermittent leave, such as migraines or asthma can be gone at least one day per week, every week of the year and never exhaust their FMLA leave. This translates into a *protected annual absenteeism rate of over 20%*, an unacceptable rate in any industry. This is an issue for employers of all sizes. Clearly, small employers have difficulty in being required to accommodate this type of unexpected absenteeism. Similarly, larger employers are generally composed of small and medium sized departments that can be significantly and adversely affected by a single employee’s repeated and unscheduled absenteeism. Additionally, the unscheduled intermittent leave of one or more co-workers often significantly affects the morale of other co-workers.”²¹⁶
- Sunny Gwaltney with Bessemer Plant shares her frustration with employees who blatantly abuse FMLA. “To begin with, intermittent FMLA in increments of 10 minutes???? Let me share how some employees use this: they get a doctor to say they have sleep apnea, (or headaches, or horribalonia) then don’t call in to report off in a timely fashion, and when they show up an hour or 20 minutes late, just say that they couldn’t wake up and call. We have one plant with at least 10 people doing this!! Surprisingly enough, these are folks who were often late to work before they discovered their medical condition.”²¹⁷
- Sue Pursel from Waste Management of Pennsylvania provides examples of employee activities that clearly are not related to serious health conditions. “Maintaining operations when an employee takes unscheduled intermittent leave is very difficult. With the current regulations, we must literally hire a replacement employee and have that person available at any point to do the work of the employee exercising their intermittent leave right. It would be much better to have either a ‘reasonableness’ standard or the option to have the person go on a regular LOA until the situation can be resolved. Intermittent leave is also the most abused leave, with many employees doing other things (getting manicures, visiting the mall, going on fire calls) while they are supposedly using FMLA. (This is NOT an exaggeration. I have personally seen employees using FMLA intermittent leave go get manicures, visit the mall, and go on fire calls as a volunteer fireman!)”²¹⁸
- Alice Berquist from Allina Hospitals and Clinics explains how abuse of intermittent FMLA can prevent a clinic from providing good medical care. “An Allina employed physician who worked at one of the Allina clinics has a disabled child whose care is erratic. The provider would call in several times a month stating that she was going to be several hours late or that she could not come to work at all so that she

215. FL125, Pierce County, Washington.

216. FL31, Association of Corporate Counsel.

217. Doc. 78, Bessemer Plant.

218. Doc. 5283, Waste Management of Pennsylvania.

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could provide care for her child with a serious health condition. The physician had submitted a completed medical certification form that allowed her to be gone when her child needed care. When she would call in to say that she was staying with her child, the clinic was forced to cancel all of the physician's appointments at the last minute. Some of the patients who were affected were so frustrated with the cancellations that they called the clinic crying. Despite the very negative effect on patient care, no employment action could be taken against the physician because she was exercising her FMLA rights.

“Another provision that should be changed is the definition of a health care provider for employees who travel to foreign countries. (29 CFR 825.118). That section requires employers to accept the documentation of foreign providers if the provider is recognized in the employee's country of origin. Allina has many employees from Africa and India who return home for up to three months. When they return, they have documentation in foreign languages from foreign ‘providers.’ It is not possible as a practical matter to check to determine whether the absence was for an appropriate reason. Employees should have to see a provider in the United States so that an employer is given the opportunity to clarify the reason for the leave.”²¹⁹

- A commenter wishing to remain anonymous explains the difficulty of dealing with the absenteeism that results from FMLA. “Intermittent leave has been the most difficult area of this law to manage. I understand the need for leave for doctor's appointments or shortened work schedules but the law has been interpreted so that any portion of a day can be declared intermittent leave with no notice, which requires overtime costs and causes disgruntled co-workers.

“The methods for proving fraudulent use of FMLA are so onerous, it is impossible to jump through the hoops. We have determined we can no longer manage absenteeism, as it is impossible to terminate employees who don't come to work.”²²⁰

- Leigh Tillman from MarkOne Financial explains that work does not always get accomplished due to staff shortages created by FMLA. “After reading an article in Benefit News that stated ‘intermittent leave is rare’, I felt the need to provide my comments on FMLA. I have over 11 years experience in Human Resources. I have managed FMLA for small companies (my current employer of only 75 people) and large organizations (over 70,000 employees nationwide).

“Currently, our challenge is 13% of our workforce is on some form of FMLA. And of those individuals, 57% of them use FMLA intermittently (three with chronic conditions requiring either ongoing treatment or occasional absence from job because they are ill). It goes without saying that in a small organization, it's very difficult to staff when you have employees out unexpectedly. There are occasions when production is not completed.”²²¹

219. Doc. 641, Allina Hospitals and Clinics.

220. R34.

221. Doc. 5186, MarkOne Financial.

CHAPTER 8

Bonus and Rewards Programs Cut

Congress intended the Family and Medical Leave Act to improve working conditions, but for many workers it has done the opposite. Under the Act employers may not discipline their employees for using FMLA leave. The Department of Labor has interpreted this to mean that employers may not count FMLA leave use against employees in attendance reward programs.

This interpretation allows workers to miss up to fifty days of work and still receive a bonus for perfect attendance. Companies now find it virtually impossible to reward employees for good attendance. When irresponsible workers use FMLA leave to skip work without any penalty, employees with good attendance records feel cheated. Many companies have discontinued attendance bonuses, meaning that the Family and Medical Leave Act has had the unintended effect of reducing some workers' pay.

- Sue Pursel from Waste Management of Pennsylvania thinks that employees who take advantage of FMLA should not be eligible for attendance awards. “The FMLA has adversely affected our ability to reward employees with good attendance. Employee perception is that it is unfair that employees who have intermittent or regular FMLA leave receive the same reward they receive. It has also discouraged management from creating new programs to reward employees.”²²²
- Eric Brandenburg, an employee, explains how FMLA causes friction between coworkers when some are rewarded for perfect attendance even though they missed weeks of work. “If there is any way to legitimize all FMLA leave this might not be a problem, however (and this is a true story) when an associate steps up to receive a perfect attendance award after missing 53 days of intermittent leave, missing through the week and working weekends, it turns the stomach of their peers. They know better than I what the individual is doing and the hardship it places on the co-workers. It is bad enough that I have to encourage associates to apply for FMLA, but the [sic] do not want to be considered in the same group as an abuser.”²²³
- Bruce Schwartz with Jerith Manufacturing Company, Inc., stresses that FMLA causes friction among employees when bonuses are awarded to those who have taken FMLA and are still able to claim perfect attendance. “This [FMLA] has caused a tremendous morale problem, especially since we offer a ‘perfect attendance’ bonus. The bonus is offered on a quarterly basis, so some employees who miss several weeks of work under FMLA qualify for a bonus. This is not viewed very favorably by those employees who actually show up to work for 13 straight weeks, and it really hurts morale on the shop floor. We will try to remove this bonus when we renegotiate our union contract, since it is now rewarding employees whose attendance is far less than ‘perfect’.”²²⁴
- Maxine Russel with Edison Electric Institute points out that missed work is causing employers to rethink giving perfect attendance bonuses. “Under the current regulations 29 C.F.R. 825.215 (c) (2) an employer is not allowed to treat an employee, who is on FML, any different than an employee not on FML when it comes to awarding bonuses for perfect attendance or safety. Employees on FML are entitled to rewards when they are absent from work. This FML restriction is a disincentive for an employer to have various bonus programs in place because employers are paying an employee a bonus for something they did not earn.”²²⁵

222. Doc. 2480, Waste Management of Pennsylvania.

223. Doc. 4917, Eric Brandenburg.

224. Doc. 4530, Jerith Mfg. Co., Inc.

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- Teresa Angerman with Interbake Foods reiterates the problem with employees who take FMLA and still are eligible for perfect attendance recognition. “Although the entire workforce is covered under the labor agreement, FMLA privileges afford special treatment to employees absent for FMLA reasons. It also makes it very difficult to reward employees for perfect attendance as it unfairly protects FMLA absences.”²²⁶
- An employer wishing to remain anonymous submitted the following comment on how poor attendance with no consequences affects non-FMLA coworkers. “Employees that are not utilizing the unforeseen, intermittent leave report feeling cheated. They come to work on time and work 40 hours each week. When they need time off, they utilize their vacation time. They also report that employees on unforeseen, intermittent leave indicate that they can and will abuse the system when they want to. As a result, more and more employees are applying for unforeseen, intermittent leave so they can take time off of work whenever they choose. How can an employer tell when an employee has a migraine? It’s not possible.

“Employees that have worked hard and qualified for attendance awards feel cheated when an employee who has missed work on numerous occasions (sometimes under questionable circumstances) also receives the same honor. Attendance awards will be eliminated because they no longer have a positive impact on employee morale.”²²⁷

- Lori Davey with the City of Philadelphia explains, “Employees can now absent themselves from work (up to a maximum of 60 days a year) and receive the same attendance incentives/bonuses as employees who come to work everyday.”²²⁸
- Myrnie Daut, an employee with the City of Eugene, Oregon, notes that employees who use FMLA receive an unfair advantage over those who cannot. “An employee who uses 12 weeks of FMLA protected leave in a year is entitled to receive an extra vacation day for ‘low sick leave use’ but an employee who missed four days of work, one day at a time throughout the year due to non-FMLA qualifying illness, does not receive the extra vacation day under the City’s program.”²²⁹
- Ginger-Lee Rasler with AM General LLC remarks that FMLA hurts employer perfect attendance incentives and causes morale problems. “Attendance Policies – FMLA affects the ability, as an employer, to administer our attendance policy. It has affected our ability to use a perfect attendance award system, which in turn affects the morale of the employees who in fact have perfect attendance.”²³⁰
- Randy Hurt from Stant Manufacturing Company explains how FMLA undermines attendance policies. “A few years ago, we had to implement a no-fault attendance policy to control absentee abusers. When our employees learned about the protections of FMLA, those same employees that had been an attendance problem began submitting FMLA certifications for such conditions as chronic/acute migraines and asthma. Since FMLA allows employees to wait up to 48 hours after their return to work, we can’t even require them to notify us ahead of time that they will be off. The third shift supervisor must carry extra manpower on the shift (added expense) to be able to run the jobs that must run every night, and must wait until the start of the shift to see who came in and who did not, to be able to assign work in line with seniority rights.”²³¹
- Tricia Miller is employed by Bendix Commercial Vehicle System LLC and believes FMLA abuse weakens employee morale and cohesiveness due to the loss of bonus and rewards. “This is a real morale issue for our workforce—those that have true perfect attendance. They don’t think it is fair that they come to work every day on time and someone who misses for FMLA, intermittent or consecutive, gets the same

225. Doc. 10010A, Edison Electric Institute.

226. Doc. 10012A, Interbake Foods.

227. Doc. 10021A.

228. Doc. 10058A, City of Philadelphia.

229. Doc. 10069A, City of Eugene.

230. Doc. 10073A, AM General LLC.

231. Doc. 4742, Stant Mfg. Co.

reward they do ... Usually coworkers are asked to pick up the slack and this can be a morale issue, especially if they believe the coworker is abusing the FMLA. They feel that their coworker is not pulling their weight and they have to pick up the slack. (Employees talk on the floor. Sometimes employees that have approved intermittent leave like to brag about having the approved leave and what they are really doing during the time missed.)²³²

- Robert Ryan with MedStar Health, Inc., explains that FMLA has caused his company to cut most attendance bonus programs. “As a result, MedStar Health has eliminated virtually of its attendance bonus programs, which previously had been important to our facilities’ culture, employee morale and promotion of work attendance. This decision was made when the inequities created by Sections 825.215(c)(2) and 825.220(c) became apparent to employees, who expressed that the programs were meaningless when employees taking FMLA for the full 12 workweeks were entitled to the bonuses, but an employee who missed one day in a given period was disqualified from the program.”²³³
- James Masur II of Locke Reynolds LLP explains how FMLA erodes any employee attendance bonus plan. “FMLA regulations’ restrictions against providing financial incentives to reward employees who can maintain perfect attendance seems at odds with the statute’s intended scope and objective. The restriction codifies a pointless disincentive to those employees who have the ability to contribute to advancement of their employer in a tangible way.”²³⁴
- Jill Bodensteiner with University of Notre Dame states that her employer has eliminated the attendance awards due to FMLA. “For example, the Building Services division at Notre Dame has eliminated its perfect attendance award program because of the employee morale issues caused when an employee who misses an incredible amount of unforeseeable, intermittent leave (and must be ‘covered for’ by fellow employees) receives an award.”²³⁵
- Steven Bernstein of Fisher & Phillips LLP states that employers’ attendance rewards programs have been rendered meaningless by FMLA. “Perfect attendance recognition...has essentially been rendered meaningless for those employees who maintain their impressive attendance records, to the extent that other employees qualify for the same recognition despite missing up to twelve work weeks per year, particularly where some absences are for relatively minor conditions that other employees work through (such as sinus infections). The requirement that FMLA leave not count against an employee’s absence record for purposes of a perfect attendance reward has been particularly challenging for manufacturers, and has created morale problems for many others.”²³⁶
- Steven Wojcik with National Business Group on Health states many employers have dropped their attendance rewards programs since FMLA was enacted. “Because the current law does not allow employers to exclude such employees, the unintended consequence is that many employers have dropped these programs due to the negative impact on employees who have not missed any work being recognized alongside employees who may have taken up to 12 weeks of FMLA leave. This change would allow employers to use bonus and recognition programs once again as a means of rewarding employee attendance and improving employee morale.”²³⁷
- Ed Carpenter, an employee with Tecumseh Power Company, notes that attendance reward programs are diminished by FMLA. “Overlooking days missed for FMLA diminishes the VALUE of the reward for those employees that work hard to have perfect attendance. When they realize a co-worker abuses FMLA and still gets an award, it’s not good for morale and de-motivates employees.”²³⁸

232. Doc. 10079, Bendix Commercial Vehicle System LLC.

233. Doc. 10144, MedStar Health, Inc.

234. Doc. 10170A, Locke Reynolds LLP.

235. Doc. 10248A, University of Notre Dame.

236. Doc. 10262A, Fisher & Phillips LLP.

237. Doc. 10268A, National Business Group on Health.

238. R123, Tecumseh Power Company.

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- Francis Alvarez of Jackson Lewis LLP remarks, “An employee can take up to sixty days off annually yet be entitled to a perfect attendance bonus might seem irrational, if not a violation of the ‘plain meaning’ rule. But when the absences are covered by the Family and Medical Leave Act, that employee has perfect attendance and cannot be denied the bonus.”²³⁹
- Bonnie Eastman with Madison Gas and Electric Company notes that FMLA inadvertently rewards employees who miss work under FMLA at the expense of those who had to cover for absent coworkers. “Employer attendance policies are impacted by adherence to FMLA. The employer’s ability to implement policies to encourage perfect attendance is severely curtailed by FMLA. By eliminating FMLA absences from consideration in attendance policies, morale for employees working without any absences of any kind are treated unfairly. Often these are the very employees who are left to cover duties when another is on a FMLA leave.”²⁴⁰
- Mark Morgan of Florida Power & Light Company explains how FMLA can actually increase absenteeism and result in a decline in productivity. “The FMLA does not allow an employer to count a FMLA day when administering an attendance policy. For example, an employee who has taken off 5 days of FMLA will receive the same reward as an employee that has had perfect attendance. This regulation hurts the morale of the employees with good attendance and reduces our ability to effectively manage absenteeism. Increased absenteeism leads to additional lost productivity and thus additional costs.”²⁴¹
- Dan Danner with the National Federation of Independent Business (NFIB) and NFIB Legal Foundation references testimony given by one of the group’s members to Congress. “As one of our members testified before the House of Representatives in 1997: ‘FMLA requires perfect attendance awards to be given to leave-takers, thereby rendering perfect attendance awards valueless. . . Did Congress really intend that an employee absent for weeks on FMLA leave should still be eligible for a “perfect attendance” award or incentive? This undermines the value of perfect attendance awards.’ To make these awards effective tools to boost morale and productivity, an employee should have to be at work every day to receive them.”²⁴²
- An employee with Avaya Communication explains that FMLA has undermined the value of attendance reward programs. “The effect of the FMLA requirement that employees be treated the same as if they were working during their leave has been to eviscerate programs that reward good attendance. Accordingly, attendance awards have been abandoned by many employers because they rewarded people who actually missed work. Previously, our Company provided unlimited paid sick days (including approved FMLA days), but because certain employees, using the protections afforded by the FMLA, abused this generous policy, new policies which capped the number of paid sick days had to be implemented.”²⁴³
- Russell Samson with Iowa Association of Business and Industry states that “Awarding perfect attendance bonuses to employees who have been absent for FMLA purposes for up to 12 weeks when employees with near perfect attendance records do not receive such bonuses creates a major morale problem.”²⁴⁴
- Helen Adams with Dickinson Mackannan Tyler & Hagen PC Attorneys and Counselors complains that FMLA unfairly rewards employees who undeservedly receive perfect attendance recognition. “. . . [P]erfect attendance bonuses are unfair to employees who have not missed a day of work for any reason and to employees who miss just one day of work for a non-FMLA reason. Awarding perfect attendance bonuses to employees who have been absent for FMLA purposes for up to 12 weeks when employees with near perfect attendance records do not receive such bonuses creates a major morale problem.”²⁴⁵

239. FL71, Jackson Lewis LLP.

240. Doc. 10288A, Madison Gas and Electric Company.

241. Doc. 10275A, Florida Power & Light Company.

242. Doc. 10302A, National Federation of Independent Business (NFIB) and NFIB Legal Foundation.

243. FL33, Avaya Communication.

244. FL49, Iowa Association of Business and Industry.

245. FL48, Dickinson Mackannan Tyler & Hagen PC Attorneys and Counselors.

- Scott Langelin with Briggs & Stratton Corporation explains that FMLA makes it possible for employees who miss many days of work to be eligible for attendance bonuses. “It is an absolute morale deflator for employees to see two awards given for perfect attendance—one to an employee who has been at his job on time, every day over the past 3 months and the second award going to an employee who worked 2 days at the start of the quarter and 3 days at the end and was absent all other times under FMLA. While DOL says the FMLA user in this case need only receive 1/12th of the total award amount if the amount of the bonus is tied to the number of hours worked that is a lost subtlety for managers and employees. In many instances, the bonus is a flat amount such as a 100 dollar bill. In that situation, the employee who worked only one week is entitled to the same bonus as the employee with perfect attendance.”²⁴⁶
- Employee Sharon Pepper regrets the loss of employee attendance bonuses due to FMLA. “Another issue that is unfortunate is the fact that most companies have quit recognizing and rewarding people with perfect attendance because it has just gotten too complicated and the recognition has become too watered down under FMLA. Those that abuse the privilege and those that are off for long periods during the year, per FMLA regs., must be recognized and rewarded for perfect attendance just like the employee who has missed no days at all for any reason during a year period of time.”²⁴⁷
- James Duff with Dallas Area Rapid Transit notes that his company discontinued employee attendance bonus program due to FMLA. “In 2003, our employees became keenly aware that eligibility for the attendance bonus was protected if they were off work on an approved FMLA leave of absence. As a result of this newfound knowledge we have experienced a significant increase in FMLA leaves of absence since 2003. The regulations also caused DART to provide bonus pay to numerous employees who had already established a pattern of poor attendance, which circumvented efforts to reduce unscheduled absences. The Attendance Bonus Program was discontinued and productivity continues to suffer.”²⁴⁸
- Lorin Simpson, who is employed by the Utah Transit Authority, is disturbed by the loss of her company’s attendance rewards program due to FMLA. “Our organization has discontinued our attendance bonus incentives because FMLA causes the rules and calculation to be administratively burdensome and, in the end, we are unable to reward employees as effectively because FMLA absences cannot be considered. Doing away with this incentive is a detriment to all employees, but continuing to employ a now ineffective incentive system simply does not make sense.”²⁴⁹

246. FL37, Briggs & Stratton Corporation.

247. Doc. 5325, Sharon Pepper.

248. FL41, Dallas Area Rapid Transit.

249. Doc. 1029A, Utah Transit Authority.

CHAPTER 9

Difficult to Communicate with Doctors

Under the Family and Medical Leave Act, employers cannot directly contact the doctors who certify their employees' medical conditions. Instead, they must ask their health care provider to contact the certifying doctor. Congress intended this restriction to protect patient's medical privacy, but protection comes at a cost. In practice, it has turned into a bureaucratic mess for employers trying to assess their workers medical needs.

The Americans with Disabilities Act allows employers to directly contact doctors. This system works well. Employers can let doctors know if a patient appears to be unable to perform duties, and doctors can be more open concerning the patient's diagnosis and needs. Employers would be less likely to put employees with serious health conditions in any danger, and abuse would be easier to catch if employers and doctors were allowed to communicate under the FMLA as well.

- Carol Carrier from the University of Minnesota explains the problems that arise when employers are not able to communicate with an employee's health care provider. "The University's human resources personnel have concerns regarding the medical certification process, and their ability to communicate with an employee's health care provider. The provision in section 825.307 of the regulations that permits an employer to communicate with an employee's health care provider only through the employer's health care provider is unworkable. In many cases, the administrator reviewing an employee's medical certification needs clarification about the impact of the employee's condition on the employee's ability to perform his/her work duties and responsibilities. The administrator might also want to clarify the need for intermittent leave, and/or discuss various options for addressing work restrictions. The employer's health care provider typically is not familiar enough with the employee's duties and responsibilities to effectively engage in such discussions. Relaying questions and answers through the employer's health care provider is inefficient, and often results in miscommunications, and delays. The regulations should be amended to specifically allow direct communications between the employer and the employee's health care provider."

She went on to add: "The employer is limited from seeking recertification during the period of incapacity listed on the certification form. Leaves sometime extend over long periods of time. Periods of incapacity might cover months, or even years. In some cases they might simply be listed as 'ongoing'. In the case of extended or open-ended periods of incapacitation, an employer may have no reasonable way of knowing whether changes have occurred in the employee's condition, and/or if the request for leave continues to be valid. Once again, the University believes that, in all cases, employers should be permitted to request recertification every thirty days."²⁵⁰

- Hugh Quill from the State of Ohio explains the problems with the regulations concerning communication with doctors. "The State of Ohio has concerns regarding the medical certification procedures required by the regulations. Specifically, the State of Ohio opposes the regulation that prohibits an employer from consulting informally with an employee's doctor when there is a question or problem with the employee's FMLA certification form. The requirement that the employer request a second certification from the employee is costly to the State of Ohio, and is time-consuming for both parties. Thus, instead of being able to informally resolve any questions regarding an employee's certification, the State of Ohio now must adhere to a rigid, costly, and time-consuming process. These limitations either lead

250. Doc. 4777A, University of Minnesota.

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the State of Ohio to deny FMLA coverage due to lack of sufficient certification or to grant FMLA coverage despite the lack of sufficient factual support.”²⁵¹

- Katie Jones from the Pennsylvania Turnpike Commission explains how communication with doctors is complicated and time-consuming. “We do not generally have our health care provider contact the employee’s health care provider. With the 2-day turnaround time requirement on certifications, it isn’t feasible for us to rely on two different health care providers to catch each other at the same time with their busy schedules.”²⁵²
- Fortney Scott from the National Association of Manufacturers discusses the difficulty caused by the barrier to contacting health care providers. “The provision that allows employers to contact the employee’s health care provider only through employer’s health care provider for purposes of clarification and authentication should be deleted. Because most manufacturers do not employ or have no effective access to their own health care providers, this provision constitutes a complete barrier to the acquisition of needed health information. Even where such providers are available to employers, it results in unnecessary employer expenses and/or delays the certification process. It is a needless barrier that the ADA, which usually deals with much more serious health problems than those confronted under the FMLA, has successfully avoided.”²⁵³
- Richard Foley of Foley and Lardner LLP suggests that employers should be able to contact the health care provider of the employee, as they are allowed to do under the ADA. “The regulatory provision found in section 825.307 which requires the employer’s health care provider to contact the employee’s health care provider, with employee permission, to determine authenticity or obtain clarification is burdensome, awkward and expensive. Employers routinely contact employee’s health care providers in an effort to provide reasonable accommodation under the Americans with Disabilities Act. This has not led to widespread complaints of abuse or lack of confidentiality.”²⁵⁴
- Daniel Finerty of Krukowski and Costello explains how documents received from doctors can be very confusing and how it would be helpful to contact the doctor directly. “In the case of one Committee Member (the Laurate Group), a certification for family and medical leave was submitted requesting that the employee should be provided leave on a regular basis for specific days only (Friday, Saturday, and Sunday). While the doctor’s certification was less than clear about why he certified the specific three-day leave (except that it appeared to be what the employee requested), upon follow-up, the doctor would not budge on the three-day schedule to allow the employer to properly staff the facility. The employer did not necessarily have a problem granting three days of leave; however, it needed the flexibility to determine necessary staffing levels to comply with various state mandates and ensure resident safety. At the end of the day, the doctor would not budge on the three days he specified—rather, the doctor told the employer that he did not want to have to deal with the difficult employee / patient in addressing a more flexible certification.”²⁵⁵
- Joseph Micucci from the Methodist Hospital division of Thomas Jefferson University Hospital recounts a disturbing personal experience. “Medical practitioners have no problem giving notes and documentation to their patients. I actually called a physician’s office to classify a note and the receptionist said that ‘I can handle your issue; how many days do you want to be off.’”²⁵⁶
- Tina Ehrhardt from ABC Laboratories Inc. explains the hardship of not being able to communicate with medical providers. “We recently had an employee provide no notice about non-emergency surgery. I wanted to verify if the timeframe needed to be out was reasonable. We were severely limited in asking

251. Doc. 10205A, State of Ohio.

252. Doc. 10092A, Pennsylvania Turnpike Commission.

253. Doc. 10229A, National Association of Manufacturers.

254. Doc. 10129A, Foley & Lardner LLP.

255. Doc. 10185A, Krukowski & Costello.

256. FL76, Methodist Hospital, Thomas Jefferson University Hospital.

any questions of this employee or addressing some scheduled training issues because of HIPAA. FMLA and HIPAA were in direct conflict. It created some hardship on us due to this person's role and we were on a slippery slope for requesting more information."²⁵⁷

- Francis Alvarez from Jackson Lewis LLP explains the hardship caused by the lack of communication with health care providers. "Today, despite the ability to do so under the ADA, the FMLA prevents employers from confirming whether employees returning from FMLA can safely perform essential job functions. In some instances this restriction exposes the employee returning from FMLA leave, co-workers and the public to risks of injury or even death. Despite the ability to do so under the ADA, and despite having an employee's permission and/or urging to contact his/her medical provider to clarify a medical certification, the FMLA forces employers to either waive their rights to receive clarification or spend additional money to: retain health care providers to contact employees' health care providers."²⁵⁸
- Elizabeth Morin from Garrett Container Systems, Inc., explains how open communication with medical providers would help curb abuses of FMLA. "We employ 80 people, of which 70 work on the shop floor. Our most pressing problem with FMLA compliance has been with those who we believe have abused the law, in particular with intermittent leave. We have several diabetics, which we know is defined as a serious health condition. We have found that this has allowed them free rein of terror on the shop floor. Employees must be at his or her station to do the job so that production runs as scheduled and we get our products out on time. With several employees who have a condition which is defined as serious health condition, they have discovered they can decide they don't feel well, blame it on the condition, say they have to see a doctor and then they get the rest of the day off. They do actually go to their doctor, who writes a Return to Work slip for the next day. Most times the slips never say more than that. Because of HIPAA and privacy laws, we cannot contact the doctor for further information."²⁵⁹
- Sally Burnell from the Indiana state government provides an example of how direct communication with medical providers would benefit both employers and employees. "Another example involved a recertification request in which the employer attached the employee's attendance record to the request so the health care provider could see that the employee was using more intermittent leave than had been earlier estimated and determine whether the certification should be modified. The health care provider modified his treatment of the employee, requiring the employee to contact the medical office whenever she called off work because he did not know she was having such frequent problems and he needed to address that in his treatment protocol. The sharing of information provided an opportunity for the employee to receive better health care and incidents of intermittent leave were reduced."²⁶⁰
- Penny Boyer from Dorman Products, Inc., explains the company's specific situation and the difficulty in communicating with health care providers. "We have a very diverse community of employees. Many are from India, Bangladesh and similarly remote areas of the world. We find that when these employees are at work, they are very good workers but it is amazing how many of them receive notification from relative that their parent is sick and they must return home. Most of these request come in the October/Nov timeframe. The employees are given the appropriate FMLA paperwork. They fly to their native country and someone faxes the completed paperwork back to us. We have no good way of verifying that the person completing the paperwork is a doctor or if there is actually a medical situation for which they are needed. On the occasions where we called the verify information no one spoke English.

"Taking matters to the next step, several of these same employees provide additional documentation in mid-end December (they are still out on their original FMLA leave and still in their native country) that another parent has fallen ill and requires their assistance. Additional paperwork and certs are provided and the process begins again. These employees are staying out of work for up to 24 weeks (12 for the

257. Doc. 193, ABC Laboratories Inc.

258. FL71, Jackson Lewis LLP.

259. Doc. 2476, Garrett Container Systems, Inc.

260. Doc. 10244A, State of Indiana.

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current year, 12 for the new year) and we cannot validate the situation. It causes a great moral problem especially when some return married. They talk openly among themselves that they must return home to marry but we cannot disprove the medical information. Obviously something isn't quite right with this. Since you are re-evaluating the law, please give some consideration to how employers are able to provide time off while still being assured that they are dealing with legitimate medical facilities around the world.

"I travel to each of our sites and I realize FMLA is a valuable benefit when it is medically justified. Unfortunately, many employees stop to ask me what I can do to stop the abuse. Employees talk to one another. They tell each other the real reason why they're not at work and laugh that they are 'protected' under the law."²⁶¹

261. Doc. 18, Dorman Products, Inc.

CHAPTER 10

Certification Form Confusing

Like so many federal laws, the Family and Medical Leave Act has created a raft of complex paperwork for employers, employees, and their doctors. The WH-380 certification form is lengthy and confusing. Many doctors are not sure how to fill the form, and there is little consistency between offices. One doctor may certify a patient as having a serious medical condition while another will deny the request for the same condition. Some doctors will certify almost anything as a serious medical condition.

Another kink in the law is that FMLA does not allow employers to have direct contact with an employee's health care provider. The lack of contact makes it extremely difficult to resolve issues with the medical certification. Sometimes employers cannot even read what is written on the form, or the health care provider has neglected to fill out an important section. The medical certification process is cumbersome and does little to prevent irresponsible employees from abusing the system.

- Greinilda Anistead from Cardone FML has experience with doctors filling out the certification form incorrectly. "Doctors don't clearly understand their obligation in completing the FMLA paperwork. One goal is to get doctors to document correctly and completely the qualifying medical conditions. Attending physicians need to be trained as it is explained to us by the DOL that we must rely on the physicians as to what falls under FMLA and what doesn't. We struggle with physicians filling out the Medical Certificate incorrectly."²⁶²
- Carol Carrier of the University of Minnesota explains the different types of "Serious Health Conditions" that doctors approve for FMLA medical leave. "In some cases, the doctor might specifically indicate that workplace stress, conflicts between the employee and his/her co-workers or supervisor, or other workplace factors cause or contribute to the symptoms. In one case, the doctor cited an employee's 8:00 a.m. start time as a contributing factor. In another case, the doctor referenced the fact that the employee was at times required to work overtime. In other cases, doctors have tied intermittent leave to specific duties or responsibilities (e.g., When symptoms occur, Employee should be excused from performing classroom teaching duties.). Dealing with such situations is extremely difficult. Supervisors do not know if the employee will come in to work on any given day."²⁶³
- Kathryn Curley from AIG explains how the certification form leaves employers with many questions and few answers. "An employee reported an absence on 2/15/06. A Certification Form was sent on 2/16/06. On 2/27 the employee reported the form was never received. A second form was sent, due back 3/14. On 3/15 an incomplete form was received. The incomplete form was returned to the employee to have completed, due back in 10 days on 3/26. On 3/27 the claim was denied as no complete form was returned. On 4/10 the employee returns a complete certification form. Must the employer now count these days, almost 2 months prior, as job protected?"²⁶⁴
- Fortney Scott from the National Association of Manufacturers explains how FMLA is difficult for employees to deal with. "The difficulties faced by employers are mirrored by those of employees. Our members note that the cumbersome and often confusing medical certification forms are frequently resisted by health care providers. *Employees* report that their providers routinely stated that 'we do not

262. Doc. 10131A, Cardone FML.

263. Doc. 4777A, University of Minnesota.

264. Doc. 10085A, AIG.

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complete forms requested by employers and certain providers have refused to comply. Other employees report that some doctors charge an exorbitant fee (in one case, \$50) for completion of the form.”²⁶⁵

- Mary Jewers of TD Banknorth feels that doctors are not accountable for their diagnoses. “My frustration comes with the medical certification. There needs to be some way we can hold doctor’s accountable for what they are writing on this form or in the notes they provide. ‘Abusers’ of FMLA can get a doctor to write them out for anything and we pretty much have to take it at face value. Because of this, I have problem employees use FMLA as a safety net.”²⁶⁶
- Sue Pursel from Waste Management of Pennsylvania explains that the current medical form is very confusing. “The Certification Form is not well understood by Physicians. It is usually filled out incorrectly, and causes headaches for employers and employees. Also, the Response to Employee form is very confusing to complete, as well as difficult for employees to understand. It does not spell out intermittent requirements well at all.”²⁶⁷
- One unnamed company expressed concern with the financial burden of the medical certifications. “The regulatory requirement that the employee’s health care provider be contacted only through the employer’s health care representative and only with the employee’s permission has been very costly to employers.

“Charges – For companies that do not have a health care provider on staff, they are forced to utilize outside services. Health care providers are frequently charging fees for this consulting service. Charges range from \$15 up to \$250. For a company with 650 employees taking FMLA annually, this cost is an undue hardship.

“Second opinions are so cost prohibitive and have such limited timeframes that they are simply not used. This clearly ties the hands of employers who made [sic] need more information regarding the employees condition in order to determine if it is an FMLA qualifying event.”²⁶⁸

- Ginger-Lee Rasler from AM General LLC explains that some physicians resist filling out the certification forms. “We see mostly certifications turned in not completed by the physician. We also have physicians who refuse to complete them, charge the employee to complete them, and even tell the employees that the company is harassing them by making them have the information complete and suggesting the names of attorneys so the employee can take action against the company for harassment. The use of the forms are appropriate, it just appears as though the physicians do not realize the impact of what the intermittent leave actually is.”²⁶⁹
- Steven Wojcik representing the National Business Group on Health explains some of the challenges related to the medical certification form. “One challenge with medical certification for FMLA is that doctors do not respond timely or with the appropriate information. When this happens and employers must obtain more information, it delays approval or denial of leave requests. Additionally, the diagnosis is not always included on the medical certification form, which makes determining a serious health condition unclear. Yet another challenge is that some doctors charge employees a fee to complete FMLA forms, which creates delays in obtaining medical certification.”²⁷⁰
- Sandra Vaughn from the Child and Adolescent Service Center is also frustrated dealing with certification forms. “FMLA is by far, the most frustrating and time consuming to administer. Most of the problems we run into center around intermittent leave and short term leave. We have left it up to physicians and medical personnel to determine if a person has a serious problem. Interestingly enough, they all do. The medical personnel do not take into account what the person’s job functions are in determining if they should be gone, nor do they attend to what they are/ are not able to do when they return.”²⁷¹

265. Doc. 10229A, National Association of Manufacturers.

266. Doc. 4661, TD Banknorth.

267. Doc. 2480, Waste Management of Pennsylvania.

268. Doc. 10021A.

269. Doc. 10073A, AM General LLC.

270. Doc. 10268A, National Business Group on Health.

- Anna Dancy from South Central Human Resource Management Association explains the difficulty of verifying medical certification forms that are sent from foreign countries. “Our members report an increasing number of requests by employees to take FMLA leave due to the serious health condition of a parent who lives in a foreign country. In such cases, the employee produces a medical certification from a health care provider who is not licensed to practice medicine in the United States. These requests tend to come at certain times of the year, such as near major holidays and during the summer (which are times when employees are also more likely to want vacation). Many employers believe that intermittent leave to care for a family member in another country is becoming a popular and virtually foolproof way for employees to obtain an extended and job-protected vacation.”²⁷²
- Steve Rebagliati from Fry’s Electronics explains the difficulty of dealing with out-of-country medical forms. “In fact, employees are already abusing this portion of the law to the detriment of employers. For example, Fry’s will encounter an employee who says that her mother in India is ill and requires her care for 3 months. This employee will provide us with a medical certification from her mother’s alleged doctor in India. If we have reason to doubt the validity of the certification, we have no statutory way to question it.”²⁷³
- Judy Lathem from MeadWestvaco Envelope Products Group cites an example of suspected abuse that is hard to prove. “Employers should be able to communicate with doctors to make sure that what they are treating the patient for qualifies as FMLA. We have one employee who is just looking for some way to cover her latenesses, early quits, and days that she simply does not come to work. She claims that every time she is out it is because of a ‘serious health problem’—hence FMLA. However, all her doctor puts on her excuses is ‘Medical Reasons’ which could be anything from a sore throat to a broken toe. She claims that the doctor told her that she needs to be off work several times a month for a year. However, the doctor never sends us anything that indicates this....”²⁷⁴
- Ileen Grange, VP of Accounting for the Middleton Place Foundation: “A case in point: an employee’s mother in another state was diagnosed with aggressive cancer. The employee was distraught over the news and unable to work an accounting position in her distracted state of mind. Because the situation with her mother was expected to progress rather rapidly, the employee was allowed to use FMLA leave to come to terms with the situation and to visit her mother whenever she needed. According to the letter of the law, this was a stretch in the interpretation. The employee did need to get herself under control, so in that sense it was a mental health issue for the employee. But the mother’s situation did not require her daughter’s presence for medical purposes, only for a time of family bonding and support. As it turned out, the employee used the FMLA cover to take a day or a week off every time her mother got a bad report, though she rarely used the time to visit. Her attendance became unpredictable with frequent other common illnesses, so keeping track of normal sick days versus FMLA days was tedious. And she developed a sense of entitlement whenever she wanted to claim mental stress. Over two years later, the mother is still alive, though now actually failing. The employee never reached the magic 12 weeks in a 12-month period, but wanted to restart the FMLA year every 12 months. The employee never sought professional help for her emotional stress beyond a few visits to her local Doctor’s Care clinic for a prescription refill.”²⁷⁵
- Sally Burnell of the Employee Relations Division for the state of Indiana says that the certification form is cumbersome for all parties involved. “Form WHD-380 is cumbersome and confusing for health care providers, employees and employers. The questions are repetitive and frequently result in contradictory answers. In addition, the essay-type answers are frequently illegible or use abbreviations or jargon not commonly understood outside the medical profession. These problems require clarification and health care providers are charging up to \$50 for each form completed.”²⁷⁶

271. Doc. 5211, Child and Adolescent Service Center.

272. Doc. 10136A, South Central Human Resource Management Association.

273. Doc. 10338A, Fry’s Electronics.

274. Doc. 158, MeadWestvaco Envelope Products Group.

275. Doc. 211, Middleton Place Foundation.

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- Elaine Howell from International Auto Processing, Inc., explains the additional cost and burden of mandated medical forms. “Form WH-380 has been a problem for us. Because of its length, some doctors in our area charge our employees to have the form filled out. For some employees, an unexpected \$15 charge on top of an office co-pay can make a big difference to them. Those forms that are filled out always look as if the doctor has rushed through them and minimally filled them out.”²⁷⁷
- Leigh Tillman from MarkOne Financial provides a few examples of how the certification process is difficult and leads to undesired results. “Employee applies for FMLA to care for son. Under the definition of a ‘serious health condition,’ the child qualifies because of ongoing physician visits and a prescription drug regimen. However, the physician says it’s not a serious health condition by her definition and refuses to complete the certification. I had no other option but to deny this employee’s application which caused her to incur unexcused absences and a corrective action for attendance.

“Another employee applies for FMLA for herself as she needs physical therapy. Her physician completes the certification stating repeatedly the employee is not incapacitated and does not need to miss work. However, she also states that the employee requires physical therapy twice a week for at least four weeks. The employee will need to miss work for these visits despite the physician’s assertion otherwise. The physician has not been clear in her certification but yet I am unable to contact the physician for clarification. My only remedy is to explain to the employee and hope that she can relate it appropriately to the physician to resolve. I am currently awaiting updated certification to resolve this request.

“Most physicians require employees to pay an additional fee to complete the certification paperwork (my own physician charges \$25). For some employees, this is an expensive request, especially if using FMLA intermittently and having to re-certify.”²⁷⁸

- Jenny Voigt from Amplify Federal Credit Union explains the difficulty in clarifying necessary information on the medical certification forms. “The WH-380 form is usually not given the needed attention by the treating physician, resulting in either incomplete, confusing, or unreadable information. This is only compounded by the fact that we, as employers, are not allowed to contact the doctor directly for clarification. Most companies do not have a retained physician. In the cases where I have needed more information, I have been unable to find a physician willing to act as a liaison.”²⁷⁹
- An employer wishing to remain anonymous finds the certification forms are often not complete or accurate. “Educate physicians on how to complete the FMLA request forms completely and accurately. (We are having increased difficulty with physicians listing N/A or serious illness rather than a diagnosis and specifics regarding required time off which results in our request to have the forms completed again. These same physicians want to then charge the employee additional fees to complete the forms)”²⁸⁰
- Sue Sumler from The Manufacturers’ Alliance/MAPI relates the views of the group’s constituent companies. In this example, one company reported struggling with the medical certification form. “The 24,000-employee company mentioned earlier points out that many doctors do not understand what FMLA is or how a serious health condition is defined. They often struggle with the intent of the certification form and under what circumstances it should be used. These issues can result in the certification being completed for virtually *any* medical condition, making it nearly impossible for employers to determine if the employee’s health condition is actually a serious health condition under the FMLA. This company recommends that the certification form include a clarification requiring definitive medical evidence supporting the need for an extended leave of absence.”²⁸¹

276. Doc. 10244A, State of Indiana.

277. Doc. 4752, International Auto Processing, Inc.

278. Doc. 5186, MarkOne Financial.

279. Doc. 174, Amplify Federal Credit Union.

280. R110.

281. Doc. 10063A, Manufacturers’ Alliance/MAPI. Emphasis in original.

- Robin Murphy, working for Alaskan Copper Companies, explains their situation with unclear certifications. “I’ve discussed FMLA with doctors (who hate filling out the paperwork, and some are even charging for it now, what are we going to do with that?) and they’ve told me point-blank that they are the patient’s advocate, if they request them to label their illness/injury as a serious health condition, they will!! I’ve also had issues with the definition of providing psychological support to a dying parent. Does taking dying dad to a baseball game count? Yep, you bet.”²⁸²
- Jodi Schaad describes problems with certification that she has encountered. “What I am faced with is open ended, vague requests before an employee is even absent. For example, one employee has a hip replacement, his physician writes he needs intermittent FMLA up to 12 days per month for pain. The employee only is treated with OTC pain relievers. Isn’t this part of the natural aging process? I am forced as the employer to allow employees to work in essence part time year after year and receive the same benefits as those employees who do not abuse the system.
“Another example, an employee asks for FMLA due his mother’s health condition, but tells me he needs time to take care of her financial needs and besides he can work the weekends at time and one half and double time and make more money. The doctor fills out the form appropriately. It is too time consuming and expensive to prove the employee is misusing the time. In fact I have little to no time to respond as he may simply report off that he has the need. When I question employees or require certification, I am faced with accusations of harassment.”²⁸³
- Barbara Hays explains the complications from a vague definition of “serious health problems.” “A company has few if any rights to protect itself from a person who gets a doctor to sign FMLA paperwork for illnesses that should not be considered ‘serious’ health problems. The term ‘serious’ needs to be defined. It is so vague now that my department has, or has had people off for, wisdom teeth extraction, high blood pressure that was under treatment, depression from getting a divorce and several other illness that should not be considered serious. Employees will find a doctor that will give them ‘intermittent’ leave and they use it when they can’t get a day off they want or when they just don’t want to show up. At this time I have more than a quarter of my employees with FMLA paperwork that covers them.”²⁸⁴
- Kathleen Pontone from Miles & Stockbridge PC explains the difficulty of dealing with the medical certification form. “Under the current regulations, the only mechanism that an employer can use to verify FMLA leave is through the certification form. This is problematic because the information that is often on the certification form is ‘wishy washy,’ cryptic and/or unclear. The certification form is simply not a useful document as it does not require the health care provider to detail the employee’s incapacity, the limitations faced by the employee, how long the health care provider expects the incapacity to last, or the reasons for the need of FMLA leave.”²⁸⁵
- Vikki Brueggemen from Zimbrick, Inc., mentions a situation that could be avoided if employers were allowed to contact health care providers. “[H]ealthcare providers have received no education or guidance on how to complete the forms correctly. You’d think with an MD degree this would not be a problem. Nine out of ten forms are not legible and are missing information. We then have to send the form back to the employee with a letter asking them to have their doctor fill it out completely.”²⁸⁶
- David Stringer from Progressive has experienced unexplained delays because of a lack of communication with doctors. “In many cases, the employee’s notice or certification is delayed by a matter of months, not days. For example, the Company has received intermittent FMLA notices and certifications for absences dating back six or more months. To defend such grossly untimely submissions, employees have claimed, among other things, that their health care providers were delinquent in providing necessary information and/or that a recent diagnosis applied to prior absences.”²⁸⁷

282. Doc. 5144, Alaskan Copper Companies.

283. Doc. 4735.

284. Doc. 185.

285. FL79, Miles & Stockbridge PC.

286. FL125, Zimbrick, Inc.

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- Shelly Johnson from the Oklahoma State University/Tulsa Campus explains a similar problem. “We advise our employees that they have 15 days to have the Medical Certification filled out and returned to us. Oftentimes, the employee has gotten the Medical Certification form to their physician and the physician’s office will not get it filled out. Again, we encounter a problem with the physicians’ offices. The eligibility of the employee to be on FMLA is in the hands of the physician and may be denied even though the employee has done their part.

“Because this is a Federal Law and we require the Medical Certification from the employee’s physician to verify their serious health condition, it is disturbing that physicians charge our employees a fee to fill the form out. The highest fee we have been made aware of is \$50. We, the employer, are required to offer the protection under FMLA but it is denied if we do not receive the required Medical Certification. Many employees are unable to pay the \$50 to have their physicians fill this out, thus they are not eligible for FMLA protection. Insurance companies will not pay this fee. Is there any way to stop physicians from charging such fees which inhibit the employee’s receiving protection under the FMLA?”²⁸⁸

- Geri Lanier from the Government Employees Insurance Company explains that health care providers do not always provide adequate information, which makes the certification process very lengthy. “There is also the problem of physicians and health care providers finding the Certification form frustrating and difficult to understand. Many health care providers do not realize that form WH-380 is a Department of Labor form and they blame companies for requiring this paperwork. A recurrent issue for employers is the failure of health care providers to provide the essential information on the Certification form. Health care providers routinely fail to specifically answer or provide sufficient answers to question 5a., 5.b., and 5.c., which include questions pertaining to intermittent leave. The physicians then may put very liberal amounts of intermittent leave to avoid having to complete additional paperwork (e.g. 5 x monthly lasting 1-5 days, 2-3 days weekly, 100x a year, etc.). It is extremely difficult to manage staffing needs with such open ended leave available.

“As a side note, some of our employees have been required by their health care providers to pay an additional fee to complete the FML paperwork. Although this is permitted by the regulations, this can be a problem for employees.”²⁸⁹

- Mary Morris from St. Elizabeth Medical Center is frustrated with the lack of consistency when the certification forms are filled out by different doctors. “Physicians charge employees \$10.00 up to \$30.00 to complete the Certification of Health Care Providers...and frequently they are not filled out correctly or completely. They will not have them completed for the employee within the 15 day period or need to be clarified. Very frustrating to separate when a minor illness fits the description of an acute FMLA illness (4 day period of incapacity/treatment). Some physicians will mark anything as a ‘Serious condition’; another will **not** mark surgery a serious condition. There is no consistency with physicians and no interest in clearing up this matter. Physicians and their office staff see this as a burden and penalize their patients by charging these fees.”²⁹⁰
- Cathy Brown from Freeman Health System explains that health care providers are charging employees extra money to complete the medical certification form. “Our experience is that health care providers do not like completing these forms. Our employees are being charged as much as \$30.00 to have the form completed.”²⁹¹
- A respondent wishing to remain anonymous also reports problems caused by the extra charges for medical forms. “Employees refuse to request FMLA because some medical providers either refuse to complete the paperwork, complete it incorrectly or incompletely, or charge the patient up to \$50 to complete the required certification.”²⁹²

287. FL2, Progressive.

288. Doc. 5185, Oklahoma State University/Tulsa Campus.

289. Doc. 10279A, Government Employees Insurance Company.

290. Doc. 10071A, St. Elizabeth Medical Center. Emphasis in original.

291. FL61, Freeman Health System.

- Douglas Duckett from the Ohio Public Employer Labor Relations Association explains that FMLA medical forms are cumbersome and health care providers do not want to fill them out. “The certification of health provider form (WH 380) is so long and complex that physicians are frequently refusing to complete the form without imposing large charges. The providers also frequently fail to complete the form in full.”²⁹³
- Sara Ricker provides personal testimony of doctor charges for FMLA paperwork. “Doctors have begun charging employees to complete the paperwork, in some cases up to \$75. For many employees, that cost means they don’t get the paperwork filled out and run the risk of a termination. If the law is intended to be employee friendly, doctors should not be allowed to profit off of completing paperwork.”²⁹⁴
- Glenna Stump from Harrisburg Area Community College reports on the complaints she has heard from employees who have to pay fees for medical certification. “I have had complaints from some employees about the cost that is involved with getting the medical certification form completed by their physician. Some physicians appear to treat this form as an insurance form, which they charge their patients to complete. Some employees then do not return their FMLA paperwork to Human Resources because they will not pay this cost. This then becomes an issue for Human Resources because we cannot determine if their absence from work is FMLA eligible.”²⁹⁵
- A health professional who wished to remain anonymous offers an opinion on the medical certification form. “The biggest problem I see is that health professionals don’t know how to fill out the forms. They just do what the employee/patient tells them. If an employee needs that much intermittent time off for an illness, as a health professional I would want to know why as maybe my treatment plan isn’t working. There should be more clear cut guidance from the government on ‘serious illness’. Education sent to health professionals on the ‘how to’s’ of completing the form.”²⁹⁶

292. FL13.

293. FL93, Ohio Public Employer Labor Relations Association.

294. Doc. 163, Sara Ricker.

295. Doc. 4915, Harrisburg Area Community College.

296. R58.

CHAPTER 11

Administrative Burden of FMLA

The Department of Labor's incremental leave regulations require employers to provide FMLA leave in the smallest unit of time that their payroll system records. The government also requires employers to record the use of FMLA leave. For many employers this means tracking and recording leave in units as small as minutes, which can place a heavy administrative burden on employers. Many employers find these requirements to be the most time consuming and difficult aspects of FMLA.

Employees who obtain a FMLA medical certification form are able to miss 12 weeks of work and maintain their job and full-time work benefits. To keep track of these 12 weeks by the minute is a monumental administrative task. For example, tracking repeated 12 minute leaves of an employee who is consistently late but is covered because of migraines can take a great deal of time and resources. This law applies to all organizations that employ 50+ workers, and in the smaller companies time must be tracked manually by another employee. Other examples of the burden of intermittent leave include scheduling around a vital employee who takes unplanned intermittent leave or finding replacement workers on short notice. Although the FMLA has done much good, the administrative burden to employers of tracking and working around minute-long intermittent leave breaks should not be ignored. Below are real-world cases of how incremental leave requirements have burdened employers.

- Janet Bartelmay from the Association of American Railroads explains the burdens of tracking FMLA according to the company time clock. "Since many employers' payroll systems can track time in increments of a few minutes, the DOI's regulations have inadvertently created significant problems tracking leave and maintaining attendance policies. For instance, in one fiscal year an employee could take 960 separate 1/2 hour leaves, all of which would require payroll entries and separate analyses to determine how to classify the leave and whether to count it as sick leave or FMA leave. Furthermore, the expansive definition of 'serious health condition'... in some circumstances, allow employees to give no advance notice when they will start or return from FMLA leave, make it practically impossible for an employer to enforce fair and valid tardiness policies."²⁹⁷
- Anna Dancy from the South Central Human Resource Management Association agrees that small increments of leave are hard to manage. "When an employee misses an entire work day or a half-day, the record-keeping is not onerous. It is fairly easy to add absences in full-day or half-day increments. But when an employee is absent for less than a half-day, the mathematics become much more difficult, especially when most electronic time keeping systems keep track of time worked to the minute or second. It is easy to make errors."²⁹⁸
- Hugh Quill from the State of Ohio said that intermittent leave is very hard for the state to administer. "The administration of intermittent leave, which must be done in 1/10 hour increments for the State of Ohio, is overly burdensome on the state. The requirement that employees be permitted to take FMLA leave in the smallest increments used by the State's payroll system has provided employees with the opportunity to avoid compliance with accepted practices of timeliness in the workplace, and creates recordkeeping problems for the State of Ohio."

Quill goes on to suggest that "Intermittent leave could be made a more workable concept by either limiting the amount of FMLA leave that could be taken on an intermittent basis or by permitting employers

297. Doc. 10193A, Association of American Railroads.

298. Doc. 10136A, South Central Human Resource Management Association.

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to require employees to take intermittent leave in increments no smaller than one hour or one half-day, regardless of the timekeeping system the employer has available. Such a change would minimize disruptions to the workplace and still accommodate an employee's need to be absent from work on a reduced or intermittent basis."²⁹⁹

- Rebecca Dent from the Employers Association of New Jersey explains the administrative burden of having previous work counted toward qualifying for FMLA as well as keeping track of small increments of times. "In determining whether the 12 month requirement has been met, Section 825.110(b) states: 'If an employee is maintained on the payroll for any part of a week...the week counts as a week of employment...' The specific retention requirements for records indicating whether an employee was 'on the payroll' is 3 years. To require an employer to determine employment prior to that specified time period is overly burdensome, as no records may exist... Regulations allow that intermittent leave be counted in increments of the shortest amount of time that the employer's payroll system can execute. For many of our employers this time period is one-minute, making administration of intermittent leaves exceedingly onerous."³⁰⁰
- Christine Bogdan of Pleasant Holidays, LLC expressed similar frustration in dealing with FMLA's intermittent leave. "All intermittent leaves are tracked in 15 minute increments due to our time tracking system. This time is added up and counted against their total FMLA allotment. This includes late arrivals and early departures. The process is time consuming and has to be manually accounted for each pay-period."³⁰¹
- Joshua Ulman of the College & University Professional Association for Human Resources explains the difficulty of tracking intermittent leave. "Many employers have payroll systems capable of accounting in increments as small as six minutes. Tracking FMLA leave in such small increments is extremely burdensome—particularly with respect to exempt employees, whose time is not normally tracked. In addition, CUPA-HR members have had difficulties scheduling around intermittent leave because it is hard to find a replacement worker for small increments of time and the regulations do not require employees to provide any advance notice of the need for leave."³⁰²
- Robert Ryan from MedStar Health, Inc., comments on the difficulty of counting past work as qualifying for FMLA. "Section 825.110(b) allows an employee's non-consecutive service with an employer to be combined for the purpose of satisfying the 12-month service eligibility criteria, regardless of how long ago the employee actually worked for that employer. Allowing such an open-ended period for calculating an employee's service has led to significant difficulties for employers. First, depending on a company's information systems technology and retention of 'outdated' personnel records, prior service is not easy to identify and/or to track over a number of years. Thus, an employee's inclusion of prior service on a current employment contract cannot necessarily be confirmed by an employer."³⁰³
- Rich Glass at Infinisource explains the company's difficulty in managing FMLA. "Many employers have payroll systems that can track time in increments as small as six minutes (0.10 hours). This becomes difficult for employers to manage because the vast majority of employees no longer work on a strict time-clock system, where they punch in and punch out. Add to this difficulty the fact that many employers have no formal tracking system at all for exempt employees—who are not subject to overtime requirements—and this rule becomes very problematic. A more workable increment is needed."³⁰⁴
- Linda Wyatt from the Levy Co. agrees that "Tracking intermittent leave is very problematic and time consuming. More importantly, it wreaks havoc on our production requirements. The manager has to make shift I employee changes in a very short time frame."³⁰⁵

299. Doc. 10205A, State of Ohio.

300. Doc. 10119A, Employers Association of New Jersey.

301. Doc. 10322A, Pleasant Holidays, LLC.

302. Doc. 10238A, College & University Professionals Association for Human Resources.

303. Doc. 10144A, MedStar Health, Inc.

304. Doc. 10311A, Infinisource.

305. FL8, Edw. C. Levy Co.

- Diane Elizondo of the Walsh Trucking Co. Ltd. expresses her frustration in dealing with FMLA. “I can’t even begin to describe the issues we have complying with FMLA regulations. The ongoing recordkeeping of the intermittent leave is labor intensive, not to mention that it seems to be eternal. One person’s migraine headache leave consistently rolls over year after year after year. The other employees see this as a ‘ticket’ to taking unforeseen leave whenever the employee desires. This is NOT a good morale enhancing practice.”³⁰⁶
- Charles S. Einsiedler from Maine Pulp & Paper Association explains how the requirement to track by the minute can lead to abuses by employees. “The requirement that employers track intermittent leave in the smallest increment of time that their payroll system allows has placed an enormous administrative burden on employers, many of whom have several employees taking intermittent leave, usually unscheduled, on any given day. In addition, the FMLA’s coverage of such small increments of time encourages employees to abuse the law. Employees who arrive late or want to leave early regularly attribute that time to some FMLA-qualifying reason, leaving the employer with little ability to enforce its rules regarding tardiness and attendance.”³⁰⁷
- Lynn Schlessler from Gelita USA explains how employees might be more thoughtful in using their FMLA time if it were counted in large increments. “Tracking of FMLA leave to the smallest increment of time on a payroll system is overly burdensome in the case of intermittent leave. Our time clock system allows for a minute as the smallest increment. To require an employee to utilize FMLA in increments of four hours would seem more reasonable to document. This could minimize the abuse of the regulations when an employee can call in at the last minute and apply the absence to FMLA. If the FMLA leave becomes more precious to the employee, the loss of four (4) hours at a time could have a greater impact on whether or not they choose to be absent.”³⁰⁸
- Dan Danner from the National Federation of Independent Business (NFIB) and NFIB Legal Foundation expressed some of the frustration that is being reported to the NFIB. “Intermittent leave presents many onerous paperwork burdens, including keeping track of time on leave in increments as small as six minutes. The lack of any meaningful notice requirement for the intermittent absences mandated by the FMLA is especially difficult to deal with and schedule around. For instance, at least one NFIB member had an FMLA leave-taker who would come and go when they wanted, informing our member that this was due to the leave-taker’s FMLA condition. As other employees witness the convenience of the comings and goings of this leave-taker, the stage is being set for the other employees to manipulate the system and utilize FMLA to arrive and depart as they like.”³⁰⁹
- Jim Denning from Discover Vision Centers expresses discontent with the administrative burden and abuse of FMLA. “The current FMLA law is an enormous burden on employers of any size. It is abused by 80% of employees. Therefore, its noble intention of protecting workers is not working. Furthermore, good employees are getting harder and harder to find and retain. Any employer worth their salt will do everything possible to retain good employees with health issues. FMLA is next to impossible to administer, weakens the work force by dumbing down productivity, adds expense to every service and product, and makes U.S. companies products and services less competitive as a result. Lowering the threshold to less than 50 employees would be devastating to small businesses. Would recommend that the threshold be raised for 50 employees to 1,000. That would be the best direction for this socialistic approach to the work force.”³¹⁰
- Steven Wojcik from National Business Group on Health explains the burden of tracking FMLA leave according to the payroll system. “It is difficult for employers to track intermittent leave in increments as small as their payroll system will allow. Since many employers track in increments of as small as six min-

306. Doc. 216, Walsh Trucking Co. Ltd.

307. Doc. 10191A, Maine Pulp & Paper Association.

308. Doc. 10208A, Gelita USA.

309. Doc. 10302A, National Federation of Independent Business (NFIB) and NFIB Legal Foundation.

310. Doc. 164, Discover Vision Centers.

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utes, the task of accounting for and tracking intermittent leave is a significant administrative burden. This is especially the case when coupled with the broad definition of ‘serious health condition,’ which means that employers are keeping track of a large number of partial days or even minutes for serious and non-serious conditions alike. As a result, some employers only count full days of FMLA leave and do not charge employees who take FMLA leave for a half day or less. Moreover, employers must overstaff departments due to the large amount of leave requests at any given time.”³¹¹

- Betsy Sawyers from Pierce County explains the difficulty of administering FMLA. “In addition, with the current provisions that allow FMLA leave to be tracked in the smallest payroll hour tracked (in our case, one-tenth of an hour), some employees have used their FMLA leave in an abusive manner as an excuse for tardiness. Frequently, a ‘backup’ employee must be called in on an emergency overtime basis to cover the tardiness. And, because we cannot require an employee to use greater FMLA leave than is necessary to resolve the circumstances (29 CFR 825.309 (c)), the covered employee eventually comes to work, we have duplicate coverage, and with minimum overtime call-out requirements, we must pay both employees for the remainder of the shift.”³¹²
- Patricia Turner explains the burden of FMLA from an HR professional’s perspective. “As an Human Resources Professional my perception is that this Act should be put to a minimum of 2 hour increments as it is OFTEN used to cover minutes used which are not related to the leave issues—for instance, being late to work 5-20 minutes when you have FMLA for Migraine Headaches.”³¹³
- Jill May from the Miami Valley Human Resource Association describes the many problems that employers are experiencing due to FMLA. “Survey respondents resoundingly concurred that employees should **not** be permitted to combine nonconsecutive periods of employment to meet the 12-month eligibility requirement. A requirement that employers maintain records of former employees for five, ten or twenty years in order to appropriately administer an FMLA leave program is patently unreasonable. While most employers do not object to counting ‘non-consecutive periods of employment’ where the nature of the position requires short breaks (matters of days or weeks, not months or years), as may occur in the construction industry, where an employee ends employment on a permanent basis, that should cut off all right to count that time worked for FMLA purposes.”³¹⁴
- Janie Libby from Dover Downs Hotel and Casino provides another example of employee abuse of FMLA. “An employee worked for one year and quit. She was rehired five years later. She worked only a couple of days then she announced that she needed 12 weeks off due to a medical condition. Even though she worked only a couple of days, the law says she is eligible due to the prior employment period of one year (minimum).”³¹⁵
- Elizabeth Brackett also expresses her opinion concerning the burden of FMLA. “In my professional experience, employees are often certified for intermittent leave for conditions that I would think are questionable. I have actually seen notes for intermittent FMLA for 6 minute increments to go to the restroom when an employee suffers from constipation. I have encountered numerous challenges in administering unscheduled, intermittent leave. It is often difficult to track an employee intermittent leave usage, especially when the employee takes FMLA leave in small increments.”³¹⁶
- Richard Duncan explains how hard it is to administer intermittent FMLA. “FMLA intermittent because employers are unable to administer disciplinary action for employees exceeding frequency. Allowing employers to require documentation, even prior to the thirty (30) day period established for recertification, for employees who exhibit habitual overuse of intermittent time allows FMLA to be monitored

311. Doc. 10268A, National Business Group on Health.

312. FL97, Pierce County.

313. Doc. 5257, Patricia Turner.

314. Doc. 10156A, The Miami Valley Human Resource Association. Emphasis in original.

315. Doc. 10278A, Dover Downs Hotel and Casino.

316. Doc. 5464, Elizabeth Brackett.

in a fair, legally acceptable way ... Employers could also substantially benefit, with little or no undue hardship to the employee, if the current regulations were amended to define intermittent leave usage as 'half day or more increments.' While this policy update would not eliminate intermittent usage, nor the hardship such usage causes employers, it would allow the employer to strategically plan their staffing needs. Employees that need to take pre-scheduled appointments or treatments (i.e. chemotherapy, radiation, or physical therapy) could still use FMLA in quarter hour increments."³¹⁷

- Lori Middlehurst from Sun Microsystems explains the unfair burden of FMLA. "Intermittent leave poses one of the greatest administrative burdens on employers, and in some cases employees.... [T]he ADA imposes a reasonableness standard on accommodation, but FMLA does not. It poses a hardship on employers and the other employees in a work group to cover for unplanned absences that can be as much as one or two days every week. Consider for example the impact of the absences of a programmer working on a project that has deadlines or a group manager or a receptionist. If the job requires regular attendance then that should be a defense (like it is for the ADA) if an employer can not provide unplanned intermittent leave."³¹⁸
- Kathi Miller from the Milwaukee County Transit System explains how intermittent leave creates particular hardship for the transit system. "Rendering the administration of intermittent leave even more difficult for employers, employees customarily only provide notice of the need for intermittent leave—which is frequently not foreseeable—on the actual day that the leave is taken. This practice poses unique hardships for a public mass transit provider such as MCTS, because employee work assignments are planned one day in advance to ensure that staffing is adequate to provide service to the public."³¹⁹
- Lisa McDaniel from Kittitas Valley Community Hospital explains the problem of running a hospital when employees take liberal amounts of FMLA leave. "Under the current FMLA the effect of this is allowing employees to have a legal entitlement to a permanent part-time status while maintaining full-time benefits. Additionally while the national average for percentage use of sick leave runs somewhere between 2% and 3%, this provision allows employees to be legitimately sick 23% of the time. Most people would agree that an employee who is only at work 78% of the time is not a productive employee. It is easy to cover a person who is gone 12 weeks or who has planned treatments, the last minute 23% absence is impossible to manage."³²⁰
- Sue Pursel from Waste Management in Pennsylvania explains how intermittent leave is difficult to administer and open to abuse. "Maintaining operations when an employee takes unscheduled intermittent leave is very difficult. With the current regulations, we must literally hire a replacement employee and have that person available at any point to do the work of the employee exercising their intermittent leave right. It would be much better to have either a 'reasonableness' standard or the option to have the person go on a regular LOA until the situation can be resolved. Intermittent leave is also the most abused leave, with many employees doing other things (getting manicures, visiting the mall, going on firecalls) while they are supposedly using FMLA."³²¹

317. Doc. 10102, First Data Corporation.

318. Doc. 10070A, Sun Microsystems.

319. FL80, Milwaukee County Transit System.

320. Doc. 666, Kittitas Valley Community Hospital.

321. Doc. 2480, Waste Management of Pennsylvania.

CONCLUSION

When Congress formulated and promoted the Family and Medical Leave Act to the public, the law was labeled as a win for families. Proponents explained that finally new mothers and workers who needed to care for sick relatives would have job security and up to 12 weeks off of work. What Congress apparently did not foresee was that FMLA would also protect lazy workers and be detrimental to industries including healthcare and public services. These and similar consequences of the act become clear after a review of the public comments submitted to the Department of Labor.

The law is hurting U.S. employers, who must deal with the abuse of intermittent leave and hire extra staff to manage the administrative burden and extra work. Hospitals are unable to provide sufficient care, transit authorities cannot maintain standards for public transportation, and construction companies cannot fulfill contracts. Employees are also suffering through reductions in bonuses and increases in work demands.

Perhaps the most frustrating part of FMLA for the employers and employees who are negatively affected by abuse of the act is that small changes could reduce the amount of abuse without harming the good intentions of the law. Some examples suggested by the public include: redefine serious health condition, limit intermittent leave, increase the minimum requirement for tracking leave, and allow employers to communicate with health providers as is done with the Americans with Disabilities Act.

As Congress discusses expanding FMLA, it is important to bear in mind the unintended but real consequences. Supporters argue that such an expansion is good for the America family, but there are costs in rampant abuse and misuse of the act that could far outweigh the benefits.