

Managing Intermittent Leave Misuse – Practical Strategies for employers



David Setzkorn

Sedgwick

Sr Vice President Workforce Absence & Disability Practice

Jeff Nowak

Little

Co-Chair, Leaves of Absence and Disability Accommodation Practice Group

Agenda

- Managing your “Frequent Flyers”
- Top 10 Steps to Manage FMLA Misuse in your Workplace



George Pickens Flagged for the False Start!

- George Pickens is a ramp agent for USA Airlines (aka “America’s airline”), out several weeks for pneumonia
- Upon return, he was assigned to the red luggage ramp (his preference is the blue luggage ramp). When told he would work the “red ramp,” George accused his boss, John Jones, of “punishing” him for being absent and announced that he would “take a vacation until they figured it out.” He requested five days, but John denied it because he didn’t provide advance notice.



George Pickens Flagged for the False Start!

- George's wife allegedly had a cardiovascular disease that would "flare up" several times each month, requiring George to care for her (FMLA leave "without repercussions" 158 times in nearly three years)
- Upon denial of his vacation request, George told John he was going "home on FMLA" because his wife was "not feeling very good."
- In the days to follow, John (who often prefers sitting in his office high above the ramp) concluded that George's wife did not need him at home, and that he invoked FMLA leave to hide his true reason for leaving his shift that day, which was his anger at his reassignment.

As a result, USA Airlines terminated George's employment

Is this a Problem?



Poll Question

What's your call on this one?

- 1. George was up to no good, FMLA claims dismissed!*
- 2. George needed FMLA leave, his FMLA claims are legit!*



Catches the Hail Mary

Court:

- Wife had 13 heart attacks, clearly a “serious health condition”
- But was it “medically necessary” for George to be at home to care for her during the days of absence for which he was fired?
- Certification estimated that her cardiovascular disease would “flare up” approximately four times per month, with each occurrence lasting about two days
- The “medically necessary” care included transportation to appointments or to the hospital in case of worsening chest pain or shortness of breath
- At his deposition, George was rather charming – claimed that he told John he was going “home on FMLA” because his wife was “not feeling very good”
- Although he did not provide much in the way of details, a jury could reasonably conclude, based on the symptoms she was experiencing and the doctor’s paperwork, that his presence at home was “medically necessary”

Black v. Swift Pork Company (8th Cir. 2024)



So, How Do You Deal with the “Georges” in your Workplace?



Tori for the Touchdown!

- Tori, executive assistant, reactive arthritis
- Poor attendance over period of time
- Attendance policy: 12 points in one year = termination
- Medical Certification: 2 days/month; 2 one-half days for treatment
- Employer:
 - “Any absences above and beyond the FMLA approved frequency will be considered regular absences and will be eligible for attendance points per policy.”*
- Exceeded certification on six occasions over one year period; employer outlined the pattern for Tori’s physician, asked for recertification
- On recertification, Doctor stated: “Refer to prior FMLA form”
- Employer issued attendance points for the absences that exceeded the frequency identified on the certification form



Exceeding Frequency and Duration

- Tori: ***That's an FMLA violation!***
- Court: *Nope*
 - If an employee's absences "exceed what was estimated in the certification, the employer has the right to "notify the employee and give them a reasonable opportunity to cure the deficiency"
 - When Tori's physician recertified Tori "for the same frequency and duration of leave as his earlier certification," the employer "lawfully denied [Tori's] FMLA leave for absences exceeding the amount certified (and later recertified) by her physician"

Evans v. Cooperative Response Center (D. Minn. June 18, 2019)



Intermittent Leave: The Rules

- Intermittent Leave is a thing. As is Reduced Schedule Leave.
- Almost all FMLA leave is legit
- But must be “medically necessary”
- General rules:
 - Intermittent leave can be used in the smallest increment allowed for other types of leave (one hour rule)
 - Flare ups treated differently than appointments: employee must *make reasonable efforts* to schedule appointments around your operations



Credit: mohd izzuan
Creative #:2255154120
iStock / Getty Images Plus



Analyzing Frequency/Pattern

- Do we have a *significant* change in frequency? 29 CFR § 825.308(c)(2)
- Pattern or other suspected misuse?
 - "... the employer may provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern" 29 CFR § 825.308(e)
 - Use correspondence to your advantage
 - Letter to employee (to provide to their doctor) explaining background: fact pattern, express concern
 - Invite HCP to explain why need for leave occurs on Fri./Mon. and after his vacation day had been denied
 - Is pattern consistent with SHC and need for leave?
 - Use new certification form for HCP to complete



George Pickens currently is employed as a ramp agent. A current job description of his position is attached.

Mr. Pickens currently is certified for leave under the Family and Medical Leave Act based on a medical certification form submitted on [DATE]. This medical certification form indicates that he may need to be absent from work as often as four times per month, two days each to care for his wife. Since his intermittent FMLA request was approved, Mr. Pickens has used intermittent FMLA leave on a number of occasions, some of which have been taken under suspicious circumstances.

We are concerned about his use of FMLA leave on this occasion because it appears to be inconsistent with the information in the medical certification provided by Mr. Pickens, which did not indicate that these absences would be **taken on a moment's notice after his request for vacation leave had been denied. Because his pattern of absences is** potentially inconsistent with the medical certification form, we request that you recertify his need for leave. We also ask **that you confirm whether his use of FMLA on these occasions is consistent with his wife's medical condition and his need** for FMLA leave. Moreover, we request that you confirm whether his absence on this occasion was medically necessary based on your medical judgment.



FMLA Recertification: Suspicious Pattern Format

SAMPLE QUESTIONS

- Is Employee's absence pattern detailed above consistent with his wife serious health condition and need for leave? Yes No
- If you answered "Yes," please explain why the Employee's absence pattern is consistent with his/her wife's serious health condition and need for leave and why it is medically necessary
- If you answered "No," please explain why the Employee's absence pattern is not consistent with his wife's serious health condition and need for leave



Tackling Concerns About Potential Misuse/Abuse of FMLA

- This typically includes direct observations by management, co-workers or HR, or the infamous Facebook/Instagram postings
- The standard we are looking for: do we have an “honest belief” that the observed activity is clearly inconsistent with the need for leave
- Highly fact specific
- Investigation is critical
- Independent feedback important



“Honest Belief” is Alive and Well



Credit: Prostock-Studio
Creative #: 1190581109
iStock / Getty Images Plus

- *Capps v. Mondelez Global*:
 - Employee takes intermittent FMLA, goes to a bar at end of day, gets drunk and gets arrested for DUI on the way home. Terminated for misuse of FMLA, relying on criminal court docket indicating that arrest date and court dates coincided with reported FMLA days. Fantastic facts—wife out of town, he couldn't cook, needed food, went to bar, blood alcohol at arrest was .339
- *Rowe v. United Airlines*: Flight attendant flew to Taipei less than 12 hours before she would have to return to Denver for a shift



Pick your TPA Wisely!

- *Michael Juday v. FCA US LLC (7th Cir. 2023)*
 - Husband and wife, Michael and Becky, were employed by the Company, and both were certified for FMLA for flare-ups of irritable bowel syndrome
 - Sedgwick flagged a significant pattern of overlap in the Judays' FMLA leave dates. In one, year, found 21 common days of absence and an additional 27 days on which their partial-day leave requests overlapped.



Michael and Becky

- Investigation: Michael indicated that Becky's irritable bowel syndrome flare-ups would trigger his anxiety 20%–30% of the time and that his medical conditions would also randomly intensify
- Becky similarly stated that her IBS episodes were random and sometimes triggered by stressful situations, including flare-ups of Michael's condition
- Neither Michael nor Becky had any explanation for why their leave requests overlapped as frequently as they did



Michael and Becky

- When the investigation concluded, employer reviewed the interview transcripts and the couple's overall attendance records for the year
- More than half of Michael's FMLA absences and half of his late days were on the same date and at the same time as Becky's. This conflicted with Michael's estimate that his need for FMLA leave was triggered by Becky's condition about 20%–30% of the time.
- Employer concluded that the couple had provided false and/or misleading information regarding their FMLA leave
- FMLA Claims Dismissed!



But Always Proceed with Caution

- *Brady v. Bath Iron Works Corp.*
 - After 26 years working as a carpenter for employer, Brady elected to use FMLA to treat his “chronic, serious mental health conditions, including depression and anxiety,” allegedly related to his work with defendant
 - When Brady took a half-day of FMLA leave after a stressful morning, he loaded his truck with scrap wood and went to lunch with a co-worker. Defendant sent two individuals to monitor Brady, who was observed drinking beer. He was terminated for misuse of FMLA leave.
 - Court held this was **not** “a situation where an employee has been caught ‘red-handed’ engaging in an activity clearly inconsistent with the intended purpose of the leave.”
 - Employer should have consulted with Brady’s doctor to see if his conduct was inconsistent with his treatment/medical issues



Back to Ben – Practical Steps

- Courts look for complete/exhaustive investigation
- Employers **lose** when there is no sense of “due process” or there is a rush to judgment
- What is a complete investigation of the facts?
 - Get complete facts, gather information, mindful of state law
 - Meet with Ben upon his return, and during meeting:
 1. Confirm his request for a leave of absence
 2. Confirm the need to be off work and unable to work during requested period
 3. Confirm his whereabouts
 4. Confirm he understands how seriously you take fraud
 5. Ask if he left the area during his leave, confront with reason for leave
 6. Confront with information
 7. Show social media entries if he denies
- Independent level of review?



Call to the Boyfriend, But Not the Employer

- Tonya, a restaurant manager, repeatedly violated Westar's strict attendance and call-in policy by missing or leaving shifts without directly notifying her supervisor or district manager, leading Westar to warn her that further violations could result in termination
- After a severe diabetic low-blood-sugar episode, Tonya was disoriented and hospitalized on an IV
- During that time, she called her son and boyfriend, but did not contact Westar or her supervisor before her early-morning shift, causing the restaurant to open more than five hours late
- Westar first learned of Tonya's absence through a customer complaint and later through a conversation with Tonya's son, not from Tonya herself
- Tonya called Westar the next morning to explain her medical emergency and request sick leave. Westar focused on her failure to follow notice procedures, and about 30 minutes after that call, decided to terminate her employment for attendance violations



Poll Question

Did Tonya Provide Timely Notice of the Need for Leave?

*No, if She Called her Boyfriend and Son, She Could have Called
Hardees!*

Yes, Her Failure to Timely Contact Hardees was due to her Condition



Sometimes, You're Just Unlucky

- Honest-belief defense fails
 - Court held that a jury could find Westar had sufficient notice during the next-morning call and that Huber's failure to call earlier may have been caused by the same medical emergency, making summary judgment for Westar improper
- "Intertwinement" test

Huber v. Westar Foods, Inc. (8th Cir. 2025)



10 Practical Steps to Identify, Manage and Prevent FMLA Misuse



Before Leave Occurs

1. Put controls in place before FMLA misuse becomes a problem

- Establish and enforce reasonable call-in policy and procedures
- Two-call ins where appropriate
- Use script of questions
- Use Leave of Absence form, submit to HR
- Require Dr. note for paid sick days, consistent application



Before Leave Occurs

2. Seek medical certification wherever possible; attach job description

- Initially
- Every leave year
- Every time reason changes
- Request for extension of leave
- Push back on insufficient information
 - Duration? Frequency? Planned treatment?
 - Intermittent leave medically necessary

Certification of Health Care Provider for Employee's Serious Health Condition under the Family and Medical Leave Act

U.S. Department of Labor
Wage and Hour Division



DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR.
RETURN TO THE PATIENT.

OMB Control Number: 1235-0003
Expires: 6/30/2023

The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave due to a serious health condition to submit a medical certification issued by the employee's health care provider. 29 U.S.C. §§ 2613, 2614(c)(3); 29 C.F.R. § 825.305. The employer must give the employee **at least 15 calendar days** to provide the certification. If the employee fails to provide complete and sufficient medical certification, his or her FMLA leave request may be denied. 29 C.F.R. § 825.313. Information about the FMLA may be found [on the WHD website at www.dol.gov/agencies/whd/fmla](http://www.dol.gov/agencies/whd/fmla).

SECTION I – EMPLOYER

Either the employee or the employer may complete Section I. While use of this form is optional, this form asks the health care provider for the information necessary for a complete and sufficient medical certification, which is set out at 29 C.F.R. § 825.306. **You may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308.** Additionally, you **may not** request a certification for FMLA leave to bond with a healthy newborn child or a child placed for adoption or foster care.

Employers must generally maintain records and documents relating to medical information, medical certifications, recertifications, or medical histories of employees created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies, and in accordance with 29 C.F.R. § 1635.9, if the Genetic Information Nondiscrimination Act applies.

- (1) Employee name: _____
First Middle Last
- (2) Employer name: _____ Date: _____ (mm/dd/yyyy)
(List date certification requested)
- (3) The medical certification must be returned by _____ (mm/dd/yyyy)
(Must allow at least 15 calendar days from the date requested, unless it is not feasible despite the employee's diligent, good faith efforts.)
- (4) Employee's job title: _____ Job description (is / is not) attached.
Employee's regular work schedule: _____
Statement of the employee's essential job functions: _____
(The essential functions of the employee's position are determined with reference to the position the employee held at the time the employee notified the employer of the need for leave or the leave started, whichever is earlier.)

SECTION II - HEALTH CARE PROVIDER

Please provide your contact information, complete all relevant parts of this Section, and sign the form. Your patient has



Before Leave Occurs

- 3. Authenticate/clarify certification when the medical certification is inadequate or incomplete**
- 4. Use second and third opinions where appropriate**
- 5. Schedule an Expectations Meeting with your employee**



Set an Expectations Meeting

- Expectations for reporting absences: walk employee through call-in procedures, sign off on process
- Review FMLA policy (e.g., use of concurrent paid leave, recertification, outside employment, fraud)
- Specific discussion about planned medical treatment
 - Scheduling expectations should be set up in advance
 - Once local HR/manager knows of potential appointments, scheduling expectations should be set in advance to avoid surprises
- Advise employee of notice requirements and enforce them



During FMLA Leave

6. Recertification!

- Obtain at first available instance
- Frequency/duration inconsistent
- Pattern of suspicious absences
- Circumstances cast doubt on continuing validity
- Send letter/attendance record to health care provider

7. Coordinate with your TPA: You (employer) are the eyes and the ears!

8. Establish policy prohibiting second job; consider surveillance/investigator in egregious cases



Before, During and After FMLA Leave

9. Address performance issues

- Don't ignore performance problems
- If employee has non-FMLA attendance issues, note this on the disciplinary form

10. Train your John Joneses!



Tools Available to Employers



Provider Scoring

A tool that can be helpful is scoring providers based on criteria to detect providers with anomalies or irregular patterns.

What can be included in scoring providers:

- Percentage of intermittent leaves are approved by providers
- Distance from provider and claimant (within 50 miles...in another state)
- Similarities in certification language / frequency and duration
- Prefilled medical certification forms

Data over time can identify potential bad actors and address with the tools available



Steps you can take to combat misuse from providers

If a pattern of abuse or fraud is detected, an employer (with advice from their legal counsel) could refuse to accept medical certifications from certain providers

- This is a very slippery slope
- Should not be taken lightly
- Always involve your legal counsel





FMLA Insights

Guidance & Solutions for Employers

Employers, Before You Pick Up the Phone to Call an Employee's Physician, Put it on Hold

By Jeff Nowak on July 17, 2025

POSTED IN [ADA](#), [FMLA](#), [MEDICAL CERTIFICATION](#)

There must be something in the water in EmployerLand, USA.

On multiple occasions lately, employers have confessed frustration to me with the lack of information provided by an employee's physician in an FMLA medical certification or in support of an ADA accommodation.



But their next line is always troubling: "So, Jeff, I just picked up the phone and called the doctor directly with a few of our questions about the form."

[Cringe]

Friends, whether it's an FMLA or ADA situation, employers must follow very specific rules when communicating directly with an employee's physician about the employee's medical condition. They start with these:

ABOUT JEFF



Jeff Nowak is a shareholder at Littler Mendelson P.C., the world's largest

employment and labor law practice representing employers. Jeff has two decades of experience advising and litigating on behalf of employers on a wide range of complex employment law matters and is a recognized leader on FMLA and ADA issues, helping employers develop comprehensive strategies to achieve compliance with employee leave and accommodation issues.

[Read More...](#)

CONNECT WITH JEFF



Subscribe to this blog

SUBSCRIBE



Come see Sedgwick at Booth 101 or scan the QR code for a copy of our white paper on navigating absence misuse



Proactive prevention starts here

The following steps provide a clear roadmap to strengthen your compliance strategy and safeguard your bottom line.

10 practical steps to prevent FMLA misuse

BEFORE LEAVE

- 01** Put controls in place early: Establish and enforce timely reporting policies, use scripts and require leave documentation.
- 02** Seek medical certification: Attach job descriptions and push for clarity on duration, frequency and treatment plans.
- 03** Authenticate and clarify certifications: Address incomplete or inadequate documentation promptly.
- 04** Use second and third opinions: When appropriate, confirm legitimacy through additional medical reviews.
- 05** Connect with employee: Set clear expectations in advance regarding benefits payments, outside employment and return to work.

DURING LEAVE

- 06** Rectify when absence patterns raise concerns: Act quickly if you notice suspicious changes in frequency/durations or multiple employees are seeing the same provider.
- 07** Confirm adherence to outside employment policies: Review and investigate concerns about second jobs where appropriate.

BEFORE, DURING AND AFTER LEAVE

- 08** Manage performance consistently: Document and address non-FMLA attendance problems.
- 09** Train managers: Ensure people leaders understand FMLA rules and misuse prevention tools.
- 10** Partner with your third party administrator (TPA): Sedgwick's AI-powered technology monitors patterns and flags anomalies for employers.

For more on these steps, refer to the guide by Sedgwick subject matter experts Brice Caswell and David Seltman in the DMEC's January-March 2026 issue of @Work (DMEC membership required for full content access).

Connect with Jeff

Email: jnowak@littler.com

FMLA Insights Blog: www.fmlainsights.com

LinkedIn: www.linkedin.com/in/jeffnowak

X: @jeffreysnowak



Connect with David

Email: david.setzkorn@sedgwick.com

Sedgwick: <https://www.sedgwick.com/benefits-administration/absence-management-and-disability/>

LinkedIn: www.linkedin.com/in/davidsetzkorn



Questions?

