



Simplifying Intermittent Leave Challenges: Reduce the Impact and Stay Compliant

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Speakers

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Agenda

- Incidence, Costs and Impacts of Intermittent Leave
- FMLA Overview
- Best Practices in Intermittent Leave Compliance
- Resources, Triggers and Case Studies
- Questions & Answers



Incidence, Costs & Impacts of Intermittent Leave

Recent Intermittent Leave Findings*

- 33% of employers report an increase in intermittent leave
 - Uptick attributed to stronger tracking
- 45% report difficulty managing/tracking intermittent leave
- 26% of employers with call centers report higher frequency of absence in call centers driven primarily by intermittent leave

*Source: Mercer Survey on Absence and Disability Management, 2013 Survey Report

Commonly Confused “FML” Definitions

- **Intermittent**

- Leave taken in separate blocks of time due to a single qualifying medical or family reason (e.g. August 4-6, August 8, August 12-August 14).

- **Continuous**

- Leave taken in a continuous block (e.g. August 1- August 31)

- **Concurrent**

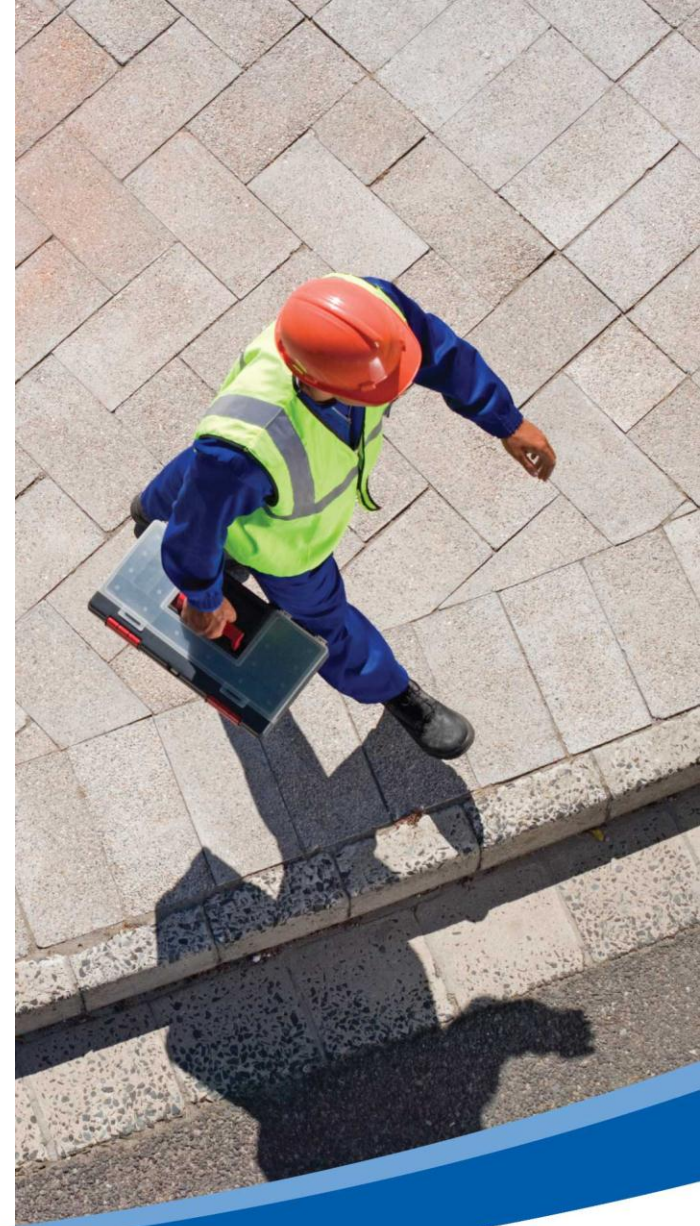
- Runs at same time as income replacement program such as STD, sick leave, salary continuation, etc. and enables “linkage” between the two

- **Stand-alone**

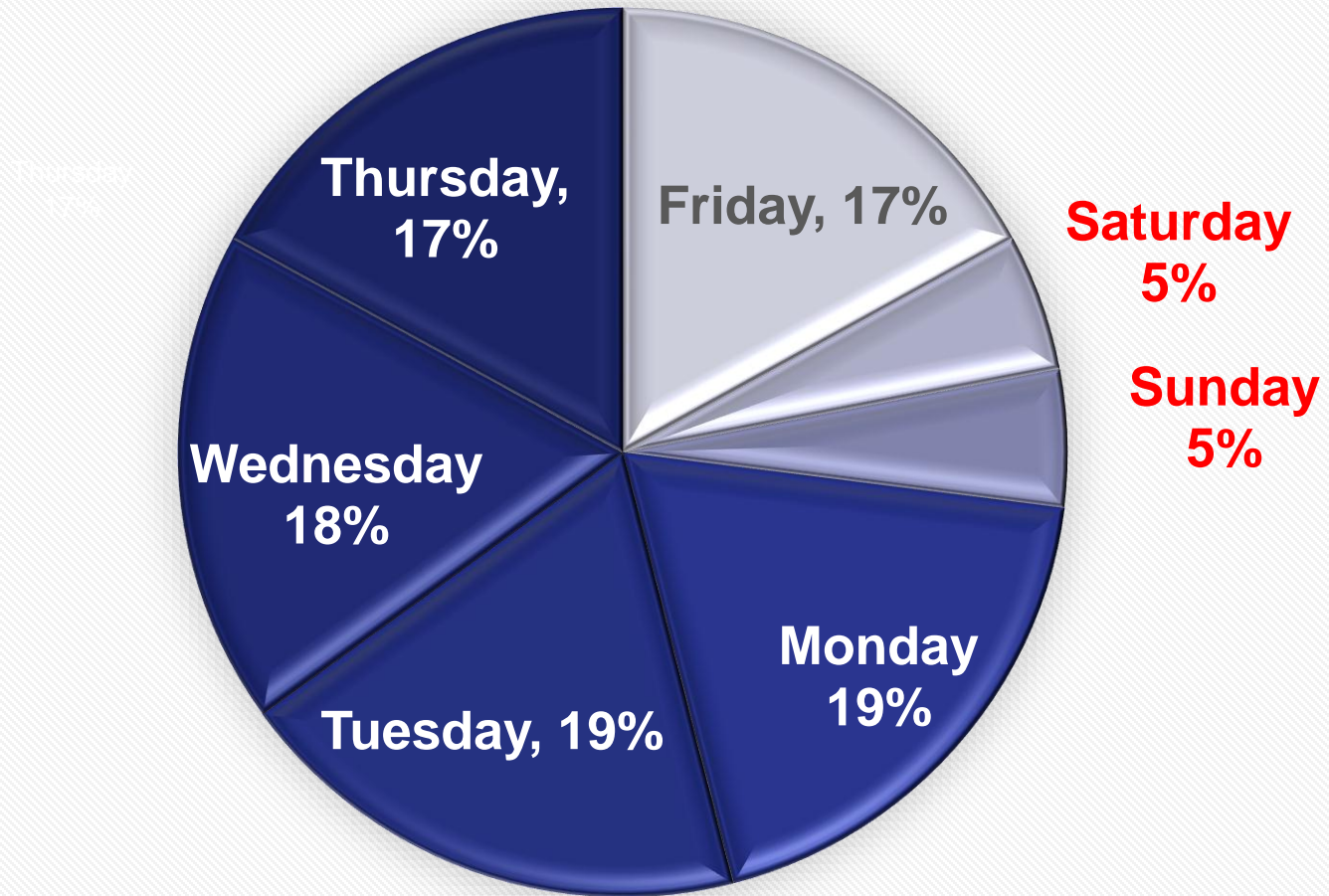
- Runs without income replacement program

Why Is Management of Intermittent Leave Important?

- For Employers
 - Lost productivity
 - Complexity
 - Compliance
 - Department of Labor
 - Audits
 - Fines
 - Wrongful termination lawsuits
 - ADAAA



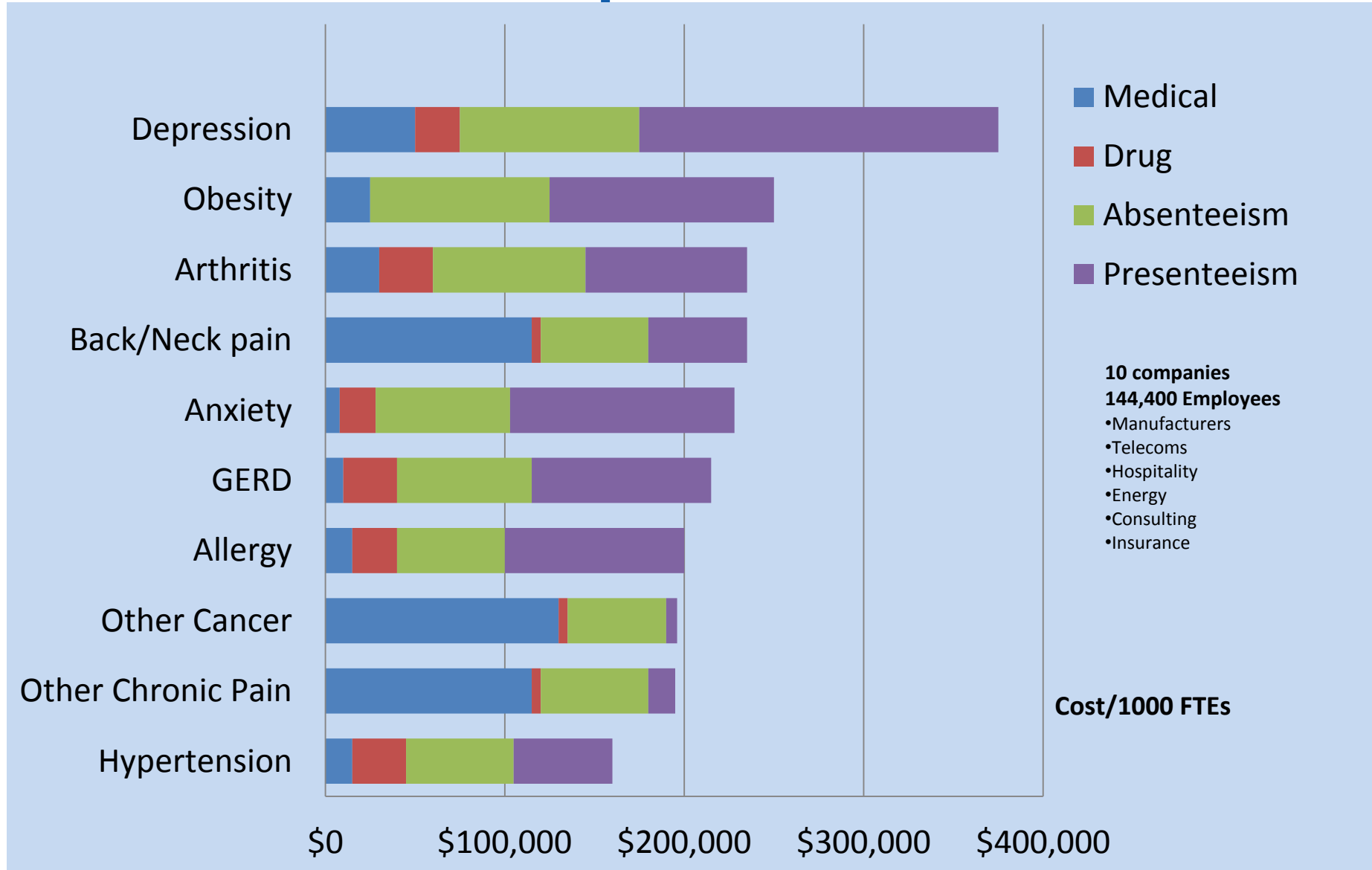
Intermittent Leave Myth



Gallup: Absence Causes Lost Productivity*

Occupation	Annual cost of lost productivity due to absenteeism (in billions)
Professionals	\$24.2
Managers/executives	\$15.7
Service workers	\$8.5
Clerical/office	\$8.1
Sales	\$6.8
School teachers (K-12)	\$5.6
Nurses	\$3.6
Transportation	\$3.5
Manufacturing/production	\$2.8
Business owners	\$2.0
Installation/repair	\$1.5
Construction/mining	\$1.3

Annual Costs: Top 10 Health Conditions*



*Health and Productivity as a business strategy: A multiemployer study, Journal of Occupational and Environmental Medicine, Volume 51, No.4, April 2009

Intermittent FMLA Incidence*

	Median All ERs	Median Hospitals	Median Manufacturing	Median Finance
Total leave/ 100 eligible employees	11.2	21.1	10.9	11.2
Intermittent leaves/100 eligible employees	1.4	3.1	1.3	1.5
Lost workdays/ intermittent leave	5.0	3.0	4.8	5.9

Cost of Excess Intermittent Leave

Manufacturing Company XYZ

- 1000 eligible ees X \$40,000/yr. = \$40,000,000 payroll
- Daily wages = \$154/day
- Intermittent leaves = 6.2/100 eligible ees
 - IBI median = 1.3/100 eligible ees
- Lost workdays/intermittent leave = 7.0 days
 - IBI median = 4.8 days
- Total lost workdays for intermittent leaves = 434 days
 - 7.0 days x 6.2 leaves/100 eligible employees
- Lost workdays above IBI median (434 – 63) = 371 days
- Extra cost (direct) of intermittent leave (371 x \$154) = \$57,134
- Extra total cost of intermittent leave (2.9* x \$57,134) = **\$165,689**



Best Practices in Intermittent Leave Compliance

FMLA Overview

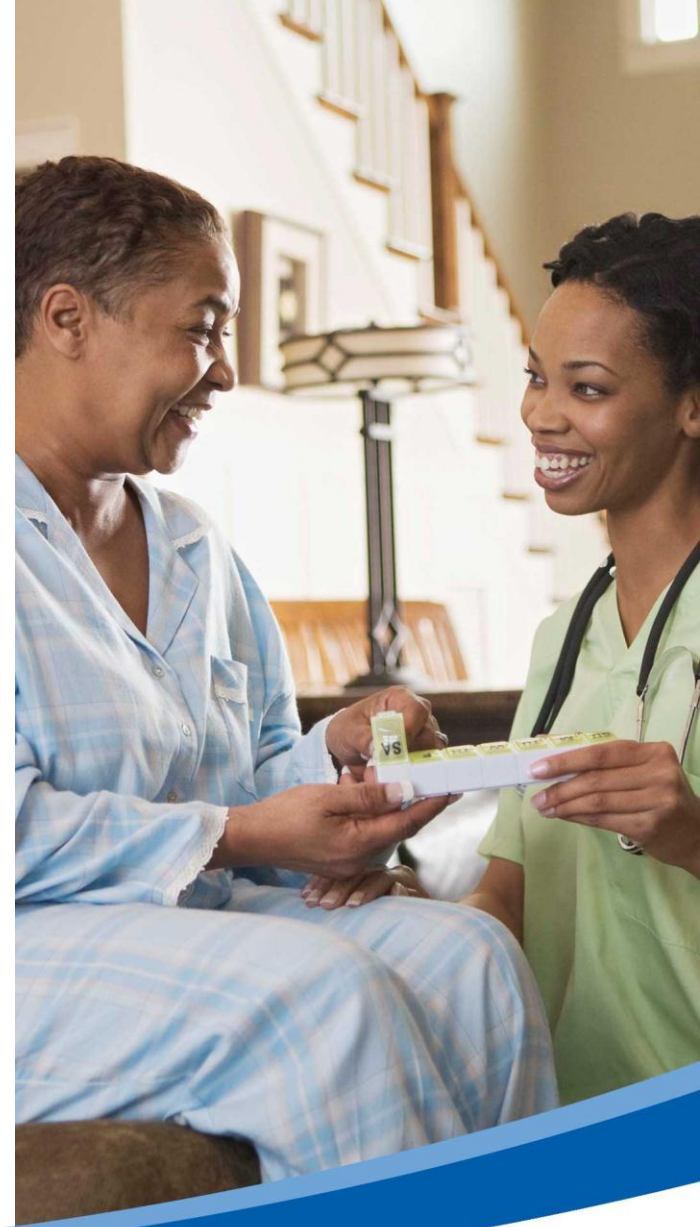
- Purpose of the Law:
 - Provide employees with unpaid, job-protected leave.
- Covered Employers:
 - Employ 50 or more employees for 20 or more calendar workweeks during the preceding calendar year.
- Eligible Employees:
 - Employed for at least 12 months by a covered employer.
 - Worked at least 1,250 hours during the previous 12-month period before leave.
 - Employed at a worksite with 50 or more employees within 75 miles.

Intermittent Leave

- Can be taken for:
 - Employee's own serious health condition
 - Family member's serious health condition
 - Care for covered service member with a serious injury or illness
 - Due to a qualifying exigency
 - After the birth of a healthy child, or placement for adoption or foster care
 - BUT the employer must agree to an intermittent schedule in this instance.

Intermittent Leave (cont.)

- Employee must make a reasonable effort to schedule planned medical treatment so that they do not “unduly disrupt” operations.
- Employer has the ability to require an employee to transfer to an alternative position to better accommodate recurring periods of leave.



Recent Court Cases on Intermittent Leave

- ***Hyldahl vs. Michigan Bell Telephone Company***

- Employee was on intermittent leave due to multiple serious health conditions.
- After the employee exceeded her frequency and duration for the month, the employer requested a recertification.
- The recertification was duly provided, but the employer discounted the new document, denying leave and terminating employment.
- The court found that the employer interfered with the employee's right to leave under FMLA and upheld a jury verdict awarding front pay, back pay, attorney's fees and liquidated damages totaling \$523,000.

Managing Intermittent Leave: Tip #1

- Ensure that employees are following the law's notice requirements.
 - For foreseeable leaves: 30 days notice, or as soon as practicable under the circumstances.
 - For unforeseeable leaves: as soon as practicable under the circumstances.



Managing Intermittent Leave: Tip #2

- Enforce your normal call-in procedures for reporting an absence. When the employee does call in, make sure you're obtaining sufficient information to determine whether leave is FMLA-qualifying by asking:
 - What are the specific reasons for the absence?
 - What job duties is the employee unable to perform?
 - Is the employee going to see a physician?
 - Has the employee previously taken leave for this condition?
 - When did the employee first learn he/she needed to be absent?
 - When does the employee expect to return to work?

Managing Intermittent Leave: Tip #3

- Track intermittent leave usage carefully:
 - Are there patterns of usage, e.g. certain departments, days of the week, managers?
- Intermittent Leave Increments:
 - Employer must account using increments no greater than the shortest amount of time used for other forms of leave.
 - Ex. If an employer accounts for vacation time in increments of one hour, and sick time in increments of 1/2 hour, FMLA leave must use increments no larger than 1/2 hour.

Recent Court Cases on Intermittent Leave

- ***Tillman vs. Ohio Bell Telephone Company***

- Employee was granted intermittent leave for a chronic back condition.
- The pattern of usage created suspicion; exceeded frequency of approved leave, routinely occurred on Fridays, weekends and around holidays.
- After conducting an investigation, including the use of surveillance and an interview with the employee, the employee was terminated.

Tillman vs. Ohio Bell Company (cont.)

- Key Takeaways:
 - Court upheld the termination based on “abuse” of FMLA leave, and violation of a company policy against “fraudulent or illegal conduct”.
 - In cases where the employer has contrary evidence, the medical certification is not a “license to take unnecessary medical leave”.



Managing Intermittent Leave: Tip #4

- Require medical certifications to be completed and returned:
 - Employee must provide completed certification within 15 days of request, unless special circumstances apply.
 - Review the medical certifications carefully. If appropriate, the employer (not the employee's supervisor) may contact the health care provider to authenticate.
- Authenticate:
 - Send the health care provider a copy of the certification for verification that the form was properly completed or authorized by them; no additional information can be requested.

Managing Intermittent Leave: Tip #4 (cont.)

- Clarification:
 - Contact the provider to understand handwriting or the meaning of a response; no additional information beyond what's on the form can be requested.
- Provide notice in writing that certification is deficient, must allow seven days to cure.
- If the certification is not returned, leave can be denied.



Managing Intermittent Leave: Tip #5

- Ask for Recertifications
- Recertifications can be requested no more often than every 30 days, unless:
 - The minimum duration of the certification is greater than 30 days
 - BUT, regardless of the duration, recertifications can be required every six months.
- Recertifications can be requested more frequently than every 30 days, if:
 - The employee requests an extension of leave.
 - Circumstances have changed significantly from the original certification. (e.g. Instead of 1-2 days/month, employee is missing 10 days)
 - Employer receives information which casts doubt on the reason for leave.

Managing Intermittent Leave: Tip #5 (cont.)

- Employers may supply the health care provider with a leave usage pattern and ask if the serious health condition and need for leave is consistent with such pattern.
- Employers may request a new certification each leave year for conditions lasting longer than 12 months. These new medical certifications are subject to the 2nd/3rd opinion process.



Recent Court Cases on Intermittent Leave

- ***Graham vs. BlueCross BlueShield of Tennessee, Inc.***
 - Employee requested intermittent leave for migraine headaches.
 - Subsequently missed 28 consecutive days, significantly exceeding the frequency and duration on the certification.
 - Employer requested a recertification, but employee never provided.
 - Employee was terminated and the Court upheld this action.

Graham vs. BlueCross BlueShield TN, Inc. (cont.)

- Key Takeaways:
 - Closely review the circumstances of the leave, and request a recertification when appropriate.
 - Here, the usage pattern changed substantially.
 - “Plaintiff’s certification did not entitle her to unfettered FMLA leave.”

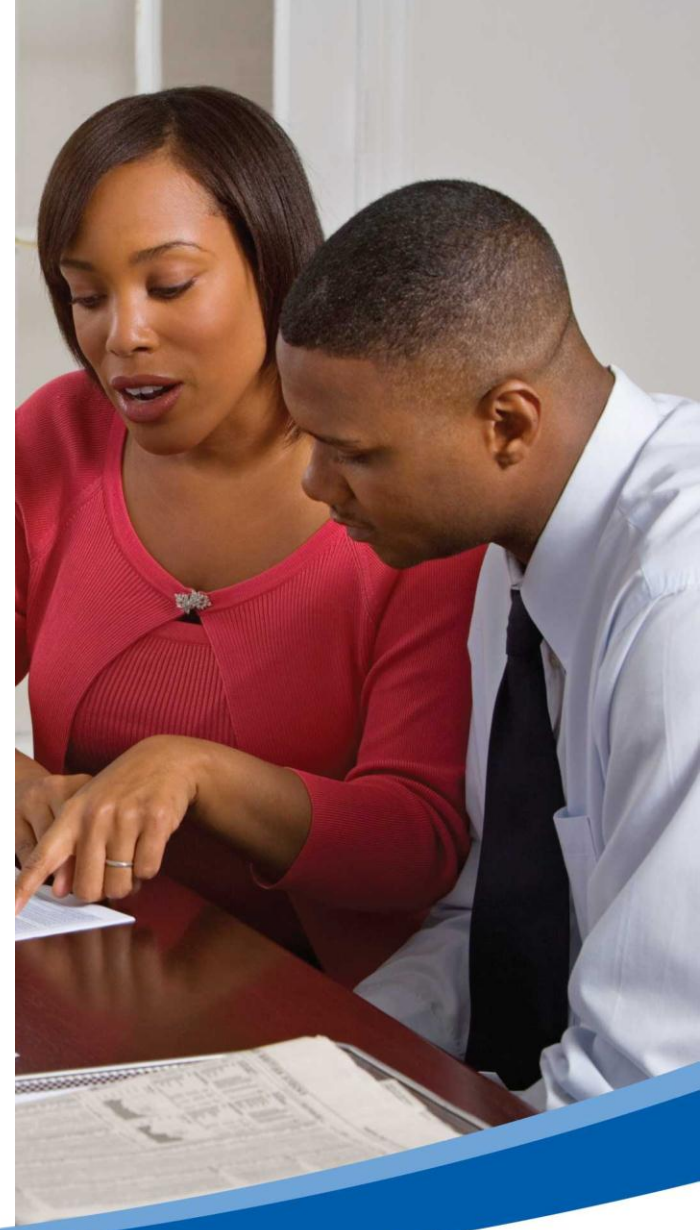


Managing Intermittent Leave: Tip #6

- Obtain 2nd and 3rd Opinions
- If an employer doubts the validity of the initial certification, consider a second opinion:
 - At the employer's expense
 - Employee is provisionally entitled to leave during the process
 - Employee must authorize release of relevant medical records if requested by second opinion provider
 - Employer can designate the second opinion provider

Managing Intermittent Leave: Tip #6 (cont.)

- If the certification and 2nd opinion differ, a 3rd opinion can be requested:
 - At the employer's expense
 - 3rd opinion provider is designated and approved by both employer and employee
 - 3rd opinion decision is final and binding



Recent Court Cases on Intermittent Leave

- ***Oak Harbor Freight Lines v. Antti***

- Employee requested intermittent leave for a back condition, with ongoing treatments scheduled for Friday mornings.
- Employer had a policy of requiring a provider's note for each absence.
- Court found that the note requirement was not permissible under FMLA.

Oak Harbor Freight Lines v. Antti (cont.)

- Key Takeaways:
 - Closely review the initial certification, authenticate and clarify if needed.
 - If you question the validity of the initial certification, consider a 2nd opinion.
 - Adhere to the recertification requirements discussed above.
 - Court made a point of noting that appointments could have been scheduled on weekends- not unduly disrupting operations.



Summary: Best Practices in Intermittent Leave Compliance

1. Educate employees about notice requirements under the law
2. Enforce call-in procedures
3. Track leave usage carefully
4. Require medical certifications
5. Ask for recertifications
6. Consider obtaining a 2nd or 3rd opinion when in doubt



Resources, Triggers and Case Studies

Available Resources

- For complex cases, outside consultation is valuable.
- **International Association of Rehabilitation Professionals**
 - A professional case manager can provide guidance and expertise to manage more challenging intermittent leave cases.
 - www.rehabpro.org
- **Job Accommodation Network**
 - www.askjan.org
 - The site offers accommodation ideas for a broad variety of medical conditions.

Intermittent Leaves: Behavioral Health

- Mental health symptoms and treatment can trigger a leave.
- Case management: encouragement and support, clarification of functional capacities with providers, ensure appropriate treatment
 - Referral to Employee Assistance Program
 - Offer telecommuting
 - Reduce distractions, e.g. noise
 - Provide natural lighting
 - Provide place for employee to rest during breaks

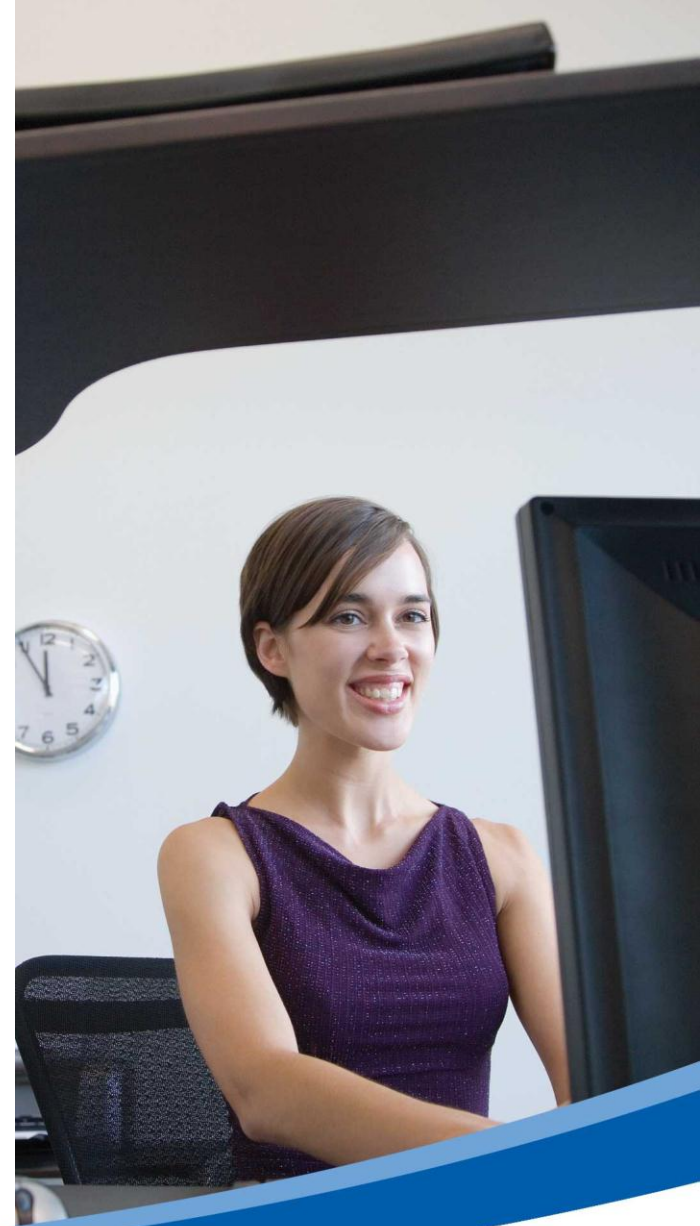
Intermittent Leaves: Migraines

- Migraine headaches are difficult to predict and often cause employees to take leaves on an intermittent basis.
- Combating Common Triggers:
 - Lighting
 - Provide filters for fluorescent lights and monitors, sunglasses, move employee to private area
 - Noise
 - Move employee to lower traffic area, noise canceling headset, environmental sound machine or sound absorption panels
 - Smell/Fragrance
 - Implement “fragrance-free” policy, telecommuting, air purification system

Case Study 1: Administrative Clerk

Problem:

Constant neck and back pain, no relief from medical treatment, high intermittent leave usage due to medical appointments.



Administrative Clerk (cont.)

Intervention	Consultant worked with employee to make ergonomic adjustments as she recently was provided with a chair. The consultant provided education and training on ergonomic prevention and stretching. Multiple visits were made with employee to make these adjustments.
Outcome	Employee able to be more productive and reduction in absences were almost immediate.
Leave Usage	Employee had 18 intermittent leaves and 3 continuous leaves between 2011 through 2012.
Leave Usage Post-Invention	No leaves taken to date for same condition.

Case Study 2: Customer Service Rep

Problem:

Chronic gastrointestinal condition required frequent restroom use, but telephone duties made this difficult.



Customer Service Rep (cont.)

Intervention	Consultant worked with employer and employee to modify workstation, provide assistance getting appropriate medical care, and change job duties to reduce telephone tasks.
Outcome	Employee was more comfortable, obtained treatment for her condition, and was able to use the restroom as needed.
Leave Usage	Employee continued to require intermittent leave despite the assistance.
Leave Usage Post-Invention	n/a

Case Study 3: Computer Systems Analyst

Problem:

Difficulty sitting, performing computer tasks due to pain.



Computer Systems Analyst (cont.)

Intervention	Consultant provided an in-depth ergonomic assessment, worked with employee to make adjustments and improve postures, employee provided a new ergonomic chair.
Outcome	Employee able to work more easily with less pain.
Leave Usage	Employee had 11 intermittent leaves and 9 weeks of continuous leaves between 2010 through 2013.
Leave Usage Post-Invention	No leaves taken to date for related condition .

Final Thoughts

- Intermittent leaves cause lost productivity and are expensive
 - Difficult and time consuming to administer due to ambiguities in the law and varying interpretation of the regulations
 - Challenging to assess an employee's right to take leaves vs. cases of abuse
- There are a number of solutions to reduce intermittent leaves
 - Create a plan of action and consistently follow it
 - Don't give up
 - Provide ergonomic and case management interventions when possible
 - Leverage existing resources and experts

Questions?

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