

FRANCZEK RADELET
Attorneys and Counselors

Identifying, Managing & Preventing FMLA Abuse


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Welcome

- Link to a feedback survey to be distributed following the program, also available from main page of webinar
- For HRCI and CLE credit please complete the feedback survey
- Use Q&A box at the bottom of the screen for any questions during the program




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Agenda

- Overview of FMLA abuse, intermittent leave
- Real-life scenarios
- Top 10 Practical Steps to Identify, Manage and Prevent FMLA Abuse
- Your Questions

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“Chronic” FMLA Headaches 


- Where a chronic serious health condition is involved, what drives employers mad?
 - Tracking intermittent FMLA Leave
 - Vague medical certification
 - Employer unsure about legitimacy of leave request
 - Chronic abuse of intermittent FMLA Leave

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Intermittent Leave 


- FMLA = block, intermittent, reduced schedule
- Main culprit of FMLA abuse – **Intermittent Leave**
 - By its very nature, intermittent FMLA leave lends itself to abuse: FMLA leave taken in separate blocks of time (in various increments) due to a single qualifying reason.
 - Reduced schedule: FMLA leave schedule that reduces employee’s usual number of working hours per week/day

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Intermittent Leave 

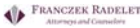
- Employer required to grant intermittent or reduced schedule leave only when such leave is medically necessary and the necessity is best accommodated through intermittent leave or reduced schedule
- Examples:
 - Medical appointments
 - Prenatal exams
 - Migraines
 - Restricted work hours (e.g., worker’s comp)

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Just "Taking a FMLA Day" 

- John, Project Manager
- Chronic Musculoskeletal condition – unable to work when condition “flares up”
- John’s Pattern:
 - Calls into supervisor’s voicemail to avoid live person
 - On some occasions, reports chronic condition; on other occasions, reports that he’s “not feeling well again” or simply “taking an FMLA day”
 - He calls 15-30 minutes before start of shift; policy calls for employee to report absence at least one hour before shift
- What do you do?

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The Inquisition 


- “The Employer may find it necessary to inquire further to determine if the leave is because of a serious health condition . . .”
29 C.F.R. 825.302(c)
- Fairly broad right to talk directly to employee
- Employer has right to know:
 - what the medical condition is
 - why the employee cannot perform the job
 - time periods involved
 - whether this is recurring, and whether doctor is involved

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Establish a Call-in Policy 


- Employee must comply with employer’s usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances
- If employee does not follow, FMLA may be delayed or denied
- Importance of call-in policy and following employer’s procedural requirements
 - *Brown v. Automotive Components Hldg’s/Ford Motor Co.* (7th Cir. Sept 8, 2010) (www.fmlainsights.com)

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Use a Standard Leave Form 

- Use General Leave of Absence form
- Foreseeable leave: complete prior to leave
- Unforeseeable:
 - Completed prior to leave
 - If not possible, verbal notice followed up with written compliance as soon as practicable
- Helps employer determine whether leave request triggers FMLA


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A Migraine Again! 

- Susie, receptionist
- Migraines – absent 1-2 days/mo.
- Certification: 1-2 days/mo.; ½ to 1 day per episode; lifetime condition
- Reality:
 - 1st month: 4 absences
 - 2nd month: 3 absences and 2 more unclear
 - Nearly all absences on Friday or Monday




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Combating Migraines 

- **Recertification is your main weapon**
 - Letter to health care provider with pattern of absences/attendance record
- **Maintain contact with employee while on leave**


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Oh My Aching Back! 

- Jesse, security guard
- Called off for chronic “bad back”
- Use the script!
- Learn if it’s a long-term condition; will it be an issue in the future
- Seek medical certification




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Medical Certification 

- Issue #1: Jesse does not return certification within 15 days.
 - Regulations allow employer to deny leave after 15 days until certification provided
 - Best practice?

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Medical Certification 

- Issue #2: Returns certification on Day 20. Certification incomplete and inadequate.
- Medical facts: “Bad back”

4. Describe other relevant medical facts, if any, related to the condition for which the employee seeks leave (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment):

Bad back

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Medical Certification FRANCZEK RADELET
Attorneys and Counselors

- Issue #3: Jesse brings certification back to doctor for completion – completed, but raises two issues:
 - “Bad back will flare up from time to time”
 - Possible fraud?

4. Describe other relevant medical facts, if any, related to the condition for which the employee seeks leave (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment):


Bad back
Back will flare up from time to time

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Medical Certification FRANCZEK RADELET
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- Issue #4: Let me take you in a different direction. Assume that Jesse sought a 10-day leave of absence for a vacation he planned and wants to use FMLA to cover the absence because it will help him recuperate from the back pain he has endured.

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HOSPITAL

To: [Redacted] From: Keith [Redacted] MD, DPM
Certified Physical Nurse
Bariatric Treatment Center

Date: 7/21/09 Page: [Redacted]

Re: 630-759-6152
DOB: 11/6/60

[Redacted] had emergency surgery
7/21/09 after 4h initial surgery 7/20/09
On pt we should be able to work 4-6 wks.

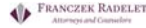
we feel that a vacation was OK. to take.

We have reviewed pt. had emergency surgery
in location & how to return home via plane.
Due to the stress of 2 surgeries & one of them
emergency, we suggest consider going on vacation during
a 2 week recuperation period.

Dr. [Redacted]

Warden

Caring for a Family Member




- Joe, medical technologist
- Asks for leave to care for mom (diabetes, high blood pressure, weight loss and arthritis)
- Intermittent leave for 6 months to provide food and transport her to doctor appointments
- Later absent for four days to attend to flooding in mom's basement. Asking for several more. Covered by FMLA?

"Caring For" Best Practices



- Has the employee provided notice of the need for FMLA-qualifying leave?
- Look to the information contained in the medical certification – what does it say?
- Harm to the family member if not provided
- What can the family member do?
- "Intertwined" responsibilities


10 Practical Steps to Identify, Manage and Prevent FMLA Abuse

Before Leave Occurs 

1. Put controls in place before FMLA abuse has a chance to infiltrate

- Establish and enforce reasonable call-in policy and procedures
- Use script of questions
- Use Leave of Absence form


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Before Leave Occurs 

2. Seek medical certification wherever possible; attach job description

- Push back on insufficient information
 - Duration?
 - Frequency?
 - Diagnosis?
 - Planned treatment?
 - Intermittent leave medically necessary

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Before Leave Occurs 

3. Authenticate/clarify certification when the medical certification is inadequate or incomplete


Example of a medical certification form:

1. Approximate date condition commenced: August 2006

Probable duration of condition: Five years, 1 month, 3 days, 8 hours and 42 seconds

Mark below as applicable:
 Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility?
 No Yes. If so, dates of admission: _____

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During FMLA Leave 


4. Use second and third opinions where appropriate
5. Recertification!
 - Obtain at first available instance
 - Send letter/attendance record to health care provider
 - Require health care provider to initial to attachment
6. Track absence pattern; stay in touch with employee during leave – require check-in

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During and After FMLA Leave 

7. Establish policy prohibiting second job; consider surveillance/investigator in egregious cases
8. Address performance issues
 - Don't ignore performance problems
 - If employee has non-FMLA attendance issues, note this on the disciplinary form
9. Insist on Fitness for Duty Certification
 - Intermittent leave: only where employee poses safety risk (ADA standard)

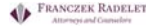
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Before, During and After FMLA Leave 

TRAIN YOUR EMPLOYEES!

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In It For the Long Haul...



- FMLA is stacked in favor of employees and fraught with traps for employers
- Use all of the tools the FMLA provides you
 - Call-in policies
 - Fairly broad right to question employees
 - Medical certification/re-certification
 - 2nd and 3rd opinions
 - Maintain contact
- Be prepared for resistance from employees/unions
- Hold firm, be consistent, and slowly but surely, the message will be heard by employees

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FMLA and for practical advice
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