



**Your Irreplaceable Workforce Management Partner**



Anne M. Lavelle  
CTR Compliance Specialist

# **Family Medical Leave Act (FMLA) Intermittent Leave**

## OVERVIEW OF TOPICS:

### Legislative/Court Updates:

- U.S. Supreme Court Decision:
  - Universities and Affirmative Action
  - Employer DEI
- Illinois Electronic Notices Law
- Pregnant Workers Fairness Act

### FMLA Intermittent Leave Cases

### U.S. DOL FMLA examples

## Legislative/Court Update:

U.S. Supreme Court - Students for Fair Admissions, Inc. v. Harvard et. Al. (2023)

- What does this mean for employer DEI initiatives?

Illinois Notice Law

- At-home workers must receive electronic notices of all labor and employment laws.

Pregnant Workers Fairness Act

- Reasonable Accommodations Required

## Render v. FCA (6<sup>th</sup> Cir. 2022)

- Employee has mental health issues – major recurrent depression and moderate/generalized anxiety disorder.
- On performance improvement plan due to attendance. Union workforce.
- Informs employer. Employer approves up to 4 days/month for FMLA leave in October 2017.
- Employee calls off three days in December 2017 and one day in January 2017.
  - Does not say absences are FMLA related
  - Says “not feeling at all well” and “flare up.”
- Employer terminates for attendance.

## Juday v. FCA US LLC (7<sup>th</sup> Cir. 2023)

- Spouses work at same automotive plant
- Both have FMLA qualifying conditions and utilize intermittent leave
  - Wife has anxiety and IBS
  - Husband has back pain, anxiety and depression.
- Outside FMLA Administrator finds that the couple took overlapping FMLA more than 20 times in one year.
- Company calls employees into discuss this coincidence.
- Company suspends employees.

## Hyldahl v. Michigan Bell (6<sup>th</sup> Cir. 2012)

- Employee had significant psychiatric issues, including PTSD, depression and anxiety. She also suffered from chronic pain.
- Applied for intermittent FMLA leave – employer granted 48 hours per month.
- Employee utilized more than 400 hours of FMLA leave in 5 years.
- Employee’s manager informs HR that he thinks employee is utilizing FMLA to “extend weekends.”
- HR places employee under surveillance. Multiple days of surveillance did not yield any inconsistent conduct with FMLA leave.
- December 14, 2007, employee takes FMLA leave. Went to dentist, haircut, lunch with friend, holiday party and dinner/drinks. This absence takes her over the 48 hour threshold.
- Employer questions leave on the 14<sup>th</sup>. Employee submits a new note and FMLA certification from therapist saying leave was necessary on that date for mental health.
- Employer terminates.



## Holfrey v. Collier County Bd. Of Commissioners (M.D. Fla. 2017)

- Employee approved for FMLA leave.
- Management employee discloses medical condition (involving employee's reproductive organs) to co-workers to help explain why employee is out and why the other employees need to pick up his "slack" when he is gone.
- Employee returns. Co-workers ask how he is doing. Some couple the question with crude jokes/gestures.
- Employee is embarrassed. Sues for interference and retaliation.

## **Forte v. West Florida Medical Center Clinic (M.D. Fla. 2015)**

- Employee out on FMLA leave
- Co-workers make comments that she appears to be “enjoying her free time” away from work.
- When she returns, employer holds staff meeting to address the co-workers’ concerns.
- Employee upset during meeting.
- Employer fires employee for insubordination at meeting.
- Employee sues for interference/retaliation.

## U.S. Department of Labor (DOL) Opinion Letter February 9, 2023

- Employee may not be able to work more than an 8 hour day or may not be able to work quite 8 hours in a day.
- This could result in an INDEFINITE shortened workday. Employer objects and seeks DOL input.

DOL input says an INDEFINITE shortened workday is an acceptable result under the FMLA AND ADA.

## Beishl v. County of Bucks. (E.D. Pa. 2019)

- Employee on intermittent leave.
- Also in a rock band called, Flabbergasted.
- FMLA coincides with dates of concerts.
- Surveillance video of concert on same day as FMLA leave.
- Employee terminated.

## Jackson v. BNSF (N.D. Tex. 2017)

- Employee on intermittent FMLA leave.
- Leave requested almost immediately after a negative performance review.
- Attends Beyonce concert in luxury suite same day as one of his leaves.
- Employer terminates.

Kathy, Serenity, and Ray work for the same employer. Their employer provides a bonus to employees who work or are paid for 40 hours a week.

In a particular week:

- Kathy works 38 hours and uses 2 hours of unpaid leave to have lunch with a friend. Kathy is paid a total of 38 hours for the week and is not eligible for the bonus.
- Serenity works 38 hours and uses 2 hours of paid sick leave to see a dentist for a health reason that does not qualify for FMLA leave. Serenity is paid a total of 40 hours for the week and is eligible for the bonus.
- Ray works 38 hours and uses 2 hours of paid sick leave at the same time as FMLA leave to see a physical therapist for treatment of a serious health condition. Ray is paid a total of 40 hours for the week and is eligible for the bonus.

Under the FMLA, Ray is eligible for the bonus because Ray used FMLA leave at the same time as paid sick leave, and employees like Serenity who use paid sick leave are not disqualified from the bonus.

But what if in another week:

- Ray works 38 hours and uses 2 hours of unpaid FMLA leave because of a serious health condition. Ray is paid a total of 38 hours for the week and is not eligible for the bonus.

U.S. DOL Fact Sheet #28A

•At Francesca’s office, everyone who has a late start to work gets a point under the employer’s disciplinary policy, no matter why they are late. (No fault attendance policy.) Francesca receives a disciplinary warning because she received three points for being late to work three different times. One of the times that Francesca was late for work, she was using FMLA leave to care for her child. Is this the right result?

•Parker uses FMLA leave to go with her spouse to a prenatal care appointment. When Parker comes back to work, her supervisor threatens that she will not be considered for a promotion if she continues to use FMLA leave because of her spouse’s pregnancy.

U.S. DOL Fact Sheet #28A



Thank you for attending!