



December 4, 2002

FMLA2002-6

Dear **Name***

This is in response to your letter of **Name***, requesting written guidance from the Wage and Hour Division of the U.S. Department of Labor with regard to the application of the 1,250-hour eligibility test and intermittent leave under the Family and Medical Leave Act of 1993 (FMLA).

The scenario you describe in your letter, and in a conversation with a member of my staff, involves several employees who submitted FMLA documentation to their employer and were subsequently approved for intermittent leave for a twelve-month period. On the medical certification form, the employees' physician specified how often they would be expected to be absent from work on a monthly basis. However, when employees miss more workdays on a monthly basis than those specified on the medical certification, the employer requires them to submit another FMLA request form and to update the information on their medical certification form to reflect the need for additional time off monthly. Once the medical certification is resubmitted for the same serious health condition, the employer applies the 1,250-hour eligibility test for the second time in the same twelve-month period. As a result, some employees are denied additional FMLA leave pursuant to the original approved FMLA leave request, as well as the new request, because they fail to meet the 1,250-hour requirement.

The FMLA provides that an employee is entitled to leave for up to 12 weeks in any 12-month period for the employee's own serious health condition, or to care for a spouse, son, daughter, or parent who has a serious health condition. Pursuant to Section 102(b)(1) of the Act, leave may be taken all at once, or may be taken "intermittently or on a reduced leave schedule" when medically necessary. The FMLA's implementing regulations at 29 CFR Part 825.203 and 825.800, copy enclosed, define intermittent leave as "leave taken in separate blocks of time due to a single qualifying reason." This definition is based upon the statutory provisions and legislative history pertaining to intermittent leave.

An employer may require that a request for FMLA leave due to a serious health condition be supported by a certification completed by the individual's health care provider. However, not all absences caused by certain serious health conditions will be predictable, and the FMLA does not require a health care provider to submit an exact schedule of leave when submitting the medical certification. Health care providers are only expected to provide their best, informed medical judgment. The FMLA does not permit an employer to withhold approval of a request for FMLA leave if an exact schedule of leave is not submitted. For pregnancy, chronic, and long-term serious health conditions, an employer may require this medical certification every 30 days in connection with an absence by the employee. However, where the circumstances described by a previous medical certification have changed significantly (including significant changes in the duration and/or frequency of absences), an employer may request recertification in less than the 30-day minimum interval, but also only in connection with an absence. (See Section 825.308)

The intermittent leave concept assumes alternating periods of absence from and presence at work for the same FMLA-qualifying condition. Thus, as we have previously explained (see opinion letter FMLA-112 enclosed), an employer may not require an employee to reestablish eligibility with each absence. The 1,250-hour eligibility test may be applied only once during the same 12-month FMLA leave year, on the commencement of a series of intermittent absences, if all involve the same FMLA-qualifying serious health condition. The employee would remain entitled to FMLA leave for that medical reason throughout the 12-month period, even if the 1,250-hour calculation is not met at some later point in the 12-month period when another related instance of intermittent leave occurs.

Responsibility for investigating allegations of violations of the FMLA has been delegated to the various district offices of the Wage and Hour Division. If, after reading this letter, you need further clarification regarding the application of the FMLA to your situation, you may contact the nearest office of the Wage and Hour Division, which is located at 230 South Dearborn Street, Room 412, Chicago, Illinois 60604, telephone (312) 353-8145.



Sincerely,

Rosemary E. Sumner
Office of Enforcement Policy
Family and Medical Leave Act Team

Enclosure

*Note: * Name(s) withheld to preserve privacy, in accordance with 5 U.S.C. 552(b)(7).*