

## **Family and Medical Leave Act (FMLA) - Intermittent Leave: How can employers best manage?**

ANNOUNCER: Today our speaker is Mary- Jo Rebelo, she is a partner in and co-chair of Burns White's Employment Practices Liability Group. A seasoned litigator and business advisor with 30 years of experience, Ms. Rebelo has successfully represented manufacturers, distributors, re-sellers, property owners, business owners, boards of directors and other governing bodies, physicians, physician practice, health systems and other medical service providers in a broad range of matters. So, without further ado, I'm going to turn it over to Mary-Jo...

MARY-JO: Good Afternoon, thank you for joining us for our,our kick-off webinar, for what we hope will become our regular series of webinar offerings in the employment law area, the hot topic we chose for our first webinar in our series this year is on FMLA leave and specifically with a focus on intermittent leave. And I chose that topic because in looking back over the past 12-18 months it seems to me that the frequency in which I was getting inquiries or questions about intermittent leave, in the context of FMLA was, was significant so I thought that that might uh be an issue of interest across the board, FMLA is certainly a very broad topic and we can probably do an entire 2 or 3 day seminar on all of the nuances of FMLA but we'll talk a little bit about FMLA generally today and again with a specific focus on intermittent FMLA leave and, and specifically why intermittent again looking at some of the statistics coming out of the, COL and the ELC I discovered that it's reported that 24% of FMLA leave is in fact intermittent leave.

### **WHY FOCUS ON INTERMITTENT FMLA LEAVE?**

61% of employers report having difficulty managing intermittent FMLA leave because of the nature of it and 64% of employers report experiencing what they believe to be employee abuse of intermittent FMLA leave and we'll talk about some of the circumstances surrounding potential abuse situations and hopefully some helpful hints or guidance on what employers can do to more successfully manage intermittent FMLA leave in the workplace. So before getting into some of the specific focus on intermittent leave, I thought it might be helpful, given that we have an audience, sort of spanning a broad scope of employers and folks working within various industries and in different capacities, so I thought we'd recap on FMLA's basic rules, requirements and guidelines might be helpful. The Federal FMLA entitles eligible employees of covered employers to take unpaid, job protected leave for specified family and medical reasons so that's sort of the black letter, simple explanation of what FMLA is. Now there's a couple of words in that explanation that, that are very specific and have definitions within FMLA that employers need to understand and, and work with. FMLA, what does it mean to have job protected leave? Which is what FMLA is all about and what FMLA protected leave means is that

an eligible employee is entitled to 12 weeks of leave in a 12 month period. That's 26 weeks rather than 12 for military employees, and there's a number of instances within the FMLA where there are differences or exceptions for military related circumstances. That, again could probably be at least a webinar, if not a seminar unto itself. They'll be a couple of instances where I'll point out differences related to military in today's presentation, but, but it won't be a significant focus of our talk today. But you should just be aware that there are specific provisions in the FMLA related to military so if you have that situation in your workplace, you should certainly consult with your counsel in house or outside council to make sure you're in compliance with FMLA as it relates to a military employee. The other aspect of job protected leave under the FMLA is, and this is the protection part is an employee must be reinstated to his or her original or an equivalent position upon, at the end of their FMLA leave, and we'll talk a little more about what exactly that means as we proceed today. FMLA applies to covered employers. And who is a covered employer? Well, a covered employer as defined by the FMLA is all private sector employers who have 50 or more employees. Please understand that FMLA differs from some other federal statutes or laws, under FMLA it's simply 50 or more employees. There's no distinction between full-time or part-time employees, it's just 50 bodies if you will. So, any private sector employer with 50 or more employees is a covered employer. FMLA applies to all federal, state and government agencies, regardless of how many employees that agency has. And FMLA also applies to any public and private secondary schools regardless of number of individuals there. FMLA, as I indicated applies to eligible employees, so the question is, who is an eligible employee?

## **ELIGIBLE EMPLOYEES**

An eligible employee is one who works for a covered employer, and we just spoke about who constitutes a covered employer. An eligible employee must have worked for that covered employer for at least 12 months, and must have at least 1,250 hours of service for that covered employer within that 12 month period immediately preceding their leave. So that's not necessarily 12 calendar months and neither of those instances, it's 12 months is the time frame to keep in mind, again 1,250 hours, that's not a distinction that focuses on full-time or part-time employment, it's an hours calculation so you know if you did the math, you know arguably even a part-time employee if they averaged about, if you do the math, it's slightly more than 24 hours a week over the course of a year would make a part-time employee eligible for FMLA leave including intermittent leave in that category, so those are sort of numbers to keep in mind as you try to determine whether or not an employee who might be requesting FMLA leave is in fact an eligible employee. And then the last requirement for an eligible employee is an employee who works at a location where the employer has at least 50 employees within 75 miles. So, meaning, if you have an employer who has different work sites there may not be 50 employees at one single site but if there are 50 employees of that employer within a 75 mile radius then that employee would be eligible as well. So assuming you have a covered employer, an eligible employee, what then is the leave entitlement for an eligible employee?

## LEAVE ENTITLEMENT

That eligible employee make take up to 12 work weeks of leave in a 12 month period for 1 of several defined reasons under FMLA, those reasons including the birth of a child, or the placement of a child with an employee for adoption or foster care, to care for a spouse, child or parent who has a serious health condition, and I'll talk more about serious health condition in a moment because that is a defined term if you will under the FMLA. It should be noted that in this category, caring for a child, spouse or parent with a serious health condition, meaning that an employee is taking FMLA leave not for their own medical condition or needs but for an immediate family member... spouse, child or parent. Please understand FMLA does not include in-laws, so you don't have to worry about offending your in-laws by telling them you're not taking time off to help them with their situation. The law it doesn't allow FMLA leave to cover in-laws. Also, in a circumstance where you have a child over age 18, and the question is whether FMLA is appropriate for an otherwise eligible employee. It only covers FMLA leave for children over 18 if the child is incapable of self-care because of a serious disability that impacts a major life activity. In this issue, there are a number of aspects or issues that can arise under FMLA that require you to pay attention to other federal statutes or laws, many times particularly the ADA, the Americans with disabilities act. This one issue where if you have a situation, an employee with a child over age 18 and you're trying to assess or determine whether FMLA leave is appropriate you're gonna want to make sure you do the appropriate analysis under the ADA before reaching a conclusion on that issue. Going back to serious health condition for a moment, The FMLA defines serious health condition as an illness, injury, impairment, or physical or mental condition that involves either in-patient care in a hospital, hospice or residential medical facility or continuing treatment by a healthcare provider. And in the context of intermittent leave it is that second category, the continuing treatment by a healthcare provider which is most often the circumstance warranting the request for FMLA leave when you're talking about intermittent FMLA leave. So that is the definition of serious health condition and one that you as the employer will want to be mindful of in dealing with FMLA requests. A serious health condition as it relates to an employee is one that prevents the employee from performing his or her normal work functions on a recurring basis or for more than a few days. The other circumstance where leave entitlement is addressed is for any qualifying and I apologize there's a typo here, that should say exigency rather than emergency. So for any qualifying exigency arising out of the fact that spouse, child or parent is a military member on covered active duty or called to covered active duty status, so that's another circumstance where FMLA leave entitlement may arise. I've included a note there again, just another circumstance where the FMLA differs when you're talking about the circumstance of a military situation it's 26 work weeks, again other than the 12 weeks. Now in terms of notice under the FMLA and what's required, as an employer you should understand and be aware that employees are generally required to comply with their employers usual and customary requirements for requesting leave and provide enough information for their employer to reasonably determine whether the FMLA may apply to the leave request, based upon the things that we just talked about whether it is a circumstance that, that qualifies for FMLA leave. Generally speaking, employees must request leave 30 days in advance when the need for that leave is foreseeable, so for example if an

employee knows that they're going to need some time off because they need to schedule a surgical procedure and it is not an emergency situation, so they have the ability to schedule that procedure sufficiently in advance to provide notice to you as the employer, if that notice can be provided 30 days in advance that is the generally accepted and recommended notice period. Obviously, life doesn't always work that way and circumstances arise and the ability to provide 30 days notice is not always achievable, so when the need for leave is, is foreseeable less than 30 days in advance or it's unforeseeable, obviously an accident or some other unexpected circumstance arises requiring the employee to be off work and to seek FMLA leave. You know, employees have an obligation to provide as much notice as possible and practicable under the circumstances. That's one of many situations under the FMLA where it's going to have to be judged and assessed on, on a case by case basis. What might be possible and practical in one circumstance might not be in another but you know a good FMLA policy in your employee handbook, should articulate these expectations so that employees understand what the expectations are, what their obligations are as the employee in terms of providing appropriate notice to you as the employer to cover FMLA leave requests and situations.

## **NOTICE**

From the employer perspective, what you want to be aware of is that as a covered employer your obligations from a notice standpoint to your employees are to post a notice explaining the rights and responsibilities under the FMLA, include information about the FMLA in your employee handbook as I just mentioned or provide information to new employees upon hire, if you address or handle your FMLA communications separate from your employee handbook. When an employee requests FMLA leave, or you as the employer learn or require knowledge or information that leave may be for an FMLA qualifying reason, even if the employee hasn't raised the issue as an FMLA leave request. You as the employer should provide that employee with notice concerning his or her eligibility for FMLA leave and his or her rights or responsibilities under the FMLA. You should also notify the employee once you have all the necessary information what the leave is being designated as FMLA leave and what amount of leave will be deducted from that employee's FMLA entitlement, generally speaking that 12 week period. One big issue, when talking about FMLA leave generally but certainly when you're talking about intermittent FMLA leave, the medical certification process related to FMLA leave. When an employee requests FMLA leave, you as the employer can require certification in support of a leave from the employee's healthcare provider who's, who's supporting that FMLA leave request. You as the employer should provide the employee with the certification form within 5 business days of the request being made or, or you learning of information that there may be a circumstance warranting FMLA leave. The certification should specify the duration of the FMLA leave needed, the frequency of the leave if you're talking about an intermittent FMLA situation, the diagnosis at issue and, and the planned treatment. Employers, as a best practice should certainly confirm eligibility or in-eligibility within 5 business days of receipt of the request for FMLA leave. This should not be a process that's protracted or gets bogged down in red tape, obviously circumstances specifically necessitate the decision making with FMLA leave to be on a timely basis and as the employer you don't want to set yourself up for any sort of interference

with FMLA rights because of a delay in responding to or making a decision with respect to whether an employee's leave is deemed to be eligible or not.

## **MEDICAL CERTIFICATION**

Employees have an obligation as well, they must return their completed certification form within 15 calendar days of being provided, it's not business days, it's, it's calendar days so you should be mindful of the timing and the obligation on them, unless there are some exogenous circumstances which make it impossible or, or impractical for the employee to be able to return the form within the time frame, that should be the time frame that is included in your FMLA policy so employees are on notice of that obligation but they should also be reminded of that, that should be highlighted for them when they're provided with the paperwork, the medical certification paperwork. As an employer there are certain circumstances where there may be questions about or there may be a need for further investigation before a determination can be made with respect to FMLA eligibility. Employers under the FMLA do have the right to require a second or third medical opinion and/or periodic re-certification of what was previously determined to be a serious health condition. It should be noted that second or third opinions on medical certification are, are at the employer's expense, you can't force the employee to pay for that second or third medical opinion but, but at the employer's expense that can be done in circumstances that warrant it. Generally, an employer cannot, should not seek a re-certification prior to the expiration of the prior certification or every 30 days, whichever is longer. This issue arises very frequently in the context of intermittent FMLA leave because people are, are taking time off, coming back to work, taking time off, coming back to work and, and, and the need for re-certifying the circumstances, justifying or warranting the intermittent FMLA leave often arise in that circumstance but it should be noted that you shouldn't be doing that more than every 30 days unless circumstances warrant, and there are some circumstances and exceptions noted under FMLA law that, that allow for more frequent re-certification. That's if an employee requests an extension of their leave so if they're out on leave and, and they notify you that they need to extend their leave for some reason, re-certification in that circumstance can be warranted even if it's been less than the time frame than I previously mentioned. If the circumstances described in the prior certification have changed significantly, so if the employee went out on leave for a specific, designated medical condition or issue and then there's a notification that some other circumstance has arisen, either some additional issue, some complication of the prior issue, if those circumstances result in, in a change in the employee's condition or situation, re-certification in that circumstance can be warranted. In talking about intermittent leave the 3rd bullet point here is the one I have seen most frequently which is the employer, somehow, somehow receives information that causes some concern about the legitimacy of the employee's stated reason for the leave. Most often that comes in the form of some other employee letting it be known directly or indirectly that the employee who's out on leave is not necessarily recuperating or following doctor's orders, they're at Kennywood riding the rollercoaster and they posted it on Facebook and somebody's talking about it at the water cooler and somebody from HR or, or in management, some supervisor in capacity otherwise hears that, those type of situations where an employer somehow receives information that casts

doubt on the employee's stated reason for the leave that circumstance can warrant requiring a re-certification outside the normal time frame for asking for that.

## **JOB RESTORATION AND HEALTH BENEFITS**

Upon return from FMLA leave and this is part of the job protected element of FMLA leave that I spoke about at the beginning of my comment, this is an important aspect of FMLA, upon return from FMLA leave an employee must be restored to his or her original job or to an equivalent job with equivalent pay, benefits and other terms and conditions of employment. So, what does that mean exactly? Equivalent job. It means for lack of a better definition, substantially similar, the shift and work schedule must be the same or substantially similar so if somebody was working on the day shift you can't, when they come back to work put them on the night shift. The job must be geographically proximate in terms of their prior work site. So if you're an employer with multiple locations and the employee who went out at leave, on leave works at the company's headquarters but you've got other locations in outlying counties or in other, you can't return that employee to work and send them to work at a location that is not within the same very similar or very close geographic proximity to where they worked prior to going out on leave. It's got to be a job with substantially similar duties, responsibilities, and authority, if they were in a management position when they went out on leave you can't return them to you know working in the file room, or the mail room when they come back to work. It's got to be a job with the same effort of skill level and authority, so those two bullet points overlap to some degree. Identical pay and benefits, there can't be a reduction in their compensation including bonus eligibility or any of their benefits attributable to their employment anything that they had or were entitled to prior to going out on leave needs to be restored when the return from leave. Also it's important to understand that employers are required to continue group health insurance coverage for an employee on FMLA leave and the employee of course is obligated to continue to pay his or her share of the premium if there is an employee contribution to their healthcare insurance premium, both parties are required to maintain their ongoing obligations with respect to health insurance when out on leave.

## **INTERMITTENT LEAVE - WHAT IS IT?**

So intermittent leave specifically, you know one definition that I often see quoted in case law that's out there on the issue of disputes on intermittent leave is you know when they define intermittent leave this case from the 6th circuit often gets quoted, and that court defined it as a series of absences separated by days during which the employee is at work but all of which are taken for the same medical reason, subject to the same notice and taken during the same 12 month period. So that's a generally speaking a, a good solid definition of what intermittent leave is. When leave is needed for planned medical treatment, obviously the employee has an obligation to make a reasonable effort to schedule that treatment, so as not to unduly disrupt the employer's operations. So if, if there's an ability to schedule medical appointments, a test, a scan, an office visit to a doctor, if there's an ability to schedule that you know before work hours, during a lunch hour, at the end of the day when it might be the least disruptive to the employer's

operations, the employee has an obligation to try to accommodate that and this is where communication between whomever the appropriate representative is on behalf of the employer, hopefully that's an HR professional and the employee are discussing these issues there should be communication about what is, in an ideal world what is, what is the best timing to try to accommodate the need for leaving the workplace to deal with whatever medical treatment is required. If there's an ability to do it on a Saturday, if the physician's office is open on a Saturday an employee has an obligation to, to schedule on a Saturday even though that may interfere with their personal life rather than take time off during the workday to make that appointment. Employers, this is an important issue, often comes up in the context of FMLA and certainly with respect to intermittent FMLA, employers can require employees to use accrued paid leave such as PTO, sick or vacation time during the FMLA leave period. So what that means is paid and unpaid time would run concurrently. And, and this is an important point to make sure you have part of your written FMLA policy, if it's not part of your written FMLA policy an issue can arise as to whether or not an employer can do that, but if it's part of your policy there's no question that an employer can require an employee to use accrued paid leave time to run concurrently with FMLA leave and that's an important tool in an employer's arsenal for minimizing abuse because if an employee is forced to burn their personal time, vacation or other time, they're less likely to abuse FMLA leave.

## **INTERMITTENT LEAVE**

So just some general examples of what might be considered intermittent FMLA leave, if someone has to miss a few half days in a week or miss an hour or two at a time to take a chronically sick child to a medical appointment or to stay home with the child when a medical condition prevents the child from attending school, that may be an eligible intermittent FMLA leave circumstance. An employee who, who has to work part-time for a number of weeks, say 24 weeks in this example to be able to receive cancer treatments and rest from the accompanying fatigue. An employee who suffers from a chronic condition such as migraines, sciatica, asthma, depression - all of those circumstances can, can arguably be eligible for intermittent FMLA leave and we'll talk a little bit about that last circumstance because that one, that's a real challenge for employers because those conditions are not predictable if you will in terms of when they flare up or when the employee experiences those medical issues and so that impacts their ability to give notice, it impacts the ability to tell how long they might be out from work, the frequency so that's a real challenge from an employer standpoint managing those sorts of chronic, recurring conditions.

## **EMPLOYEE CONSENT**

Like other FMLA leave for which an eligible employee is qualified employer consent is not required when talking about intermittent or reduced-schedule leave that is medically necessary due to pregnancy, a serious health condition, and we've talked about what that means or the serious illness or injury of a covered service member. In those circumstances an employer does not need to consent to the FMLA leave, the employee is entitled to take the FMLA leave and the

employer can't deny it. Intermittent leave requests for the placement for adoption or foster care of a child are subject to employer approval, employer consent is required under those circumstances. An employer typically must also consent to intermittent leave that an employee requests in order to provide child care after the birth of a child or the placement of an adopted child. So if an employee is asking for intermittent leave in the circumstance of the birth of a child or the placement of an adopted child, an employer does need to consent to that. The DOL's regulations do not require an employer to grant intermittent FMLA leave for child birth, now the exception there is if the mother develops complications from childbirth, or the infant is premature and suffers from health problems, the "serious health condition" qualifier that we've talked about earlier would likely be triggered and require the employer to grant intermittent leave in that circumstance, but that's one nuance related to the issue of, of pregnant and childbirth that the employers should be aware of when it comes to FMLA and specifically intermittent FMLA.

## **EMPLOYER CONSENT**

Employer consent is not required when intermittent FMLA leave is, is requested in certain circumstances that are defined as a qualifying exigency with respect to members of the military, and this is a laundry list just for your reference of those circumstances where employer consent is not required so you should be aware of those.

## **MANAGING FMLA INTERMITTENT LEAVE & TRACKING**

So managing FMLA intermittent leave some of the, some of the hints from an employment lawyer perspective that employers can and should pay attention to and utilize to help manage intermittent FMLA is tracking and by that I mean first and foremost, certifying and scheduling the leave. The law requires employers as we've talked about specifically certification from the employee's doctor of the need for FMLA leave. As the employer you shouldn't just accept blanket statements, there are certification forms that come back that simply say intermittent leave recommended, that's not deemed sufficient under the law for purposes of certifying intermittent FMLA leave so you should press back on that you should require more, you can require more and the doctor should provide more. Oftentimes doctors get pressed by their patients to, to give them the necessary excuse or paperwork to allow them to have time off from work and doctors will in order to sort of not be unfruitful or misleading in what they do, they sometimes will be a bit cryptic and use phrases like "intermittent leave recommended" that, that should not pass muster in your HR department and you should push back on that. As I previously mentioned, you as the employer can request a new medical certification of an employee at the start of each FMLA year, so if FMLA leave, intermittent leave is rolling over into a new year you can request a new medical certification, however you as the employer define that FMLA year. We talked about second or third opinions that, that under certain circumstances can be requested or required again at the employer's expense. When employees have chronic conditions that I talked about a few moments ago like asthma, or depression, migraines, sciatica, crohn's disease, things that are not, chronic in the sense that the employee suffers from them on an ongoing regular basis, but they're not necessarily a daily or weekly occurrence,



when employees have those sorts of conditions and their certifications call for intermittent leave, again you should attempt to work out the leave schedule as far in advance as possible, it's certainly legal to try and schedule but you can't deny the leave understand that, even though it can create difficulties in the workplace in terms of covering other employees work, you can't deny the leave. A note here, and again another circumstance in which the FMLA has ADA implications, unlike the ADA which does not require an employer to provide an accommodation if it creates an "undue hardship" and that's a defined term if you will under the ADA, there is no such standard or exception for FMLA leave. So even if it creates an undue hardship you can't deny the FMLA leave if the employee is otherwise eligible and entitled to FMLA you can't deny the leave simply because it creates an undue hardship so you should understand that distinction and not have confusion about what the ADA allows or provides for, the FMLA is different in that respect. And as I mentioned you can't refuse FMLA leave when workers are entitled to it, you can't force them to return early from an injury for light duty work either. So key points to take away from, from the determination of eligibility and granting FMLA leave, you know to the best of your ability nail down the expected frequency and duration of the leave, insist of a medical provider's opinion on how often or likely an employee will need time off and you can wait until the provider gives you that estimate before to approve the intermittent leave in those circumstances where, where approval is allowed. Other, just a best practice recommendation from my standpoint is employers should utilize the Department of Labor's official certification form and I've, I've given you the reference there, that can be pulled off the internet off the Department of Labor's website. But using that form, rather than your own self adapted form will likely minimize, eliminate any potential problems as to whether or not your certification passes muster if you will from a legal standpoint and it certainly provides all of the requisite questions and issues from an employer's perspective that you should make sure you have appropriate and sufficient information from both the employee and the medical care provider. Also as part of the tracking process, seeking the re-certification, this comes up typically in the what I'll call the Friday/Monday scenario when you as the employer have identified or noticed that an employee on intermittent leave is, is routinely seeking time off on Mondays and Fridays the Department of Labor has come out and indicated that that pattern of absences qualifies or is justifiable information to cast doubt on that employee's stated need for FMLA leave and that's a circumstance where you can request re-certification more frequently than every 30 days. I'm mindful of our timing here so I'm going to jump ahead a little bit, there's some repetition here. In terms of sniffing out suspicious FMLA requests, again the medical certification process is the biggest weapon you as the employer have in combatting potential fraud under the FMLA, so utilize that. The right to obtain information, get a certification for each request for leave due to a serious health condition. Enforce your policy, I can't stress this enough, your policies as an employer aren't worth the paper they're written on if they're not consistently enforced and adhered to. So enforcing your policy and deny leave requests if an employee fails to submit the certification within the required time frame, examine the certification closely, require a second opinion if it's warranted, once the certification is approved make a limited inquiry each time the employee requests more leave, meaning just simply confirming that the leave is for the same qualifying reason. Watch the absences when you're talking about intermittent leave, look for that Friday/Monday pattern, look for the pattern, time off always around the holidays. Request the

certifications as often as the law allows. Again, require the leave to run concurrently with, with accrued leave to minimize potential abuse. Ask the physician to verify that the medical certification that you've been provided is exactly what he or she assigned. There have been circumstances or occurrences where employees you know get the form back from the doctor and they even notice the doctor hasn't necessarily completed it as required and the employee fills it in him or herself. Once you get the certification, send it to the doctor's office and ask for confirmation that it's exactly what they signed. If you sense a potential fraud situation, you know follow up on that and certainly always follow up on reports from fellow employees or other sources that there may be an abuse situation.

## **IMPORTANT POINTS IN MANAGING INTERMITTENT FMLA LEAVE**

One important thing I want to make sure everybody understands in terms of a certification process and following up on or requesting re-certification, that should never be done by an employee's direct supervisor. It should be done by somebody in HR preferably or, or some other management level or administrative person. It should never be the supervisor who directly oversees the employee, an issue. So that's to be noted. Also, if an employee's on workers comp you cannot require an employee to use accrued PTO, vacation, sick time so that's an exception to what I previously recommended so be aware of that exception in a workers comp situation. Also, as the employer you can require, it is not unlawful to require an employee to call in whenever they're going to be absent and certainly when they're utilizing intermittent FMLA leave. They can be required to call a specific phone number or a designated person so they're not just calling the front desk or leaving a message on voicemail at a general call number and the reason this is important is because for tracking purposes and for counting and tracking, particularly intermittent FMLA leave you want confirmation that that absence is in fact for the approved leave reason, you know somebody's out on FMLA leave and they call in and say I'm not going to be in today, you want to make sure it's because they're out with a migraine and it's not because their water pipe burst and they have to stay home and wait for the plumber. Tracking FMLA leave, it's important that you put the obligation on the employee to call in and confirm the reason for their absence. Also, with respect to over time, I, I occasionally get questions about overtime issues as it relates to intermittent FMLA leave, the regulations specifically prohibit employers from refusing to assign overtime that would otherwise be available to employees who have taken FMLA leave. So you should only decline to offer overtime to employees on intermittent FMLA leave if the employee's medical certification expressly states that they're precluded from working overtime. So just because they're out on intermittent FMLA doesn't mean that they shouldn't otherwise be offered overtime that they would be eligible for, only if the medical certification says they're precluded from that, should you not offer them the overtime. Also, if an employee would normally be required to work overtime but can't because of their FMLA qualifying reason the hours that that employee would've been required to work overtime can be counted against their FMLA entitlement so be aware of that as it relates to overtime. Now, an employee who doesn't volunteer for overtime that's offered, as long as it's not required overtime. If they don't accept overtime or volunteer for overtime that's offered you can't use it as FMLA leave unless it's required overtime. So, if they

decline, they don't volunteer for overtime, you can't count that. So if an employee is on intermittent leave and is absent on a company holiday, the holiday cannot count against the employee's FMLA leave unless the employee was scheduled to work on that holiday. So be mindful of that. And also if you're an employer with an operation that might close for a week or more, sometimes that happens around holiday time, manufacturing facilities, other types of operations close the week before Christmas and New Years or sometimes in the summer, the height of summer vacation season a business might be closed for a week. If your business is closed for a week or more, the days that the operation is inactive cannot be counted against an employee's intermittent FMLA leave, if they're out on leave during that period of time. So be mindful of that. An employer, you also have the right to temporarily transfer an employee to an alternative job that better accommodates the recurring periods of intermittent leave than the employee's regular job might. So if it's an alternative position available, that position doesn't need to have equivalent duties but it must have equivalent pay and benefits. So what we're talking about here is a temporary transfer, this is different than the return to work scenario at the conclusion of FMLA leave, that does require the job to be substantially similar, equivalent duties, responsibilities, authority, in talking about a temporary transfer during the course of intermittent FMLA leave. It doesn't have to be equivalent duties but it does have to be equivalent pay and benefits. So the message here is that you can't alter the employee's employment during intermittent FMLA leave if that alteration could be deemed to be an effort to discourage the employee from taking leave. So you make the conditions or the employment situation so markedly different in terms of their work schedule, their work site, what they're doing, that it could arguably be interpreted as an effort or a means to discourage the employee from taking leave, that's not lawful. The temporary transfer obviously that circumstance has to end once the employee no longer needs leave and of course you need to be mindful that before making a transfer you want to make sure you're not in violation of any provisions of a collective bargaining agreement if that is an issue and a circumstance you're dealing with and certainly any of the other applicable Federal or state laws including the ADA. Part-time's an option but you can't force an employee to take more leave than is necessary so you can't force someone to go to a part-time schedule if that requires them to take more time off and utilize more FMLA leave than their circumstances warrant and you cannot eliminate benefits because of part-time status but you can reduce proportionally the benefits based upon the number of hours, so for example, the best example there, accrued vacation time. That can be adjusted if it's based on the number of hours but you can't eliminate benefits otherwise just because someone shifts to a part-time.

#### **QUESTIONS:**

So that's it, I will stop there, we'll see if we have any questions.

OTHER SPEAKER: We do have a few questions.

MARY- JO: Okay

OTHER SPEAKER: So, first one, how long should the FMLA certification 15 day deadline be extended when the extenuating circumstances arise?

MARY-JO: Well, again that's a question that's going to be dependent upon what the extenuating circumstances are, I had one a couple of months ago, a client who had an employee reporting that they couldn't get the form returned in time because their treating physician was on vacation, was on a 3-week vacation. So the situation there is, the question obviously, when's the doctor going to return. Okay, recognizing that this might not be the highest priority on the doctor's to do list immediately upon return from vacation, you don't want to necessarily mandate that they need to have it back 24 hours after the doctor returns from vacation. But certainly that next business week upon the physician's return from vacation, so that's just one example. It's going to be highly dependent upon whatever the circumstances are that's warranting the ability to get the form completed and returned in time. So I wish I could give you a black and white answer to that, it's going to be a use your best judgement, it's not going to be a one size fits all, it's going to be a highly dependent, and it's going to be heavily dependent upon what the employee is communicating as the reason for the inability to turn it in within the 15 days.

OTHER SPEAKER: Okay. Next question, as far as chronic conditions, can an employer expect an employee to recover? An example, an employee has chronic back pain but has surgery. It is reasonable to expect the employee to recover from the chronic prior condition.

MARY-JO: Yeah, I mean that's obviously going to be dependent upon the advice of the medical treating physician or physicians in terms of what the recovery, the expectation of recovery is, there are some situations obviously chronic back pain, there are some situations where surgery may alleviate some of the symptoms associated with that back pain, for example if somebody has recurring shooting pain down their leg or nerve issues, they get you know, they can't sit for long periods of time because of this back issue. Surgery may help that particular nuance that's deriving from the back issue, it may not cure the back issue in it's entirety, that employee may still have back related pain, discomfort issues associated that'll root with that initial diagnosis. So it's going to be dependent upon the information that you receive from the treating physician as to what the surgery is intended to address and the likely recovery from that surgical option again and as with so many things FMLA related and when you're dealing with individuals health conditions highly dependent upon the particular facts of the medical diagnosis and the treatment plan provided.

OTHER SPEAKER: Okay. Is it all all chronic conditions that do not need to have an intermittent schedule or only certain things? For example, if someone has a migraine and is supposed to have intermittent FMLA but the doctor will not provide a frequency for the time needed. Do we still need to approve?

MARY-JO: Yeah, best practice on that is to really press the treating physicians for some indication of the likely frequency, and I can tell you, not to reveal too much personal information

but I am one who suffers from migraines and I see a physician out at the migraine center here in Pittsburgh and I can tell you the first thing I have to do before I actually see him is I've got to fill out every time I go to his office this questionnaire with all of these questions and specifics aimed at his ability to assess since he saw me last, what the frequency of my migraines are, fortunately I see him pretty much only on a yearly basis now because his treatments are working but you know and, and the first thing he will do is look at the information that I'm providing him based upon my experience since the last time I saw him and the first thing he'll say to me is okay, I see that you're averaging you know x, last year you were averaging y. The treating physician has some ability based upon their assessment of the patient to make a, a prediction and it's just that, it's a prediction, in this circumstance if you receive a certification from a physician that has the frequency as for example, estimated at you know 2-3 times a month there may be a migraine experience or flair up and then employee, you're tracking this and you see the employee has 7 absences in the past month. That is a circumstance where you can legitimately follow-up and ask for a re-certification if the estimate is deviating from what you're seeing at the actual absence experience with that employee. I would not recommend necessarily pressing that button in the first month that might deviate from what the physician has estimated but if you have a reasonable period of time that you've had the certification and you have you know a reasonable period of time comparing the actual absence experience to that certification and there's a meaningful deviation, then that is justifiable circumstances to warrant or request a re-certification or follow-up from the treating physician.

OTHER SPEAKER: Okay. I think we have time for one more question.

MARY-JO: Okay.

OTHER SPEAKER: Those, we really appreciate you submitting those questions and they're very important so we will get answers out after the conclusion of the program. We will send them via email to address and answer questions we haven't. But, our last question is, For a Friday/Monday pattern, what amount would be considered a pattern?

MARY-JO: Yeah. I would say if you have at least 3 or more experiences where somebody has otherwise a, an eligible intermittent FMLA leave certification and, and you have 3 or more instances of the Friday/Monday or the oh it just always happens around a holiday type experience that that is a justifiable circumstance to, to request and to bring that to the attention of the treating provider and see what action he will take in terms of re-certifying that intermittent leave.

OTHER SPEAKER: Okay. Alright well when it again, thank you for taking the time to join the webinar today, we hope that you received some valuable information, as I mentioned, we will have the unanswered questions sent out with answers to you later this afternoon and...

MARY-JO: Uh, not so sure about that time, but soon.

OTHER SPEAKER: (Laughs)

OTHER SPEAKER: Soon, and then we will also have this webinar available on our website in the next few days should you need to review it for any additional information. As always, Mary-Jo is happy to answer any other questions that you might have, if you think of anything, please feel free to send us an email and have a great rest of your day!

MARY-JO: Thank you!