

## Employment Law Update: Summertime and Taking Leave Is Easy - August 2018

### Summertime and Taking Leave Is Easy

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Summertime brings summer vacations and holidays. However, for employers, it can also bring a pattern of Friday and Monday absenteeism by employees on intermittent leave under the Family Medical Leave Act (FMLA) or, perhaps in these instances, better referred to as the “Friday Monday Leave Act.” Understandably, this pattern may raise the suspicion of an employer who questions the validity of the absence, but feels there is no recourse for fear of violating the FMLA. However, employers, have no fear, there are ways to address the matter without running afoul of the FMLA.

The FMLA allows eligible employees of covered employers to take unpaid, job-protected leave for a specified family or medical reason with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. Once it has been determined that an employee is eligible for leave under the FMLA, leave can be taken all at once or intermittently. It is intermittent leave that gives rise to the Friday/Monday absence pattern.

Once an employee is certified for intermittent FMLA, an employer can request recertification every 30 days for pregnancy, chronic or permanent/long term conditions, none of which have a specified minimum duration of incapacity, provided the recertification is requested in connection with an absence and it is made on a “reasonable basis.” If circumstances change significantly, or the employer receives information that cast doubt on the continuing validity of the certification, recertification may be requested more frequently than every 30 days.

The U.S Department of Labor, the governmental entity that enforces the FMLA, has found that a pattern of Friday/Monday absences can constitute “information that casts doubt upon the employee’s stated reason for the absence,” triggering recertification more frequently than every 30 days. However, there must not be evidence that provides a medical reason for the timing of such absences and the request for recertification is made in conjunction with an absence. For example, according to the Department of Labor: “A recertification under these circumstances could thus be justified . . . if a medical certification indicated the need for intermittent leave for two or three days a month due to migraine headaches, and the employee took such leave every Monday or Friday (the first and last days of the

employee's work week)."

In some instances, termination can be justified if it is found that an employee is abusing FMLA leave by using leave time to extend the weekend. In the recent case, *Tillman v. Ohio Bell Telephone Company*, a federal appellate court addressed the pattern of Friday/Monday absences when it upheld summary judgment in favor of an employer that terminated its employee after surveillance footage revealed the employee misused his intermittent FMLA leave. The employee's attendance record showed a pattern of absences that routinely fell on Fridays and weekends, resulting in multiple three-day and even four-day weekends off from work. The employer became suspicious, and after an investigation of the employee's actions during leave, which showed him running errands and working in his yard, he was terminated. On appeal, the appellate court found that the surveillance footage the employer offered was legitimate, non-discriminatory evidence of intermittent leave abuse, and as such, no FMLA violations occurred.

While summertime does bring vacations and holidays, employees on intermittent FMLA leave remain accountable to their employers. The FMLA allows an employee to balance workplace demands with family and personal medical obligations, and it should not be used as a three-day weekend pass.