Managing FMLA Intermittent Leaves and Curbing Abuse
**TABLE OF CONTENTS**

Introduction ................................................................................................................................. 3
Understanding the Law .................................................................................................................. 4
  Employer Rights ........................................................................................................................ 4
Case Study – The Ajax Perfume Company .................................................................................. 7
  #1 – Harold Underdown, California ......................................................................................... 8
  #2 – Mary Lots, Kentucky ........................................................................................................ 8
  #3 – Jean Levis, Alaska ............................................................................................................ 9
  #4 – Justin Kerrigan, New Hampshire ..................................................................................... 10
  #5 – Sheryl Newson, Illinois ................................................................................................... 11
Making Technology Work for You .............................................................................................. 11

The information in this whitepaper has been derived from a joint presentation entitled “Intermittent Leaves: Managing Difficulties and Curbing Abuse” which was presented at the 2013 DMEC FMLA/ADAAA Employer Compliance Conference. It was developed and co-presented by Frank Alvarez of Jackson Lewis, Teri Weber of Spring Consulting Group and Donald Olds of Presagia.

---

**NOTICE**

Copyright Presagia 2013. All rights reserved.

Presagia is a registered trademark. The Presagia logo is a trademark of Presagia Corp. Other trademarks identified in this document are the property of their respective owners.

Information provided within this guide is not intended to be used as legal guidance. Presagia maintains that legal counsel should always be consulted when considering or implementing changes to the leave processes and policies.
Introduction

As the summer months are officially upon us, many employers notice a particular trend that takes place across their organization: requests for continuous Family and Medical Leave Act (FMLA) leaves spike along with those even trickier intermittent FMLA requests. With long awaited sunny days perfect for afternoons spent boating, beaching and picnicking, some employees see the use of intermittent leave as the ideal way to take advantage of the season. Others may wait until hunting season kicks off or see it as a way to extend their winter holidays. It’s no secret that managing intermittent leave is one of the most complex areas to administer under the FMLA and while a surge of employees suddenly requesting intermittent FMLA leaves may seem suspicious, taking disciplinary action can land employers in hot water. Properly certifying, scheduling and tracking are the basics of the intermittent leave process but knowing how to curb abuse and enforce disciplinary action, when appropriate and required, are equally as important.

In this whitepaper we are going to use a case study methodology to show examples of real world challenges through a fictitious company, the Ajax Perfume Company. We will also illustrate how to implement the programs, technology and business processes needed to properly manage intermittent leaves and how to use those programs, technology and business processes to improve intermittent leave management within your own organization.

When an employee consistently takes FMLA days in what seems like an attempt to extend their weekends and holidays, how do you spot the pattern and curb the abuse?
Understanding the Law

The basics of intermittent FMLA leave are the same as regular FMLA continuous leaves. Employers and employees are subject to certain requirements for eligibility. We’ll explain these briefly below but for detailed information about eligibility, entitlement and medical certifications download Presagia’s FMLA Guide, Second Edition or Presagia’s FMLA Intermittent Leave Guide.

To qualify as an employer you must have 50 employees. To qualify as an employee you must have worked for your employer for at least 12 months and 1,250 hours in the last year. It should be noted that while the employee must have worked for you for 12 months, it does not have to happen consecutively so if an employee is rehired within a seven year period, all time worked counts towards their FMLA eligibility. Eligible employees may take up to 12 weeks of unpaid, job protected leave in any 12 month period or up to 26 workweeks to care for an injured servicemember.

Under FMLA, intermittent leave must be medically necessary and an employer can require the employee to provide a medical certification. Employers are also entitled to information on the expected frequency and duration of the periods of incapacity. Once approved, employees may take intermittent FMLA leaves in increments of days, hours and even minutes. Employees may have multiple intermittent leave cases open at any given time and may take leave without notice in extenuating circumstances.

Employer Rights

While many employers are aware of their rights and obligations under the FMLA, they are often reluctant to exercise their rights. Enforcing call-in and call-out procedures, requiring complete and sufficient information on the medical necessity of intermittent leave and engaging supervisors and managers to properly capture, report and follow up on intermittent leaves all require time and effort. When the process becomes too onerous, inefficient or unreliable, employers feel less confident in their ability to enforce their policies around abuse of intermittent leave. However, while the FMLA may seem like a leave law designed to benefit employees, employers have their own rights as well and exercising those rights can significantly reduce the cost to an organization for intermittent leave.

As an employer you have a right to:

- Require employees to provide complete and sufficient medical documentation that not only supports the leave, but also supports the need for intermittent leave
• Ask for a second opinion if you receive a medical certification that is suspicious, contains information that does not appear to be consistent with the described injury or illness or appears to be contradictory
• Ask for a re-certification if the circumstances of the leave have or appear to have changed
• Require employees to identify which intermittent leave they are taking an absence for if they have multiple approved leaves
• Require employees to be reasonable when scheduling intermittent leave so as not to cause undue hardship to the operation of the business

An important piece to ensuring that your employer rights remain protected lies with recognizing that your rights are not guaranteed but rather conditional. Effective management of intermittent leave requires that employers hold employees accountable for fulfilling their legal obligations to give notice, provide supporting medical documentation and meet the established timelines. However, it is the employer’s responsibility to inform employees in advance of what they must do and say and enforce those obligations. If an employer does not educate their employees on these processes, employees have no legal obligations.

Let’s use an example to clarify. Under the regulations, an employer is entitled to require that employees provide sufficient information for the employer to evaluate whether or not their request for leave qualifies under FMLA. If the employer has provided advance notice to the employee of this requirement, and the employee’s explanation is deemed insufficient, then they have the right to provide written notice of their denial of the leave for this reason. However, if the employer had not provided notice of this requirement, they cannot deny the leave for this reason.

To summarize, employers may deny intermittent leave requests only if they take action:

• Before the leave is ever requested;
• At the time the leave request is made; and
• After employees fail to meet their own obligations.

The following table clearly defines some scenarios when employers may lawfully deny an FMLA request after taking the appropriate steps.
Employer May Deny FMLA Based on...

- Employee failed to give timely notice of need for leave
- Employee failed to provide a timely medical certification
- Leave is not for a serious health condition
- Employee failed to provide complete or sufficient medical certification
- Intermittent leave is not medically necessary

Only if the employer takes the following steps:

- Employer provides general notice to employee of requirement to provide timely notice of need for leave
- Employer evaluates the timing of notice provided by employee
- Employer provides employee written notice denying leave for this reason

- Employer provides employee written notice of need to provide timely medical certification
- Employer provides employee written notice of need to return certification
- Employer extends 15-day deadline in appropriate circumstances
- Following deadline, employer provides employee written notice denying leave for this reason

- Employer obtains a medical certification establishing that the medical condition is not a qualifying serious health condition
- Employer provides employee written notice denying leave for this reason

- Employer provides written notice of deficiency in medical certification
- Employer provides employee at least 7 days to resubmit
- Following deadline, employer provides employee written notice denying leave for this reason

- Employer provides employee with medical certification seeking appropriate information to determine medical need for intermittent leave
- Employer receives medical certification that establishes intermittent leave is not medically necessary
- Employer provides employee written notice denying leave for this reason
Some employers mistakenly believe that managing FMLA abuse is not worth the effort in their current manual process environment because they have difficulty detecting abuse or disciplining with confidence due to inconsistencies in their own programs. Taking disciplinary action with any uncertainty is a risky move and one that can land an employer in unwanted and costly litigation. Yet employers who have a handle on managing intermittent leave share some straightforward common traits:

- They educate front line staff
- They implement well defined call-in and call-out procedures for all absence and attendance programs
- They provide centralized access to absence data for HR and front line staff
- They tie participation in wage replacement programs to unpaid leave approvals
- They actively monitor their programs

Now let’s move on to the case study to put some of these principles into practice.

**Case Study – The Ajax Perfume Company**

Headquartered in Des Moines, Illinois, the Ajax Perfume Company has been in existence since 1926 and has grown significantly since its humble beginnings behind the local tannery, where its founder, Pierre Delacroix, of Parisian origin, began to ply his family trade of creating “beautiful scents for beautiful ladies.” Through a mixture of organic growth and acquisition, by the end of 2012, Ajax Perfume Company had grown to be the national leader in perfume confection and distribution, with 4,000 employees employed at five perfume factories in Illinois, Kentucky, California, New Hampshire and Alaska. As each of the installations beyond the borders of Illinois was acquired, the organization of the Ajax Perfume Company is decentralized, with each factory retaining local control of most corporate functions including all aspects of human resource management. As a result of the acquisitions, the company enjoys a complex web of different Payroll, Time and Attendance and HRIS systems.

M. Delacroix’s grandson, Robert, has recently come into control of the family business and after studying business, has made the decision to centralize human resource management and ensure that company HR policies are harmonized and uniformly applied across all of the company’s installations. His new corporate VP of HR, Lisa “make my” Day, began by inviting all of her HR directors to an off-site meeting and asking them to bring with them concrete examples of some of the issues that they are having difficulty managing. Five of the cases they brought to the table involved difficulty in managing intermittent leave under the FMLA. These are the cases.
#1 – Harold Underdown, California

Harold Underdown works 10 hour shifts four times per week, Monday to Thursday, operating the mixers that take the perfume components and blend them to produce the final product. His herniated disk has resulted in him being absent once a week for three hours to work with his specialized physical therapist. His supervisor signed off on his intermittent leave permission form for every Wednesday morning. While reviewing his FMLA file, Lisa wonders why he didn’t schedule his appointments for Friday. In his file, she only finds absence slips signed by his supervisor permitting him to be out for FMLA leave yet no accompanying medical certification.

The California office has failed to establish a proper policy foundation for the management of FMLA. It must:

- Establish clear and consistent employee-facing policies
- Train managers to understand legal protections available to employees
- Develop a toolbox of forms and letters to facilitate communications with employees in accordance with legal obligations

Learning Point

*Employers forego many of their rights and abilities to manage intermittent FMLA leave if they have not established and communicated clear policies that set forth what the employee and employer must do when a potential FMLA case exists. In this case the employer should have requested and processed a medical certification and should have deemed it reasonable to ask the employee to reschedule their appointments for their day off.*

#2 – Mary Lots, Kentucky

Mary Lots is New Hampshire’s “Perfumer” and is charged with blending the different scents to invent new products to bring to the market. Mary’s nose is in exquisite health, but she suffers from migraines, diabetes and chronic back pain. Given her critical role, Mary’s absence is always noticed and it is being noticed more and more frequently. One day, the plant manager asked HR to review Mary’s absences for the last two years and compare it to the expected frequency and duration of her three approved intermittent leaves. It soon became obvious that both the frequency and duration of Mary’s absences accelerated 12 months ago and had collectively exceeded the combined frequency and duration of her approved leaves. Her leaves were also often falling on a Friday or Monday. Lisa finds three copies of medical certifications in the file but no correspondence prior or any requests for recertification since the cases were opened. She also discovers that
Mary was denied a fourth intermittent leave request but leave as a reasonable accommodation under the Americans with Disabilities Act (ADA) does not appear to have been considered.

While the Kentucky office has effectively communicated to employees their rights and obligations, they lack the appropriate tools and processes to ensure:

- Retention of paper and electronic records
- Absence reasons are captured and assigned to approved leaves
- Notices to and from employees are being delivered/received on time
- HR has the tools to detect differences between expected and actual frequency and duration
- Leave as a reasonable accommodation under the ADA is considered

### Learning Point

*Even with policies in place, employers must have appropriate systems or resources to detect potential areas of abuse and prompt actions such as medical recertification. They must also ensure they record all actions and documentation in a centralized case file.*

### #3 – Jean Levis, Alaska

Jean Levis, a loader operator in the perfume stock room, did not come to work one day. The next day he came in with a WH-380-E medical certification form signed by Dr. Zhivago. He mentioned the nature of his serious medical condition to Lisa in passing. When he left, she reviewed the expected frequency and duration for his intermittent leave reason and even though she had little medical training, it did not seem to correspond to the frequency and duration indicated by the doctor. Reflecting that the name Zhivago seemed familiar, she went back into her records to look at the last few intermittent leave requests that she had filed for other employees. Three of them in the last six months were from Dr. Zhivago and all of them had identical frequencies and durations prescribed. She realizes that while the office tracks the difference between actual and expected frequency and duration, they are missing policies for the review of medical certifications and the conditions under which a healthcare provider is asked for clarification.

The Alaska office lacks the business processes and workflow to ensure that appropriate information is captured and acted on. They need to address:

- Redesign internal systems and departments administering leave policies
- Mandate an appropriate review of initial medical certifications and follow up with a review of each absence to ensure it matches the certification
• Train managers on protocols for escalating complex issues to the leave management team
• Report on healthcare provider performance

Learning Point

*Even with appropriately communicated policies, a comprehensive review of internal processes and workflow is essential to effectively managing intermittent leave. Look to reporting to identify systemic issues like healthcare providers overprescribing leave or always prescribing the same leave.*

#4 – Justin Kerrigan, New Hampshire

Justin Kerrigan is a specialized chemical purchaser working in New Hampshire. He works full time, day shift and has had an open intermittent leave for four years related to chronic back pain. The New Hampshire business unit had recently taken the decision to outsource leave management to a third party provider. The leave case manager from the third party provider called Lisa to report that their internal system had flagged Justin’s intermittent leave file. In the last four years, John had on average missed one day of work per month except for the months of November and December, where he averaged three and a half days per month. Justin’s file contains a complete medical certification and annual recertifications yet knowing that he is a hunting enthusiast, Lisa finds it coincidental that his absences coincide with New Hampshire’s prime deer hunting season – the middle of November to the middle of December – and wonders why his supervisor never questioned his absence patterns over the years.

While the New Hampshire office has proper processes for approving and recertifying intermittent leaves they need to:

• Train HR to detect differences between expected and actual frequency and duration
• Implement consistent and equitable processes for approaching suspected abuse
• Establish clear guidelines for recertifying

Learning Point

*A comprehensive review of company policies, procedures and technology will lead to situations where employees benefit from all of their rights under the FMLA, while employers ensure that only appropriate leave is granted.*
#5 – Sheryl Newson, Illinois

Working as a factory assistant in Illinois, an essential duty of Sheryl Newson’s job is lifting heavy drums, upwards of 50 pounds on a regular basis. During her pregnancy, she was diagnosed with preeclampsia. Shortly after her diagnosis, she applied for intermittent FMLA for scheduled visits to see her healthcare provider. Her healthcare provider informed her she needed to avoid any heavy lifting so Sheryl was moved to a continuous FMLA leave for the remainder of her pregnancy. As Lisa reviews her file, she notices that Sheryl had the baby over a month ago yet is still on leave with preeclampsia as the reason. She also notices that Sheryl was never required to use her accrued paid sick and vacation days, as per company policy. While she has not yet exhausted her FMLA entitlement, Lisa wonders if the manager thinks he is doing her a favor by simply extending her leave not realizing that Sheryl could still be eligible for intermittent leave for birth and bonding without the medical necessity requirement, as long as the employer and employee agree.

The Illinois office has the business processes in place for properly certifying intermittent leaves but lacks the tools to maintain compliance throughout the leave. They need to:

- Clearly communicate company policies regarding employees’ FMLA rights and responsibilities to employees and managers
- Ensure that HR is monitoring cases on an ongoing basis, especially once the conditions of the leave have changed
- Implement processes to ensure HR is maintaining open, compliant communication with employees

Learning Point

Company policies must be reviewed to ensure that proper policies and processes are in place and monitored for the entire leave process to ensure that employer rights are respected while avoiding over entitlement or an incorrect leave designation.

Making Technology Work for You

Employers once had two options when managing employee leaves. The first was to use a manual, time-consuming combination of paper, pencil and spreadsheets. This offered no real possibility of efficiently documenting and processing leaves or monitoring individual employees’ and overall organizational absence patterns. The other option was to hire an outside vendor to take over leave management. While this ‘out of
It is only through adhering to the right process that you can exercise your contingent rights to curb intermittent FMLA abuse.

As with all leave management, the first step to better control over intermittent leave is accurate, accessible documentation. A good software system will record every step in the leave process, from the time the employee gave initial notice of their need for leave through to their full return to work. As intermittent leave can be very complex and can include a lot of correspondence and many decisions along the way, you must always be able to go back at any point in time to prove you made your best efforts as an employer.

While documentation is the first step, the next is to ensure adherence to the timelines set forth by leave laws. As mentioned earlier, employers have contingent rights when managing the FMLA. To enforce these contingent rights, employers must follow the right steps at the right time, sending notices of eligibility, requests for medical certification, reviewing completed medical certifications, sending designation notices, and more. A great software system will automatically notify users with tasks and alerts as these and other deadlines approach to support employers’ efforts to enforce their contingent rights and curb intermittent FMLA abuse.

In addition to providing process automation to ensure consistent and equitable management, each stakeholder in the leave process should have access to decision support tools. For instance, leave managers can benefit from wizards that take them step by step through medical certification reviews and prompt the input of the information that is needed in order to render a decision. Managers on the other hand need easy access to company policies through a tool such as a knowledge base. It is through having all stakeholders in the leave process educated, from the VP of HR to the front line manager to the employees themselves, that employers can ensure the right information and procedures are followed at each step.

Looking back at the Ajax Perfume Company case study, monitoring the many aspects of intermittent leave cases is incredibly difficult, especially when employees are in many locations and can have multiple open cases. There is simply not enough time to manually monitor all intermittent cases for absence patterns that might suggest potential abuse, entitlement exhaustion and recertification. An invaluable tool that some of the latest software systems provide is automatic monitoring of absence patterns and alerts when potential abuse is identified. Absence patterns could be when an employee takes more days than their approved
frequency and duration or when their days off consistently fall on Monday or Friday or always on a day contiguous with a holiday. Software should be able to detect this potential abuse and send an alert to the case manager. The case manager should then have an analysis tool at their fingertips which allows a deeper dive and outlines why the case was flagged, when absences happened, and what the approved frequency and duration is.

Many intermittent leaves are open-ended as they can be in relation to life-long conditions. However, even for these cases, it’s important to keep monitoring them, as the extended length can lead to entitlement exhaustion. When this approaches, the case should be flagged and the employee should be sent an exhaustion warning. You also need to be prompted to periodically recertify such cases, in case conditions have changed. Employers have the right to recertify leaves twice a year, so a best-practice is for the software to initiate recertification at the six month mark.

When choosing a leave management system, make sure that you implement technology that works for you. Make a list of key questions to ask when evaluating or re-evaluating systems. With the right piece of technology added to your leave administration, you will benefit from the confidence that you’re properly adhering to the provisions of the law, while keeping your organization compliant and respecting your employees’ rights.

For more information about the information provided in this whitepaper or about Presagia, contact info@presagia.com or feel free to visit www.presagia.com/enterprise-dashboard for a full list of whitepapers including Presagia’s FMLA Guides and Presagia’s FMLA Intermittent Leave Guide, infographics, articles and more.

About Presagia

Presagia provides integrated absence management software solutions to employers and Human Resources Outsourcing Providers. These innovative solutions, designed to account for more than 450 pieces of federal and state leave legislation across 53 jurisdictions, enable organizations to increase efficiency, improve compliance, control absence, and reduce risks and costs. Presagia customers are located around the world and include enterprises such as Ceridian, CenturyLink/Qwest, American Foods Group and Scripps Health.

www.presagia.com