

# FMLA – Handling Intermittent Leave Issues

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## When can an employee use intermittent leave?

An employee may take intermittent FMLA leave or reduced schedule leave when medically necessary for:

- an incapacity because of a serious health condition;
- the planned or unexpected medical treatment of a serious health condition;
- a military member's serious injury or illness; or
- for a qualifying exigency.

An employee cannot take intermittent leave or reduced schedule leave for the birth, adoption or foster care placement of a child unless the employer consents to the leave.

## What about business disruption?

An employee who needs intermittent or reduced schedule leave for planned medical treatment must make a reasonable effort to schedule the treatment to avoid undue disruption of the employer's operations. Note, this applies to "planned medical leave."

## Can you transfer an employee during intermittent leave?

Yes. During a leave period, you can temporarily transfer an employee who is on foreseeable intermittent leave or reduced schedule leave to an open available position.

The position must be one for which the employee is qualified and that better accommodates the recurring need for leave.

The transfer may include altering an employee's existing job.

Note - The alternative position must have the same pay and benefits.

Returning - When an employee no longer needs intermittent or reduced schedule leave and can return to work full time, the employee must be returned to the same or an equivalent position.

### How do you count increments of FMLA leave?

For intermittent or reduced schedule leave, an employer may need to convert the employee's workweek to hours or fractions of an hour.

For example, an employee who works 50 hours a week has 600 (50 x 12 workweeks of leave) hours of leave available. If that employee worked only 25 hours in a week, that employee would use half of a workweek of FMLA leave.

Note – You must account for an employee's leave using an increment of time no greater than the shortest period of time used to account for other forms of paid or unpaid leave so long as it is not greater than one hour.

However, the employee's FMLA leave entitlement must **not** be reduced by more than the leave actually taken, unless:

1. it is physically impossible for an employee to start work midway through a shift (for example, a pilot), the entire period that the employee must be absent counts against the employee's leave allotment; or
2. the employee wants to substitute paid leave and the company only deducts paid time off in, for example, four-hour increments, then the employer may deduct four hours from the employee's FMLA leave entitlement. [Note - If you mandate the use of paid time off for FMLA leave, the employer must waive the four-hour requirement.]

If the employee is restricted to 40 hours per week, mandatory overtime the employee cannot work should be counted against the employee's FMLA leave entitlement but voluntary overtime cannot be.

### How do you handle exempt employees who are taking intermittent or reduced schedule leave?

You may deduct from an exempt employee's salary any hours taken as intermittent or reduced FMLA leave within a workweek without jeopardizing the employee's exempt status. This deduction is only allowed if the employee is on FMLA-qualifying leave.

You may compensate an employee paid on the fluctuating workweek method on an hourly basis and pay only for hours actually worked.

Under a "fluctuating workweek" pay plan, the employee is paid a salary that is understood to be straight-time compensation for all the time at work, including all overtime hours.

For hours worked over 40 in a workweek, the employee is due an overtime premium calculated by multiplying those hours over 40 by 50% of the hourly rate. The hourly rate is determined by dividing the salary by all hours worked that workweek. The employee's regular rate therefore fluctuates, that is, it decreases as his hours worked increase, and vice versa.

For more information on the Family Medical Leave Act, see our full archive of FMLA blog entries.