



## Employment Law Letter

Focusing on Alaska, Arizona, Hawaii, Nevada, Oregon, Washington

Vol. 4, No. 10 | October 2023

### INTERMITTENT LEAVE

## Managing the challenges of intermittent FMLA

AK AZ HI NV OR WA

by Jodi R. Bohr, Tiffany & Bosco, P.A.

*In March of this year, I provided you with basics steps to take to avoid Family and Medical Leave Act (FMLA) mishaps and best practices to follow when eligible employees request FMLA leave. Since the publication of my previous column, I have been approached by several clients with questions regarding the implementation of intermittent FMLA leave. Managing intermittent FMLA leave creates unique challenges for employers, especially with an increasing remote workforce.*

### Managing intermittent FMLA leave for remote workers

Earlier this year, the Department of Labor (DOL), the agency responsible for enforcing FMLA compliance, issued new guidance for determining eligibility for remote workers and FMLA leave. Specifically, the DOL explained that, in determining eligibility with respect to the requirement that at least 50 employees be employed within a 75-mile radius, the relevant worksite is “the office to which they report or from which their assignments are made.” Based on this guidance, more remote employees will likely be eligible for FMLA than previously presumed.

With respect to intermittent FMLA leave for remote employees, employers need to take extra care to ensure that timekeeping is properly recorded. If digital

timekeeping isn’t an option, it would be helpful to create a spreadsheet and require the employee to record intermittent FMLA time each day. The employee would need to turn that spreadsheet in at the end of each week to human resources to allow for proper tracking and recordkeeping of FMLA leave.

### Intermittent FMLA leave for exempt employees

To start, regardless of whether an employer decides to deduct from an exempt employee’s salary during the intermittent FMLA leave, the employee must track intermittent FMLA leave hours taken to allow the employer to properly track and maintain records for the employee’s leave and know when the leave has been exhausted.

This may be problematic, as employees who are exempt don’t generally track hours worked. Employers should discuss this requirement with their employees before leave starts so employees know why they are tracking their hours.

While an employer generally can’t deduct from the salary of an exempt employee based on quantity of work without losing the FLSA exemption, the employee’s use of FMLA is one exception. Before doing so, the FMLA regulations require an employer and employee to agree on the employee’s normal schedule or average weekly hours. They will also need to agree on the reduced weekly leave

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schedule and reduce that agreement to writing that's maintained in the employee's confidential medical file. This will allow the employer to know the salary deduction to be taken for the intermittent leave.

Keep in mind that this may not be possible in situations in which intermittent FMLA isn't predictable.

### Can an employee make up intermittent FMLA leave?

Whether an employee can make up intermittent FMLA leave depends on the employer's policy and practice. The FMLA doesn't require that an employee be permitted to make up intermittent FMLA leave time, unless the employer has a policy that gives employees using non-FMLA leave the ability to work extra hours and make up missed time.

In other words, employers are required to extend the same benefits to employees on FMLA leave as they provide to employees not taking leave.

Employers should adopt a clear policy ahead of time that defines what makeup time will allow employees to do. Will it just allow employees to replace lost wages? Or will it also allow employees to save FMLA leave? Regardless of what the employer wants to allow, the policy should be clearly stated.

### Key takeaways

As you can see, managing intermittent FMLA leave for employees comes with different challenges. These challenges don't take into consideration various state leave statutes that may be in place.

For example, aside from a paid sick leave statute, Arizona doesn't have state-specific requirements governing medical leave. Regardless, there are still many complications of implementing intermittent FMLA because they're fact-specific. So, if questions arise, consult with experienced employment counsel for guidance.

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### AGE DISCRIMINATION

## AI discrimination—What EEOC settlement with iTutorGroup, Inc., means for employers

AK AZ HI NV OR WA

by Juliet S. Burgess, Burgess Law Group

*Can artificial intelligence (AI) and machine learning programs lead to discrimination claims? The simple answer is yes, and the recent settlement between the Equal Employment Opportunity Commission (EEOC) and three integrated English-language tutoring companies known as iTutorGroup, Inc., confirms any doubts employers might have. Now more than ever, employers should carefully evaluate the benefits and risks of using AI or machine learning in recruiting and for employment decisions like hiring, promotion, and terminations, particularly because statistics show an increasing number of employers are using some form of AI in their hiring process. The EEOC is also continuing to focus on this issue, with the intention of bringing more litigation in this area.*

### Background

The use of AI software, machine learning, and other emerging technologies has raised so many concerns that in 2021, EEOC Chair Charlotte A. Burrows launched an agency-wide initiative to ensure their use complies with the federal civil rights laws the agency enforces. As part of the AI Initiative, the EEOC continues to issue technical assistance; identify permissible practices; hold listening sessions with key stakeholders; and gather information about the adoption, design, and impact of employment-related technologies.

For example, in May 2022, the EEOC publicly released guidance on the Americans with Disabilities Act (ADA) and the use of AI to assess job applicants and employees, and in May 2023, it published a technical assistance document entitled "Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964."