

Intermittent LOA: Questionable Patterns that Don't Add Up

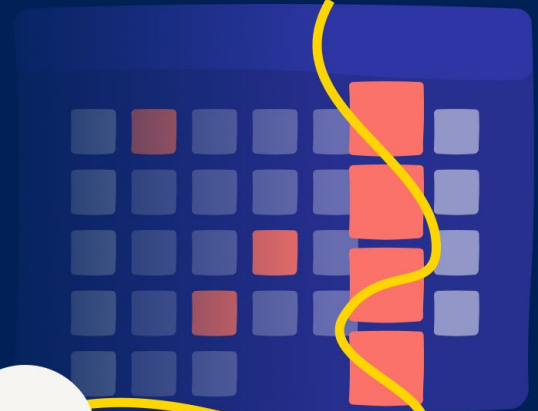
FMLA Entitlement vs ADA Accommodation

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FMLA

APPROVED

ADA



Presenters



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Larkin is recognized by SHRM to offer Professional Development Credits (PDCs) for SHRM-CP or SHRM-SCP recertification activities. This program has been approved for 1.0 recertification credit by the HR Certification Institute.

Agenda

- Compare requirements of intermittent leave under FMLA vs ADA
- Present FMLA scenario and what can and cannot be done by employer
- Discuss changes that occur when ADA applies instead of FMLA
- Review examples and potential solutions under ADA

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Qualifications

Type	FMLA	ADA
Service Requirements	Must qualify for entitlement by working for employer for 12 months and at least 1,250 hours in preceding 12-month period, and work at a location where there are at least 50 employees within 75 miles	No timing or hours worked criteria to qualify; immediately applies to all current employees and applicants
Eligibility	Serious health condition for self or family member (spouse, child, parent)	Individual has a disability impairment that significantly limits the ability to perform a major life activity
Required Documentation	Sufficient certification confirms date SHC began and how long it will last, includes appropriate medical facts like symptoms, hospitalization, or doctor's visits, confirms they cannot perform the essential functions of their job, and the frequency and duration of each absence when it is medically necessary to take intermittent leave	Sufficient certification describes the nature, severity, and duration of the individual's impairment, the activity(ies) that the impairment limits, the extent to which the impairment limits the ability to perform the activity(ies), and substantiates why the requested reasonable accommodation is needed

FMLA Intermittent Leave Rules

- Can be used in the smallest increment allowed for other types of leave
- Intermittent leave includes leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of 6 months, such as for chemotherapy
- There must be a medical necessity for intermittent leave and it must be that such medical need can be best accommodated through an intermittent leave schedule
- When scheduling appointments, employee must make a reasonable effort to schedule them in a way that doesn't "unduly disrupt" business
- Flare ups are unscheduled absences and can occur without advance notice

FMLA: When Intermittent LOA Frequency/Duration Pattern Doesn't Add Up

29 CFR 825.308 Recertifications for leave taken because of an employee's own serious health condition or the serious health condition of a family member

Recertification can be requested:

- Once every 30 days and only in connection with an absence unless either of the below situations apply
- Every 6 months including if the need for intermittent or reduced schedule leave is for a lifetime condition
- Less than 30 days if:
 - An extension is requested
 - Circumstances such as the frequency/duration on the previous certification have changed *significantly* including using more FMLA time than was on the certification
 - Employer receives information that casts doubt on employee's stated reason for the absence or the continuing validity of the certification

FMLA: When Intermittent LOA Frequency/Duration Pattern Doesn't Add Up

29 CFR 825.308 Recertifications for leave taken because of an employee's own serious health condition or the serious health condition of a family member

Examples of a Pattern:

1. Medical certification stated an employee needed leave for 1-2 days for migraine headaches. The last two migraines lasted 4 days each
2. Employee takes unscheduled FMLA leave for migraines in conjunction with their scheduled days off, i.e., a Friday/Monday pattern



FMLA: When Intermittent LOA Frequency/Duration Pattern Doesn't Add Up

29 CFR 825.308 Recertifications for leave taken because of an employee's own serious health condition or the serious health condition of a family member

When making requests:

- Employer may ask for the same information when obtaining recertification as was permitted for the original certification
- Additionally, when an employee's absence pattern is more than what was expected, the employer may provide the record of the employee's absence pattern and ask the HCP if the serious health condition and need for leave is consistent with such a pattern

Non-Exhaustive List of Conditions that May Require Intermittent Leave

Mental Health

- Anxiety disorders
- Bipolar disorder
- Major depression
- Panic disorder
- Post-traumatic stress disorder (PTSD)

Other Conditions

- Autoimmune disorders such as Lyme disease or HIV/AIDS
- Fibromyalgia
- Cancer
- Gastrointestinal disorders
- Multiple Sclerosis

FMLA: When Intermittent LOA Frequency/Duration Pattern Doesn't Add Up

EXAMPLE LETTER TO HEALTH CARE PROVIDER

Your patient Roy G. Biv has been approved for leave of absence under the Family and Medical Leave Act (FMLA) based on certification dated [DATE] that certified intermittent leave for flare ups of his own serious health condition of [FREQUENCY/DURATION] from [DATE] until [DATE].

Over the last two months, we have observed that Roy has used intermittent leave three times and two of these three occurred on a Friday or Monday, which in essence extends his weekend when he is not scheduled to work. We have concerns that this pattern is inconsistent with the premise that flare ups are unpredictable and can occur at any time. We are also concerned that his most recent absence on [DATE] was not medically necessary.

Please kindly respond to the following questions to address our concerns, thank you.

FMLA: When Intermittent LOA Frequency/Duration Pattern Doesn't Add Up

EXAMPLE LETTER TO HEALTH CARE PROVIDER

- Is your patient's absence pattern described above consistent with their serious health condition and need for intermittent leave? ___ YES ___ NO
 - If "Yes," please explain why the absence pattern is consistent with their need for intermittent leave.
 - If "No," please explain why the absence pattern is not consistent with their need for intermittent leave.

Takeaways

- The focus is on whether a serious health condition exists
- There is a limited path to clarify the usage of intermittent leave
- FMLA is an entitlement



Intermittent LOA Through the Lens of ADA

- New request with unreasonable frequency/duration
- Extend beyond FMLA
- Gain FMLA during accommodation
- Friday/Monday LOA



Assessment Criteria under ADA

Does the requested accommodation create an undue hardship?

- Significant difficulty or expense
- Accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business



Assessment Criteria under ADA: Undue Hardship

To determine undue hardship, assess the following:

- The nature and cost of the accommodation needed
- The overall financial resources of the facility making the reasonable accommodation; the number of persons employed at this facility; the effect on expenses and resources of the facility
- The overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity)
- The type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer
- The impact of the accommodation on the operation of the facility

ADA Example: New Request

Health Care Provider recommends intermittent LOA with a frequency of once a week lasting up to three days per episode

Assessment of the Request

- If the full amount is used every week, the employee would only work 2 days a week
 - They would be working 40% of their full time schedule
 - They would not be working 60% of their work schedule
- The job exists as a full time role with full time responsibilities
- Regular and predictable attendance is essential to the role

Sample Points In Alternative Accommodation Letter

- Regular and predictable attendance is an essential requirement of your position.
- Based on information from your physician, it is understood that there are no accommodations the Company can provide that would enable you to perform your essential job functions and avoid being absent on days when your medical impairment restricts your ability to perform essential job functions. If you and/or your health care provider believe this understanding is inaccurate, please contact me immediately.
- As a result, we have concluded that your ongoing need for unpredictable and frequent absences as outlined in your medical certification may cause you to miss an extensive amount of time during the work week, and these absences render you unqualified to perform your essential job requirement of regular and predictable attendance. If all the absences at the requested frequency and duration occur, then it will remove the essential function of regularly attending work. If you do not regularly attend work then you will be unable to complete other essential job functions, which is why the position exists.
- As an alternative, we believe that intermittent leave with a lower frequency and duration than you have requested may be acceptable in allowing you to perform your essential job functions. To be clear, we remain concerned that continued absences may impact your ability to perform these job functions; however, we are willing to consider providing you some modest time away from work so as to help you perform your job. If these additional absences impact business operations, it will be communicated to you.
- Absences due to your medical condition that exceed the approved frequency and duration may be subject to company policies, such as for attendance.

Sample Points In Alternative Accommodation Letter Continued

- The alternative frequency and duration.
- You are invited to submit alternative or additional accommodation suggestions to be considered.
- If it is an offer letter then include, 'If no response is received by [DATE] and you have not provided other suggestions for us to consider then we will move forward with implementing the offered accommodation(s).

ADA Example: Extending Intermittent LOA Beyond FMLA

Health Care Provider recommends intermittent LOA with a frequency of once a week lasting up to three days per episode. **Three more months beyond exhausting FMLA.**

Actual usage under FMLA

One week a month uses 3 days and the other weeks 1 or 2 days are used

WEEK	MON	TUES	WED	THURS	FRI
1	8	8	8		
2			8	8	
3	8				
4				8	8

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WEEK	MON	TUES	WED	THUR	FRI	Total Days Missed
1	8	8	8			3/5
2			8	8		2/5
3	8					1/5
4				8	8	2/5
TOTAL						8 out of 20

ASSESSMENT

- Leave of 1 to 3 days was used each week
- Out of 20 working days in the month, missed 8 days
 - They did not work 40% of their full time schedule
 - They worked 60% of their full time schedule
 - Two coworkers covered daily tasks on days missed in addition to performing their own full time work
- The job exists as a full time role with full time responsibilities
- Regular and predictable attendance is essential to the role

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- Out of 20 working days in the month, missed 8 days
 - They did not work 40% of their full time schedule
 - They worked 60% of their full time schedule
 - Two coworkers covered daily tasks on days missed in addition to performing their own full time work



What is reasonable to approve?

- The job exists as a full time role with full time responsibilities
- Regular and predictable attendance is essential to the role
- How much time away would not be overly burdensome to the business or on coworkers?
- How much time away would still allow EE to fully perform all essential job functions?

ADA Example: Extending Intermittent LOA Beyond FMLA

- Regular and predictable attendance is an essential requirement of your position.
- Based on information from your physician, it is understood that there are no accommodations the Company can provide that would enable you to perform your essential job functions and avoid being absent on days when your medical impairment restricts your ability to perform essential job functions. If you and/or your health care provider believe this understanding is inaccurate, please contact me immediately.
- During your approved intermittent leave under FMLA, you missed work 40% of the time. Based on actual time used, we have concluded that your ongoing need for unpredictable and frequent absences causes you to miss an extensive amount of time during the work week, and these absences render you unqualified to perform your essential job requirement of regular and predictable attendance. By using the amount of time you have used the last three months, it has effectively removed the essential function of regularly attending work. If you do not regularly attend work then you are unable to complete other essential job functions, which is why the position exists. Additionally, your coworkers have covered your unfinished workload in addition to their own work the past three months. Continuing to cover extra work is overly burdensome and not sustainable.
- As an alternative, we believe that intermittent leave with a lower frequency and duration than you have requested may be acceptable in allowing you to perform your essential job functions. To be clear, we remain concerned that continued absences may impact your ability to perform these job functions; however, we are willing to consider providing you some modest time away from work so as to help you perform your job. If these additional absences impact business operations, it will be communicated to you.
- Absences due to your medical condition that exceed the approved frequency and duration may be subject to company policies, such as for attendance.

ADA Example: Extending Intermittent LOA Beyond FMLA, Continued

- State the alternative frequency and duration that is reasonable.
- You are invited to submit alternative or additional accommodation suggestions to be considered.
- If it is an offer letter then include, 'If no response is received by [DATE] and you have not provided other suggestions for us to consider then we will move forward with implementing the offered accommodation(s).

ADA Example: Gaining FMLA Eligibility While Intermittent LOA Has Been Approved as Reasonable Accommodation

Employee Willy Nilly has been with the company for 9 months when he suffers a concussion. Health Care Provider advises intermittent LOA is necessary for the next 5 months with a frequency of once a week lasting up to three days per episode. Without FMLA eligibility, Willy is approved for a reasonable accommodation to take intermittent LOA once a week, one day per episode.

- Recognize Willy will likely gain FMLA eligibility at his one year anniversary date
- Acknowledge and include in the approval letter that time missed for this condition will be tracked against his FMLA entitlement upon gaining eligibility
- Track time missed and begin tracking against FMLA entitlement upon gaining it
 - What if he's missing time that aligns more closely with what had been medically advised at the time he gains FMLA entitlement?

ADA Example: Gaining FMLA Eligibility While Intermittent LOA Has Been Approved as Reasonable Accommodation

What if he's missing time that aligns more closely with what had been medically advised at the time he gains FMLA entitlement?

- FMLA now applies so request medical certification according to FMLA when needed
- Notify the employee of the time being tracked under FMLA
- Approve what is medically certified under FMLA

MONTHS TIMELINE	1	2	3	4	5
PROTECTION	Americans with Disabilities Act (ADA)			Family and Medical Leave Act (FMLA)	

“As we discussed, during your leave of absence, you are expected to become eligible for leave under the Family and Medical Leave Act (FMLA) beginning [DATE]”

ADA Example: Gaining FMLA Eligibility While Intermittent LOA Has Been Approved as Reasonable Accommodation

Willy is requesting to extend his intermittent leave

- Request medical certification according to FMLA
- Approve what is medically certified under FMLA

MONTHS TIMELINE	1	2	3	4	5	6	7	8	9	10	11	12
PROTECTION	Americans with Disabilities Act (ADA)			Family and Medical Leave Act (FMLA)				Americans with Disabilities Act (ADA)				

ADA Example: Friday/Monday Intermittent LOA

Health Care Provider recommends intermittent LOA with a frequency of once a week lasting up to three days per episode

WEEK	MON	TUES	WED	THUR	FRI
1	8	8			
2					
3					
4					8

WEEK	MON	TUES	WED	THUR	FRI
1	8	8			
2					
3					
4					8

Approved For & Uses 3 Days a Month

Manager reports that Willy is taking his approved time off at month-end, which is causing major disruption

ADA Example: Friday/Monday Intermittent LOA

Options to Address Concerns

- Talk with employee about missing month end – what can we do to help?
- Update the approval letter
 - Attending work to complete month end work is required
 - Agreed upon accommodation modifications between business and employee
- Clarify medical needs with health care provider

ADA Example: Friday/Monday Intermittent LOA

EXAMPLE LETTER TO HEALTH CARE PROVIDER

Your patient Willy Nilly has been approved for leave of absence as reasonable accommodation under the Americans with Disabilities Act (ADA) Amendments Act and applicable state law [for three days a month](#).

Over the last two months, we have observed that Willy has used intermittent leave on a [Friday, Monday, Tuesday at month-end](#). [This usage](#) in essence extends his weekend when he is not scheduled to work [and also removes him from performing his month-end responsibilities such that coworkers must cover his work](#). We have concerns that this pattern is inconsistent with the premise that flare ups are unpredictable and can occur at any time. We also have concerns about [his ability to perform his month-end essential job functions, and](#) how disruptive his absences are to the business because [coworkers must complete their own month-end responsibilities in addition to Willy's](#).

Please kindly respond to the following questions to address our concerns, thank you.

ADA Example: Friday/Monday Intermittent LOA

EXAMPLE LETTER TO HEALTH CARE PROVIDER

- Is your patient's absence pattern described above consistent with their disability impairment and need for intermittent leave? ___ YES ___ NO
 - If "Yes," please explain why the absence pattern is consistent with their need for intermittent leave.
 - If "No," please explain why the absence pattern is not consistent with their need for intermittent leave.
- Would providing a scheduled day off each week such as on a Wednesday that does not coincide with month-end processing be an effective way for Willy to manage his needs such that he would be able to attend work to complete his month-end responsibilities? Please explain your response.
- What other accommodation(s) if approved, would be effective at enabling Willy to attend work including at month-end to complete his responsibilities? Please provide as much detail as possible for consideration.

What Happens if EE Pushes Back or Rejects the Alternative



Continue the interactive discussion process.
Options include:

- Move forward with approving the offer and applying attendance policy to time away that exceeds approved frequency & duration
- Consider additional or alternative accommodations from EE and their HCP
 - This may require additional clarification from HCP
- Determine if they have been rendered unqualified for the role
- Consider job reassignment as accommodation of last resort

Final Thoughts



Employer and Employee rights depend on the regulation that applies (FMLA v. ADA)



Accommodations will NOT be something that is already customarily done. It must be reasonable for the business to provide AND effective for the individual so that they may fully perform all essential job functions



Approve, check effectiveness and readjust accommodations as necessary until they become effective or all options are exhausted

Resources

- <https://www.ecfr.gov/current/title-29/subtitle-B/chapter-V/subchapter-C/part-825/subpart-B/section-825.204>
- <https://askjan.org/topics/leave.cfm>
- [Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA | U.S. Equal Employment Opportunity Commission](#)
- [Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA | U.S. Equal Employment Opportunity Commission](#)

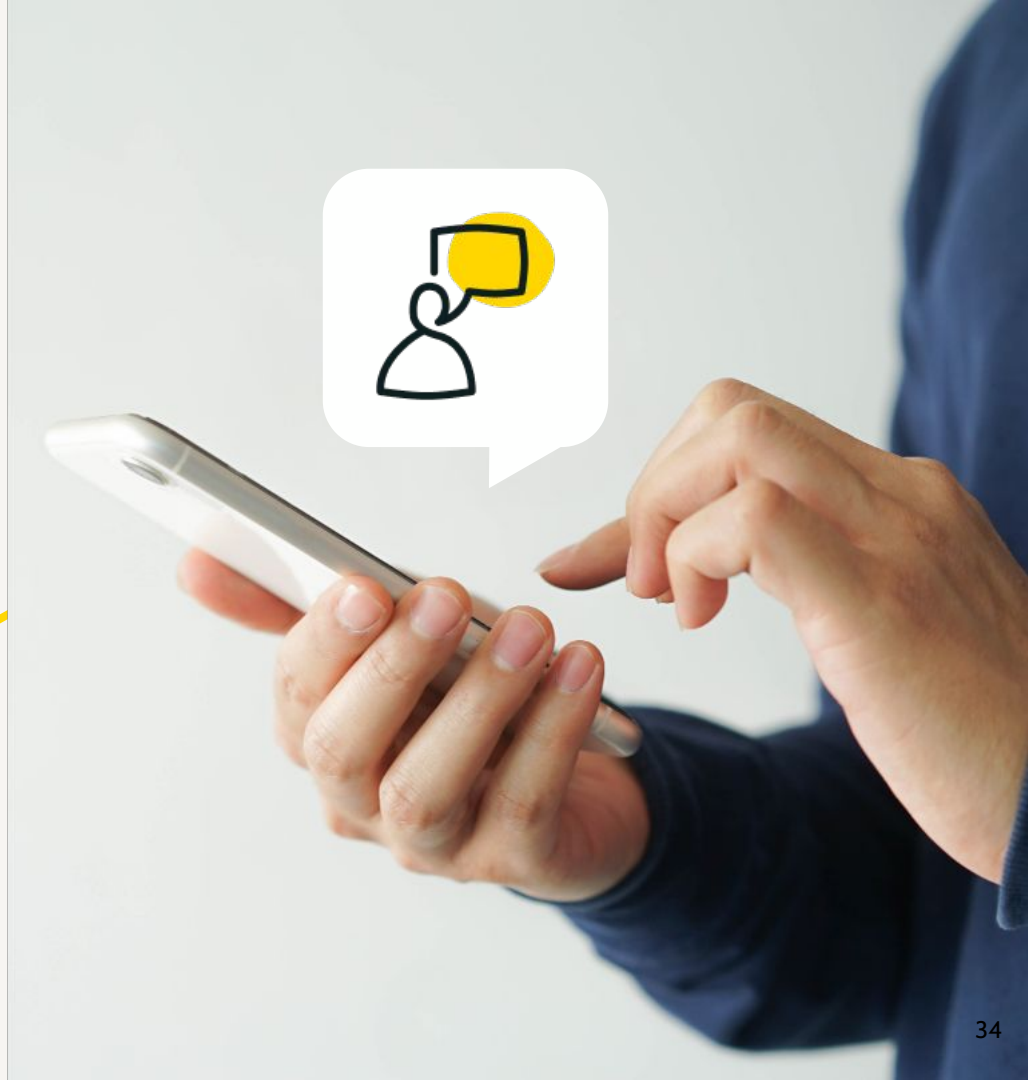
Questions?

→ **Current clients**

Reach out to your Client Success Manager.
If you aren't sure who to reach out to, email us
at client_success@thelarkincompany.com

→ **Prospects**

Reach out to sales@thelarkincompany.com



Thank you

