



# Sixth Circuit Clarifies Notice Requirements for FMLA Intermittent Leave

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Beyond question, managing and tracking FMLA intermittent leave is a challenging task for many employers. At year end, the Sixth Circuit Court of Appeals (jurisdiction over cases arising in Kentucky, Michigan, Ohio, and Tennessee) issued a [decision](#) (*Render v. FCA US, LLC*) providing valuable guidance on how to navigate the admittedly nuanced intermittent leave FMLA regulations.

## Background Facts

Render applied for intermittent leave to manage his depression/anxiety disorder. The medical certification form noted he could not perform his job “during [a] flare-up of symptoms.” Render’s request was conditionally approved. On four occasions, Render contacted the call-in line and reported he would be absent or tardy because he was “having a flare up,” did not “feel good at all,” or he had “been sick the last few days.” He did not reference the FMLA or his medical condition. Those four absences/tardies were labeled as “unexcused.” Render eventually was terminated under the employer’s attendance policy.

Render brought FMLA interference and retaliation claims against the employer. The district court ruled in the employer’s favor – essentially because Render did not specify his absences were for his FMLA condition. The Sixth Circuit reversed that ruling. In doing so, it engaged in a detailed discussion of the FMLA’s intermittent leave regulations providing instructive guidance on an employee’s “notice” obligations.

## Initial Designation of FMLA Leave

Under 29 C.F.R. §825.301(b), an employee giving notice of the need for FMLA leave is not required to specifically mention the FMLA, “though the employee would need to state a qualifying reason or

the needed leave **and otherwise satisfy the notice requirements set forth in §825.302 or §825.303 depending on whether the need for leave is foreseeable or unforeseeable.**" (emphasis added.) Thus, employees must comply with the broader notice provision and one of the two above specific provisions governing foreseeable or unforeseeable leave.

### **Intermittent Leave is Treated as Foreseeable Leave**

The court explained the unforeseeable leave regulation (§825.303) "never mentions intermittent leave." However, the foreseeable leave regulation (§825.302) includes specific procedures that apply to intermittent leave requests. Based on its interpretation of those two regulations, the court held intermittent leave is a type of foreseeable leave. With laudable candor, the court admitted "[t]his may seem counterintuitive, since the point of intermittent leave is that an employee is asking for approved FMLA leave for unexpected and unpredictable absences." However, the court emphasized intermittent leave is taken in separate blocks of time for a single qualifying reason. Thus, foreseeability turns on whether the "qualifying reason" (i.e., the serious health condition) was foreseeable.

In intermittent leave cases, the qualifying reason is known in advance, even if it is unclear when the condition will flare up and require time off. In this case, the employer knew of Render's medical condition and Render's flare-ups were foreseeable "even if Render could not predict precisely when he would need to take FMLA leave days."

### **One Notice is Sufficient**

The court next addressed whether Render had to give notice when he first applied for intermittent leave and/or on each day he sought to take intermittent leave. Because intermittent leave is treated as foreseeable leave, the court focused on the applicable regulation that "whether FMLA leave is to be continuous or is to be taken intermittently...*notice need only be given one time*, but the employee shall advise the employer as soon as practicable *if dates*

*of scheduled leave...were initially unknown.” 29 C.F.R. §825.302(a) (italics in original).*

Accordingly, Render was not required to give formal “notice” every time he called off to use FMLA leave. Rather, Render needed to meet the initial notice requirement when he first sought approval for intermittent leave “because this was when [the employer] first learned about his qualifying condition.” 29 C.F.R. §825.301(b). The court found Render satisfied the one-time notice requirement for intermittent leave when he initially notified the employer of his need for FMLA leave. Additionally, Render’s medical certification form specified a qualifying reason (depression/anxiety disorder).

Render’s subsequent call offs did not need to “specifically reference either the qualifying reason for leave or the need for FMLA leave.” 29 C.F.R. §825.302(b). In other words, “Render was under no obligation to cite the reason for his absence with such specificity because he had already given [his employer] formal notice of his qualifying condition.” Going forward, Render simply had to inform his employer of his schedule change on days he sought to use intermittent leave. 29 C.F.R. §825.302(a). Moreover, even if a “notice” requirement applied to his subsequent calls, the court stated Render’s reference to “flare-ups” was sufficient because his FMLA medical documentation repeatedly referenced that phrase. As the court reasoned, “[r]eferencing symptoms and language that is used in an employee’s medical certification forms would be sufficient even if the notice requirements applied to each call-in.”

### **Court is Critical of Employer’s Call-in Procedures**

The court reiterated employers can establish call-in procedures and may deny FMLA leave if an employee fails to follow them. However, an employee cannot be faulted for failing to comply with such a policy if it is unclear or the employee lacked notice of it. In this case, the employer argued Render did not follow its call-in procedures – contacting the employer and the third-party administrator (“TPA”). The court disagreed, noting the employer gave conflicting call-off instructions. Moreover, the employee told two different supervisors that his absences were FMLA days.

## Next Steps

- Confirm you have effective procedures in place for receiving and addressing an employee's request for intermittent leave.
- Ideally, HR (not frontline supervisors) will handle these requests. HR should be familiar with the FMLA regulations.
- Do not be overly rigid or excessively technical about whether an employee met your intermittent leave request/notice obligations. Common sense should be your guide.
- Make sure the TPA's procedures are legally compliant and consistent with your expectations.
- Alert supervisors to notify HR if employees inform them their absences are FMLA-related.
- Review your attendance call-off procedures. Are they clear and consistent? Are employees aware of them? Are they consistent with the TPA's separate call-off policies? If the answer is "no" to those questions, the employee likely will not be faulted for any alleged noncompliance.

If you have any questions about this decision or other FMLA compliance issues, any attorney in Frost Brown Todd's [Labor & Employment](#) practice group.

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