

# Substitutes and Absenteeism

Curtis Leonard

Region 4

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# The “Problem”

- Substitutes behaving badly
  - The “easy examples”, substitutes engaging in misconduct. The District should have no tolerance for substitute misconduct.



# The “Problem”

- Substitutes behaving badly. This is predominately a hiring question.
- How stringent are your standards for a substitute?
  - Requirement of background checks, reference checks, misconduct forms.


# Substitute Hiring Tests





# Effectively Screening for Substitutes

- **Develop effective screening to weed out the substitutes that are prone to misconduct.**
  - Applications
  - Interviews
  - Reference checks
  - Misconduct forms
  - Background checks

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- Although only a substitute, the District is still hiring someone that will supervise children.
  - **When hiring, treat all substitutes the same within a category. Do not create shortcuts or deviate from the process.**



## The “Problem” part 2


- Substitutes oftentimes do not possess the skills of an experienced teacher.
- How much time do we invest in “teaching up” our substitutes?



## The Problem part 2

- At-will employment is a two-way street.
- Substitutes are not obligated to stay with your District, creating an incentive to do the least possible to get by (training, pay, incentives).
- Your substitute pool is shared with neighboring Districts – this is a shared resource.



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- **Look at pay, incentives, recognition programs when deciding how to hire and retain quality substitutes.**
  - Hint – it is not just about pay.



## The “Problem” part 3

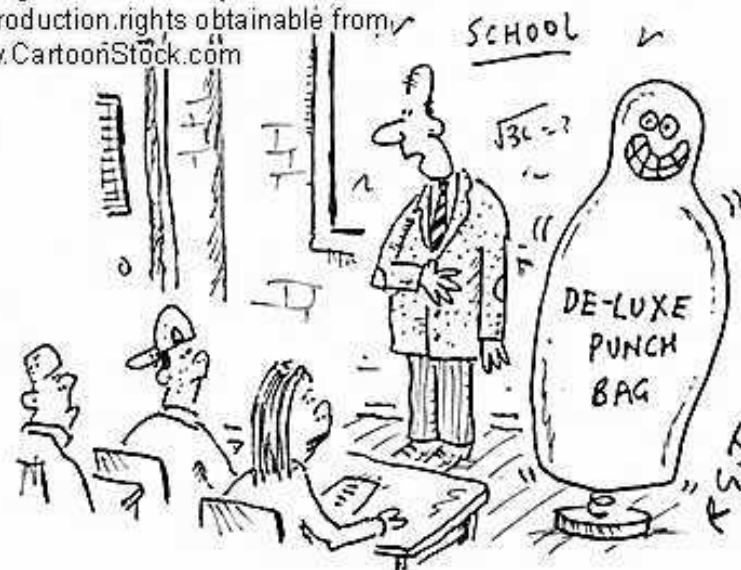
- Principal request to ban a substitute from their building.
- What is the obligation of the District investigate or remediate substitute conduct?
- How much process is “due” to a substitute?



## The “Problem” part 4

- How do you hold, and enforce, high standards for substitutes when Districts are needing substitutes more than ever.
  - Increased vacancies due to professional development, sickness and other issues.

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"Miss Pemberton is off with nervous exhaustion, so  
this is your substitute teacher."



# At-Will Employment


- Although at-will is positive for District, it can create complacency in:
  - Hiring,
  - Training,
  - Managing and,
  - Disciplining substitutes

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- Even though substitutes are “at-will” a District should:
    - Hire qualified substitutes
    - Place them in situations to succeed
    - Inform them of the District’s expectations
    - Provide training and professional development
    - Make HR decisions (firing, blocking) based on some type of process



# At-will Employment

- Blocking Substitutes from certain buildings
- Removing from the substitute pool
- Contract Status
  
- **Verify that your substitutes employment is “at-will”**

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- Generally, substitutes employees are “at-will” meaning that they can be fired at the will of the District for any reason, or no reason at all, as long it is not for one of the illegal reasons.
    - Caution – some documents might give individual employees more rights
      - CBA applying to substitutes
      - Individual employee contracts
      - Personnel manuals
      - District Practices



# Exceptions to At-will

- Washington is an “at-will” employment state. As such, at-will employees can be terminated for any reason, except reasons that are deemed to be illegal, such as on the basis of race, nationality or sexual orientation, or because the employee refuses to break a law. Employees who are covered by an employment contract can usually only be terminated for the reasons set out in the contract, unless the employer shows proof that the employee is at-will.
- Employees in Washington cannot be fired for filing a workplace rights complaint, a safety complaint or an injured worker claim.



# Retaliation Exception

- Retaliation for exercising your legal rights as an employee, such as: making a complaint to the District that you are violating a law that protects employees; blowing the whistle on the District for violating some other type of law; engaging in union activities; or complaining about unsafe conditions.


# Contractual Exception

- Contracts, including collective bargaining agreements, may negate at-will employment by setting forth the guidelines by which employers must terminate employees. Washington state also recognizes an implied contract exception to at-will employment. Written notices from employers to employees that establish valid reasons for discharge limit employers' authority to terminate employees for other reasons.
  - Bargain out language
  - Include a proper disclaimer in writing



- **Verify whether the CBA applies to your substitutes.**

- Might include provisions about pay and benefits after a certain amount of time.

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- **Verify whether your CBAs contain specific language mandating the District to follow procedures prior to terminating a substitute.**
  - Such language is not required by law, but has been bargained as additional protection to substitutes.

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- **Work with the District's bargaining team to remove mandatory language related to substitutes.**

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- **Add a disclaimer to your substitutes handbook to solidify the “at-will” status of substitutes.**

# Disclaimers

- Any disclaimer should include: (1) a description of the at-will employment relationship and an explanation that either party can end the relationship at any time; (2) an assertion that nothing in the offer of employment employee manual, personnel manual, or other employment documents, or other oral communications shall be deemed to create an employment contract or to modify the at-will relationship; and (3) a statement that no person other than the Superintendent of the District has the authority to bind the District to an employment contract or an agreement to modify the at-will employment.



# Certificated Teacher Rights

- Regular teachers are covered by RCW 28A.405.210, which guarantees them automatic renewal of their contracts, except for cause. Upon nonrenewal, formal procedures apply. A regular teacher must receive written notice that specifies the cause for nonrenewal. RCW 28A.405.210. The teacher may then request a hearing to determine whether sufficient cause for nonrenewal existed. RCW 28A.405.210.

# Contract Status of Substitutes

- **Moldt v. Tacoma School District**. A group of substitute teachers formerly employed by Tacoma School District sued the District, contending they were entitled to continuing contract rights under RCW 28A.405.210.
- “Cadre substitutes” that were guaranteed a certain number of days and paid at a higher rate.
- Had a contract that specifically stated that there were no continuing contract rights.
- Court granted summary judgment for the District on the contract question



# Contract Status

- 1975 Attorney General opinion, RCW 28A.405.900 excludes substitute teachers from continuing contract rights regardless of whether they fill in for a short or long-term leave.

# Discussion Examples

- Principal comes to you and states that he does not like Sally Sub and wants her blocked from the building.
  - “Not a good fit for our building.”
  - “Doesn’t follow lesson plans.”
  - “Got in a fist fight with my dean of students.”

# Discussion Examples

- You receive an allegation that a sub used inappropriate language. Do you:
  - Terminate them immediately because they are “at-will”
  - Hire an outside investigator
  - Invite the substitute to have a conversation with HR.

# How Much Process is Due?

- While subs are not entitled to contractual due process rights, the District will want to verify the veracity of allegations before blocking or terminating a sub.
  - Chance for sub to be heard
  - A **reasonable** investigation
  - Rule out patently false claims
  - If inconclusive, can still decide to move on
  - Substitute evaluations vs. feedback forms

# What Every Sub Should Know



# Top Ten Complaints about Subs

- Failure to follow lesson plans
- Conducting personal business (phone use, internet)
- Failure to respect teacher's personal items
- Reading the newspaper/magazines
- Failing to supervise students
- Nonprofessional appearance
- No classroom management
- Not filing out required forms
- Failing to follow discipline policies
- Inappropriate language





# Sharing Expectations

- **Does your District have substitute job descriptions that detail the essential functions and expectations of the job**
  - Job descriptions
  - Substitute handbook



# Mandatory Reporting Requirements

- “certificated or classified school employees” are mandatory reporters
- Training on mandatory reporting upon hiring and then after three years



# Training Requirements

- **Determine the relevant trainings for substitute orientation**
  - Safeschools
  - Safety issues
  - Supervision
  - Unpaid vs. paid



# Supervision Requirements

- **Share expectation that every substitute employee needs the requisite skills to appropriately and safely supervise a classroom of students**



## Samples - Role of Substitute Teacher

- The guest teacher is in charge of the classroom in the absence of the teacher. The guest teacher is responsible for the delivery of the instructional program as well as to maintain the care, welfare, safety and security of students in the classroom.
- Classroom teachers, site administrators and district personnel praise and value guest teachers who are professional in dress, attitude and presentation.

# Sample Job Description

Substitute Teachers should be required to fulfill the following responsibilities:

1. Implement the teacher's written lesson plans. Consult with site administration and/or staff to resolve questions and/or concerns.
2. Teach schedule classes
  1. Prepare a written summary of work completed
  2. Make teacher and/or site administration aware of special situations or problems encountered
3. Maintain proper control and discipline both inside and outside the classroom in a positive manner by establishing good, wholesome rapport through healthy relationships between individuals involved in the learning process and in accordance with district policy and procedures.
  1. Maintain high standards and upholds the student conduct code.
  2. Properly report misconduct to site administration
  3. Maintain supervisory control of students including, but not limited to, before and after school, as well as classroom transitions.

# Job Description, Con't

4. Perform basic attendance accounting and business services as required.
5. Comply with all building procedures and schedules you are made aware of. Promote the proper care use and care of school property.
6. Uphold board policies and follow administrative procedures.
7. Cooperate with other professional staff members in assessing and helping pupils solve health, attitude and learning problems.
8. Work cooperatively with site administration, staff, students and families.
9. Follow directives of site administration, including but not limited to substituting in another classroom during a preparation period, performing administrative tasks and performing other related duties as assigned.
10. Substitute teachers accepting long term assignments (11 days or more) are responsible for performing all responsibilities listed in items 1-10 above as well as those identified in the absent teacher's job description.

# In the Classroom - From the Handbook

Review the following:

- Lesson plans – immediately inform the office if there are no plans
- Review the teacher's expectations or classroom rules
- Worksheets or other produced materials for carrying out the day's activities in the classroom.
- Emergency plans
- Notes regarding specific students (sped, health plans, BIPs)
- Attendance directions and materials
- Special procedures
- Seating charts
- Names of student helpers
- Names and hours of teacher assistant



# Day in the Life of a Substitute

- Introduce yourself to the class; write your name on the board and require students to use your proper name.
- Greet the students at the door and get them involved in a learning activity immediately.
- Establish your responsibility as their teacher for the day. Let students know your expectations. A positive, but firm attitude will help make your day successful. Closely following the teacher's written expectations will make the day run smoothly.
- Start class promptly; this helps reduce discipline problems.
- Record attendance

# Day in the Life, Con't

- Supervise students at all times, including passing times. Circulate the classroom and offer assistance.
- Follow the teacher's lesson plans as closely as possible. If you find it necessary to deviate, be sure to leave a note for the teacher with that information.
- Use clear, consistent instructions in directing every activity.
- Immediately request assistance from the front office in situations that threaten the safety of students and others.
- Substitute teachers are not entitled to a planning period. You may be asked to cover another period or assist in administrative tasks.
- Conducting personal business is prohibited.
- Refrain from reading the newspaper, engaging in personal phone calls or school or personal phone, sending text messages, or using the internet for non-school related purposes.

# At the end of the school day

- Do not leave school early. You are required to remain until the end of the contract day.
- Write a detailed summary for the teacher describing the day's instruction and student interactions.
- Leave the classroom in the same condition as when you arrived. Be sure to turn off any electronic devices used, close windows and lock the classroom doors.

Report any classroom accidents, spills or repairs to site administration.

- Check out with the front desk. Have your time sheet signed and return any keys or materials.

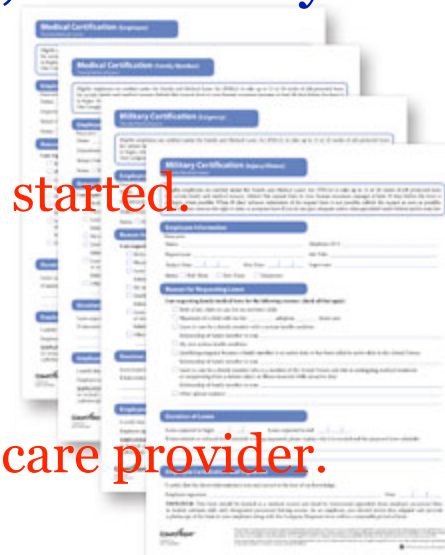
# Medical Certification



## “Medical Certification” requirements for serious health condition leave

- The District may require, at its option, that the **serious health condition** of the **eligible employee** or family member be certified by the relevant person’s health care provider for three occasions:
  - When the leave is requested
  - When the District has reason to question the appropriateness of the leave or its duration after its inception; and
  - When an employee requests an extension of a leave
- The District may furnish the health care provider with a description of the essential functions of the employee’s position.

- If requested, the employee must provide, in a timely manner, a **medical certification** that includes:



- **a.** The date when the serious health condition started.
- **b.** How long it is expected to last.
- **c.** Relevant medical facts known by the healthcare provider.
- **d.** A statement that the employee is needed to care for a family member or a statement that an employee cannot perform the functions of his or her job.
- **e.** In addition, where an employee asks for **intermittent leave** or a **reduced leave schedule**, a statement that the proposed schedule is medically necessary; the dates, if known, on which treatment is expected to be given; and the expected duration of the **intermittent leave or reduced leave schedule**

- 29 U.S.C.A. 2603(b)(1) to (3)

## Additional “Medical Certification” requirements for leave “to care for” a family member

- The **certification** must also contain a statement that the eligible employee is needed to care for the family member and an estimate of the amount of time that such employee is needed to care for the family member.

- 29 U.S.C.A 2603(b)(4)(A)



## Certification for Intermittent Leave

- Employers should ensure that the health care provider has certified its necessity and circumstances of the leave. The health care provider's certification should make clear the medical necessity of the leave and how long the intermittent schedule will be required.
- If treatment is required, the certification should provide the date that treatment will begin and the expected duration of treatment.



- In addition, **certification for intermittent leave** must also include an estimate of the probable number of treatments and interval between such treatments, actual or estimated dates of treatment if known, and the period required for recovery, if any.
  - If this information is NOT included, you can require additional information before approving intermittent FMLA.
- **IMPORTANT** – this information provided in the certification will serve as a basis for recertification if there is any change of circumstances (additional absences).

## “Medical Certification” for return to work

- The District may require an employee submit a “**Medical Certification**” for **return to work** but the requirement must be applied to all District employees of the same position or suffering from similar serious health condition.
- The District must notify the employee of the fitness for duty exam and the consequence for not doing so at the beginning of the leave.
- If medical provider suggests **light duty**, employee can decline as long as FMLA leave is still available.
  - Careful of ADA

# Medical Certification Timing

- A District may request medical certification up to five days after the employee provides notice of the need for FMLA leave. The request for certification must be made in writing. The employee has 15 calendar days in which to provide the completed and sufficient certification unless it is not practicable to do so.



## Medical Certification

- **Content** The medical certification must include the healthcare provider's specialization, medical facts regarding the patient's condition, and whether intermittent or reduced schedule leave is medically necessary. The District may not request information beyond that required in the DOL-sanctioned form. The DOL has created separate forms for employee and family member medical certification of a serious health condition.

# Medical Certification clarification

- If the certification is incomplete or deficient, the District must notify the employee in writing and give the employee seven calendar days to resubmit the certification. If the employee does not comply, FMLA leave may be denied. A certificate that is not returned constitutes a failure to provide certification.
- The District's representative (healthcare provider, human resources professional, leave administrator, or management personnel) may contact the employee's healthcare provider directly to clarify or authenticate the medical certification. The employee's direct supervisor is not permitted to contact the healthcare provider.



# Authentication and Clarification

- Once the employer has received a complete and sufficient certification, the employer may not request additional information from the health care provider.



# Sufficient Certification

- If the certification is incomplete or insufficient, the employer must give the employee a written notice stating what additional information is necessary to make the certification complete and sufficient.
- The employee must provide the additional information to the employer within seven calendar days.



# Consequences

- If the employee does not provide the requested certification within the time required (15 calendar days) or fails to provide a complete and sufficient certification despite the opportunity to cure any deficiencies, the employer may deny the request for FMLA leave.



# Medical Certification

## Annual and Re-Certifications

- If the serious health condition of either the employee or family member lasts beyond the leave year, the employee may require a new certification for each subsequent year the employee takes FMLA leave. Recertification cannot be requested more than every 30 days, unless **the employee requests an extension of FMLA, the circumstances as described in the original certification have changed; or the District receives information regarding the validity of the original certification.** In any event, the District may request recertification every 6 months.



# Medical Certification Example

- Janie takes six weeks of FMLA leave for a cancer operation and treatment and gives her employer a medical certification that states that she will be absent for six weeks. Because her certification covers a six-week absence, her employer cannot ask for a recertification during that time. At the end of the six-week period, Janie asks to take two more weeks of FMLA leave; her employer may properly ask Janie for a recertification for the additional two weeks.



# Certification

- If the employee's need for FMLA leave lasts beyond a single FMLA leave year, the employer may require the employee to provide a new medical certification in each new FMLA leave year.



# Certification

- The certification should include:
  - The date on which the serious health condition commenced;
  - The probable duration of the condition; and
  - A statement that the employee is unable to perform the functions of the position because of the serious health condition.
- A complete and sufficient certification is generally provided within 15 calendar days after the employer's request.

# Second and Third Opinions

- If the employer has received a complete and sufficient certification but has a reason to doubt that it is valid, the employer may require the employee to obtain a second medical certification – different from recertification.
  - Employer can choose the provider, but may not select a provider who it employs on a regular basis.
  - Employer pays for the second opinion, including out of pocket expenses (travel). Can't require travel for long distances.
- While waiting for the result, the employee is provisionally entitled to FMLA leave.



# Third Opinions

- If the second opinion differs from the original certification, the employer may require the employee to obtain a third certification from a health care provider selected by both the employee and employer.
- This opinion is final and must be used by the employer.
- Employer pays for the third opinion, including costs.
- Employee is granted provisional FMLA leave while waiting for third opinion.



# Intermittent Leave Following a Block of Leave

- An employee has a serious health condition, is out for six weeks of protected leave and then wants to come back to work, but only on an intermittent basis.
- The employer will determine how much leave is left and will verify if the original certification provides for intermittent leave.
  - If it does not, the employer may seek additional certification from the health care provider relating to this new period of limitation. Must meet the requirements for certification for intermittent leave.



## Notice - Foreseeable Leave

- Foreseeable circumstances – the employee is supposed to give the employer at least 30 days advance notice before using FMLA leave.
- If not practical, then “as soon as practicable.”





## Notice - Unforeseeable Leave

- In cases where the circumstances for the leave is not foreseeable, the employee must provide notice within two days of their awareness of the leave.
  - Example: Individual with a serious health condition has a flare up and that was unforeseeable may provide notice two days after the flare up.

# Entitlement to Leave

## Intermittent Leave

- The final rule clarifies that employees who take **intermittent FMLA leave** have a statutory obligation to make a “**reasonable effort**” to schedule such leave so as not to disrupt unduly the employer's operations.



# Scheduling Medical Treatment

- When employees are planning medical treatment, they are required to consult with the employer to make a reasonable effort to schedule the leave as to avoid unduly disrupting the employer's operations.
- If an employee fails to consult with the employer, the employer may initiate discussions and require the employee to attempt to make arrangements that will not disrupt its operations.

# Entitlement to Leave

## Minimum Leave Increments

- A District must account for **intermittent or reduced leave** using an increment no greater than the shortest period of time the District uses to account for the use of other forms of leave provided that it is not greater than one hour. This allows Districts to account for FMLA leave on the same basis as other employee absences.

# Transferring an Employee During Intermittent Leave

- Employer can transfer employee who are using intermittent leave to other positions within the organization to better accommodate the absence.
- Must be equivalent pay and benefits.
- Not used to discourage the use of leave or to retaliate against the employee.
- At the end of the leave, the employer is required to reinstate the employee to the same of equivalent position from the time the leave began.

# Preventing Abuse

- Provide the employee's health care provider with a job description or list of essential function so s/he can determine if employee can perform essential duties.
- Insist that medical certification be complete, including information related to intermittent leave.
- If certification is not complete, treat the absences as non-FMLA absences subject to disciplinary action (if applicable, no leave available)
- Do not accept vague certifications.
- Hold employees accountable to the terms of the certification, including non-compliance

# Preventing Abuse

- Determine if a recertification might be appropriate.
- Follow up on changed or suspicious circumstances
  - Increase of absences
- Provide a list of absences to the medical provider to verify if consistent with medical condition.
- Require a second and third opinion on medical certifications submitted by employees.
- Require the employee to provide appropriate notice for use of leave – follow call-in procedures. Initiate consequences for failure to follow.




# Preventing Abuse

- Consider transfers during the period of intermittent leave (equivalent pay).
- Prohibit employees from working elsewhere while on leave.
- Follow your normal leave procedures – leave without pay.
- Work with employees to schedule treatment to lessen the impact to the district.



# Preventing Abuse

- Dr's note provide for intermittent leave for 3 days a month for migraines and the employee takes leave every Monday and Friday, extending the weekends.
  - DOL guidance – the opinion letter allowed that such situation likely triggered a recertification and that the employer could inform the health care provider about this pattern of absence and ask some specific questions about that.

- 
- **Can an employer require paid leave to run at the same time as FMLA leave?**
    - Here, the employer's policy governs. If the policy requires any accrued paid leave to run concurrently with FMLA leave, then an employer can require both FMLA leave *and* paid leave to run at the same time. [29 CFR § 825.207\(a\)](#). In the absence of such a policy, however, the employee can decide whether to use paid leave in conjunction with FMLA leave.

# Concurrent Leave

- Under the regulations, an employee may choose to substitute accrued paid leave for unpaid FMLA leave if the employee complies with the terms and conditions of the employer's applicable paid leave policy. The regulations also clarify that substituting paid leave for unpaid FMLA leave means that the two types of leave run concurrently, with the employee receiving pay pursuant to the paid leave policy and receiving protection for the leave under the FMLA. If the employee does not choose to substitute applicable accrued paid leave, the employer may require the employee to do so.

# Example


- Neila needs to take two hours of FMLA leave for a treatment appointment for her serious health condition. Neila would like to substitute paid sick leave for her absence, but her employer's sick policy only permits employees to take sick leave in full days. Neila may either choose to comply with her employer's sick leave policy by taking a full day of sick leave for her doctor's appointment (in which case she will use a full day of FMLA leave), or she may ask her employer to waive the requirement that sick leave be used in full day increments and permit her to use two hours of sick leave for her FMLA absence. Neila can also take unpaid FMLA leave for the two hours.



- **Can an employer make the employee use FMLA leave, even if the employee does not want to use it?**


- The employer is responsible in all circumstances for designating leave as FMLA-qualifying, and for giving notice of the designation to the employee . . . When the employer has enough information to determine whether the leave is being taken for a FMLA-qualifying reason (e.g., after receiving a certification), the employer must notify the employee whether the leave will be designated and will be counted as FMLA leave within five business days absent extenuating circumstances. [29 CFR § 825.300\(d\)](#)

- Can put on leave without medical certification? Yes, but be consistent.

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- The employer has an *obligation* to designate leave as FMLA-qualifying as soon as the absence becomes an FMLA-qualifying event. Employees do not have the right to choose when they take FMLA leave. As soon as the leave of absence qualifies as FMLA leave, it should be designated as such -- regardless of whether the employee wants FMLA to apply.

# Q and A

- Can an employee take a continuous block of leave and intermittent FMLA for the same FMLA condition?
  - YES, if specified in the certification, if requesting more, then require recertification.
- If an employee who is authorized for FMLA leave for one serious health condition submits a request for a second, unrelated serious health condition, can the employer look back over the preceding year to determine the 1,250 hours?
  - YES, it is possible that the employee will not qualify for the second leave, due to the failure to work the 1,250 hours. The employee would still be qualified for the original condition. Any subsequent absences would need to relate back to the first condition to be protected under FMLA.

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- If the employer suspects that an employee is abusing FMLA leave, whether it be a pattern or otherwise, can the employer require an independent medical evaluation even if the recertification period is not up?
    - If you have evidence of possible abuse, you might be allowed to schedule a recertification before the end of the certification year. If there continues to be a question about the validity of the certification, the employer might also require a second opinion.