



# In The Trenches

By Jennifer Anderson Whitlock

## Practical Answers to Your HR Questions

**Q** *We have an employee who has been certified for intermittent FMLA leave due to recurring migraine headaches. Her absences, however, generally fall on Mondays and Fridays. Other employees have complained that she is abusing her FMLA leave and is simply enjoying three-day weekends. Do we have any options to seek additional certification of her ailment to determine if there is any such abuse?*

**A** Department of Labor (“DOL”) regulations permit employers to seek recertification of an FMLA-qualifying medical condition more frequently than every 30 days if circumstances change significantly, or if there is evidence that casts doubt on the continuing validity of the medical certification. A DOL opinion letter issued last year indicates that a Monday-Friday pattern of absences is the type of evidence that casts doubt on the validity of a FMLA leave claim, thereby allowing recertification of the condition more frequently than every 30 days. In addition, DOL made clear that in such circumstances employers may ask the employee’s health-care provider whether the Monday-Friday pattern of absences is consistent with the medical condition. Because direct contact with the employee’s health-care provider is prohibited, however, you should ask about the pattern of absences on the certification form or through your company’s health-care provider, if the employee has consented.

**Q** *We have an administrative employee who has the potential to someday manage our office. The employee wants to acquire the skills and experience that would make this possible. Recently he asked whether he could work in the office after hours to learn the computer software and accounting procedures relating to the manager position. The employee has several dependents and cannot afford to take classes to learn these programs. I have informed him that the company cannot afford to pay him overtime for the extra hours, but he insists that he would not expect to be compensated and that he wants to*

*put in the time as an investment in his career. If we let him do this would we run afoul of the wage and hour laws?*

**A** Employers have the burden of making sure that employees do not work unauthorized overtime. In order to avoid paying overtime, you need both a rule prohibiting unauthorized overtime work, such as in an employee manual, and a practice of consistently enforcing the rule. As the Department of Labor states in the overtime regulations, “[a]n announcement by the employer that no overtime work will be permitted, or that overtime work will not be compensated unless authorized in advance, will not impair the employee’s right to compensation for work which he is actually suffered or permitted to perform.”

Although you want to help the employee gain valuable job skills, and the employee apparently has no present desire to be paid for the work, it is likely you would be sanctioning overtime work and be liable for paying overtime under the Fair Labor Standards Act (“FLSA”). Self-education on “accounting procedures relating to the manager position” appears to relate directly to company operations, and is therefore subject to overtime. With regard to the computer software, even if the employee intends only to learn how to use the software and not to do any work for the company during that study, there is a possibility or even a probability that he would perform exercises related to company operations. Allowing him to perform such tasks in the office after hours also sets a bad precedent for other employees. It is best to avoid potential FLSA violations and overtime liability entirely and encourage the employee to find another way to obtain the skills necessary to advance in the job. ■

This section is provided courtesy of the Labor and Employment Law Group of VanCott, Bagley, Cornwall & McCarthy, P.C., and is authored this month by Jennifer Anderson Whitlock. Ms. Whitlock is a litigation shareholder at VanCott and a member of VanCott’s Labor and Employment Law Group. You can reach Ms. Whitlock at 801.532.3333. If you have questions you would like considered for publication in future issues of *HR Views*, please send them to Pam Gunnell at [npgunnell@netzero.net](mailto:npgunnell@netzero.net).