



VIA EMAIL

April 16, 2021

Peter Korin, Director of Nursing, Pelican Bay State Prison
Jessica Dark, Unit Supervisor, Pelican Bay State Prison

**RE: DEMAND TO CEASE AND DESIST FROM
INTERFERING WITH NURSES' RIGHTS
UNDER FMLA/CFRA**

Dear Mr. Korin and Ms. Dark:

By this letter I am demanding that you cease and desist from violating the FMLA and CFRA by interfering with and harassing our members for exercising their right to take intermittent FMLA leave. This letter is based on reports from at least five nurses under your supervision that they are being subjected to additional questioning and interrogation when they assert their right to use the leave, and this will not be tolerated. Failure to cease this conduct will result in Local 1000 pursuing all available legal remedies against the medical management at Pelican Bay and CCHCS.

Right to Intermittent Leave

Both the federal Family Medical Leave Act (FMLA) and the California Family Rights Act (CFRA) allow employees to take up to twelve weeks of leave per year due to their own medical needs or to care for a family member. (29 U.S.C. § 2612(a); Cal. Gov. Code § 12945.2) This leave can be taken intermittently, meaning on an as needed basis. (29 U.S.C. § 2612(b)(1); 29 C.F.R. § 825.202; 2 CCR 11090(c)(2).) When an employee needs to take intermittent leave, they can provide certification and obtain approval in advance and then do not need to provide a medical note or further substantiation when the need arises to use the intermittent leave.

Violations of the Law

It has been reported to us that in the past week, nurses who attempt to use intermittent FMLA when they have been told they will be mandated to work overtime, are being asked further inappropriate questions by the Unit Supervisor or Supervising Registered Nurse, such as:

- What precludes you from working overtime?
- Does your FMLA preclude you from working all mandatory overtime?
- What is the immediate need that prevents you from providing the required advanced notice for your need for intermittent leave?

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- Does your physical reason for FMLA prevent you from being able to do the mandated overtime?
- Can you do the duties that are required of you in your duty statement?

Nurses have then been told they must report to the Director of Nursing for further questioning about their FMLA usage, that they will be reported to the DON if they refuse to answer the questions, or that they must put their responses in writing. Additionally, at least one nurse has been told to submit leave requests for all times in which she might need to use FMLA, which goes beyond the requirement of obtaining approval to use intermittent leave as needed. These interactions have been extremely upsetting to our nurses and make them feel harassed for using their job-protected leave.

Asking employees further questions about the reasons for their leave, in response to their attempt to use the leave, interferes with their right to take job-protected leave under FMLA and CFRA. Once the certification is provided, asking further questions impermissibly discourages the use of the job-protected leave. Such interference is prohibited under state and federal law. (See 29 U.S.C. § 2615(a)(1); Cal. Gov code § 12945.2(q), Title 2 CCR 11094.)

One purpose of allowing intermittent leave is to not force an employee to repeatedly validate their need for leave. These are employees who are already burdened with either their own serious medical condition or the need to care for a family member with a serious medical condition. Employees in this already difficult situation should not have to repeatedly justify the need for use of the leave. Once the certification has been provided and approved by CDCR, employees need only inform their supervisor and/or manager that the leave they are requesting is for the FMLA for which they have been already been approved. The further questioning is harassing and must stop.

Intermittent Leave Can be Used for Mandatory Overtime

It appears possible from your questioning that you may be attempting to impose a policy that would make an ability to work mandatory overtime an essential function of the job, and that having intermittent FMLA would mean the nurse could not meet the minimum qualifications for the job. Please know that the State Personnel Board (SPB) overturned such a policy specifically at Pelican Bay previously, and held that:

The fact that [CDCR] has a policy that states that it is not required to honor a FMLA/CFRA request to excuse an employee from mandatory overtime if it is an essential function of the job, does not make it so. . . . Simply stated, Complainant is entitled to use CFRA/FMLA leave for mandatory overtime.

(Appeal of Elliot Schwarz (2012) SPB case no. 12-0886). I am happy to provide you with a copy of this decision if you would like to see it.

Moreover, since that SPB decision was issued, California enacted further CFRA regulations, which clarify that intermittent FMLA leave *can* be used to cover what would have been a mandatory overtime shift:

If an employee normally would be required to work overtime, but is unable to do so because of a CFRA-qualifying reason that limits the employee's ability to work overtime, the hours that the employee would have been required to work may be counted against the employee's CFRA entitlement. In such a case, the employee is using intermittent or reduced schedule leave. For example, if an employee normally would be required to work 48 hours in a particular week, but due to a serious health condition the employee works 40 hours that week, the employee would utilize eight hours of CFRA-protected leave out of the 48-hour workweek. Voluntary overtime hours that an employee does not work due to a serious health condition shall not be counted against the employee's CFRA leave entitlement.

(2 CCR 11090(c)(4)). Thus there should be no confusion as to whether a nurse is entitled to use intermittent FMLA/CFRA leave in place of a mandatory overtime shift.

In summary, we demand that you cease and desist from asking nurses who have been approved for intermittent FMLA/CFRA any further questions regarding their need to take leave in lieu of a mandatory overtime shift when they have informed you they are using their approved FMLA leave. Failure to do so will result in legal actions filed by the union and our members, including but not limited to complaints with the Department of Labor and the Department of Fair Employment and Housing.

If you have any questions or would like to discuss this further, I can be reached at twitherspoon@seiu1000.org or 916-717-3515.

Sincerely,



Theresa C. Witherspoon
Assistant Chief Counsel

cc: Bill Woods, Health Care CEO, Pelican Bay State Prison
Sarah Yeboah, Chief Nursing Executive, Pelican Bay State Prison