

Blog Post

The Challenges of Poor FMLA Certifications

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Did that FMLA certification arrive illegible? Is the information provided too vague? Are the responses to the questions internally inconsistent? Do you suspect that it wasn't filled out by a healthcare provider at all?

Employers navigating the FMLA maze – especially those who outsource the function – may not get the information they need in the certification. Many simply accept what they receive and designate the leave as FMLA without sufficient documentation. But that can hamper an employer's legitimate efforts to work with an employee who has a medical condition down the road. Yes, it's challenging, but it's worth making sure the FMLA documentation you receive meets the statutory requirements.

First, when an employer becomes aware that an eligible employee has a potentially FMLA-qualifying condition, the employer should not wait for the employee to ask for leave. Once the employer is on notice, the employer should send the employee the Department of Labor's Form WH-380 Certification of Health Care Provider and include with that form a description of the employee's essential job functions. That job description is critical, as you are asking the doctor to advise whether the employee is incapacitated or needs intermittent leave or a part-time schedule, or whether the employee may experience episodic flare-ups *that would*

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periodically prevent the employee from performing the employee's job functions. To answer that, the doctor needs to know what those job functions are.

The content of WH-380 Certification is supposed to include medical facts sufficient to support the need for leave, and information sufficient to establish that the employee cannot perform the essential functions of the employee's job, as well as the nature of any other work restrictions and the likely duration of such inability. 29 C.F.R. § 825.306. If the employee is asking for intermittent leave, the completed form is *supposed to provide sufficient information to establish the necessity for such intermittent leave or reduced schedule and an estimate of the dates of duration of such treatments or the periods of recovery.* At the time the employee requests certification, the employer must also advise the employee of the anticipated consequences of failure to provide adequate certification.

Employers should keep in mind that a certification is considered insufficient if the information provided is vague, ambiguous or non-responsive. An employer may contact the health care provider to seek authentication or clarification of the certification, but must first give the employee the opportunity to cure any deficiencies. The employer must notify the employee in writing what additional information is necessary to make the certification sufficient. The employer must provide the employee with seven calendar days (unless not practicable, even if the employee acts in good faith) to cure such deficiency. 29 C.F.R. § 825.305

Let's say a pediatric medical assistant six months into a high-risk pregnancy stops coming to work and seeks FMLA leave. She submits a certification from her provider which says that she is *not currently incapacitated*, but will be incapacitated for a single continuous period of time for six weeks post-delivery. However, the form also says she *cannot do several of the essential functions of her job, including lifting, reaching, bending, standing or*

walking. The form is ambiguous since it says that she is not incapacitated, but the restrictions also make clear that she cannot perform the essential functions of the job. However, the employer cannot simply deny the leave, or send it back to the employee and say it is insufficient. The employer must notify the employee in writing what additional information is necessary to make the certification sufficient. The employer should explain in writing the internal inconsistency and ask the employee to have the doctor clarify whether she is currently unable to perform the essential functions of her job and therefore is incapacitated and needs full-time leave, or, alternatively, whether she is able perform the essential functions of her job and if so, whether there are any restrictions. The employer needs to give her seven days to cure the deficiency. If the employee fails to do so, then the employer may deny FMLA leave. 29 C.F.R. § 825.305

Once the employer has given the employee the opportunity to cure, if the certification is still not sufficient, the employer may seek “clarification” by contacting the healthcare provider, but must use a healthcare provider, human resources professional, leave administrator or a management official to do so. The employee’s direct supervisor may not contact the employee’s health care provider under any circumstances.

Let’s say the certification provided is not internally inconsistent, but instead looks like it was filled out by the employee, not a healthcare provider. An employer is permitted to seek “authentication” by “providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document.” Again, the employer’s attempts to authenticate must be made by a health care provider, human resources professional, leave administrator, or management official.

All contact between the employer and the health care provider must comply with the requirements of the Health Insurance Portability and Accountability Act.

Complying with the FMLA and other leave laws requires navigating a minefield. Employers facing FMLA leave issues should consider consulting experienced labor and employment counsel.

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