

FMLA LEAVE DETERMINATIONS/MEDICAL CERTIFICATIONS
DOL Topic: K¹

PART ONE OF THIS MEMORANDUM PROVIDES A SUMMARY OF QUESTIONS ASKED AND COMMENTS SUBMITTED IN RESPONSE TO THE DOL REQUEST FOR INFORMATION (“RFI”) ABOUT FMLA LEAVE DETERMINATIONS AND MEDICAL CERTIFICATIONS.²

PART TWO OF THIS MEMORANDUM CONTAINS THE RELEVANT STATUTORY AND REGULATORY TEXT. PART TWO ALSO LISTS OTHER SOURCES CITED IN THE COMMENTS ABOUT THIS TOPIC.

PART ONE

The DOL requested information regarding determinations of whether leaves are FMLA-qualifying and the medical certifications process. Under the FMLA and its regulations, an employer may require an employee who has requested leave due to a serious health condition to obtain a medical certification documenting the serious health condition.³ In addition, a second opinion from an employer-approved health care provider may be sought at the employer’s expense if the employer questions the employee’s original eligibility certification.⁴ Once an employee has been deemed eligible for medical leave, an employer may require subsequent recertifications only “on a reasonable basis,” which has been interpreted by the DOL to mean not more than once every 30 days.⁵ Second opinions are not permitted for recertifications.⁶

¹ This topic is discussed in the Family and Medical Leave Act Regulations: A Report on the Department of Labor’s Request For Information, 72 Fed. Reg. 35550 (June 28, 2007), available at <http://www.dol.gov/esa/whd/FMLA2007FederalRegisterNotice/07-3102.pdf>, primarily in Chapter VI.

² The comments reviewed herein are from employers, employer organizations, employees, employee organizations, health care providers, and health care provider organizations. They reflect all comments posted on regulations.gov or available via a Google search as of May 8, 2007. More detailed descriptions of these comments are found in the “Digest of Comments Submitted in Response to the Department of Labor’s Request for Information on the Family and Medical Leave Act,” available at <http://www.law.georgetown.edu/workplaceflexibility2010/law/fmla.cfm>.

³ 29 U.S.C. § 2613, 29 C.F.R. § 825.305.

⁴ 29 U.S.C. § 2613(c).

⁵ 29 U.S.C. § 2613(e); 29 C.F.R. § 825.306(c).

⁶ 29 C.F.R. § 825.306(e).

The DOL solicited comments on five issues regarding leave determinations and medical certifications:

- Employer Contact with Employee's Health Care Provider
- Medical Certification Form (WH-380)
- Timeframe for FMLA Leave Approval and Recertification
- Second Opinions
- "Fitness For Duty" Certifications

ISSUE: Employer Contact with Employee's Health Care Provider

- **The RFI asked: Does 29 C.F.R. § 825.307 create unnecessary expenses and burdens on employers and/or delay the certification process?** As explained in the RFI, under 29 C.F.R. § 825.307, an employer may not contact the employee's health care provider directly. Instead, the employer must obtain the employee's permission for the employer's health care provider to communicate with the employee's health care provider. The DOL noted that HIPAA does "not impede the disclosure of the protected health information for FMLA reasons" in certain situations, but that "recent enforcement experience reveals . . . clarification may be needed."
- **The RFI asked: Can the FMLA be reconciled with the ADA,** which contains no limitation on employers' contact with employees' health care providers?

ISSUE: Medical Certification Form (WH-380)

- **The RFI asked: How can WH-380 be improved? What can be done to make it easier for health care providers to complete?** WH-380 is an optional certification form that the DOL developed for employees to use to obtain certification of a serious health condition. The RFI stated that questions have been raised as to whether it seeks the appropriate medical information.⁷

ISSUE: Timeframe for FMLA Leave Approval and Recertification

- **The RFI asked: Do employers have enough time to properly evaluate information**

⁷ WH-380 is an optional form; but the DOL's regulation precludes employers from requiring additional information than what is found in WH-380. 29 C.F.R. § 825.306.

ISSUE: Timeframe for FMLA Leave Approval and Recertification

and determine whether an employee is eligible to qualify for FMLA leave? The RFI explained that employers have two days to notify employees whether their requests for FMLA leave are approved or denied.⁸

- **The RFI asked: Is the timeframe for recertification in 29 C.F.R. § 825.308 appropriate?** Currently, 29 C.F.R. § 825.308 allows an employer to request a medical recertification no more than once in a thirty-day period in most situations.

ISSUE: Second Opinions

- **The RFI asked: Should employers be able to seek second opinions for recertifications? Specifically, what costs, benefits, and/or hardships would result from permitting employers to obtain second opinions?** The RFI explained that when making determinations regarding whether leave is FMLA-qualifying, employers are permitted to request a second opinion, but only for the initial certification. Currently, 29 C.F.R. § 825.306(e) prevents employers from requiring second (or third) opinions on recertifications.

ISSUE: “Fitness for Duty” Certifications

- **The RFI asked: What are the benefits and burdens of allowing “fitness for duty” certifications,** which are medical certifications that an employee is able (or unable) to return to work? The RFI explained that currently, 29 C.F.R. § 825.310 prohibits employers from requiring “fitness for duty” certifications before an employee may return from intermittent leave.

EMPLOYER-SIDE COMMENTS

Each bold-faced heading below sets forth a particular subject of commentary from employers or employer organizations, and is followed by explanatory text describing the comment in greater detail.

- **Employer Contact With Employee’s Health Care Provider** - Employers express the view that they should be able to communicate directly with an employee’s health care provider.

⁸ 29 C.F.R. § 825.208(b)(1),(c).

EMPLOYER-SIDE COMMENTS

- Employers report that certifications provided by employees are often vague and incomplete. The current requirement that employers must employ or contract with a health care provider simply to contact the employee's health care provider is complicated, costly, and time-consuming. Employers state that they should be able to seek clarification directly from employees' medical providers.
 - Interaction with HIPAA: Employers report that health care providers express concern that providing the information requested on the medical certification form may result in inadvertent disclosure of medical information subject to HIPAA's privacy protections.
 - Interaction with the ADA: Employers report that the ADA's and the FMLA's differing requirements with respect to contact with health care providers are the source of significant confusion for employers. Employers complain that an employer who, acting within the ADA's requirements, makes a good faith contact with an employee's medical provider may inadvertently run afoul of the FMLA. Further, employers note the inconsistency between the 12 week limit on FMLA leave and the "reasonable accommodation" provision of the ADA which may, under certain circumstances, require an employer to provide more than 12 weeks of leave to an employee with a disability.
 - Employers' Suggested Changes: (1) Revise 29 C.F.R. § 825.310(c) to allow employers to directly contact employees' health care providers. Some commenters specifically request the ability to contact health care providers after every period of intermittent leave to ensure that the leave was taken due to the employee's certified serious health condition. (2) The DOL and EEOC should work together to reconcile the FMLA and ADA. (3) Allow an employer to delay an employee's return to work while the employee's health care provider is being contacted if the employer needs clarification of the certification.
- **Form WH-380**
 - Both employers and health care providers complain that WH-380 is confusing and not uniformly used by all employers.
 - Employers report that many health care providers refuse to fill out the requested medical certification forms, making completion of the certification process very difficult. Employers also report that the validity of medical information contained on the forms is often in question because doctors frequently permit secretaries and nurses to complete the forms, and often, even when completing the forms themselves, simply transcribe onto the forms any conditions that patients report.

EMPLOYER-SIDE COMMENTS

- Employers' Suggested Changes: Revise 29 C.F.R. § 825.117 to include a standard form that includes: (1) diagnosis codes; (2) treatment plan, including whether/why intermittent leave is necessary; (3) anticipated duration and frequency of leave needed; and (4) an authorization to release medical information to the employer.
 - Other suggestions include: using only checkboxes; eliminating yes or no questions; distinguishing between leave for one's own serious health condition and that of family members; including a question about the health care provider's credentials; adding the list of non-serious health conditions found in 29 C.F.R. § 825.114(c) to the form; imposing a seven-day time frame on the health care provider to complete the form; allowing only one opportunity for an employee to "cure" a deficient form within seven days; requiring that the health care provider certifying a condition to be a specialist in a field relevant to the employee's health condition; defining health care provider to include only licensed physicians; creating a model form for use in both ADA and FMLA cases; and creating an employer defense to FMLA litigation when employees fail to comply with a medical certification request.
 - A handful of commenters suggest implementing sanctions against non-complying health care providers, but acknowledge that the DOL does not have the authority to do this. However, employers expressed their sentiment that health care providers should be required to submit complete forms that contain sufficient medical information, e.g., "undetermined," "unknown," "lifelong," and "as needed" are not helpful descriptions of the period of time needed.
 - Health care providers should be required to be trained on: (1) the definition of a serious health condition; (2) how to properly and comprehensively complete the certification; and (3) the interaction of HIPAA and the FMLA.
- **Foreign Employment and Certification** – The Society for Human Resource Management ("SHRM") and a handful of individual employers note the difficulty of verifying or otherwise dealing with forms completed outside of the United States, which are often completed in other languages.
 - Employers' Suggested Change: Revise 29 C.F.R. § 825.118 to require employees traveling to other countries to be certified by a health care provider in the United States.

EMPLOYER-SIDE COMMENTS

- **Timeframe for FMLA Leave Approval and Recertification**⁹
 - **Leave Approval:** Employers report that the current two-day timeframe for providing notification to employees that the requested leave is FMLA-qualifying is inadequate. Employers stated that employers should have the same amount of time to designate a request as FMLA-qualifying as employees usually have to provide the medical certification requested by an employer for foreseeable leave.¹⁰
 - Employers' Suggested Change: Employers should be given ten to fifteen business days to decide whether an employee's leave is FMLA-qualifying.
 - **Recertification – Employers' Suggested Changes:** (1) Revise the regulation to allow recertification every thirty days for conditions that are not chronic conditions or a permanent disability. (2) Codify the opinion expressed in DOL Opinion Letter FMLA-2004-2A in the regulations – i.e., when there is no minimum duration specified for a chronic condition in the initial certification, allow employers to request recertification: (1) every thirty days; (2) more frequently when there is evidence of a potential pattern of abuse, such as repeated Monday/ Friday absences, casting doubt on the employee's stated reason for absence; and (3) allow an employer to ask the health care provider to clarify whether a suspicious pattern of absences is consistent with the serious health condition at issue.
- **Second Opinions – Employers' Suggested Change:** Revise 29 C.F.R. § 825.308(e) to allow employers to require second (or third) opinions on recertifications.
- **“Fitness-for-Duty” Certifications**
 - Employers should be allowed to require fitness for duty certifications before any employee who is on FMLA leave (even intermittent leave) can return to work. In addition, an employer should be able to delay an employee's return to work if the employer has a reasonable basis to believe that the employee may not be able to return safely to work and perform the essential functions of the job.
 - 29 C.F.R. § 825.310(g)'s prohibition on obtaining a “fitness for duty” report after an employee's return from intermittent leave conflicts with the ADA, under which such reports are available when job-related and consistent with business necessity.

⁹ See also Topic J.

¹⁰ See 29 C.F.R. § 825.305(b).

EMPLOYER-SIDE COMMENTS

- Employers' Suggested Changes: Revise 29 C.F.R. § 825.310(c) to allow an employer to request more than "a simple statement of an employee's ability to return to work." Permit such reports as long as the request is job-related and consistent with business necessity, which will eliminate conflict between the FMLA and ADA.

EMPLOYEE-SIDE COMMENTS

Each bold-faced heading below sets forth a particular subject of commentary from employee organizations, and is followed by explanatory text describing the comments about this subject in more detail.

- **Employer Contact With Employees' Health Care Providers**

- Employee organizations state that employers should not be allowed to contact employees' health care providers directly. Employee organizations express the view that the current regulations strike an appropriate balance between employee privacy interests and employers' legitimate business needs. Employee organizations remind the DOL that the interim regulations prior to the current regulations did not permit any contact between the employer and the health care provider.
- Interaction with HIPAA: Employee organizations state that protecting the privacy of medical information greatly outweighs the minimal costs or delay from requiring an employer to contact the employee's health care provider through its own health care representative.
- Interaction with the ADA: Employee organizations state that employers need detailed information about employees' disabilities for the purpose of providing accommodations under the ADA, but that there is no similar compelling reason to provide employers with detailed accounts of the conditions necessitating FMLA leave.

- **Form WH-380**

- Employee organizations do not want any changes made to the current certification form that would impose additional, unnecessary burdens for employees.

EMPLOYEE-SIDE COMMENTS

- Employee organizations emphasize that health care providers – not employers – are most equipped to determine whether someone has a serious health condition.
 - Employee organizations complain that health care providers are requiring patients to pay fees of up to \$50 per form, which means that, in some cases, only employees who can afford to pay are able to comply with FMLA certification requirements.
 - Concerned about privacy, members of the Coalition of Labor Women object to being asked to sign waivers permitting their doctors to disclose information contained in their medical records. Employees report that some employers have failed to safeguard the privacy of medical information disclosed as part of FMLA medical certifications.
 - Employees' Suggested Change: Prohibit health care providers from charging fees to fill out FMLA certification forms.
- **Timeframe Regarding FMLA Leave Approval and Recertification**
 - **Leave Approval**: Employee organizations state that 29 C.F.R. § 825.301(c) should not be amended. The data reflects that two days is sufficient for employers to review and respond to an employee's leave request. According to WorldatWork, most employers only spend between 30 and 120 minutes of administrative time per FMLA leave episode to provide notice, determine eligibility, request and review documentation, and request a second opinion.
 - **Recertification**: 29 C.F.R. § 825.308 should not be changed. The DOL determined that a thirty day minimum for recertifications was reasonable after considering comments that suggested varying periods from fifteen days to one year.
 - Employee organizations state that employers are protected from potential abuse by 29 C.F.R. § 825.306(c), which provides exceptions to the thirty-day minimum when: (1) an employee requests a leave extension; (2) an employee's previously documented situation has significantly changed; or (3) the employer receives information that leads them to suspect abuse.
 - Employee organizations warn that allowing more frequent recertification would unduly burden employees who would have to shoulder the cost.

EMPLOYEE-SIDE COMMENTS

- **Second Opinions** – Employee organizations emphasize that employers are not permitted to request second opinions for medical certifications because the statute itself only provides for second opinions in the context of initial certifications. Requiring employees to obtain second opinions would also unfairly burden employees because it would require them to miss work for medical appointments that are unrelated to the direct treatment of their serious health condition, impose an additional cost on employees, and require employers and coworkers to have to cover an avoidable absence.
- **“Fitness-for-Duty” Certifications** - 29 C.F.R. § 825.310(g) should not be changed. As with second opinions, employees report that requiring “fitness-for-duty” certifications would impose an unwarranted burden on employees by requiring more paperwork, additional costs, and unneeded physician’s visits.

PART TWO

THE APPLICABLE STATUTORY SECTIONS AND REGULATORY PROVISIONS RELATED TO TOPIC K HAVE BEEN EXCERPTED BELOW. THESE PROVISIONS WERE NOT NECESSARILY CITED IN THE RFI.

STATUTES

I. FMLA

29 U.S.C. § 2613

(a) In general - **An employer may require that a request for leave under subparagraph (C) or (D) of section 2612(a)(1) of this title be supported by a certification issued by the health care provider of the eligible employee or of the son, daughter, spouse, or parent of the employee, as appropriate.** The employee shall provide, in a timely manner, a copy of such certification to the employer . . .

(c) Second opinion

(1) In general - In any case in which the employer has reason to doubt the validity of the certification provided under subsection (a) of this section for leave under subparagraph (C) or (D) of section 2612(a)(1) of this title, **the employer may require, at the expense of the employer, that the eligible employee obtain the opinion of a second health care provider designated or approved by the employer concerning any information certified under subsection (b) of this section for such leave . . .**

(e) Subsequent recertification - **The employer may require that the eligible employee obtain subsequent recertifications on a reasonable basis.**

II. ADA

42 U.S.C. § 12112

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, **the term "discriminate" includes--** . . .

(5)(A) **not making reasonable accommodations** to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity;
or

(B) **denying employment opportunities to a job applicant or employee** who is an otherwise qualified individual with a disability, **if such denial is based on the need of such covered entity to make reasonable accommodation** to the physical or mental impairments of the employee or applicant

(d) Medical examinations and inquiries. . . .

(4) Examination and inquiry

(A) Prohibited examinations and inquiries - A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries . . . **A covered entity may make inquiries into the ability of an employee to perform job-related functions.**

(C) Requirement - Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

REGULATIONS

I. FMLA

29 C.F.R. § 825.117

For intermittent leave or leave on a reduced leave schedule, there must be a medical need for leave (as distinguished from voluntary treatments and procedures) and it must be that such medical need can be best accommodated through an intermittent or reduced leave schedule. The treatment regimen and other information described in the certification of a serious health condition (see § 825.306) meets the requirement for certification of the medical necessity of intermittent leave or leave on a reduced leave schedule. Employees needing intermittent FMLA leave or leave on a reduced leave schedule must attempt to schedule their leave so as not to disrupt the employer's operations. In addition, an employer may assign an employee to an alternative position with equivalent pay and benefits that better accommodates the employee's intermittent or reduced leave schedule.

29 C.F.R. § 825.118

(a) The Act defines "health care provider" as: (1) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or (2) Any other person determined by the Secretary to be capable of providing health care services.

(b) Others "capable of providing health care services" include only:

(1) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;

(2) Nurse practitioners, nurse-midwives and clinical social workers who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law; . . .

(4) Any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and

(5) A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

(c) The phrase "authorized to practice in the State" as used in this section means that the provider must be authorized to diagnose and treat physical or mental health conditions without supervision by a doctor or other health care provider.

29 C.F.R. § 825.208

. . . (b)(1) Once the employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave . . .

(c) If the employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this decision must be made by the employer within two business days of the time the employee gives notice of the need for leave, or, where the employer does not initially have sufficient information to make a determination, when the employer determines that the leave qualifies as FMLA leave if this happens later. The employer's designation must be made before the leave starts, unless the employer does not have sufficient information as to the employee's reason for taking the leave until after the leave commenced...

29 C.F.R. § 825.301(c)

Except as provided in this subparagraph, the written notice required by paragraph (b) (and by subparagraph (a)(2) where applicable) must be provided to the employee no less often than the first time in each six-month period that an employee gives notice of the need for FMLA leave (if FMLA leave is taken during the six-month period). **The notice shall be given within a reasonable time after notice of the need for leave is given by the employee--within one or two business days if feasible. If leave has already begun, the notice should be mailed to the employee's address of record.**

(1) If the specific information provided by the notice changes with respect to a subsequent period of FMLA leave during the six-month period, the employer shall, within one or two business days of receipt of the employee's notice of need for leave, provide written notice referencing the prior notice and setting forth any of the information in

subparagraph (b) which has changed. For example, if the initial leave period were paid leave and the subsequent leave period would be unpaid leave, the employer may need to give notice of the arrangements for making premium payments.

(2)(i) Except as provided in subparagraph (ii), if the employer is requiring medical certification or a "fitness-for-duty" report, written notice of the requirement shall be given with respect to each employee notice of a need for leave.

(ii) Subsequent written notification shall not be required if the initial notice in the six-months period and the employer handbook or other written documents (if any) describing the employer's leave policies, clearly provided that certification or a "fitness-for-duty" report would be required (e.g., by stating that certification would be required in all cases, by stating that certification would be required in all cases in which leave of more than a specified number of days is taken, or by stating that a "fitness-for-duty" report would be required in all cases for back injuries for employees in a certain occupation). Where subsequent written notice is not required, at least oral notice shall be provided. (See § 825.305(a).)

29 C.F.R. § 825.305

(a) **An employer may require that an employee's leave to care for the employee's seriously-ill spouse, son, daughter, or parent, or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's ill family member.** An employer must give notice of a requirement for medical certification each time a certification is required; such notice must be written notice whenever required by § 825.301. An employer's oral request to an employee to furnish any subsequent medical certification is sufficient.

(b) When the leave is foreseeable and at least 30 days notice has been provided, the employee should provide the medical certification before the leave begins. When this is not possible, **the employee must provide the requested certification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request)**, unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(c) **In most cases, the employer should request that an employee furnish certification from a health care provider at the time the employee gives notice of the need for leave or within two business days thereafter, or, in the case of unforeseen leave, within two business days after the leave commences.** The employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration...

29 C.F.R. § 825.306

(a) **DOL has developed an optional form (Form WH-380, as revised) for employees' (or their family members') use in obtaining medical certification, including second and third opinions, from health care providers that meets FMLA's certification requirements.** (See Appendix B . . .) This optional form reflects certification requirements so as to permit the health care provider to furnish appropriate medical information within his or her knowledge.

(b) **Form WH-380, as revised, or another form containing the same basic information, may be used by the employer; however, no additional information may be required.** In all instances the information on the form must relate only to the serious health condition for which the current need for leave exists...

(c) For circumstances not covered by paragraphs (a) or (b) of this section, **an employer may request recertification at any reasonable interval, but not more often than every 30 days,** unless:

- (1) The employee requests an extension of leave;
- (2) Circumstances described by the previous certification have changed significantly (e.g., the duration of the illness, the nature of the illness, complications); or
- (3) The employer receives information that casts doubt upon the continuing validity of the certification**

(e) Any recertification requested by the employer shall be at the employee's expense unless the employer provides otherwise. **No second or third opinion on recertification may be required.**

29 C.F.R. § 825.307(a)

If an employee submits a complete certification signed by the health care provider, the employer may not request additional information from the employee's health care provider. However, a health care provider representing the employer may contact the employee's health care provider, with the employee's permission, for purposes of

clarification and authenticity of the medical certification

(2) An employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employer's expense...

29 C.F.R. § 825.308

(a) For pregnancy, **chronic**, or permanent/long-term **conditions** under continuing supervision of a health care provider (as defined in § 825.114(a)(2)(ii), (iii) or (iv)), **an employer may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless:**

(1) **Circumstances described by the previous certification have changed significantly** (e.g., the duration or frequency of absences, the severity of the condition, complications); or

(2) **The employer receives information that casts doubt upon the employee's stated reason** for the absence.

(b)(1) If the minimum duration of the period of incapacity specified on a certification furnished by the health care provider is more than 30 days, the employer may not request recertification until that minimum duration has passed unless one of the conditions set forth in paragraph (c)(1), (2) or (3) of this section is met.

(2) For FMLA leave taken intermittently or on a reduced leave schedule basis, the employer may not request recertification in less than the minimum period specified on the certification as necessary for such leave (including treatment) unless one of the conditions set forth in paragraph (c)(1), (2) or (3) of this section is met.

(c) For circumstances not covered by paragraphs (a) or (b) of this section, an employer may request recertification at any reasonable interval, but not more often than every 30 days, unless:

(1) The employee requests an extension of leave;

(2) Circumstances described by the previous certification have changed significantly (e.g., the duration of the illness, the nature of the illness, complications); or

(3) The employer receives information that casts doubt upon the continuing validity of the certification.

(d) The employee must provide the requested recertification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(e) Any recertification requested by the employer shall be at the employee's expense unless the employer provides otherwise. **No second or third opinion on recertification may be required.**

29 C.F.R. § 825.310

(a) As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employer may have a uniformly-applied policy or practice that requires all similarly-situated employees (i.e., same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work.

(b) If State or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied. Similarly, requirements under the Americans with Disabilities Act (ADA) that any return-to-work physical be job-related and consistent with business necessity apply. For example, an attorney could not be required to submit to a medical examination or inquiry just because her leg had been amputated. The essential functions of an attorney's job do not require use of both legs; therefore such an inquiry would not be job related. An employer may require a warehouse laborer, whose back impairment affects the ability to lift, to be examined by an orthopedist, but may not require this employee to submit to an HIV test where the test is not related to either the essential functions of his/her job or to his/her impairment.

(c) An employer may seek fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification itself need only be a simple statement of an employee's ability to return to work. A health care provider employed by the employer may contact the employee's health care provider with the employee's permission, for purposes of clarification of the employee's fitness to return to work. No additional information may be acquired, and clarification may be requested only for the serious health condition for which FMLA leave was

taken. The employer may not delay the employee's return to work while contact with the health care provider is being made.

(d) The cost of the certification shall be borne by the employee and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification.

(e) The notice that employers are required to give to each employee giving notice of the need for FMLA leave regarding their FMLA rights and obligations (see § 825.301) shall advise the employee if the employer will require fitness-for-duty certification to return to work. If the employer has a handbook explaining employment policies and benefits, the handbook should explain the employer's general policy regarding any requirement for fitness-for-duty certification to return to work. Specific notice shall also be given to any employee from whom fitness-for-duty certification will be required either at the time notice of the need for leave is given or immediately after leave commences and the employer is advised of the medical circumstances requiring the leave, unless the employee's condition changes from one that did not previously require certification pursuant to the employer's practice or policy. No second or third fitness-for-duty certification may be required.

(f) An employer may delay restoration to employment until an employee submits a required fitness-for-duty certification unless the employer has failed to provide the notices required in paragraph (e) of this section.

(g) An employer is not entitled to certification of fitness to return to duty when the employee takes intermittent leave as described in § 825.203.

(h) When an employee is unable to return to work after FMLA leave because of the continuation, recurrence, or onset of the employee's or family member's serious health condition, thereby preventing the employer from recovering its share of health benefit premium payments made on the employee's behalf during a period of unpaid FMLA leave, the employer may require medical certification of the employee's or the family member's serious health condition. (See § 825.213(a)(3).) The cost of the certification shall be borne by the employee and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification.

29 C.F.R. § 825.311

(a) In the case of foreseeable leave, an employer may delay the taking of FMLA leave to an employee who fails to provide timely certification after being requested by the employer to furnish such certification (i.e., within 15 calendar days, if practicable), until the required certification is provided.

(b) When the need for leave is not foreseeable, or in the case of recertification, an employee must provide certification (or recertification) within the time frame requested by the employer (which must allow at least 15 days after the employer's request) or as soon as reasonably possible under the particular facts and circumstances. In the case of a medical emergency, it may not be practicable for an employee to provide the required certification within 15 calendar days. If an employee fails to provide a medical certification within a reasonable time under the pertinent circumstances, the employer may delay the employee's continuation of FMLA leave. If the employee never produces the certification, the leave is not FMLA leave.

(c) When requested by the employer pursuant to a uniformly applied policy for similarly-situated employees, the employee must provide medical certification at the time the employee seeks reinstatement at the end of FMLA leave taken for the employee's serious health condition, that the employee is fit for duty and able to return to work (see § 825.310(a)) if the employer has provided the required notice (see § 825.301(c); the employer may delay restoration until the certification is provided. In this situation, unless the employee provides either a fitness-for-duty certification or a new medical certification for a serious health condition at the time FMLA leave is concluded, the employee may be terminated. See also § 825.213(a)(3).

II. HIPAA

45 C.F.R. § 164.502 - Uses and disclosures of protected health information: general rules

(a) Standard. **A covered entity may not use or disclose protected health information**, except as permitted or required by this subpart or by subpart C of part 160 of this subchapter.

(1) Permitted uses and disclosures. **A covered entity is permitted to use or disclose protected health information as follows:**

- (i) To the individual;
- (ii) For treatment, payment, or health care operations, as permitted by and in compliance with § 164.506;
- (iii) Incident to a use or disclosure otherwise permitted or required by this subpart, provided that the covered entity has complied with the applicable requirements of § 164.502(b), § 164.514(d), and § 164.530(c) with respect to such otherwise permitted or required use or disclosure;
- (iv) **Pursuant to and in compliance with a valid authorization under § 164.508;**
- (v) Pursuant to an agreement under, or as otherwise permitted by, § 164.510; and
- (vi) As permitted by and in compliance with this section, § 164.512, or § 164.514(e), (f), or (g). . .

(b) Standard: Minimum necessary.

(1) Minimum necessary applies. **When using or disclosing protected health information or when requesting protected health information from another covered entity, a covered entity must make reasonable efforts to limit protected health information to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request**

45 C.F.R. § 164.508 - Uses and disclosures for which an authorization is required.

(a) Standard: authorizations for uses and disclosures.--

(1) Authorization required: general rule. Except as otherwise permitted or required by this subchapter, **a covered entity may not use or disclose protected health information without an authorization that is valid under this section.** When a covered entity obtains or receives a valid authorization for its use or disclosure of protected health information, such use or disclosure must be consistent with such authorization. . .

(b) Implementation specifications: general requirements.--

(1) **Valid authorizations.**

- (i) A valid authorization is a document that meets the requirements in paragraphs (a)(3)(ii), (c)(1), and (c)(2) of this section, as applicable.

- (ii) A valid authorization may contain elements or information in addition to the elements required by this section, provided that such additional elements or information are not inconsistent with the elements required by this section. . . .

(c) Implementation specifications: Core elements and requirements.--

(1) Core elements. A valid authorization under this section must contain at least the following elements:

- (i) A description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion.
- (ii) The name or other specific identification of the person(s), or class of persons, authorized to make the requested use or disclosure.
- (iii) The name or other specific identification of the person(s), or class of persons, to whom the covered entity may make the requested use or disclosure.
- (iv) A description of each purpose of the requested use or disclosure. The statement "at the request of the individual" is a sufficient description of the purpose when an individual initiates the authorization and does not, or elects not to, provide a statement of the purpose.
- (v) An expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure. The statement "end of the research study," "none," or similar language is sufficient if the authorization is for a use or disclosure of protected health information for research, including for the creation and maintenance of a research database or research repository.
- (vi) Signature of the individual and date. If the authorization is signed by a personal representative of the individual, a description of such representative's authority to act for the individual must also be provided.

III. ADA

EEOC, Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act, Enforcement Guidance No. 915.002 (Oct. 17, 2002), available at <http://www.eeoc.gov/policy/docs/accommodation.html>.

6. May an employer ask an individual for documentation when the individual requests reasonable accommodation?

Yes. When the disability and/or the need for accommodation is not obvious, **the employer may ask the individual for reasonable documentation about his/her disability and functional limitations.** The employer is entitled to know that the individual has a covered disability for which s/he needs a reasonable accommodation.

Reasonable documentation means that the employer may require only the documentation that is needed to establish that a person has an ADA disability, and that the disability necessitates a reasonable accommodation. Thus, an employer, in response to a request for reasonable accommodation, cannot ask for documentation that is unrelated to determining the existence of a disability and the necessity for an accommodation. This means that in most situations an employer cannot request a person's complete medical records because they are likely to contain information unrelated to the disability at issue and the need for accommodation. If an individual has more than one disability, an employer can request information pertaining only to the disability that requires a reasonable accommodation.

An employer may require that the documentation about the disability and the functional limitations come from an appropriate health care or rehabilitation professional. The appropriate professional in any particular situation will depend on the disability and the type of functional limitation it imposes. Appropriate professionals include, but are not limited to, doctors (including psychiatrists), psychologists, nurses, physical therapists, occupational therapists, speech therapists, vocational rehabilitation specialists, and licensed mental health professionals.

In requesting documentation, employers should specify what types of information they are seeking regarding the disability, its functional limitations, and the need for reasonable accommodation. The individual can be asked to sign a limited release allowing the employer to submit a list of specific questions to the health care or vocational professional.⁽²⁸⁾ [TEXT OF FOOTNOTE 28: Since a doctor cannot disclose information about a patient without his/her permission, **an employer must obtain a release from the individual that will permit his/her doctor to answer questions.** The release should be clear as to what information will be requested. Employers must maintain the confidentiality of all medical information collected during this process, regardless of where the information comes from.]

As an alternative to requesting documentation, an employer may simply discuss with the person the nature of his/her disability and functional limitations. It would be useful for the employer to make clear to the individual why it is requesting information, i.e., to verify the existence of an ADA disability and the need for a reasonable accommodation.

7. May an employer require an individual to go to a health care professional of the employer's (rather than the employee's) choice for purposes of documenting need for accommodation and disability?

The ADA does not prevent an employer from requiring an individual to go to an appropriate health professional of the employer's choice if the individual provides insufficient information from his/her treating physician (or other health care professional) to substantiate that s/he has an ADA disability and needs a reasonable accommodation. However, if an individual provides insufficient documentation in response to the employer's initial request, the employer should explain why the documentation is insufficient and allow the individual an opportunity to provide the missing information in a timely manner. Documentation is insufficient if it does not specify the existence of an ADA disability and explain the need for reasonable accommodation.

Any medical examination conducted by the employer's health professional must be job-related and consistent with business necessity. This means that the examination must be limited to determining the existence of an ADA disability and the functional limitations that require reasonable accommodation. If an employer requires an employee to go to a health professional of the employer's choice, the employer must pay all costs associated with the visit(s).

8. Are there situations in which an employer cannot ask for documentation in response to a request for reasonable accommodation?

Yes. An employer cannot ask for documentation when: (1) both the disability and the need for reasonable accommodation are obvious, or (2) the individual has already provided the employer with sufficient information to substantiate that s/he has an ADA disability and needs the reasonable accommodation requested.

29 C.F.R. § 1630.9 - Not making reasonable accommodation

(a) It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

(b) It is unlawful for a covered entity to deny employment opportunities to an otherwise qualified job applicant or employee with a disability based on the need of such covered entity to make reasonable accommodation to such individual's physical or mental impairments.

29 C.F.R. § 1630.13(b)

Examination or inquiry of employees. Except as permitted by § 1630.14, it is unlawful for a covered entity to require a medical examination of an employee or to make inquiries as to whether an employee is an individual with a disability or as to the nature or severity of such disability.

29 C.F.R. § 1630.14(c)

(c) Examination of employees. A covered entity may require a medical examination (and/or inquiry) of an employee that is job-related and consistent with business necessity. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(1) Information obtained under paragraph (c) of this section regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that:

(i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations...

(2) Information obtained under paragraph (c) of this section regarding the medical condition or history of any employee shall not be used for any purpose inconsistent with this part...

MATERIALS CITED IN COMMENTS RESPONDING TO THE RFI¹¹

Cases

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- *Moticka v. Weck Closure Sys.*, No. 05-1231, 2006 U.S. App. LEXIS 13443 (4th Cir. May 31, 2006).
- *Crouch v. Whirlpool Corp.*, 447 F.3d 984 (7th Cir. 2006).
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- *Sorrell v. Rinker Materials Corp.*, 395 F.3d 332 (6th Cir. 2005).
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- *Urban v. Dolgencorp of Tex., Inc.*, 393 F.3d 572 (5th Cir. 2004).
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- *Cavin v. Honda of Am. Mfg, Inc.*, 346 F.3d 713 (6th Cir. 2003).
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- *Porter v. Alumoweld Co., Inc.*, 125 F.3d 243 (4th Cir. 1997).
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- *Harcourt v. Cincinatti Bell*, 383 F. Supp. 2d 944 (S.D. Ohio 2005).

¹¹ Cases and materials cited in the RFI are excluded from this list. This list does not include surveys cited in reviewed comments.

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- *Kitts v. General Tel. N., Inc.*, No. 03-2071-JWL, 2005 U.S. Dist. Lexis 20241 (S.D. Ohio Sept. 15, 2005).
- *Morgan v. Neiman-Marcus Group*, No. 05-0079-G 2005 U.S. Dist. LEXIS 34541 (N.D. Tex. Dec. 20, 2005).
- *Baldwin-Love v. Elec. Data Sys. Corp.*, 307 F. Supp. 2d 1222 (M.D. Ala. 2004).
- *Dowell v. Ind. Heart Physicians, Inc.*, No. 1:03-CV-1310, 2004 U.S. Dist. LEXIS 26431 (S.D. Ind. Dec. 22, 2004).
- *Wheeler v. Pioneer Developmental Servs., Inc.*, 349 F. Supp. 2d 158, 168 (D. Mass. 2004).
- *Nagy v. Tee Vee Toons, Inc.*, No. 03-7838, 2004 U.S. Dist. LEXIS 8400 (S.D.N.Y. May 12, 2004).
- *Konipol v. Rest. Assocs.*, No. 01-7857, 2002 U.S. Dist. LEXIS 22439 (S.D.N.Y. Nov. 20, 2002).
- *Underhill v. Willamina Lumber Co.*, No. 98-630-AS, 1999, U.S. Dist. LEXIS 9722 (D. Or. May 20, 1999).
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- Dep't of Labor Opinion Letter, FMLA 2004-2-A (May 25, 2004), http://www.dol.gov/esa/whd/opinion/FMLA/2004_05_25_2A_FMLA.pdf.
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Other Materials

- Allen Smith, *Promised Changes to FMLA Regulations Languish*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT, Nov. 8, 2005.