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## **What you don't know CAN hurt you...and cost you money!**

### Avoiding FMLA Compliance Mistakes

#### Part 2 of 3-Part Series

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#### **What's My Obligation?**

Many employers remain unclear about what their responsibilities are under the Family Medical Leave Act. Does an employee have to "request" FMLA and what is considered "being put on notice?" Unfortunately, many employers turn a blind eye to FMLA and only provide it when an employee specifically requests leave under FMLA. Mistakes surrounding "notice" are all too common and can place employers in litigious situations.

#### **Here are some points to remember:**

- Although an employee need not mention FMLA by name, they have an affirmative duty to put you on notice of a potentially FMLA qualifying event. While saying "I am sick" isn't enough information for an employer to determine if a situation may be FMLA qualifying, an employee doesn't have to say the magic words "FMLA." The employer must be given enough information to distinguish FMLA-type leave from other absences, such as sick leave.
- The U.S. Department of Labor (DOL) has recently put even more stringent notice requirements in place for employees seeking FMLA leave. Amended regulation 825.303(b) states that the employee must specifically reference either the qualifying reason for leave (e.g., depression or pregnancy) or the need for FMLA leave.
- If an employee mentions a serious health condition by name (even without mentioning the FMLA), you have a duty to investigate the claim to determine if they are entitled to leave under the Act.
- It is important to train your management staff and front line supervisors on what constitutes notice of FMLA. Further, supervisors have an obligation to take action if they suspect an employee has provided notice. If a supervisor has knowledge of a serious health condition, FMLA request or a potential FMLA qualifying event and does not take active measures to pass that information along to the appropriate party (in most cases, Human Resources), the supervisor can be held personally liable for damages. (Shultz v Advocate Health & Hospitals Corp.)

#### **What information can you request?**

An employee has an obligation to provide enough information to an employer that substantiates the request for leave under FMLA. In most cases, this comes in the form of the Medical Certification Document.

Requesting the permissible information in an FMLA medical certification, can help you determine whether a condition or situation meets the DOL issued definition of "serious health condition."

#### **The following are appropriate pieces of information to request:**

- Employee's name
- Patient's name (if other than employee)
- Type of serious health condition
- Medical facts supporting certification
- Date the serious health condition began
- Likely duration

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- Facts concerning need for reduced/intermittent leave
- Regimen of treatment
- Whether the employee can perform work of any kind or is unable to perform any one or more of the job's essential functions
- Whether the employee will provide direct care or psychological comfort if the FMLA leave is for a relative with a serious condition
- Signature of health care provider and date
- Signature of employee and date

Even though the law does not specifically require medical certification, it is critical to incorporate this practice into your policy. In addition to getting the medical documentation which supports the need for an employee's leave under FMLA, you will establish a culture of consistency. All employees seeking FMLA leave are treated the same way.

Requesting medical certification becomes increasingly vital if an employee with a serious health condition develops complications or their health status changes that would require an extension of FMLA leave. Recertification can be requested no more than once every six months. Once the request is made, an employee has 15 business days to submit documentation to support the extension. However, employers are able to request recertification more frequently than once every six months if an employee's status has changed, the frequency and duration have changed or there is some sort of change that would require the employee to miss more or less time from work under FMLA.

According to the DOL FMLA regulations, an employee has 15 days from when the employer provides notification of their rights to FMLA to submit completed medical certification. Even though it is not the employer's responsibility to make sure employees submit the certification on time, "courts will frown on companies that deny FMLA leave simply because the employee submits his certification form on the 16th day" (Ohio Employment Law, March 2008). In other words, if an employee's certification is late or lacks complete information, notify the employee and provide time for them to correct the deficiency. Although, not legally required, some employers allow automatic extensions of three to five days to allow for mailing time and slow responding providers. With this type of employer-offered extension, an employee would have 18 to 20 days from the employer's notification to submit the documentation.

**Employers can be faced with legal fees and monetary damages by not allowing an employee the appropriate amount of time to provide supporting medical documentation, as illustrated in the sample scenario below.**

*Ms. Killian was granted FMLA leave until December 10th after a surgery. Unfortunately, her surgery led to complications. As a result, Ms. Killian called her employer on December 4th to request an extension. The extension was approved verbally by the employer. The employer also asked her to provide a new medical certification.*

*The company fired the employee on December 10th because she did not return to work and did not provide the recertification. The extension and request for recertification was made on December 4th, which gave the employee 15 business days to turn in that recertification. The employee filed an FMLA suit saying she was not given adequate time to provide the recertification. The court agreed with her complaint and awarded her \$50,000. (Killian v. Yorozu Automotive, No. 04-6202, 6th Cir.)*

If medical certification is incomplete, provides inconsistent information or is unclear, an employer can request medical clarification. Once the employer notifies the employee of the deficiency, in writing, the employee has seven days to get the necessary information back to the employer for designation determination according to the DOL.

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#### Can I ask that?

Knowing what you can and can not ask an employee regarding FMLA can get confusing. In addition to the medical certification employers can verbally request information that pertains specifically to an employee's ability to work. For instance, it is appropriate to ask an employee if they will miss a continuous or intermittent period from work. Questions surrounding staffing, operations and productions are appropriate to ask as they are directly related to the employer's ability to continue operations.

Employers and their supervisory staff should steer clear of questions pertaining to the condition or specific reason someone is taking leave. It is not advisable to ask what is wrong with an employee, or what they are seeing their doctor for. These types of questions do not pertain to the employer's operations and can increase legal risk for employers.

Remaining in compliance with the DOL's FMLA regulations can be an uphill battle for employers. However, staying up to date on regulations and obtaining ongoing education can help employers avoid common compliance mistakes and pitfalls.

#### CareWorks USA

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