

FMLA UPDATE

DATE: February 1, 2000 PERSL 1360

TO: Personnel Directors/Designees
Labor Relations Directors/Designees

FROM: DOER Labor Relations/Compensation Division

RE: FMLA UPDATE -- recent issues.

A variety of FMLA-related issues have come up since the last FMLA Update was issued in February of 1998. Please read the following update thoroughly and contact your labor relations representative with questions.

- Fitness for duty statements and the FMLA: Many questions have emerged regarding: a) an agency's ability to request fitness-for-duty statements from employees returning from FMLA-qualified leaves; and b) an agency's ability to refuse to return employees to work (and/or to ask for a 2nd opinion) if they are not satisfied with the original fitness-for-duty statement. As background, many of our collective bargaining agreements allow agencies to request fitness-for-duty statements from employees who they are not sure are physically fit to return from leave. Because the ability to request fitness-for-duty statements is established in our contracts, the FMLA allows us to continue that practice. At some agencies, these statements are requested routinely from all employees who return from sick/medical leave, regardless of whether the leave is FMLA-qualified or not. At other agencies, fitness for duty statements are requested on an as-needed basis, at the discretion of the agency. Several agencies have also required 2nd opinions on fitness-for-duty statements. This practice has been called in to question. Several courts in other jurisdictions have ruled that employees who submit return-to-work statements at the end of their FMLA-qualifying leave have an absolute right to return to their jobs without interference and without an employer right to a 2nd opinion. While courts in our jurisdiction have not yet ruled on this issue, we are making the following recommendations, in conjunction with advice from the Attorney General's office:
 - a) Each agency should develop a uniform policy informing employees whether fitness-for-duty statements will be required in order to return to work from sick/medical leave.
 - b) This policy should be administered consistently for all employees, whether the leave is FMLA-qualifying or not.
 - c) If you want the doctor to consider a specific fitness-for-duty form and/or address specific job-related issues in deciding whether an employee is fit for duty, that form

must be given to the employee at the time the employee is informed that a fitness-for-duty statement will be required. The best method is to outline the specific responsibilities and ask the doctor to indicate whether the employee is physically and mentally fit to return to work, based on a review of the foregoing job responsibilities.

- d) If the employee's doctor indicates that the employee is fit to return to work, the employee should be returned to work.
 - e) Agencies who remain concerned about an individual employee's actual ability to return to work, despite a signed statement from the employee's doctor, should contact their DOER labor relations representative or the Attorney General's office for additional consultation.
 - f) In most cases, if an employee's doctor certifies that the employee is fit to return, you will be required to return the employee to work.
- Need to provide Tennessean Warning when requesting completion of a Certification of Health Care Provider form. In response to some concerns raised by employees, the Attorney General's office recommends that you provide the attached Tennessean Warning to any employee to whom you provide a Certification of Health Care Provider form.
 - Requesting Dr.'s slips for sick leave vs. requiring Certification of Health Care Provider form for FMLA .
 - a) Agencies may require employees to indicate on their sick leave slip which absences they are claiming as FMLA-qualifying and which they are not.
 - b) Agencies may require employees to provide doctor's statements when sick leave abuse is suspected that is not FMLA-related.
 - c) Agencies who suspect that an employee is using FMLA time fraudulently, must use the FMLA recertification process (and *not* the doctor slip process). Essentially, agencies can require FMLA recertification every 30 days and/or more frequently if an employee's FMLA-claimed absences deviate from their certification.

- Notification of employees that leave is FMLA-qualifying. As you know, employees are supposed to be notified as soon as possible whether or not their leave time will be considered FMLA-qualifying. In general, the FMLA regulations state that if an Employer fails to provide such timely notification to the employee, the time can not be deducted from the employee's 12 weeks. (In essence, the employee ends up with "extra" protected time due to an Employer error). The regulations do make the following exceptions to that general rule:
 - 1) if an employee is still out on the leave, an Employer may – at any time during the leave – declare the time as FMLA-qualifying beginning with the first date of the leave;
 - 2) if an employee returns from leave before the Employer finds out the reason for the leave, the Employer has 24 hours from the employee's return to declare the leave as FMLA-qualifying;
 - 3) as long as an employee is told at the commencement of a leave that the leave is being *provisionally* counted as FMLA-qualifying, the Employer can later go back and make that provisional designation permanent or not, depending on the doctor's certification (or lack thereof).

For your information, two federal courts have recently rejected these FMLA regulations, and have ruled, essentially, that even if an Employer fails to provide timely notice of FMLA-qualification, the employee is not harmed as long as s/he still gets 12 weeks off. While these rulings are encouraging, agencies should still try to put the FMLA "in play" as soon as possible.

- Final regulations available. If you would like a copy of the actual federal regulations, they are available via the Department of Labor's phone number (202/219-8412) or Website (<http://www.dol.gov>).
- FMLA Policy, Forms, Updates and Postings also available on DOER's Website.

cc: Melissa Wright, Attorney General's Office
Labor Relations/Compensation Division staff