

DATE: August 17, 2005

**PERSL #1391**

TO: Personnel Directors/Designees  
Labor Relations Directors/Designees

FROM: Carolyn J. Trevis, Acting Assistant State Negotiator  
Labor Relations/Total Compensation Division



PHONE: (651) 259-3758

RE: FMLA Update – Substitution of Sick Leave

FMLA Opinion Letters

Over the last several months, the U.S. Department of Labor has issued opinion letters relating to the substitution of paid leave for absences covered under the Family and Medical Leave Act of 1993 (FMLA). Specifically, these opinion letters address whether an employer, under its sick leave policy, may request proof of illness where the employee's supervisor has reason to believe that the employee may not be using paid sick leave legitimately or if the employee has a certain pattern or trend of absence which casts doubt upon the legitimacy of his/her claim that he/she is too sick to work, such as a Monday/Friday absence pattern. One of the opinion letters also confirms that such an absence pattern will support a request for recertification of the employee's health condition.

The opinions cite the regulations which provide that an employer may limit the substitution of paid sick leave to circumstances which meet the employer's usual requirements for the use of such paid leave. The regulations state that "an employer is not required to allow substitution of paid sick or medical leave for unpaid FMLA leave 'in any situation' where the employer's uniform policy would not normally allow such paid leave." 29 C.F.R. 825.207(c).

Application to the Statewide Policy on Sick Leave

Since our current Statewide Policy on Sick Leave provides that sick leave should be denied when there is evidence or reason to believe that abuse has occurred until or unless the employee provides satisfactory evidence of legitimate use of sick leave, these opinion letters are instructive. I have attached copies for your convenience. If you believe that either letter applies to a situation presented in your agency, please contact me for further discussion of how to proceed.

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- Final Regulations Available: If you would like a copy of the 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: DOER Labor Relations/Total Compensation Staff  
DOER Employee Insurance Division Staff  
Kristyn Anderson, Minnesota Office of the Attorney General

October 4, 2004

FMLA2004-3-A

Dear *Name\**,

Thank you for your letter regarding the substitution of paid leave for absences covered under the Family and Medical Leave Act of 1993 (FMLA). Specifically, you ask whether *Specific\** may offer enhanced sick leave benefits to employees beyond what the FMLA mandates, contingent upon the following:

(1) *Specific\** receives additional information from the employee verifying the basis for the requested leave beyond that required under the FMLA, and (2) *Specific\** does not discriminate against individuals taking FMLA-qualified leaves versus other types of leaves in requesting such information.

*Specific\** sick leave policy, *specific\**, allows supervisors to require that employees who are absent because of illness provide "proof of illness" (by way of a doctor's note or otherwise) in order to receive paid sick leave. Proof of illness may be required from all employees under the plan, including those whose absences are covered under Section 102(a)(1)(D) of the FMLA and who have previously submitted medical certifications. You advise that the *specific\** was in effect prior to the FMLA enactment and that similar *specific\** exist for employees covered by collective bargaining agreements and for employees who are not covered under *specific\** (including managers). You request an opinion from our office on whether *Specific\** complies with the FMLA.

The *Specific\** defines an "incidental absence" as the first seven consecutive calendar days or less that an employee is absent from work due to personal illness. As you have described the *specific\**, proof of illness is not normally requested for the majority of employees subject to the plan. However, it is within the supervisor's right to request proof of illness from any employee if the supervisor has reason to believe that the employee may not be too sick to work or if the employee has a certain pattern or trend of absence which casts doubt upon the legitimacy of his/her claim to be too sick to work, such as a Monday/Friday absence pattern.

You advise that the *specific\** are administered separately from FMLA leave policies and that it is possible for an absence to be paid under the *specific\** and not approved as FMLA qualifying, and vice versa. You state that employees who take FMLA-qualifying leave for their own serious health conditions but fail to provide the proof of illness when requested receive unpaid, FMLA-protected leave but are not eligible for paid sick leave. Employees may substitute accrued personal or vacation leave for FMLA-qualifying absences without being required to provide proof of illness. You state that the *specific\** specifically provides that "the fact that an employee has numerous FMLA-approved absences is not a reason to require proof of illness in order for the employee to receive paid sick leave for an incidental absence, without additional facts such as a Monday-Friday absence pattern, absence which coincides with a holiday, absence which coincides with overtime assignments, etc."

The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job protected leave each year – with the maintenance of any group health insurance coverage – for specified family and medical reasons. Section 102(d) permits the substitution of certain paid leaves for the unpaid FMLA leave. Section 102(d)(2) provides that an employee may elect, or an employer may require, the employee to substitute certain accrued paid vacation leave, personal leave, family leave, or sick or medical leave for the unpaid leave provided under the Act. FMLA's legislative history indicates that the purpose of Section 102(d)(2) was "to provide that specified paid leave which has accrued but has not yet been taken, may be substituted for the unpaid leave under this act in order to mitigate the financial impact of wage loss due to family and temporary medical leaves." (House Report 103-8, Feb. 2, 1993, p. 38.)

While the employer may not limit the substitution of accrued paid vacation or personal leave (see 29 C.F.R. 825.207(e)), the employer may limit the substitution of paid sick or medical leave to circumstances which meet the employer's usual requirements for the use of such paid leave (see Section 102(d)(2)(B) and 29 C.F.R. 825.207(c)). The regulations state that "an employer is not required to allow substitution of paid sick or medical leave for unpaid FMLA leave 'in any situation' where the employer's uniform policy would not normally allow such paid leave." 29 C.F.R. 825.207(c).

If, as you represent, *Specific*\* paid sick leave program is uniformly applied to absences caused by illness regardless of whether the absences are FMLA-qualifying, and if employees may take unpaid FMLA leave or substitute accrued vacation or personal leave should they choose not to provide the additional proof of illness required to receive paid sick leave, then the *specific*\* would comply with the FMLA.

Please note that in responding to your inquiry, we have assumed that all FMLA absences at issue are for FMLA-qualifying reasons. In your letter you raise the issue of seeking additional documentation pursuant to the *specific*\* for an employee you believed was potentially not “too sick to work” (the standard in your plan) but on FMLA-covered leave. We note that if an employer receives information that casts doubt upon the validity of the employee’s stated reason for the FMLA-covered absence, the employer may request recertification. See 29 C.F.R. § 825.308; see also DOL Opinion Letter dated May 25, 2004 (finding that a pattern of Friday/Monday absences can constitute “information that casts doubt upon the employee’s stated reason for the absence,” and clarifying that employers can inform the health care provider of such an absence pattern as part of the recertification process.) Moreover, we note that FMLA protections do not apply where an employee fraudulently obtains FMLA leave. See 29 C.F.R. § 825.312(g).

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

Sincerely,

Alfred B. Robinson, Jr.  
Acting Administrator

*\* Name and specifics withheld to preserve privacy, in accordance with 5 U.S.C. 552(b)(7).*

May 25, 2004

FMLA2004-2-A

Dear **Name\***,

Thank you for your letters dated July 7, 1998, addressed to Ms. Michelle Bechtoldt, formerly of the Office of Enforcement Policy, Family and Medical Leave Act Team, in regard to medical recertification issues under the Family and Medical Leave Act of 1993 (FMLA). You have requested clarification of Regulations 29 Part 825 in regard to recertification issues.

You agreed in a telephone conversation on February 27, 2004, that it would be appropriate to combine our response to your inquiries in one letter. We apologize for the long delay in providing this response.

The Wage and Hour Division of the U.S. Department of Labor administers the FMLA for all private, state and local government employees, and some federal employees. Although determinations of coverage, eligibility and other issues of compliance under the FMLA are fact intensive, we trust that the following information will provide the clarification you requested.

**1. Minimum recertification period when no minimum duration of capacity is specified in the medical certification.**

You understand that the FMLA allows an employer to request recertification every 30 days for pregnancy, chronic or permanent/long term conditions, citing four scenarios involving such conditions, none of which have a minimum duration of incapacity specified in the medical certification.<sup>11</sup> You request that we confirm this understanding or explain our basis for disagreement.

We agree with your understanding, provided the recertification is requested in connection with an absence. Section 103(e) of the FMLA states the employer may require subsequent recertifications "on a reasonable basis." The FMLA regulations at §825.308(a) limit recertification for pregnancy, chronic, or permanent/long-term serious health conditions, when no minimum duration of incapacity is specified on the medical certification (as discussed in §825.308(b)), to no more often than every 30 days, provided the recertification is done only in connection with an absence. If circumstances have changed significantly, or the employer receives information which casts doubt upon the continuing validity of the certification, recertification may be requested more frequently than every 30 days.

**2. Minimum recertification period with Friday/Monday absence pattern.**

You understand that a pattern of Friday/Monday absences can constitute "information that casts doubt upon the employee's stated reason for the absence" (§825.308(a)(2)), thus allowing an employer to request recertification more frequently than every 30 days.

We agree with your understanding, provided there is no evidence that provides a medical reason for the timing of such absences and the request for recertification is made in conjunction with an absence. A recertification under these circumstances could thus be justified, for example, if a medical certification indicated the need for intermittent leave for two or three days a month due to migraine headaches, and the employee took such leave every Monday or Friday (the first and last days of the employee's work week).

**3. Informing medical provider of pattern of Monday/Friday or apparent excessive absences, and asking for clarification.**

You understand that an employer, when requesting medical certification or recertification, may inform the health care provider that the employee has a pattern of Friday/Monday or apparent excessive absences. You add that you understand that an employer who has observed such a pattern of potential abuse may ask the health care provider, as part of the certification (and subsequent recertification) process, if this pattern of absence is consistent with the employee's serious health condition. You recognize that an employer's direct contact with the employee's health care provider is prohibited, but you understand that

this question could be added to the medical certification form given to the employee for completion by the health care provider.<sup>[2]</sup>

The FMLA does not prohibit an employer from including a record of an employee's absences along with the medical certification form for the health care provider's consideration in determining the employee's likely period of future absences. Nor does the FMLA prohibit an employer from asking, as part of the recertification process, whether the likely duration and frequency of the employee's incapacity due to the chronic condition is limited to Mondays and Fridays.

Further, please be aware that Regulation §825.307(a) permits a health care provider representing the employer to contact the employee's health care provider for purposes of clarifying the information in the medical certification. Such contact may only be made with the employee's permission.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We hope that this has been responsive to the questions you have raised. If I can be of further assistance, please do not hesitate to contact me.

Sincerely,  
Tammy D. McCutchen, Administrator

Note: \* The actual name(s) was removed to preserve privacy.

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<sup>[1]</sup>Scenario One: An employee's Health Care Provider (HCP) certifies her migraine headaches will last indefinitely. Scenario Two: An employee's HCP certifies a chronic serious health condition (diabetes) and provides no time frame for the duration of the condition. Scenario Three: The employee's chronic serious health condition (asthma) is certified to last for an indefinite period, with possible episodes of incapacity (coinciding with pollen season) over a three month period. Scenario Four: The certification again specifies an indefinite period, but indicates a need for breathing tests and treatments to be conducted over the next three months.

<sup>[2]</sup>Under the Health Insurance Portability and Accountability Act (HIPAA), 104 P.L. 191, 42 USC §1320d, covered entities (such as HCPs) are subject to certain standards regarding the use and disclosure of an individual's protected health information. (See 45 CFR Parts 160 and 164, administered by the U.S. Department of Health and Human Services, Office for Civil Rights.) In general, the HIPAA does not prohibit covered entities from releasing an individual's protected health information to that individual. An employee's failure to provide information an employer is entitled to under the FMLA could jeopardize the employee's FMLA leave entitlement.