

FMLA Doctor's Notes: What Unions Need to Know

May 04, 2016 / Robert M. Schwartz



Since its passage in 1993, the Family and Medical Leave Act (FMLA) has saved the jobs of tens of thousands of workers—union and nonunion. The law prevents employers from discharging or disciplining workers who miss work time for serious medical reasons or to care for family members. In most cases, eligible employees can take up to 60 days of leave (12 workweeks) within a 12-month period. The law can also be used to bond with new children.

Not surprisingly, employers—and the so-called “specialists” they hire to run their FMLA programs—frequently misapply the law to deny leaves or impose discipline. A common practice is to claim that the worker failed to submit a timely or adequate medical certification. When doing so, employers often ignore the regulations issued by the U.S. Department of Labor. Here’s what the rules actually say:

SUMMARY OF THE LAW

- **An employer can demand a certification from a health care provider** when an employee requests FMLA leave for his or her own condition or to care for a family member. Most employers use a form prepared by the Department of Labor.

Authorized providers include physicians, chiropractors, clinical psychologists, social workers, nurse practitioners, and physician assistants.

- **The initial demand for certification must be put in writing and delivered individually to the employee**, generally within five business days of a request for leave or notice that an absence is for an FMLA reason.

It is not enough for a handbook or benefit plan to state that medical reports must be submitted in all cases. The certification request must inform the employee what consequences to expect if the certification is inadequate.

- **The employer must allow the employee at least 15 days** to submit the report. Additional time must be allowed if, despite the employee's diligent efforts, the doctor or other provider does not complete the certification on time.
- **If the certification is submitted late**, and there are no extenuating circumstances, the employer may count absences between the deadline and the late certification as unexcused—but not absences before the deadline.
- **If the medical certification is insufficient**, the employer may not deny FMLA leave.

Instead, it must notify the employee of the missing information and allow the employee at least seven days to submit a new certification or a letter from the provider. If the provider is unavailable, additional time must be allowed.

- **When a medical certification certifies a need for a leave** of a particular duration or intermittent absences of a particular frequency, the employer must approve the request even if the employer has doubts about the doctor's opinion.
- **The only way to challenge an employee's health care provider** is to arrange for two additional providers who do not regularly do business with the employer to examine the employee or the family member.

Both must find fault with the first provider before the employer can reject the original certification.

- **If the initial certification verifies a need for intermittent leave for a particular period up to six months**, the employer cannot ask the employee to submit a new certification or "doctor's note" following an absence until the period is over, unless the employee significantly exceeds the number of estimated absences per week or month (an exception may apply if the absence qualifies for paid leave).

WORDS TO THE WISE

Here is some advice a union can offer if a worker is asked to submit an FMLA medical certification:

- **Review the certification form** to familiarize yourself with the questions and to make sure the employer properly listed your job title, schedule, and job functions. Ask the employer to correct any mistakes.
- **Deliver the form to your provider immediately** and explain what you are seeking: a continuous leave to recover from an accident, for example, or intermittent leave because of an anxiety disorder.

For intermittent leave, the provider must estimate how often and for how long you are likely to be absent. When appropriate, encourage the provider to estimate a substantial duration such as six months or a year and an ample number of expected flare-ups.

If you, or your family member, has a chronic condition, make sure the provider says that at least two treatment visits a year are needed for the condition.

- **If the first provider you ask fails to complete the form** despite your best efforts, ask another provider to take over.
- **Be cautious when using a chiropractor.** Chiropractors are only authorized to fill out FMLA certifications when performing spinal manipulations after reviewing an X-ray showing a “subluxation” (misalignment of a vertebra). If your chiropractor does not have an X-ray, make sure to obtain one.
- **Instruct the provider’s office to fax or send you the completed form.** Review the responses. If there are mistakes or omissions, ask the provider to make corrections.

Fax or deliver the form to your employer, keeping a copy for yourself.

- **If it appears that your certification will be late,** explain the circumstances to your employer before the deadline, including your efforts to overcome the delay, and ask for an extension.

*Labor lawyer Robert Schwartz is the author of *The FMLA Handbook: A Union Guide to the Family and Medical Leave Act*. The fifth edition will be available this summer. Order from workrightspress.com*