

An FMLA FAQ for MnSCU HR's:

Medical Certification, Recertification and Requesting Second Opinions

When an employee requests an FMLA leave for a serious health condition the employer may require the employee to provide verification/ certification of that health condition. Certification documents are provided to the employee, to be filled out by their medical practitioner. In the case of a family member's serious health condition, the certification form must be completed by that family member's health care provider. Under some circumstances, the employer may require the employee to recertify their FMLA eligibility or may request a second medical opinion regarding the employee's serious health condition. The following may assist you in responding to FMLA leave requests and obtaining appropriate medical certifications. Citations in *italics* are references to the Federal Regulations covering FMLA, 29 CFR Part 825.

Initial certification of a serious health condition.

1. **What information should be given to the employee about this requested medical certification?**

Employees must be informed that:

- They are required to provide a written certification of their serious health condition; this certification must come from their health care provider. [*Sec. 825.305*]
- The certification must be returned in a timely manner, at least within 15 days after they are advised of the requirement for a certification. [*Sec. 825.305 and 825.311(a and b)*]
- Failure to return this certification within 15 days may delay of the start of their job protected FMLA leave. [*Sec. 825.305 and 825.311(a and b)*]
- Failure to return this certification within the 15 days may result in denial of their job protected FMLA leave. If their FMLA leave is denied, their absences may be considered "unauthorized absences" and may result in disciplinary action. [*Sec. 825.305 and 825.311(a and b)*]

In addition, employees should be informed of the following, after their certification is received and their leave is being approved:

- Whether they will be required to periodically report on their status and their intent to return to work. (Please note that employees who indicate unequivocally that they do not intend to return to work cease to be eligible for FMLA protections.) [*Sec. 825.309 (b)*]
- Whether they will be required to provide a fitness for duty certification when their leave ends. [*Sec. 825.310 (e)*] (For information about fitness for duty requirements, see #10 through #15 below.)

2. **What if the employee is incapacitated and cannot respond to our request for certification within 15 days?**

Employers are expected to be reasonable when responding to such situations. When the employee's need for FMLA leave is unforeseeable (such as a medical emergency) the employee is required to provide the certification as soon as reasonably possible. [*Sec. 825.303*] Information may be provided by the employee's spokesperson (e.g., spouse, adult family member or other responsible party) if the employee is unable to provide the information personally. [*825.303 (b)*]

If you have questions or concerns about an employee who fails to return the certification in a timely manner, contact your labor relations representative.

3. What information should the employer request from the health care provider when seeking a medical certification for FMLA purposes?

The employer may only seek information about the serious condition that generated the current FMLA leave request. The employer may not inquire into other health conditions or the employee's general health. [Sec 825.306 (b)]

The Department of Labor Regulations specify that an employer may ask the health care provider to answer the following questions: [Sec. 825.306 (a) (b) and (c)]

- Which category of serious health condition is applicable to this employee's request for FMLA leave? For example, is it the employee's or a family member's condition that has created the need for the leave? Is the health condition a chronic medical condition requiring on-going treatment? Or does the health condition create a temporary incapacity, such as pregnancy?
- When did health condition start?
- What is the probable duration of the health condition?
- What are the medical facts that support the certification?
- Does the condition necessitate additional or on-going treatments?
- If there is a regimen of continued treatments, please describe it, including: the expected number of treatments, the interval of time between such treatments and the actual or estimated dates of treatment, if known.
- If treatments are going to be provided by another health care provider, what is the nature of those treatments?
- Does the serious health condition mean that the employee is unable to perform any work for the employer?
- Is it necessary for the employee to work intermittently or work a less than full schedule?
- Is the employee able to perform their essential job functions? (Note: the employer should attach a position description and a list of essential job functions to the certification request.)
- If the employee's leave is to care for a family member, does the patient need assistance with basic medical or personal needs, or for transportation?
- If the employee's leave is to care for a family member, is the employee's presence to provide psychological comfort or assist in the patient's recovery?

Please see the "Certification of Health Care Provider" form at <http://www.doer.state.mn.us/cmr-prsl/1359cert.HTM> or [Sec. 825.306 (a) (b) and (c)] for a list of those questions that the Department of Labor permits an employer to ask.

4. What information should the employer provide to the medical practitioner?

If the employer believes that the employee will continue working while they are using FMLA leave, the employer should provide a list of the employee's essential job functions to the medical practitioner. The health care provider should be asked if the employee can perform their essential job functions. [Sec. 825.306 (b) (4) (ii)]

5. What happens if the employee or the medical practitioner do not provide the requested information?

The Department of Labor regulations specify that an employee must be given at least 15 days to return the certification documents to the employer. The regulations also specify that the employee must be warned of the consequences of failing to provide the certification within the 15 days. [Sec. 825.305 (d) and 825.311(a) and (b)] Those consequences are described below.

An employee who fails to provide the required medical certification may have their FMLA leave delayed or may lose their right to a job protected leave of absence. [Sec. 825.311(a and b) and 825.312 (b)] If the employee never provides the required certification, their absences are not FMLA protected leave. In some circumstances, employees who fail to provide the required certification may be subject to disciplinary action for "unauthorized absences."

Check with your labor relations representative before you attempt to deny an employee their right to an FMLA leave because they failed to provide the required medical certification.

6. What if the information provided by the medical practitioner is sketchy or confusing?

If the employee submits a complete certification, in which the medical practitioner has answered all of the questions identified in #3 above, the employer may not request additional information from the employee's health care provider.

If the employee grants permission, the employer may have a separate health care provider contact the employee's health care provider on behalf of the employer. Such contacts can only seek clarification or check on the authenticity of the employee's certification. [Sec. 825.307 (a)]

If the certification submitted by the employee is incomplete, the employee should be given written notification advising them:

- That they need to obtain a completed certification;
- That it must be done in a timely manner (we suggest within 5 business days);
- That failure to provide the required certification may delay their FMLA leave or result in a denial of that leave. [Sec. 825.305 (d) and 825.311 (b)]

The employer may not ask the employee for any information beyond that specified in # 3, above. [Sec. 825.306 (b)] The employer should provide a reasonable amount of time for the employee and their health care provider to respond to these information requests.

7. The employee has been approved to take intermittent leave for their serious health condition but they have displayed a pattern of suspicious behavior for

example, a number of suspicious Monday and Friday absences. Can we contact their health care provider and ask about these suspicious absences?

If an employer receives information that casts doubt on the continuing validity of the certification, the employer may require the employee to provide recertification of their serious health condition. [Sec. 825.308 (a)] A series of "suspicious Monday and Friday absences" would entitle an employer to ask the employee to provide a recertification of their serious health condition. If the employer requests a recertification under these conditions, the employer should consider providing the employee with a letter for the health care provider. This letter should identify the suspicious absences and ask the health care provider whether these absences are part of the employee's serious health condition. (Please see #17 and #18 below for more information about recertification.)

The employer should not attempt to contact the health care provider directly, but should ask the employee to provide the recertification documents.

8. What if we do not believe the information contained in the medical certification?

If the employer has a reasonable basis to doubt the information provided in the medical certification, the employer may ask for a second opinion from a medical practitioner chosen by the employer. [Sec. 825.307 (a) (2)] (For more information on second opinions, please see #16, below.)

If you desire a second opinion, please contact your labor relations representative for guidance.

9. Is there any other information that should be provided to employees who request an FMLA leave?

Yes. Employees should be informed about numerous things, including (but not limited to) whether they are permitted or required to use paid leave during their absences, what will happen with their health insurance and other benefits, whether they will be required to provide a fitness for duty certification when their FMLA leave ends and what will happen if they fail to return from the leave of absence.

Please see the sample document "Employer Response to Employee Request for Family or Medical Leave" at <http://www.doer.state.mn.us/cmr-prsl/1359cert.HTM> or [Sec. 825.301]. These contain all of the information that the Department of Labor recommends employers provide to employees. If you are uncertain about what information to include, contact your labor relations representative for assistance.

Fitness for Duty Certifications

10. Can the employer require a fitness for duty certification when the employee returns from FMLA leave?

The employer may have a policy that requires employees to provide a fitness duty certification when they return from an FMLA leave. This policy must be uniformly enforced. Fitness for duty certifications cannot be required for one employee unless they are required for all similarly situated employees (e.g., same occupation, same serious health condition) who return from FMLA leave. [Sec. 825.310 (a)]

Employees who are required to provide a fitness for duty certification should be advised of this requirement at the same time that they are advised of their FMLA rights and obligations. This is normally done when the initial FMLA paperwork is given to the employee. The Department of Labor Regulations specify that employees must be told that they will be required to furnish a fitness for duty certification, either when they request FMLA leave or immediately after the leave begins. [Sec. 825.310 (e)]

11. What kind of information may we require in a fitness for duty certification?

The employer may only require fitness certification that is job related and addresses the particular condition that caused the employee to need the FMLA leave. The certification need only be a simple statement of an employee's ability to return to work.

If the employee grants permission, the employer may have a separate health care provider contact the employee's health care provider on behalf of the employer. In this circumstance, the employer's representative can only seek clarification of the employee's fitness to return to work. [Sec. 825.310 (c)]

12. What if the employee fails to provide the required fitness for duty certification?

Employers may delay an employee's return to work until the required fitness for duty certification is provided. Employees must be provided a reasonable amount of time to provide the certification. Similar to other certifications, employees must be given at least 15 days to provide fitness for duty certifications. If, at the end of their FMLA leave, the employee fails to provide the requested fitness for duty certification or fails to provide a new certification of a serious health condition, the employee may be terminated. [Sec. 825.311 (a) (b) and (c) and 825.312 (b)]

If you are considering termination, please contact your labor relations representative for assistance.

13. Who is pays for the cost of the fitness for duty certification?

The employee is responsible for the cost. [Sec. 825.310 (d)]

14. The employee has been using leave on an intermittent basis. Can we require them to provide a fitness for duty certification when they return form intermittent leave?

No. The Department of Labor Regulations prohibit an employer from requiring a fitness for duty certification when an employee takes intermittent leave. [Sec. 825.310 (g)]

15. We do not believe the fitness for duty certification that the employee has provided. Can we request a second opinion?

No. The Department of Labor Regulations prohibit an employer from seeking a second or third opinion regarding fitness for duty. [Sec. 825.310 (e)] If an employee returns to work and is unable to perform their job duties, contact your labor relations representative for assistance.

Seeking a Second Medical Opinion

16. We do not believe the information contained in the employee's certification. Can we get a second medical opinion?

If the employer has a reasonable basis to doubt the information provided in the medical certification, the employer may ask for a second opinion from a medical practitioner chosen by the employer. The employer may not select a medical practitioner who is regularly contracted or employed by the employer unless the employer is located in a geographic area where access to health care is extremely limited. [Sec. 825.307 (a) (2) (e)]

The costs for this examination must be paid by the employer, including reasonable travel expenses. In most circumstances, the employer may not require the employee or family member to travel outside of their normal commuting distance. [Sec. 825.307 (a) (2) and (b)]

If the second medical opinion is contrary to the original certification provided by the employer, the employee has the right to request a third medical opinion from a neutral health care provider, who is agreed upon by the

employee and the employer. This third opinion is binding upon the employer and the employee. [Sec. 825.307 (c) and (d)]

If you think it is necessary to obtain a second medical opinion, please contact your labor relations representative for guidance.

Recertification of Medical Conditions.

17. Once an FMLA leave has been approved, can we require the employee to verify that their medical condition still requires the use of FMLA leave?

Yes, under some circumstances. [Sec. 825.308] For employees who are pregnant, or employees who have chronic or permanent/ long term conditions and are under continuing supervision of a health care provider, recertification cannot be requested more often than every 30 days and only in connection with an absence, unless one of the following situations applies:

- The circumstances described by the previous certification have changed significantly;
- The employer receives information that casts doubt upon the employee's stated reason for the absence;
- The employee asks for an extension of their leave.

Recertification requests can only seek information about the specific medical condition that gave rise to the FMLA request. Recertification requests cannot inquire into the employee's other health conditions. [Sec. 825.306 (b)]

18. The certification that we received said the expected duration of the employee's condition was 6 months. May we ask for recertification every 30 days?

No. Generally, you may not ask for recertification more often than the minimum period of incapacity listed on the original certification. Recertification may be requested sooner only if one of the following situations applies:

- The circumstances described by the previous certification have changed significantly.
- The employer receives information that casts doubt upon the employee's stated reason for the absence.
- The employee asks for an extension of their leave. [Sec. 825.308 (a) (b) and (c)]

19. We have received a recertification and we doubt its validity. May we require the employee to get a second opinion?

No. Neither second nor third opinions may be required on recertifications. [Sec. 825.308 (e)]

20. If we require a recertification is it at the employer's expense?

No. Recertifications, unlike second opinions, are at the employee's expense. [Sec. 825.308 (e)]

21. What happens if the employee does not comply with the request for recertification?

Except for unforeseeable circumstances, such as medical emergencies or incapacitation, an employee who fails to provide a recertification within a reasonable period of time (within 15 days after the employer's request) may have their FMLA protections delayed. If the required recertification is never provided, the leave is not FMLA protected. *[Sec. 825.305 (d) and 825.311 (b) and 825.312(b)]*