Complying with Medical Information Restrictions of the Family Medical Leave Act and Americans with Disabilities Act

Spencer Hamer, JD

Urgent message: *Urgent care centers that are subject to the Family Medical Leave Act and the Americans with Disabilities Act are limited on the types of questions they can ask related to employee requests for leave. To avoid legal problems, managers should understand the requirements for leave and implement a process for handling information requests.*

Introduction

Two common laws that employers must deal with regarding employee leave requests are the Family Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA). Not surprisingly, these laws contain a large amount of regulations governing leave rights that may present a stumbling block for many employers. Knowing the acts' basic requirements is therefore critical.

Family Medical Leave Act

The FMLA applies to employers with 50 or more employees within 75 miles of the worksite of the employee requesting leave. To be eligible, employees must be employed for 12 months and work at least 1250 hours during the 12-month period preceding the leave. Employees can take FMLA leave for a serious health condition of their child, spouse, or parent; birth and care of a newborn; adoption or foster care of a child; a "qualifying exigency" for an armed forces active-duty family member, or care for an injured military service member or veteran.

Spencer Hamer, JD, is a partner working in the Irvine, California office of the law firm of Michelman & Robinson, specializing in labor and employment matters for healthcare clients.

The employer may request initial medical certification after the employee requests a "serious health condition" leave. It must make the request in writing within 5 business days after learning of the need for leave, or if the leave was unforeseeable, within 5 business days after the leave begins. The employer may request certification at a later date only if it has reason to question the length or appropriateness of the leave. The request must advise the employee of the consequences of failure to provide adequate certification.

A medical certification is sufficient if it states

1. The date on which the serious health condition commenced
2. The probable duration of the condition
3. The appropriate medical facts regarding the condition within the knowledge of the health-care provider who is providing certification
4. That the employee is unable to perform the functions of his or her position

Certification for intermittent or reduced-schedule leave must include the dates on which planned medical treatment is expected, a statement of medical necessity, and the expected duration. The U.S. Department of Labor (DOL) has certification forms (WH-380-E, employee's serious health condition; WH-380F, family member's serious health condition) that employers may use.[1] Employers may develop their own forms, but they may not require additional information.

If the employee provides an incomplete or insufficient certification, the employer must indicate in writing what additional information is necessary and give the employee 7 days to pro-

[1]www.dol.gov/whd/forms/index.htm

vide it, unless the employee reasonably needs more time. If the employee fails to provide certification for a foreseeable leave, the employer may delay leave until it receives the documentation. When the leave is unforeseeable, the employee must provide certification within 15 days, or as soon as reasonably possible. The employer may delay the leave while awaiting certification. If the employee never provides it, the leave is not treated as FMLA leave.

If the employee submits a certification signed by a health-care provider, the employer may not request additional information. It may contact the health-care provider to make sure that the certification is authentic, or to clarify it, but must give the employee a chance to provide that information first. If the employer contacts the provider, it must do so through a health-care provider, human resources professional, leave administrator, or management official. The employee's direct supervisor cannot communicate with the provider. If FMLA leave is running concurrently with workers' compensation leave, the employer may contact the employee's workers' compensation health-care provider, in accordance with applicable workers' compensation laws.

If the employer doubts the validity of the certification, it may require a second opinion at the employer's expense. It may select the provider, but the provider cannot be one the employer regularly uses, unless health-care access in the area is very limited. If the first and second opinions are consistent, that ends the issue. If there is contradiction, the employer can seek a third opinion at its own expense, which will be final and binding, from a provider jointly designated or approved by the employer and the employee.

Although the notice of request for an initial medical certification must be in writing, subsequent requests can be made verbally. An employer may request a medical recertification no more than once every 30 days, unless circumstances regarding the request significantly change or the employer receives information casting doubt on the validity of the certification or reason for absence. An employee must be given at least 15 days to recertify. An employer may not require a second or third opinion. The employer may include a record of the employee's absences, such as a pattern of Monday and Friday absences, with the recertification form and may also ask about the likely duration and frequency of absences.

At the conclusion of FMLA leave for the employee's own serious health condition, the employer may require a fitness-for-duty certification if it requires it of all similarly situated employees returning from FMLA leave. Fitness-for-duty certification is allowed every 30 days for an employee taking intermittent or reduced-schedule leave if safety concerns exist. No second or third opinions are allowed. If the employer has a basis to question the certification, it may restore the employee to work and seek its own evaluation at its expense.

A fitness-for-duty certification may only relate to the particular condition that caused the need for leave. It must state that the employee is able to return to work and must specifically address the ability to perform essential job functions. The employer may contact the health-care provider—with the employee's permission—to clarify fitness to return, but only for the condition at issue. The employee's return cannot be delayed while clarification is being obtained. Where certification is unclear, an employer may require an independent medical examination at the employee's expense.

An employer may require certification in accordance with DOL regulations for a "qualifying exigency" arising because a family member is on active military duty. The DOL has a form (WH-384) for this purpose.[1]

Americans with Disabilities Act

Under the ADA, an employer may not ask about the existence, nature, or severity of a disability except in relation to the job and consistent with business necessity. To justify business necessity, the employer must show that it had some reason for suspecting the employee would be unable to perform essential job functions, or would pose a danger to the health and safety of the workplace.

The business necessity standard may be met before an employee's work performance declines if significant evidence could cause a reasonable person to ask whether an employee is capable of performing. To establish business necessity, the employer must show that it serves a legitimate business purpose, such as ensuring that the workplace is safe and secure, cutting down on egregious absenteeism, or preventing infectious disease. If business necessity exists, the inquiry may be no broader or more intrusive than necessary, and it cannot probe into unrelated medical conditions. For example, an employer may require a warehouse laborer whose back impairment affects the ability to lift to be examined by an orthopedist, but not to undergo a test for human immunodeficiency virus. An employer must notify an employee in advance that a fitness-for-duty report will be required.

A medical examination may also be required to determine whether an employee poses a direct threat to the health or safety of the employee or others. Employers have broader rights to demand medical examinations on the basis of a direct threat than for other reasons.

An employee with a prolonged history of illness and absenteeism that has affected job performance may be required to undergo a physical examination to determine whether the employee can do the job, even if it might disclose a disability, if the employee refuses to cooperate with the employer's less-invasive attempts to obtain this information from the employee's physician.

An employer may also request medical information if the

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employee has requested a reasonable accommodation, such as a leave of absence. Other medical inquiries are generally prohibited. For example, requiring a general diagnosis of an employee's illness after sick leave is prohibited, because it may perpetuate stereotypes; requiring employees to disclose what prescription drugs they use is prohibited because it could reveal actual or perceived disabilities.

Under both the FMLA and the ADA, information regarding certifications, medical histories of employees or family members, and information collected during permissible inquiries or examinations must be maintained in separate medical files and kept confidential. The employer may disclose such information only to supervisors and managers to determine restrictions and accommodations, first-aid and safety personnel for medical or emergency treatment, and government officials investigating compliance.

Steps for Compliance

Employers covered by the FMLA and/or the ADA should prepare in advance for handling issues regarding medical information. Key components of this preparation include the following:

- Identifying who will be responsible for responding to leave inquiries, and providing the appropriate training
- Preparing and updating employment policies and procedures, such as new-hire documentation and employee handbooks
- Obtaining all appropriate forms necessary for receiving and responding to requests for FMLA and ADA leave
- Providing employees with a clear path to raises issues they may have with the leave-of-absence process.

Although the amount of regulation regarding FMLA and ADA medical information requests is complex, proper planning will enable employers to handle these issues with confidence. However, keep in mind that employment laws change, so your center should consult a lawyer who specializes in them. ■