



November 15, 1993

FMLA-16

Dear *Name*\*,

This is in response to your letter expressing concerns regarding provisions of the Family and Medical Leave Act of 1993 (FMLA). You observe the regulations contain no provisions for dealing with employees who fraudulently obtain leave under the FMLA. You suggest the requirement for medical certification is ineffective in addressing employee abuse due to the minimal information required in the certification, particularly with regard to the care of an immediate family member with a serious health condition.

Contrary to your observations, the regulations do provide remedies for employers with regard to employees who fraudulently obtain FMLA leave. In section 825.312(g) the regulations state "An employee who fraudulently obtains FMLA leave from an employer is not protected by FMLA's job restoration or maintenance of health benefits provisions."

The medical certification requirements of the regulations are intended to provide the employer with medical evidence of the existence of a serious health condition for either the employee or an immediate family member. The greatest deterrent to abuse is the fact that the leave is unpaid. Further, if the employer has reason to question the accuracy of the certification from the employee's health care provider, provision is made for a second medical certification from a doctor of the employer's choice, and, if necessary, a third opinion from a doctor who is mutually agreeable to the employer and employee. The fact that the immediate family member is in a foreign country does not prohibit second and third opinions. Not only must the doctor certify that a serious health condition exists, but must provide an estimate of the duration of the serious health condition to insure the employee does not take more leave than necessary.

It is not required that the doctor certify that the employee is the only person that can provide the third party care for an immediate family member; only that third party care is required.

It was anticipated that in many instances, the employee's decision would be a financial one. The choice would be the ability to pay for professional medical care (e.g., a home health nurse) round the clock, or in those instances where there is no requirement to administer medication, the employee must provide the care. If the immediate family member must regularly visit the doctor and is unable to drive an automobile or take public transportation due to their health condition, does the employee hire transportation, or take FMLA leave and provide the transportation themselves. How do we measure the psychological benefit to a child whose mother is able to be present during a stay in the hospital?

Again, with regard to the employee working on another job while on leave, the regulations address this possibility. Section 825.312(h) provides for the employer to apply existing policies with regard to outside or supplemental employment.

It seems most of your concerns have been addressed by the implementing regulations. Hopefully this has been responsive to your inquiry. Should you need further assistance please let me know.

Sincerely,

J. DEAN SPEER  
Director, Division of Policy and Analysis

\* *Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. 552 (b)(7).*