



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.¹ 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.²

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 in accordance with 5 U.S.C. 552 (b)(7).*

¹ 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.

² 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.