U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

April 13, 2000 **FMLA-108**

Dear ***Name****,

This is in response to your March 21, 2000 letter requesting an opinion concerning application of sections 825.207(h), 825.305(e), and 825.306(c) of the Department of Labor's Family and Medical Leave Act ("FMLA") regulations (29 C.F.R. Part 825) to your client, ***Name****. These regulations (the "less stringent standard" regulations), provide that when an employee substitutes paid leave under the employer's sick leave plan for the unpaid leave generally provided under the FMLA, and the employer's leave plan imposes less stringent medical certification requirements than those allowed under the FMLA, the employer must apply those less stringent standards, rather than those otherwise authorized by the FMLA and its certification regulations.

I have reviewed the information contained in Exhibit C, and Attachment 1 ("Ex. C1"), submitted with ***Name**** July 21, 1999 response to the Department's motion to dismiss for lack of subject matter jurisdiction in ***Name****. Based upon this review, I have determined, and it is the position of the Department, that the medical certification procedures under ***Name**** sick leave policy are not less stringent than the medical certification requirements imposed by the FMLA, within the meaning of the regulations at issue. ***Name**** sick or medical leave plan, examined as a whole, authorizes more information to be furnished in medical certifications of employee health conditions than the certification requirements of the statute and the FMLA regulations. See 29 C.F.R. 825.306(c). Furthermore, overall, ***Name**** certification procedures are less favorable to employees than those under the FMLA. Consequently, the "less stringent standard" regulations do not apply to ***Name****.

Name* policy provides that when its Labor Relations Manager "has reasonable cause to question the basis of an employee's claim for sick leave benefits," he or she may require the employee to release to the Chief Company Doctor all "medical information relating to and necessary to process that employee's claims[.]" ***Name**** Ex. C1, Sick Leave Policy, 10.

Accordingly, ***Name**** Medical Release Form authorizes release of "copies of [the employee's] medical records or a summary report noting the day or days that [the employee] was seen by [the doctor], the disabling factors, treatment and the diagnosis." ***Name**** Ex. C1, Ex. 3, Medical Release Form.

By contrast, the FMLA does not provide the employer the discretion to require such a broad release of medical information from the employee's health care provider. The statute and the regulations strictly limit the information an employer may obtain from the health care provider. See 29 U.S.C. 2613(b); 29 C.F.R. 825.306(b) In fact, under the FMLA, the employer cannot acquire the employee's medical records or a summary medical report containing any information not set forth on the Department's certification form (i.e., Optional Form Wage-Hour 380 at 29 C.F.R. Part 825, Appendix B), or in the regulations at 29 C.F.R. 825.306(b). See 29 C.F.R. 825.307(a) Nor does a FMLA certification require the disclosure of the dates on which the employee was seen by the health care provider, or the nature of treatment provided (in most circumstances), or allow the disclosure of the diagnosis. See 29 C.F.R. 825.306(b)(3); 60 Fed.Reg. 2180, 2222 (1995)(preamble to the final FMLA regulations). Under the FMLA certification requirements, the company's only recourse where it has reason to doubt the validity of the initial certification is to obtain a second opinion at its own expense. See 29 U.S.C. 2613(c)(1).[1]

Name* policy authorizes the Chief Company Doctor to order a second examination, but, unlike the FMLA, only after the receipt of the employee's medical records or a summary report. ***Name**** Ex. C1, Sick Leave Policy, 10. Moreover, under ***Name**** procedures, the employee must use a "company doctor." Id.

---

[1] Under the FMLA, before seeking a second opinion, a health care provider representing the employer, with the employee's permission, may contact the employee's health care provider for purposes of clarification and authentication of the initial medical certification, but may not request additional information. See 29 C.F.R. 825.307(a).

Under the FMLA, the employer cannot require a second opinion from a doctor employed by, or otherwise regularly utilized by, the company. 29 U.S.C. 2613(c)(2); 29 C.F.R. 825.307(b).[2] Here, it is evident that the Chief Company Doctor, as well as the other "company doctors," are regularly utilized by ***Name****.

Also, the FMLA limits the second opinion to the information certified in the initial certification. 29 U.S.C. 2613(c)(1). By its terms, ***Name**** policy contains no such limitation on the extent of the second medical examination and opinion.

Additionally, in the event that there is a conflict between the second opinion of the company doctor and the opinion of the employee's doctor, ***Name**** procedures require a third examination by a doctor chosen by "the local medical society," whose report will be final. ***Name**** Ex. C1, Sick Leave Policy, 10. The FMLA requires that the employee and employer agree on the doctor to be used. 29 U.S.C. 2613(d). Furthermore, unlike ***Name**** policy, the third opinion is limited to the information originally certified. Id.

Also, ***Name**** recertification provision is more stringent than the FMLA recertification provisions. ***Name**** provision does not impose any restriction on when and how often the company may obtain a recertification from the employee. Rather, the provision authorizes ***Name**** to seek recertification "from time to time during periods of prolonged illness." ***Name**** Ex. C1, Sick Leave Policy, 10. On the other hand, the FMLA regulations are more favorable to the employees because they establish numerous limitations on the employer's authority to request re-certifications. See 29 C.F.R. 825.308.

Finally, ***Name**** certification procedure is less favorable to employees with regard to how quickly an employee must submit the certification. Under ***Name**** policy, the initial certification form must be submitted "at the earliest possible date following the occurrence of the disability." ***Name**** Ex. C1, Sick Leave Policy, 10. By contrast, the FMLA regulations provide that when the need for leave is foreseeable, the employee must supply a requested certification before the leave begins and if this is not possible (including circumstances where leave is not foreseeable), the employer must provide the employee at least 15 days after the request in which to furnish the certification. See 29 C.F.R. 825.305(b).

Based upon these factors, ***Name**** certification procedure is not "less stringent" than the procedure provided by the FMLA and the pertinent regulations. Therefore, the "less stringent standard" regulations do not apply to ***Name****.

This opinion is based exclusively on the facts and circumstances you provided to the court in ***Name****, and is given on the basis of your representations, 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.

Sincerely,

Michael Ginley
Director, Office of Enforcement Policy
Wage and Hour Division

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

---

[2] In the very limited circumstances of employers that are located in areas where access to health care is extremely limited (e.g., a rural area where no more than one or two doctors practice in the relevant specialty), the regulations allow the use of a health care provider commonly used by the employer. See 29 C.F.R. 825.307(b). Under the FMLA, the employer does have the right to designate or approve the health care provider. See 29 U.S.C. 2613(c)(1).