

## **FREQUENTLY ASKED QUESTIONS ABOUT THE FMLA**

The Family Medical Leave Act (“FMLA”) gives employees the right to take up to 12 weeks of unpaid leave in order to: 1) care for a newly born or adopted child; 2) tend to a “serious health condition” that renders the employee “unable to perform one or more of the essential functions of his or her job”; or, 3) care for the employee’s spouse, child, or parent with a serious health condition. 29 USC § 2612(a)(1); 29 CFR § 825.112(a), .200(a). After the leave is concluded, the employee is entitled to be restored to his or her former position or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. 29 USC § 2614(a).

The following are summary answers to the three of the most frequently asked questions about the provisions of the FMLA regarding absences based on the existence of a “serious health condition.”

### **What is a “serious health condition?”**

The FMLA defines a **serious health condition** as an illness, injury, impairment, or physical or mental condition that involves either: 1) **inpatient care** at a hospital or other medical facility; or 2) **continuing treatment by a health care provider**. 29 USC 2611(11); 29 CFR § 825.114.

**Inpatient care** must involve an overnight stay at a “hospital, hospice, or residential medical care facility.” 29 CFR § 825.114(a)(1). The leave time also includes “any period of incapacity,” which is defined to mean an “inability to work, attend school or perform other regular

daily activities due to the serious health condition, treatment therefor, or recovery therefrom.” Id. Further, the leave time includes subsequent treatment associated with the inpatient care.

An employee is receiving **continuing treatment by a health care provider** if at least one of the following is involved:

1. A period of incapacity of three or more consecutive days and subsequent treatment or incapacity where the employee has had either two or more treatments by a health care provider or a single treatment resulting in a regimen of continuing treatment under the supervision of a health care provider. The regimen of continuing treatment may consist of a course of *prescription* medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). The taking of over-the-counter medications or other activities that can be initiated without a visit to a health care provider do not count as a regimen of continuing treatment.
2. A period of incapacity due to pregnancy or for pre-natal care.
3. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition, which is a condition that: (a) requires periodic medical visits; (b) continues over an extended period of time (including recurring episodes); and, (c) may cause an episodic incapacity (e.g., asthma, diabetes, epilepsy, etc.).
4. A long-term or permanent incapacity due to a condition for which treatment may not be effective (e.g., Alzheimer’s Disease, a severe stroke, or the terminal stages of a disease). The employee or family member must be under the supervision of a medical provider but does not have to be receiving active treatment.
5. A period of absence to receive multiple treatments either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity for three or more days, as in the case of cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis).

29 CFR § 825.114(a)(2).

Generally speaking, **whether an employee or family member has a “serious health condition” is decided based on the specific facts involved.** It is difficult to generalize as to whether a given condition will or will not qualify. The following is a short, non-exhaustive list of conditions that have been found to be a “serious health condition”:

- cancer
- suicide attempt resulting in hospitalization and treatment for depression

- pneumonia
- chicken pox where employee was twice seen by physician
- severe nervous disorder
- inflammation of pharynx with antibiotic treatment prescribed
- undiagnosed heart arrhythmia
- heart attack
- one week absence ordered by doctor to allow time to perform cardiac tests
- spinal injury

Of course, given the broad definition of “serious health condition,” the list of specific conditions is endless.

**Substance abuse may be a serious health condition if the terms of the definition are met.**

A “serious health condition” does not *usually* include common ailments such as colds, the flu, headaches (except migraines), routine dental problems, and upset stomachs. 29 CFR § 824.114(b)-(c). However, the Department of Labor has issued an advisory opinion stating that **even a minor ailment, such as the flu, could be a “serious health condition”** if it requires an absence longer than three days and the employee visits a health care provider and begins a continuing medical program, such as a prescription for antibiotics. See FMLA Admin Op No 86 (1996). Further, a combination of less severe ailments might be found to be a “serious health condition.” See *Price v. City of Fort Wayne*, 117 F.3d 1022, 1024 (7th Cir. 1997).

Finally, as to the FMLA’s provisions for providing family care, an employee is “needed to care for” a family member when a serious health condition renders the family member unable to care for his or her medical, hygienic, or nutritional needs or safety. Included is psychological care, such as comforting a child, parent, or spouse who is receiving inpatient or home care. 29 CFR § 825.116(a).

**How does the employer determine whether an employee’s “serious health condition” renders the employee “unable to perform one or more of the essential functions of his or her job?”**

An employee is **unable to perform the functions of the position** when a health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee’s position. 29 CFR § 825.115. When an employee misses work in order to receive medical treatment for a serious health condition, he or she is considered to be unable to perform the essential functions of the position during the absence for treatment. A job function may be considered essential because: 1) the position exists to perform the function; 2) a limited number of employees can perform the function; or, 3) the function is highly specialized and the employee was hired to perform the function. See 42 USC § 12101 et seq.; 29 CFR § 1630.2(n). The essential functions of the employee’s position are determined at the time notice is given or leave commenced, whichever is earlier.

Note that in requiring a health care provider’s certification, an employer may provide a statement to the health care provider of the essential functions of the employee's position.

**What are the employer’s rights to seek a medical opinion and to establish certification requirements for the employee?**

An employer may require a medical certification in connection with a request for leave. 29 CFR § 825.305. The U.S. Department of Labor has developed a model certification form, Form WH-380. A copy of the form is attached. **An employer may not request information beyond that specified in the model form.** 29 CFR § 825.306(b). If an employee submits a complete certification signed by the employee’s health care provider, the employer may not request any additional information from the provider. 29 CFR § 825.307(a). The employer must determine whether the requested leave qualifies under the FMLA and notify the employee within two

business days. 29 CFR § 825.208(a). When the employee does not provide sufficient information to make this determination, the employer should inquire further about the purpose of the leave. *Id.* The employer may have its medical professional contact the employee's health care provider, but only to clarify or authenticate the certification provided. 29 CFR § 825.307(a). Moreover, the employee's permission must be obtained before making this contact. *Id.* Another federal statute, the Health Insurance Portability and Accountability Act ("HIPAA") requires that the employee sign an authorization before the employee's physician may be contacted. An authorization satisfying the HIPAA's requirements is attached.

An employer that has reason to doubt the validity of a medical certification may require a second opinion at the employer's expense. 29 CFR § 825.307(a)(2). The employer is permitted to designate which health care provider will furnish the second opinion, so long as the employer does not employ the selected provider on a regular basis. *Id.* If the first and second opinions conflict, the employer and the employee must agree on a provider to render a third and final opinion, at the employer's expense. 29 CFR § 825.307(c).

During the leave period, the employer may require recertification at reasonable intervals, typically once every thirty days. 29 CFR § 825.308(a). An employer may demand an earlier recertification if: 1) the employee requests an extension of leave; 2) circumstances described by the previous certification have changed significantly (e.g., the duration of the illness, the nature of the illness, complications); or, 3) the employer receives information casting doubt on the continuing validity of the certification. 29 CFR § 825.308(a)-(c). Unlike the initial medical certification procedure, an employer may not require a second or third opinion regarding a recertification. 29 CFR § 825.308(e).

When an employee requests intermittent leave, the employer may require that the medical certification include information as to the projected number of, and interval between, treatments, as well as the projected period of recovery following each treatment. 29 CFR § 825.306(b)(3)(i)(B). The employer should require this information so that it can compare an employee's later leave requests against his health care provider's projections. An employer can require recertification of an intermittent leave when: 1) the employee requests an extension of leave; 2) circumstances described by the previous certification have changed significantly; or, 3) the employer receives information that casts doubt on the continuing validity of the original certification. 29 CFR § 825.308(b)(2).

When returning from leave, **employees may be required to comply with a uniformly-applied policy or practice requiring all similarly-situated employees to obtain a certification from their health care providers that the employee is able to resume work (a "fitness-for-duty report")**. 29 CFR § 825.310(a). However, an employer may *not* require a fitness-for-duty report for an employee returning from intermittent leave. 29 CFR § 825.310(g). The certification need only be a simple statement of the employee's ability to return to work. The employee may be required to pay for the report. 29 CFR § 825.310(d). The employer may not require that the report pertain to health issues outside of those which caused the employee's need for FMLA leave. As with medical certifications supporting a leave request, the employer may only request clarification from the health care provider. 29 CFR § 825.310(c).