

# WAYNE STATE UNIVERSITY

## MEMORANDUM

TO: XXXXXXXXXXXXXXXXXXXXXXXX  
FROM: Michelle Fecteau, Labor Studies Center  
DATE: June 24, 2003  
RE: FMLA questions

The purpose of this memo is to address your questions:

**1) Does an employee have to provide management a diagnosis from a physician and sign a release granting the employer access to all medical files in order to receive disability benefits while on an FMLA leave?**

**2) What are the legal requirements protecting employee privacy of medical records?**

In researching these questions I reviewed the FMLA, ADA and HIPAA regulations and the U.S. Department of Labor's website as well as EEOC's website. I also spoke with Robert Schwartz, the attorney who wrote The FMLA Handbook, Christine Schott who is on the FMLA team at the U.S. Department of Labor in Washington D.C, and Romelia Sempihar at the Detroit office of the U.S. Department of Labor, Wage and Hour Division.

### **Question #1 – In General**

It is my understanding that if an employee is only requesting FMLA leave he or she can *not* be required to provide a diagnosis or authorization to release medical information to the employer. These rules apply even if the employee is using vacation or sick leave time to cover the FMLA leave.

But, if the employee wants to be paid under the employer's temporary disability plan (short term or long term disability pay plan), then they must comply with the certification requirements of the plan. This may include providing a diagnosis and medical release, check to see the policy and procedures on this. The employer can run the short term or long term disability and an FMLA leave concurrently (at the same time) but an employee can not be forced to use the employer's temporary disability plan and can opt for using only FMLA, provided they are eligible to use FMLA.

According to the FMLA regulation 825.207 (d)(1),

If the requirements to qualify for payments pursuant to the employer's temporary disability plan are more stringent than those of FMLA, the employee must meet the more stringent requirements of the plan, or may choose not to meet the requirements of the plan and instead receive no payments from the plan and use unpaid FMLA leave or substitute available accrued paid leave.

*In short, there is an FMLA violation if your employer is requiring a diagnosis and authorization for FMLA absences which do not pertain to the short term or long term disability pay plan. There is not a violation if the employee is trying to obtain payment under the employer's short term or long term disability pay plan.*

## Detailed Information Supporting FMLA Rights to Limit Access to Medical Information

With regard to requiring medical information for FMLA purposes the final FMLA regulations of 1995 address this. After the law was passed in 1993 initial regulations were issued. The public was then allowed to comment and request changes to the final regulations. Discussion on Section 306 of the FMLA regulations regarding employer's rights to medical information was debated before Congress and the issue of medical diagnosis was specifically addressed and resolved. This debate led to removing the employer's right to request diagnosis because such a request may violate ADA (American's with Disabilities Act). A summary of this discussion can be found in the preamble to the final regulations of 1995.

The preamble notes that there were ten commenters on this issue and states:

"The Women's Legal Defense Fund were reasonable representative of these commenters. They observed that the optional certification form provides more information to the employer than statutorily required (for example, diagnosis...), and that inquiries regarding such matters may be a violation to the ADA. They noted that health care providers may be reluctant to provide detailed medical information due to ethical and privacy concerns regarding confidentiality and employee waivers."

It states further:

"The regulation and form no longer provide for diagnosis, and make clear, consistent with the ADA and privacy concerns, that all information on the form relates only to the condition for which the employee is taking FMLA leave"

Accordingly, Section 306(b) of the revised FMLA regulations state:

"Form WH-380, as revised, or another form containing the same basic information, may be used by the employer; however, **no additional information may be required.**" (emphasis added)

No where on form WH-380 is an employee required to submit a diagnosis or authorize the release of medical records. (you can access a copy of the medical certification form the U.S. Department of Labor's website: [www.dol.gov/esa/regs/compliance/whd/fmla/wh380.pdf](http://www.dol.gov/esa/regs/compliance/whd/fmla/wh380.pdf))

Furthermore, the Family and Medical Leave Act Advisor, "Frequently Asked Questions and Answers" found on the U.S. Department of Labor's website at [www.dol.gov/elaws/esa/fmla/faq.asp](http://www.dol.gov/elaws/esa/fmla/faq.asp) states the following:

### **Q: Do I have to give my employer my medical records for leave due to a serious health condition?**

No. You do not have to provide medical records. The employer may, however, request that, for any leave taken due to a serious health condition, you provide a medical certification confirming that a serious health condition exists.

### **Q: Can my employer make inquiries about my leave during my absence?**

Yes, but only to you. Your employer may ask you questions to confirm whether the leave needed or being taken qualifies for FMLA purposes, and may require periodic reports on your status and intent to return to work after leave. Also, if the employer wishes to obtain another opinion, you may be required to obtain additional medical certification at the employer's expense, or recertification during a period of FMLA leave. The employer may have a health care provider representing the employer contact your health care provider, with your permission, to clarify information in the medical certification or to confirm that it was provided by the health care provider. The inquiry may **not seek additional information** regarding your health condition or that of a family member.

### **Question #1 Conclusion- Exercise Rights Under Labor Law**

Under the National Labor Relations Act, matters of wages (including benefits), hours and working conditions are mandatory subjects of bargaining. That means the employer is obligated to negotiate with the union over the implementation of policies related to these subjects. You may want to meet with your employer to negotiate revising the “Bresser Non-Work Related Disability Notice” so that employees are clearly informed that a diagnosis and authorization to release information are not required for FMLA absences only for obtaining short and long term disability benefits.

### **Question #2**

Employers are subject to maintaining employee medical records confidentially under both the Americans with Disabilities Act (ADA) and the Health Insurance Portability and Accountability Act (HIPAA).

Under the ADA regulations (Part 1630.14) when employers collect acceptable medical information from pre-employment inquiries, employment entrance exams, job-related examinations, or examinations which are part of a health program they must treat this information confidentially.

This regulation specifically states that information obtained under this section:

“... regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that:

(i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) Government officials investigating compliance with this part shall be provided relevant information on request.

(2) Information obtained under ... this section regarding the medical condition or history of any employee shall not be used for any purpose inconsistent with this part.

Your employer is also covered under HIPAA if they are self-insured for employees’ medical benefits, its handling of insurance claims and other health-related information. In this capacity, the employer would be considered a "hybrid" entity. That means the portion of the company’s operations that deal with processing health claims is a covered entity. HIPAA requires that "hybrid" entities such as self-insured employers erect "firewalls" between the portion of the company that handles the health claims and the portion that does not. That means that those who process disability claims are restricted in sharing personal medical information with those who are not involved with processing claims. Also, like any other covered entity, a "hybrid" function must (1) give notice of written privacy procedures, (2) place restrictions on the use of health information, and (3) appoint a privacy officer and train staff.