

WAYNE STATE UNIVERSITY

MEMORANDUM

TO: XXXXX

FROM: Michelle Fecteau, Labor Program Specialist, Labor Studies Center
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DATE: May 5, 2003

RE: Answers to FMLA questions at training on 4/29/03

Below are my responses to the “hard” questions you asked at the training on the 29th. I hope this is helpful to you. Keep in mind that I am not a lawyer and you may want to run these answers past your local’s attorney.

It was very nice meeting all of you. Please feel free to contact me if I can be of assistance in the future.

Question 1:

If you work 3rd shift can you leave early and be covered by FMLA to take spouse to a doctor appointment that may occur between 10:00 AM – 2:00 PM which is your normal sleep time?

Section 825.203 of the FMLA regulations (see below) outlines when you can use FMLA leave intermittently (leave taken in separate blocks of time due to a single qualifying reason), as described in the above question. Technically it seems management could take the position that having sleep time may not be a qualifying reason.

(c) Leave may be taken intermittently or on a reduced leave schedule when medically necessary for planned and/or unanticipated medical treatment of a related serious health condition by or under the supervision of a health care provider, or for recovery from treatment or recovery from a serious health condition. It may also be taken to provide care or psychological comfort to an immediate family member with a serious health condition.

(1) Intermittent leave may be taken for a serious health condition which requires treatment by a health care provider periodically, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy. A pregnant employee may take leave intermittently for prenatal examinations or for her own condition, such as for periods of severe morning sickness. An example of an employee taking leave on a reduced leave schedule is an employee who is recovering from a serious health condition and is not strong enough to work a full-time schedule.

(2) Intermittent or reduced schedule leave may be taken for absences where the employee or family member is incapacitated or unable to perform the essential functions of the position

because of a chronic serious health condition even if he or she does not receive treatment by a **health care provider**.

Question 2:

Does military leave count toward hours worked for granting FMLA leave time?

FMLA Special Rules for returning reservists have recently been issued requiring that counts military leave time towards the 1250-hour requirement. The Uniformed Services Employment and Reemployment Rights Act (USERRA) requires that a person re-employed under its provisions be given credit for any months and hours of service he or she would have been employed but for the military service in determining eligibility for Family and Medical Leave Act (FMLA) leave.

For more info see website:

<http://www.dol.gov/esa/whd/fmla/userra.htm>

Question 3:

How are county employees counted to determine if we meet the 50 employees requirement?

All county employees are considered employed by a “single employer”. County employees are also considered employed by a “public agency and therefore covered by FMLA. As long as you have 50 or more county employees within a 75 mile radius you should consider yourself covered. See Section 825.108 (c)(1) and 825.108(d) below.

(c)(1) A State or a political subdivision of a State constitutes a single public agency and, therefore, a single employer for purposes of determining employee eligibility. For example, a State is a single employer; *a county is a single employer*; a city or town is a single employer. Where there is any question about whether a public entity is a public agency, as distinguished from a part of another public agency, the U.S. Bureau of the Census' ``Census of Governments'' will be determinative, except for new entities formed since the most recent publication of the ``Census.'' For new entities, the criteria used by the Bureau of Census will be used to determine whether an entity is a public agency or a part of another agency, including existence as an organized entity, governmental character, and substantial autonomy of the entity.

(d) All public agencies are covered by FMLA regardless of the number of employees; they are not subject to the coverage threshold of 50 employees carried on the payroll each day for 20 or more weeks in a year. However, employees of public agencies must meet all of the requirements of eligibility, including the requirement that the employer (e.g., State) employ 50 employees at the worksite or within 75 miles.

Question 4:

An employee has missed worked several times but was not diagnosed until after several absences have occurred. Can we go back if there is discipline for early absences assuming discipline will occur at the end of 90 days or 180 days?

Section 825.303 discusses employee notification requirements and state in paragraph (a):

(a) When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. *It is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave*, except in extraordinary circumstances where such notice is not feasible. In the case of a medical emergency requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved.

Using this standard I would say that the employee's absences related to the diagnosis should be covered under FMLA provided the employee notified the employer within two working days of *learning* of the need for leave.

Question 5:

Could we have a copy of the regulation regarding re-certification every 30 days?

Text from the regulation §825.308 are outlined below. I also reviewed my notes from earlier this year when I spoke with the FMLA attorney Robert Schwartz regarding the medical re-certification. Robert Schwartz is the labor lawyer who wrote the "FMLA Handbook". He directed me to Section 825.308(b) of the regulations. He stated that management often looks at only 308(a) of the FMLA and does not read further. Section 308(a) states:

(a) For pregnancy, chronic, or permanent/long-term conditions under continuing supervision of a health care provider (as defined in Sec. 825.114(a)(2)(ii), (iii) or (iv)), an employer may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless:

- (1) Circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of absences, the severity of the condition, complications); or
- (2) The employer receives information that casts doubt upon the employee's stated reason for the absence.

But if they would read further to section (b) they would find the following:

(b)(1) If the minimum duration of the period of incapacity **specified on a certification** furnished by the health care provider is more than 30 days, the employer may not request recertification until that minimum duration has passed unless one of the conditions set forth in paragraph (c)(1), (2) or (3) of this section is met.

(2) For FMLA leave taken intermittently or on a reduced leave schedule basis, the employer may not request re-certification in less than the minimum period specified on the certification as necessary for such leave (including treatment) unless one of the conditions set forth in paragraph (c)(1), (2) or (3) of this section is met.

Section (c) states:

(c) For circumstances not covered by paragraphs (a) or (b) of this section, an employer may request re-certification at any reasonable interval, but not more often than every 30 days, unless:

- (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 that casts doubt upon the continuing validity of the certification.

Schwartz suggested, as I did, that the healthcare provider should write in a “minimum duration” of six-months but not more than one year on the certification forms. If this is done the regulations prohibit requesting re-certifications before the minimum duration has passed unless

- the employee requests an extension of leave;
- circumstances described by the previous certification have changed significantly;
- the employer receives information that casts doubt upon the employee's stated reason for the absence.

For the full text of §825.308 go to:

http://www.dol.gov/dol/allcfr/ESA/Title_29/Part_825/29CFR825.308.htm