

WAYNE STATE UNIVERSITY

MEMORANDUM

TO: XXXXXXXXXXXX
FROM: Michelle Fecteau, Labor Program Specialist, Labor Studies Center
DATE: 6/23/03
RE: FMLA and Recertification Requirements

I am writing in answer to your question:

Can my employer ask for additional doctor's notes for each absence I take while on an approved FMLA intermittent leave?

I reviewed my notes from earlier this year when I spoke with the FMLA attorney Robert Schwartz regarding the medical recertification. Robert Schwartz is the labor lawyer who wrote The FMLA Handbook, 2nd Edition 2001. He directed me to Section 825.308(b) of the FMLA regulations. He stated that management will often look at only 308(a) of the FMLA and 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 recertification 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 recertification 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.

(This regulation and other FMLA regulations can be accessed at the following website: www.dol.gov/esa/. (Click on FMLA link).

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 instead of using terms like “permanent”. If this is done the regulations prohibit requesting recertifications or doctor’s notes 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.

I strongly suggest that you share this information with management and others in your union.

I hope this information helps you and your members. Please feel free to contact me if I can be of further assistance.

Sincerely,

Michelle Fecteau

PS – I would also like to note that employees who are repeatedly ordered to bring in doctor’s notes due to a disability may have a harassment claim under the Americans with Disabilities Act.

- Also, managers who interfere with an employee’s right to use the FMLA may be held personally liable. I am enclosing an article that reviews this in more detail.