




QUARTERLY SPECIAL REPORT

FMLA CERTIFICATIONS: *CHALLENGES AND TIPS FOR EMPLOYERS*

HUMAN
RESOURCES





A majority of employer questions relating to the federal Family and Medical Leave Act (FMLA) surround whether or not a condition is a serious health condition. The source for the answer is found in a certification, which employers may require employees provide to support the taking of FMLA leave. Many other questions relate to the certification process:

- ▶ When to ask for one,
- ▶ When to expect one, and
- ▶ What the contents should be.

A certification is basically at the crux of administering leave under the FMLA.



WHY CERTIFICATIONS ARE IMPORTANT

The reason so many questions relate to FMLA certifications is that the forms are expected to contain information employers use to determine whether an employee's absence will be protected by the law. Without the appropriate information, employers are hard-pressed to determine whether to give employees job-protected leave. It's similar to being asked whether or not you like a dish that you've never tasted; you simply don't have enough information on which to base a decision.

The certification is important enough that an ample portion of the FMLA regulations are dedicated to it.

WHAT THE REGULATIONS SAY

The FMLA regulations indicate that, as an employer, you are not required to ask employees to give you a certification, but you may do so if you wish. Of course, without it, you might have a hard time figuring out whether an employee's absence truly falls under the FMLA's protections. Therefore, it is wise to require one when allowed.

You may not, however, request one in all FMLA leave situations. You may not request a certification when leave is strictly for bonding with a healthy newborn child or a child placed for adoption or foster care.

You may not request a certification for all leave reasons.

This makes sense, since there is actually no one has a serious condition, so doctors would have no useful information. Also, the reason isn't related to a military exigency, so no entity would have any useful input.

Don't confuse leave for bonding with leave for pregnancy, delivery, or recovery. In those situations, leave is for a serious health condition and you may require a certification.



When you request that an employee provide a certification, the usual entity completing it is a health care provider, since the majority of FMLA-related absences deal with a serious health condition.

If, however, the leave is related to a qualifying exigency caused by a family member's military duty, the FMLA regulations indicate that the certification would not be completed by a health care provider. The individual completing such certifications could be, for example, a counselor or school official. In some situations, you may request to see a copy of the military member's active duty orders or other documentation, which indicates that the military member is on covered active duty or on call to such duty.

Other documentation includes that which confirms the military member's rest and recuperation leave or a copy of a bill regarding services for the handling of legal or financial affairs.

If the leave is related to a qualifying exigency, the FMLA certification would not be completed by a health care provider.



OTHER SOURCES OF INFORMATION

Every now and then, you might obtain information from sources other than an FMLA certification. This might be the case when an employee has a work-related injury or illness and is under the care of an occupational health care provider for purposes of workers' compensation. This provider may be sharing information with you in regard to a workers' compensation claim, but it might also be ample information on which you can base an FMLA designation determination.

If that is the case, you need not request that the employee provide you with a separate, additional FMLA certification, since you already have enough information to determine if the reason for leave qualifies for FMLA protections. You might want to document the reason you did not request a certification, perhaps on the designation notice or other record.

If an employee has filed for short-term disability (STD) benefits, you might also obtain enough information from the benefits administrator to make an FMLA designation determination. If the STD-related information is not sufficient to make an FMLA designation decision, you may request a certification.

Sometimes determining whether an employee is entitled to STD benefits takes longer than the 15-day window after which you can expect to obtain a certification. As such, asking for a certification might help you make a quicker FMLA decision.



THE FORM(S)

A different certification form is to be used, depending on the reason for the employee's requested leave. The different forms include the following:

- ▶ Certification of Health Care Provider for Employee's Serious Health Condition
- ▶ Certification of Health Care Provider for Family Member's Serious Health Condition
- ▶ Certification for Military Family Leave for Qualifying Exigency
- ▶ Certification for Serious Injury or Illness of a Current Servicemember For Military Caregiver Leave
- ▶ Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave

You are not required to use those model forms, but if you use alternatives, you should ensure they do not ask for more information than is allowed. You still want to receive enough information, however, to determine whether the reason for leave qualifies for FMLA protections.

The forms generally have different sections that are to be completed by different people. The first section is usually completed by the employer, while the second section is completed by the employee. For serious health conditions, the forms also include an additional third section that is completed by a health care provider. For military caregiver leave, a health care provider may be one from the U.S. Department of Defense.



THERE ARE
5
DIFFERENT
CERTIFICATION FORMS.

THE PROCESS

The certification makes its first appearance in the FMLA process when you respond to an employee giving you notice of the need for leave. Generally, you need to provide the employee with an eligibility/rights and responsibilities notice within five days of learning of the need for leave. Along with this notice, you may include a certification form. You may, however, request a certification at a later date.

The eligibility/rights and responsibilities notice has an entry for indicating whether the employee will be required to provide a certification. Make sure you check this if you want the employee to provide you with a certification.

When providing the certification form to the employee, many employers include a list of the employee's essential job functions or a job description — when the leave is for the employee's own condition. That way, the health care provider can address the employee's limitations in relation to the job when the employee returns to work.

Once the employee receives the request for a certification, he or she is to return it — completed — within 15 calendar days, unless it is not practicable to do so within that time frame. Ensure the employee is aware of the time limit.

Letting the employee know what needs to be included in the certification can also help make sure you get one that is complete and sufficient the first time around. Reminding employees of the potential repercussions for not providing a timely certification can also help.



AN EMPLOYEE HAS
15 DAYS
TO PROVIDE A
COMPLETED CERTIFICATION.

LATE CERTIFICATIONS

As mentioned, employees are to return a completed certification within 15 calendar days. It is not all that unusual for an employee to miss this deadline. What to do in such situations will depend upon some specifics.

If, for example, if the employee could not return a certification within 15 days because he or she could not get an appointment with the doctor or some other reason made it impracticable under the particular circumstances to do so, you should be a bit forgiving. Employees do, however, need to put forth a good-faith effort in obtaining a completed certification.

To determine if there is a legitimate reason the employee has not returned a certification, ask the employee why it is late. If the employee does not have a legitimate reason, and did not put forth good-faith efforts to obtain a certification, taking disciplinary action might be acceptable. If the employee still does not provide a certification, summarize the conversation in a letter to the employee as a reminder and again include the potential repercussions.

Some employers might take a late certification as an opportunity to terminate an employee. While this might be an acceptable step to take in limited situations, it could lead to issues. A good practice is to first determine why the certification is late.



If you never receive a requested certification, despite your inquiries and requests, the leave is not FMLA leave, and you may apply your company policies.

During the 15-day window, employees are protected. If an employee misses the 15-days with no justification, you may delay or deny the FMLA protections until one is provided.

If, for example, an employee did not provide a certification for 25 days, for the 10 days between when the 15-day window closed and when the employee gave you the certification, you may deny the FMLA protections.

EMPLOYEES DON'T WANT TO USE FMLA

Some employees take a passive-aggressive stance when they would rather not have FMLA protections applied to an absence, and choose not to provide a certification. In such situations, remind the employee that without the certification, you cannot provide FMLA job protections to their absences.

You might also indicate that in the absence of the FMLA protections, you would apply your company policies, which might not include job protection. Employees should be made aware that not providing the certification could ultimately risk their job.



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EVALUATING COMPLETENESS

If a certification is incomplete or insufficient, you need to return it to the employee with a written list of what is needed to make it whole. The employee then has seven calendar days to cure any deficiencies. The employee might give authorization for communication directly between the health care provider and you expediting the process. You may not, however, require such an authorization. The employee may obtain the information from the doctor and then provide it to you. If the deficiencies are not cured, you may delay or deny FMLA leave.

SECOND OPINIONS

If you have reason to doubt the validity of a certification, you may request a second opinion. You get to choose the health care provider, but the company needs to pay for it. If the second opinion disagrees with the initial certification, you may request (and pay for) a third opinion. You and the employee need to agree on a health care provider for a third opinion, which is binding. Asking for second and third opinions is rare, but it is an option. It might be useful, for example, if you obtain a certification and the doctor's handwriting and signature is exactly like the employee's.

If a certification is complete and sufficient, but you want to make sure the appropriate individual completed it, or you can't read the handwriting or understand some of the information, you may request a clarification. You may do so by contacting the health care provider directly. The employee's direct supervisor, however, may not make such contact.

You might also want to double-check the authenticity of a certification. For a fee, some deception services will provide fake certifications and might even provide a voice on the other end of a call supporting it. If you have suspicions, you can always ask for a second opinion.

Instead of relying on only a medical certification, you may also make use of personal certifications. These are simply attestations that an employee is absent for legitimate reasons, including FMLA leave. The use of personal certifications should be usual and customary and applied to all employees, not just those who take FMLA leave. If you learn that the employee abused FMLA leave, you may use the personal certification (if false) as a basis for an employment action. These personal certifications might be useful when employees take unforeseeable, intermittent FMLA leave.



REVIEW THE INFORMATION

When you receive a certification, you need to review it carefully. Translating the information in the certification into a designation decision is sometimes the most difficult aspect of FMLA administration.

Looking at all the information, both collectively and individually, can give you a picture of what to expect from the employee regarding leave. Being familiar with the definition of a serious health condition while perusing a certification can also go a long way in making a review more effective and less time-consuming.

Employees who choose not to provide a certification could face consequences.



WHAT TO LOOK FOR

The first information to consider is the health care provider's address and type of practice or specialty. You might question the validity of a certification, for example, if an employee is out for an issue with his appendix, but the certification is completed by an optometrist. If the provider's location is some distance away, this might have an impact on the amount of time an employee is to be absent, as travel might be needed to obtain treatment.

From there, move to the medical facts — the real meat of the information used to determine if a serious health condition exists. Generally, the certification should indicate when the condition began and how long it is expected to last.

This type of information alone can give you clues to what you can expect in regard to an employee's absence. If, for example, the condition is expected to last a lifetime, it's probably a chronic condition, which means the employee will probably need leave on an intermittent basis.

Some serious health conditions might last only a few days, while others might last for a lifetime.



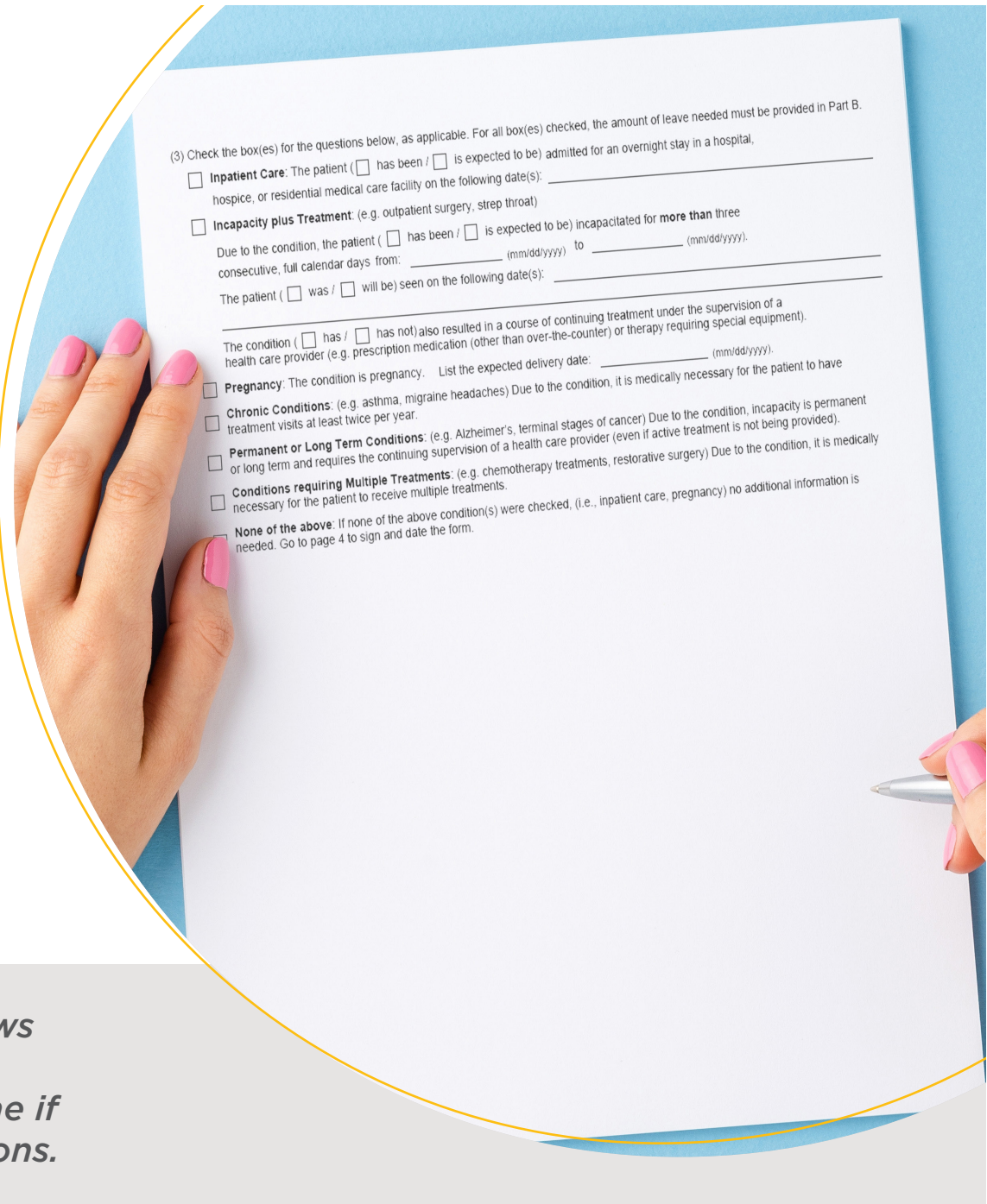
Doctors can't always determine how long a condition could last, particularly if the condition is new to the patient. Different people heal at different rates. As time goes by, the doctor will likely have a better idea regarding the condition's duration as well as how much leave an employee may need.

The certification form generally follows the definition of a serious health condition, making it easier to determine if the reason qualifies for FMLA protections.

After a couple basic questions regarding when the condition began and how long it will last, the certification form provides a list from which health care providers may choose regarding the condition. These options follow the FMLA's definition of a serious health condition, so that helps employers determine if it meets the definition.

A final option of "None of the above" is also available. If the health care provider chooses this option, the reason for leave generally does not qualify for FMLA protections.

The certification form generally follows the definition of a serious health condition, making it easier to determine if the reason qualifies for FMLA protections.



- (3) Check the box(es) for the questions below, as applicable. For all box(es) checked, the amount of leave needed must be provided in Part B.
- Inpatient Care:** The patient (has been / is expected to be) admitted for an overnight stay in a hospital, hospice, or residential medical care facility on the following date(s): _____
 - Incapacity plus Treatment:** (e.g. outpatient surgery, strep throat)
Due to the condition, the patient (has been / is expected to be) incapacitated for **more than three** consecutive, full calendar days from: _____ (mm/dd/yyyy) to _____ (mm/dd/yyyy).
The patient (was / will be) seen on the following date(s): _____
 - Pregnancy:** The condition is pregnancy. List the expected delivery date: _____ (mm/dd/yyyy).
The condition (has / has not) also resulted in a course of continuing treatment under the supervision of a health care provider (e.g. prescription medication (other than over-the-counter) or therapy requiring special equipment).
 - Chronic Conditions:** (e.g. asthma, migraine headaches) Due to the condition, it is medically necessary for the patient to have treatment visits at least twice per year.
 - Permanent or Long Term Conditions:** (e.g. Alzheimer's, terminal stages of cancer) Due to the condition, incapacity is permanent or long term and requires the continuing supervision of a health care provider (even if active treatment is not being provided).
 - Conditions requiring Multiple Treatments:** (e.g. chemotherapy treatments, restorative surgery) Due to the condition, it is medically necessary for the patient to receive multiple treatments.
 - None of the above:** If none of the above condition(s) were checked, (i.e., inpatient care, pregnancy) no additional information is needed. Go to page 4 to sign and date the form.

Looking at the list, you'll see that pregnancy is a serious health condition. This is another of the few bright-line tests in the FMLA. Time off for prenatal care is also FMLA leave, and applies to either spouse, but they must be married.

For purposes of incapacity and treatment, when an employee is incapacitated for more than three days and needs treatment, this treatment needs to involve the following:

- ▶ A visit to a health care provider two or more times within 30 days of the first day of incapacity for the treatment, or
- ▶ A visit to a health care provider on at least one occasion, which results in a regimen of continuing treatment.

A prescribed medication is a regimen of continuing treatment, as is therapy requiring special equipment.

The certification does not need to (but may) include a diagnosis, and you generally may not require that it does, as long as it provides enough information to make a designation determination. Some state laws prohibit employers from asking for a diagnosis.

A regimen can include prescription medication and therapy requiring special equipment.





EVALUATING THE AMOUNT OF LEAVE

Employers want to know when to expect an employee to be absent, and the certification attempts to obtain this information. It should indicate whether an employee will need leave on a continual basis, an intermittent basis, or a reduced-schedule basis.

All too often, the health care provider will not know a patient's treatment schedule at the time he or she is completing a certification, and might not provide all that information or the information might be a bit vague. Some employers will see this as an opportunity to request a clarification from the provider. Remember, clarification may be requested only if the certification is complete and sufficient. According to the regulations, to be insufficient is to be vague, ambiguous, or non-responsive, but these terms are not further defined. Providers might not, however, be able to provide more detail.

RECERTIFICATIONS

Things change, and when circumstances or details surrounding FMLA leave change, you may request a recertification. Sometimes the simple passing of time changes the circumstances.


You may request a recertification no more often than every 30 days in relation to an absence. If, however, the certification indicates a minimum duration of the condition, you must wait until that minimum duration expires. Sometimes, that minimum duration is a lifetime. That's why, in all instances, you may request a recertification every six months.

Some situations allow you to request a recertification without waiting 30 days or the condition's minimum duration. Those situations are as follows:

- ▶ The employee requests an extension of leave,
- ▶ Circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of the absence, the severity of the condition, complications), or
- ▶ You receive information that casts doubt on the employee's stated reason for the absence or the continuing validity of the certification.

If you have an employee who takes FMLA leave suspiciously, such as on Mondays and Fridays when the certification doesn't specifically support this, you may even include a record of the absence pattern with the recertification form and ask the health care provider if the condition and need for FMLA leave are consistent with such a pattern.

Recertifications are not without their limitations. You may not ask for a second or third opinion on recertifications. Nor may you request a recertification for qualifying exigencies or military caregiver leave.



You may require fitness-for-duty certifications before an employee returns from leave.



FITNESS-FOR-DUTY CERTIFICATIONS

Another certification that many employers use addresses an employee's ability to perform his or her job upon return to work after leave taken for the employee's own condition.

The Department of Labor does not have a model form for this, but the certification should indicate that the employee is able to resume work. You may also require that the certification specifically address the employee's ability to perform the essential functions of the job. To enforce such a requirement, however, you need to provide the employee with a list of the essential functions no later than with the designation notice. Therefore, some forethought is needed.

Your policy for requiring fitness-for-duty certifications should be uniformly applied and should require all similarly-situated employees to obtain them.

If an employee fails to provide a fitness-for-duty certification, you may delay the employee's return to work until one is submitted. If one is never submitted, you need not reinstate the employee.

CONCLUSION

FMLA certifications and recertifications are your ally, particularly when trying to determine whether an employee's absence qualifies for the FMLA's protections and also to help curb abuse, as they put some onus on the employee. They provide information you need to make a designation decision, thereby affording an employee his or her applicable rights.

Rules regarding certifications, however, must be followed. Asking for doctor's notes regarding an employee's absence for each episode of intermittent leave for an FMLA-qualifying reason has been seen as asking for a recertification. Since you may not ask for recertifications for each of these absences, you may not ask for doctor's notes for each absences.

Much of FMLA administration turns on the certifications — whether it is the dates for leave or the reasons involved. Without them, such administration would be nearly impossible.

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