



Navigating the FMLA Medical Certification Process: How to Avoid Landmines in Administering Leave

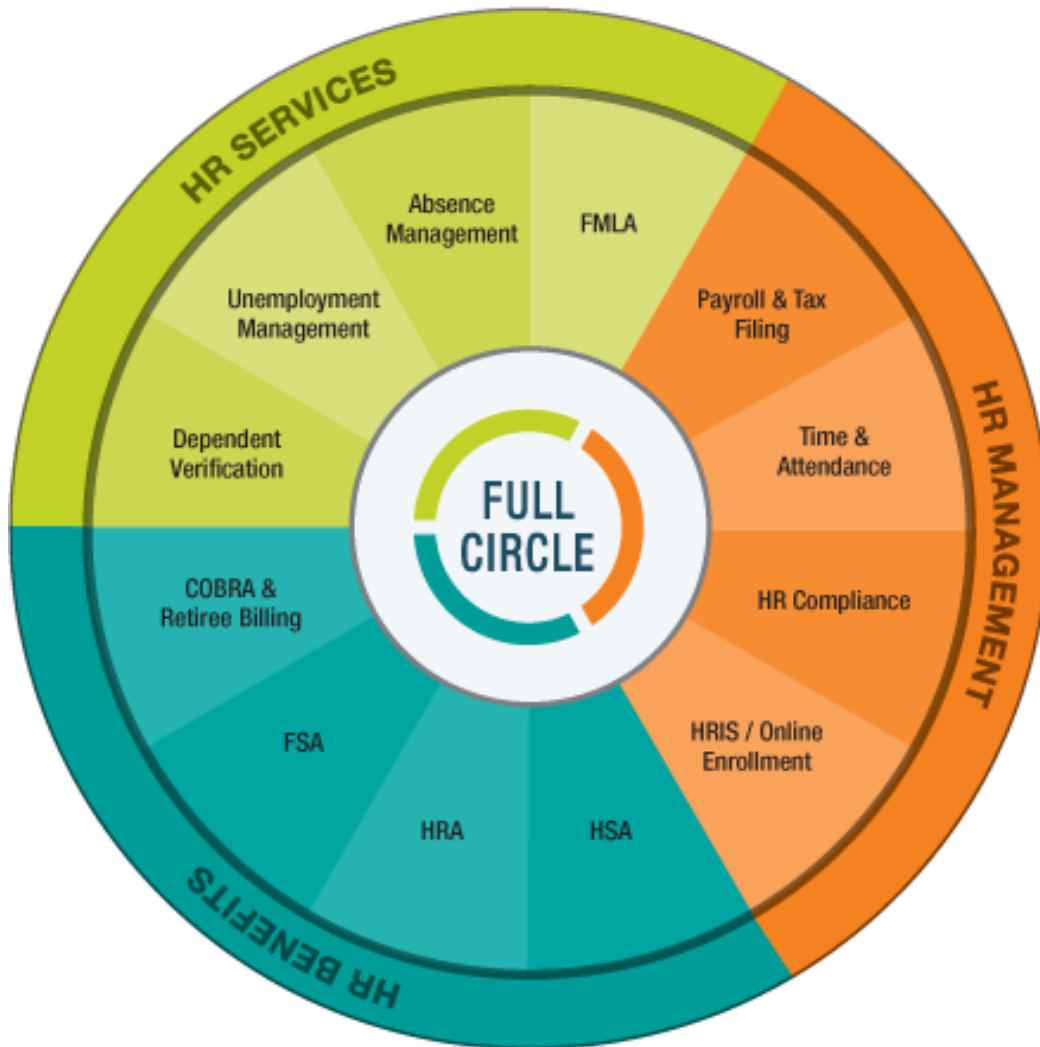
Presented by: Jeff Nowak



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Agenda



- Best practices for employers when an employee fails to return or turns in late medical certification
- Incomplete or Confusing Certification: When can an employer contact the doctor?
- How often can an employer seek certification and recertification (particularly where FMLA abuse is suspected)
- Managing the second/third opinion process
- Questions



Hey Friend, You Ever Going to Return That Cert?

Kimberly's Panic Attacks



- Your employee Kimberly claims she is suffering from job induced panic attacks ever since she was subjected to an unwelcome advance by one of her co-workers earlier this month
- She has sporadically missed five days this month and two more this week
- Kimberly's boss has come to you asking for guidance in handling the situation. She asks about terminating Kimberly's employment.

What should you do?

Kimberly's Panic Attacks



- Kimberly, who tells you, “my head is just not right,” and makes it clear that she will be on and off work for the foreseeable future as a result of the stress she’s dealing with
- You wisely observe this as a potential FMLA situation, so you issue the Notice of Eligibility/R&R notice and medical certification
- However, Kimberly doesn’t return the certification within the 15 days
- Deny leave at this point?

Best Practices for Following up



- Dealing with the silence
 - 15-day reminder in your system
 - Follow up with phone call
 - Have you contacted HCP, explaining the importance of completing the certification?
 - Are there other specialists she visited with during her treatment who could complete the form?
 - Have you mailed the form to the HCP?
 - Have you delivered the form in person?
 - Why haven't you contacted us to report the delay?
 - Send correspondence; provide another deadline (7 days)
 - What if you *still* don't hear from the employee?

Calculating Unexcused Absences



Two general rules

- Rule 1: Can delay/deny FMLA for the leave following the expiration of the 15-day time period until a sufficient certification is provided
 - *Example*: If employee does not provide certification for 45 days w/o sufficient reason, employer can deny FMLA protections for the 30-day period following the expiration of the 15-day time period, if the employee takes leave during such period (§825.313(a))
 - But does this really apply?
- Rule 2: If the employee doesn't produce the certification, the leave is not FMLA leave (§825.313(b))

Late return?



- Day 32: Send termination letter to Kimberly
- Calls HR:
 - “Didn’t think the date was a big deal”
 - “You’re catching me on a technicality”
 - “It’s been difficult lately . . . I just need the extra time”
- Day 35: Kimberly returns medical certification
- Do we reinstate Kimberly?



Can You Help me, Doctor?

Vague and Ambiguous Medical Certification



PART A: MEDICAL FACTS

1. Approximate date condition commenced: 11/1/13

Probable duration of condition: 11/1/14

Mark below as applicable:

Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility?
 No Yes. If so, dates of admission:

Date(s) you treated the patient for condition:

Will the patient need to have treatment visits at least twice per year due to the condition? No Yes.

Was medication, other than over-the-counter medication, prescribed? No Yes.

Was the patient referred to other health care provider(s) for evaluation or treatment (e.g., physical therapist)?
 No Yes. If so, state the nature of such treatments and expected duration of treatment:

2. Is the medical condition pregnancy? No Yes. If so, expected delivery date: _____

3. Use the information provided by the employer in Section I to answer this question. If the employer fails to provide a list of the employee's essential functions or a job description, answer these questions based upon the employee's own description of his/her job functions.

Is the employee unable to perform any of his/her job functions due to the condition: No Yes.

If so, identify the job functions the employee is unable to perform:

4. Describe other relevant medical facts, if any, related to the condition for which the employee seeks leave (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment):

Fibromyalgia

- Dana requests intermittent leave for her fibromyalgia
- Certification - no other information about how the fibromyalgia prevents her from doing her job
- We learn her doctor did not even examine Dana to grant her this leave.
- And . . .

Vague and Ambiguous Medical Certification



- No frequency and duration provided
- Instead, doctor wrote: “as needed” . . . “impossible to predict or estimate.”
- The certification extends for one year.

PART B: AMOUNT OF LEAVE NEEDED

5. Will the employee be incapacitated for a single continuous period of time due to his/her medical condition, including any time for treatment and recovery? No Yes.

If so, estimate the beginning and ending dates for the period of incapacity: _____

6. Will the employee need to attend follow-up treatment appointments or work part-time or on a reduced schedule because of the employee's medical condition? No Yes.

If so, are the treatments or the reduced number of hours of work medically necessary?
 No Yes.

Estimate treatment schedule, if any, including the dates of any scheduled appointments and the time required for each appointment, including any recovery period:

As needed

Estimate the part-time or reduced work schedule the employee needs, if any:

_____ hour(s) per day; _____ days per week from _____ through _____

7. Will the condition cause episodic flare-ups periodically preventing the employee from performing his/her job functions? No Yes.

Is it medically necessary for the employee to be absent from work during the flare-ups?
 No Yes. If so, explain:

Based upon the patient's medical history and your knowledge of the medical condition, estimate the frequency of flare-ups and the duration of related incapacity that the patient may have over the next 6 months (e.g., 1 episode every 3 months lasting 1-2 days):

Frequency : _____ times per _____ week(s) _____ month(s)

Duration: _____ hours or _____ day(s) per episode

Impossible to predict or estimate

ADDITIONAL INFORMATION: IDENTIFY QUESTION NUMBER WITH YOUR ADDITIONAL ANSWER.

Content of a Medical Certification



- Approximate date when the condition began
- Probable duration of the condition
- Description of appropriate medical facts supporting the need for leave
- If intermittent, an estimate of the frequency and duration for treatment or episodes of incapacity
- Employee's own serious health condition
 - Cannot perform the essential functions of employees job
 - Nature of any other work restrictions
 - Likely duration
- Family member's serious health condition
 - Need for care
 - Estimate of frequency and duration of leave required

What Questions do We Have?



- Is it sufficient?
 - Insufficient = “vague, ambiguous, or non-responsive”
- What’s wrong with it?
 1. Is “fibromyalgia” enough? Don’t we need more about how it affects her job?
 2. Can’t we get more than “as needed”?
 3. If so, can we just call Dana’s physician ourselves and ask if she’s serious?

What Questions do We Have?



- **Is “fibromyalgia” enough? Don’t we need more about how it affects her job?**
- **Yes,**
 - No statement that the “employee is unable to work”
 - No indication of “medical necessity” for intermittent episodes
- **But, we can’t take this too far**
 - “the determination of what medical facts are appropriate . . . will vary depending on the nature of the serious health condition at issue, and is appropriately left to the health care provider” and
 - If frequency and duration stated, logical conclusion is that the fibromyalgia requires employee to be out of work that long

What Questions do We Have?



- Can we get more than “as needed”?
- **Yes,**
 - An employer can require a “best estimate” of the frequency and duration
- **But,** we can’t take this too far
 - It’s possible that’s the best the doctor can do
 - “[T]here will be situations in which [terms such as ‘lifetime,’ ‘unknown,’ or ‘indeterminate’] are an appropriate response reflecting the health care provider's best medical judgment and will therefore be sufficient.” Preamble to FMLA Final Rule, 73 Fed. Reg. 222 (November 17, 2008) p. 68107

Incomplete/Insufficient Certification



- “Musts” when curing certification:
 - Written notice to the employee identifying what additional information is needed
 - Seven calendar days to provide complete and sufficient information
- Under 29 CFR §825.306(e), the employee has an obligation to either provide a complete and sufficient certification or give you permission to communicate directly with the health care provider
- Pre-emptive request for permission?



Best Practices in Recertification

Fred Has IBS



- Fred is one of your supervisors
- Suffers from irritable bowel syndrome
 - Certification indicates 2 days/mo; 1 day ea.
 - Past three months:
 - 3x/2x/3x
 - Almost all on M or F
- Can we seek recertification? If so, why?

Recertification



- General Rule:
 - No more often than every 30 days and with an absence
 - If duration specified is longer than 30 days, cannot seek recertification until that period is exhausted
 - Exception: Employer can seek recertification every 6 months, regardless of duration
- Others:
 - Employee requests an extension
 - Circumstances have changed *significantly*
 - Receive information that casts doubt on the validity
 - Duration/period has expired and absence occurs

Frequency/Pattern



- Do we have a *significant* change in frequency?
29 CFR § 825.308(c)(2)
- Pattern?
 - “. . . the employer may provide the health care provider with a record of the employee’s absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern” 29 CFR § 825.308(e)
 - Use correspondence to your advantage
 - Letter to employee (to provide to their doctor) explaining background: fact pattern, express concern
 - Invite HCP to explain why need for leave occurs on Fri./Mon.
 - Is pattern consistent with SHC and need for leave?
 - Use new certification form for HCP to complete



The FMLA Allows Second Opinions, But Aren't They Futile?

Second Opinions



- While on a week of vacation, John got uromyositis poisoning
- Requests intermittent leave as a result of condition
- Medical certification from general practice doctor supporting need for time off (4 days/mo. & two days per episode); duration is next 6 months
- Doctor is known for providing these notes
- Have reason to doubt? Can you seek second opinion?

When to seek second opinion



- Under what conditions?
 - The frequency and/or duration is inconsistent or disproportionate (the old “IBS” trick)
 - HCP is not a specialist in the area
 - Submission of inconsistent leave requests
 - Employer receives reliable information casting doubt on the validity of the certification
 - Suspicious pattern of absences
 - The health care provider is a bum (suspicious track record)
- May or may not come after authentication and/or clarification

Common second/third opinion issues



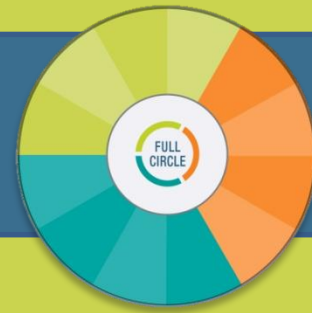
- How quickly after receiving certification must an employer seek a second opinion?
 - Regulations silent
 - One court decision: within a “reasonable period of time” after the initial certification (Sims v. Alameda..., 2 F.Supp.2d 1253 (N.D. Cal. 1998))
 - DOL’s Form WH-382 (designation notice)

How Long Does a Third Opinion Last?



- If employee's serious health condition has been tested through the second/third opinion process, employer can rely on that certification for future absences
- Employee must offer "overriding medical evidence" suggesting that the previous certification is no longer reliable.

**Stoops v. One Call Comm., 141 F.3d 309
(7th Cir. 1998)**



Questions



Do I need to obtain FMLA medical certification if the employee also submits a short-term disability claim?

Anything for a Buck



What should an Employer do if the health care provider charges a fee to complete the medical certification or to talk to the employer?

Medical Certifications from Timbuktu



My employee has submitted
medical certification from abroad
to support the need to care for a
family member.

Must I accept it? Can I question it?

Second Opinions



In a second opinion, can the health care provider perform his/her own exam, or must they rely only on the medical records obtained from the first HCP?

Certifying Pregnancy?



I want to make sure my employee is medically able to return to work after maternity leave.

What return-to-work certification can be required?

Independent Medical Exam upon Return to Work?



Employee with epilepsy has several seizures, is off for four weeks and returns to work after providing a FFD cert. Three days after returning, employee has another seizure at work.

Can we send the employee off
for an IME?



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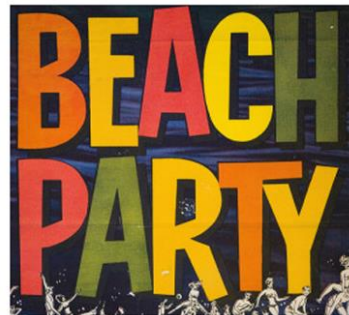
By Jeff Nowak on February 24, 2016
Posted in Abuse of FMLA leave, Court Decisions

I always love a good social media FMLA smack down. It's even better when the employer handles the situation in textbook fashion. Today's installment offers both, while also providing a road map for employers when investigating suspected FMLA abuse.


Let me share the story of Rodney.

Rodney was the activity director for Accentia Health, a local long-term care facility, and in that role, he was responsible for overseeing a staff which decorated the facility for holidays and events, and oversaw outings, parties and recreation for patients. Not a bad gig, if you can find it.

Rodney also had a bum shoulder. He took 12 weeks of FMLA leave for shoulder surgery and recovery, but he still was not able to return to work. For good measure, his doctor recommended one more month off work, and Accentia happily obliged. They called the additional month a "non-FMLA" leave of absence. As the story goes, during the final days of FMLA leave and during the month of his "non-FMLA" leave, Rodney took multiple trips to Busch Gardens in Florida and to the island of St. Martin, posting photos of his escapades on social media along the way. Rodney's treasure trove of Facebook photos consisted of his favorite Busch Garden holiday decorations, and photos and updates about his trip to St. Martin, including some photos of him on the beach, posing by a boat wreck, and swimming in the ocean — all at the very time he should have been recuperating.



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About Jeff Nowak

Jeff Nowak is co-chair of the labor and employment practice at Franczek Radelet, where he represents employers in all aspects of employment law. His clients praise him as a trusted business partner who is acutely aware of their business goals and the impact employment decisions have on their operations. A staunch advocate and effective litigator for his clients, Jeff also isn't afraid to be candid with clients where compliance issues or litigation must be resolved to meet business objectives. He is a nationally-recognized leader in the FMLA and ADA, and his passion for the FMLA shows through on this blog.

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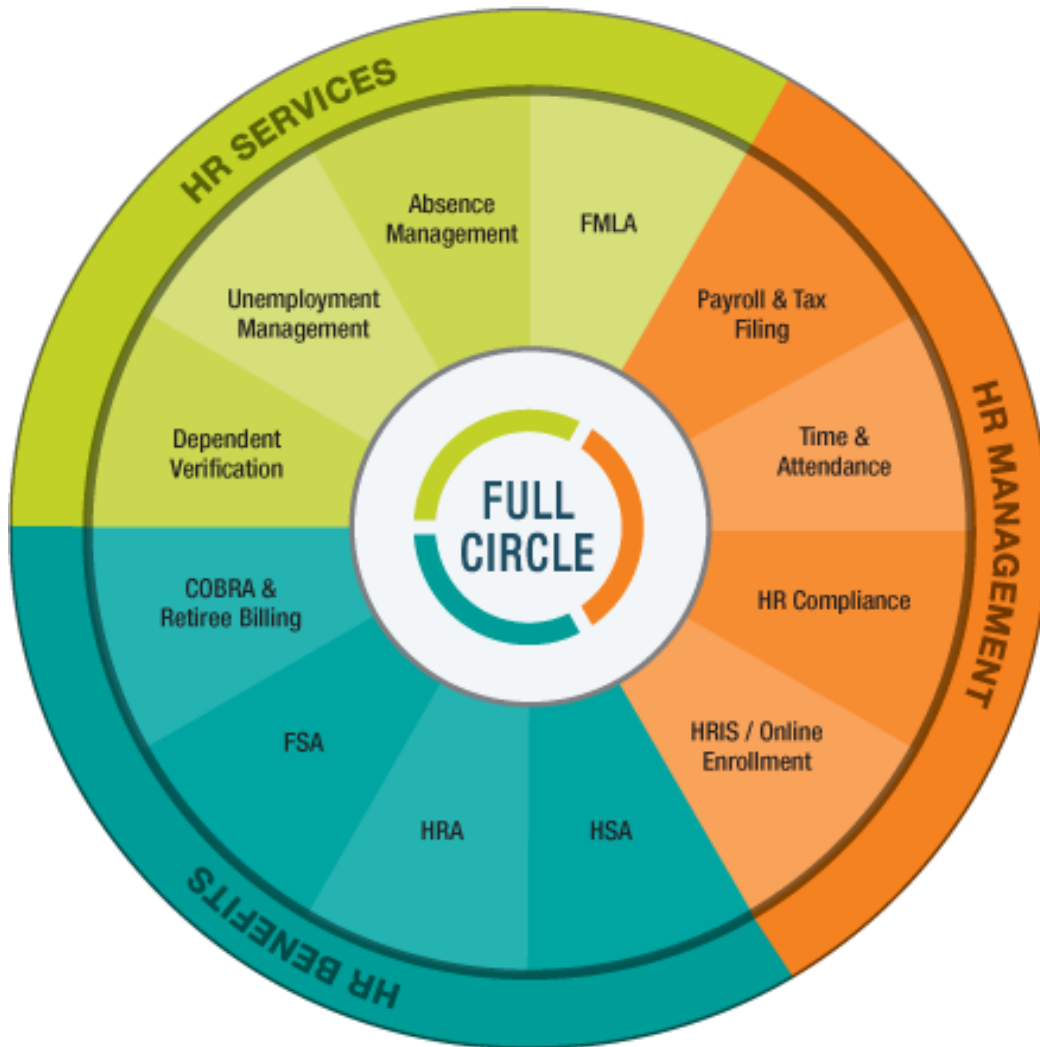
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