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How To Avoid Violating FMLA's Technical Rules — Part 2

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This is the second installment in a three-part-series addressing the FMLA's many challenging technical requirements. (Read part one here.) Part two continues with a discussion of what constitutes a "serious health condition" and the issues surrounding medical certifications, and provides specific guidance regarding the concerns raised in these areas. Taking the time up front to understand the statute's nuanced and complex requirements, while a time-consuming endeavor, is an employer's best and most cost-efficient litigation avoidance strategy, and the best defense when faced with the inevitable legal challenge. Knowledge really is power.

What Constitutes a "Serious Health Condition"?

FMLA leave is available when an employee is unable to perform the functions of the job because of his/her own serious health condition or when the employee is needed to care for a spouse, son, daughter or parent with a serious health condition. Although the U.S. Department of Labor's FMLA regulations define "serious health condition" in detail, the complexity and ambiguity inherent in these definitions has spawned significant litigation. A serious health condition is any illness, injury or impairment, or physical or mental condition that involves inpatient care (i.e., an overnight stay in a hospital, hospice or residential care facility, including related periods of incapacity) or continuing treatment by a health care provider. The regulations further divide "continuing treatment" into no less than five subcategories (i.e., incapacity and treatment; pregnancy/prenatal care; chronic conditions; permanent/long-term conditions; and conditions requiring multiple treatments), and provide definitions for each. (See 29 C.F.R. §§ 825.113-825.115.) Two recent court opinions shed some light on a few of the key terms used in the regulatory definition.

In Bonkowski v. Oberg Industries, 787 F.3d 190 (3d Cir. 2015), the Court of Appeals for the Third Circuit offered guidance concerning the meaning of "overnight stay" for purposes of establishing the "inpatient

care" prong of the serious health condition definition. Jeffrey Bonkowski, who worked as a machine operator for Oberg Industries, left work early on Nov.14, 2011, complaining of shortness of breath and dizziness. Later that evening, Bonkowski's wife drove him to the hospital. Although they arrived slightly before midnight, Bonkowski was admitted shortly after midnight on Nov. 15, 2011. After testing did not reveal any serious medical issues, Bonkowski was released from the hospital in the early evening of Nov. 15 with no restrictions on his activities. Oberg discharged Bonkowski the following day for walking off the job on Nov. 14. Bonkowski brought suit, and the district court granted Oberg's motion for summary judgment.

On appeal, the question was whether Bonkowski's admission to the hospital on Nov. 15 counted as an "overnight stay" in the hospital pursuant to 29 C.F.R. §825.114. The regulations are silent as to the meaning of this term. After assessing various approaches to defining "overnight stay," the Third Circuit decided on an objective test. In a split decision, the court concluded that an "overnight stay" means "a stay in a hospital, hospice or residential medical care facility for a substantial period of time from one calendar day to the next calendar day as measured by the individual's time of admission and time of discharge." Bonkowski, 787 F.3d at 199. Although Bonkowki's admission lasted approximately 18 hours, he was admitted and discharged on the same calendar day. This, according to the Third Circuit, was insufficient. Therefore, his visit to the hospital did not constitute an "overnight stay" and was not sufficient to demonstrate the existence of a serious health condition. As a consequence, his absence was unprotected, and summary judgment was affirmed in favor of Oberg.

In reaching its decision, the court explained that it preferred a "bright-line" test in assessing whether a hospital visit constituted an "overnight stay," which meant that the time spent by Bonkowski (or any individual) in a hospital waiting room prior to admission would not count toward the overnight stay requirement. However, endeavoring to avoid situations in which staying from 11:59 p.m. on one day to 12:01 a.m. the next day would constitute an overnight stay, the court added the requirement that the individual's stay in the hospital must be for a "substantial period of time." Short of creating another bright-line rule, the court suggested that a minimum of eight hours would seem to be an appropriate length of time.

As stated above, a serious health condition must involve either "inpatient care" or "continuing treatment," and the phrase "continuing treatment" is itself composed of multiple prongs. The prong giving employers the most headaches is that for "incapacity and treatment," which requires the employee to suffer a period of incapacity of more than three consecutive days and which involves either: (a) two or more treatments within the first 30 days of incapacity by or under the supervision of a health care provider; or (b) a single visit to a health care provider within seven days of the onset of incapacity "which results in a regimen of continuing treatment under the supervision of the health care provider." (See 29 C.F.R. § 825.115(a).) While a "regimen of continuing treatment" may sound demanding, the DOL's regulations provide that it can entail simply taking a course of prescription medication. In many cases, this interpretation has allowed seemingly minor illnesses, such as bronchitis or the flu, to qualify as serious health conditions. The following cases demonstrate the complexities of understanding and applying these terms.

In Johnson v. Wheeling Machine Products et al., 779 F.3d 514 (8th Cir. 2015), the Court of Appeals for the Eighth Circuit took a firm stand on minor illnesses, holding that simply taking medication without a health care provider's ongoing supervision is not sufficient to meet the "incapacity and treatment" prong of the definition of "serious health condition." Kendrick Johnson worked for Wheeling Machine Products in a steel plant in Arkansas. On May 12, 2011, he informed his supervisor that he was not feeling well and left work early. Johnson went to a nearby health clinic complaining of back pain, a stiff

neck, blurred vision and a “major” headache. He was seen by a physician assistant, Stephen Stewart, who diagnosed him with high blood pressure, prescribed medication, and told him to follow up with his regular physician. Stewart gave Johnson a note, explaining that Johnson had been seen at the clinic and could not return to work until May 16.

When Johnson presented the note to his employee-relations supervisor, she rejected it because Johnson himself had handwritten his name on the note. Ultimately, Johnson was unable to procure a note that was satisfactory to the company and his employment was terminated. Internal company correspondence indicated that Johnson was discharged because the company believed he had altered, falsified or forged the work excuse. Wheeling never provided Johnson with a notice of his FMLA rights nor asked him to complete a medical certification form. Johnson filed suit, and the district court granted summary judgment in favor of Wheeling, finding that Johnson had failed to present sufficient notice of his need for FMLA leave and could not otherwise establish that Wheeling’s proffered reason for discharging him was pretextual.

The Court of Appeals for the Eighth Circuit affirmed the grant of summary judgment but on much different grounds. According to the court, Johnson could not proceed on his FMLA claim because he failed to demonstrate that he suffered from a serious health condition under either part of the “incapacity and treatment” prong of the definition. As an initial matter, Johnson could not demonstrate that he was treated two or more times within 30 days of the onset of incapacity. Although Johnson contended that he was treated for a second time by his regular physician following his discharge, he offered no evidence of the date of that visit sufficient to meet his burden.

More significantly, the court breathed new life into the second part of the “incapacity and treatment” definition. While recognizing that a single visit to a health care provider which results in a prescription for medication can sometimes meet the definition of "serious health condition," the court emphasized that the requisite “regimen of continuing treatment” must still be “under the supervision of the health care provider.” According to the court, by requiring that the health care provider supervise the regimen of continuing treatment, the regulation “helps to ensure that minor conditions will fall outside the FMLA’s coverage ... ” Johnson, 779 F.3d at 520. The fact that a health care provider “prescribes medication does not necessarily mean that the provider is ‘supervising’ the prescription regimen.” Id. In this case, Stewart, the clinic doctor who examined Johnson, “did not oversee, watch or direct any part of Johnson’s treatment regimen; he simply prescribed Johnson medication and sent him on his way.” Id. Johnson never followed up with Stewart, and his regular physician likewise did not supervise any “regimen of continuing treatment.” Having failed to demonstrate that he suffered from a “serious health condition,” Johnson’s FMLA claim failed because his absences were unprotected.

The Eighth Circuit’s stance on the requirement of “supervision” in the “incapacity and treatment” context is somewhat novel, and its usefulness for employers remains to be seen — especially outside the context of one-off visits to urgent care clinics. Accordingly, employers should be cautious whenever presented with a situation in which an employee has been treated by a health care provider and prescribed medication. At a minimum, Wheeling should have provided Johnson with a notice of his rights and responsibilities and requested the completion of a medical certification form. Its failure to do so was overlooked in this case as there was no evidence that Johnson was prejudiced by Wheeling’s technical violation.

In White v. Beltram, 789 F.3d 1188 (11th Cir. 2015), the Court of Appeals for the Eleventh Circuit emphasized the importance of avoiding hasty decisions regarding whether an employee’s condition rises to the level of a serious health condition. There, the court held that a medical certification form received

after an employee's discharge should be considered in determining the existence of a serious health condition. In overturning summary judgment in favor of the employer, the court explained that the district court relied solely on medical information submitted to the employer prior to the employee's discharge. According to the court, the question of whether an individual in fact suffered from a serious health condition should be answered using all available evidence. While recognizing that this approach might seem unfair to employers trying to make decisions using the information before them, it explained that other provisions in the FMLA, such as those requiring employee notice and medical certification, "protect employers from being sandbagged by employees who try to create interference claims after the fact and based on information not known at the time of termination." White, 789 F.3d at 1195. Concluding that the FMLA certification form submitted by the employee immediately following her discharge demonstrated the existence of a serious health condition, the court held that summary judgment was inappropriate. The White case sends a message to employers that they may need to re-evaluate termination decisions if they subsequently receive information suggesting the existence of a serious health condition for which protected leave should have been granted.

Medical Certifications

The FMLA allows an employer to require various medical certifications and recertifications to support an employee's request for FMLA leave due to a serious health condition. Earlier this year, the DOL issued new model medical certification forms (among other model forms) for employers to use in administering FMLA leave. The new forms — which expire on May 31, 2018, — largely mirror the previous versions except for added references to the Genetic Information Nondiscrimination Act, 42 U.S.C. § 2000ff et seq. (GINA). Under GINA, employers are generally prohibited from requesting, requiring or purchasing genetic information regarding their employees or applicants.

To avoid violating GINA, the Equal Employment Opportunity Commission has emphasized that when an employer makes a request for health-related information, such as to support an employee's request for leave, the employer should warn the employee and/or health care provider not to provide information regarding an individual's genetic information. Although the EEOC recommended specific "safe harbor" language for this purpose, the DOL adopted only a portion of the EEOC's recommended language and did not release any guidance or commentary explaining the reasoning behind its omissions. While the EEOC would most likely bless the "safe harbor" language advanced by the DOL (its sister federal agency), it is not guaranteed. Consequently, employers who already customize the FMLA's model forms to meet their specific business needs, should continue utilizing the more robust "safe harbor" language proposed by the EEOC to ensure compliance.

Even armed with the DOL's model forms, navigating the FMLA's medical certification process can be challenging. Understanding what documents may be required, how much time should be afforded for their completion, and what an employer should do with documents it finds to be insufficient or incorrect is critical to avoiding FMLA liability. Several recent cases illustrate the challenges in this area.

The Court of Appeals for the Third Circuit's holding in Hansler v. Lehigh Valley Hospital Network, 790 F.3d 499 (3d Cir. 2015) highlights the difficulties faced by employers confronted with problematic medical certifications. Reversing the district court's order dismissing the case, in a split decision, the appellate court held that the employer violated the FMLA by discharging the plaintiff before giving her an opportunity to cure what it considered a deficient, rather than "negative," medical certification.

Deborah Hansler worked for Lehigh Valley Health Network as a technical partner. In March 2013, she began experiencing shortness of breath, nausea and vomiting, but did not know the cause of her

symptoms. On March 13, Hansler's physician completed a medical certification form requesting intermittent leave two times per week beginning on March 1 and continuing for a probable duration of one month. Hansler submitted the certification form to Lehigh Valley and was absent from work on March 13, 14, 23, 24 and 25. While Hansler's medical certification referred to the length of her requested leave, it did not state the nature or duration of her medical condition. Without seeking any additional information from Hansler regarding her medical condition, Lehigh Valley terminated Hansler at the end of her shift on March 28. At that time, Lehigh Valley informed Hansler that her request for FMLA leave had been denied because her condition did not qualify as a serious health condition. Shortly thereafter, Hansler was diagnosed with diabetes and hypertension, which she believed caused her earlier absences.

Hansler sued Lehigh Valley for both FMLA interference and retaliation, asserting that Lehigh Valley improperly denied her request for leave without first giving her an opportunity to cure her medical certification. The DOL's regulations provide detailed procedures for how employers should respond to perceived deficiencies. If a medical certification is "incomplete" or "insufficient," the employer must explain to the employee in writing what additional information is necessary and afford the employee seven days to cure the problem. (See 29 C.F.R. § 825.305(c).) A medical certification is considered "insufficient" if the employer "receives a complete certification, but the information provided is vague, ambiguous or nonresponsive." Id.

The district court found that Hansler's leave request was defective because her medical certification indicated that her condition would only last a month — instead of the "extended period of time" required to demonstrate the existence of a serious health condition under the "chronic condition" prong. In dismissing the case, the district court characterized Hansler's certification as "negative on its face" and noted that the timing of her diagnosis was "unfortunate" but of no consequence. The Court of Appeals disagreed, finding that Hansler's certification could not fairly be characterized as a "negative" certification. While so called "negative" certifications are not addressed by the FMLA or its regulations, courts have crafted the term to refer to certifications in which a health care provider's statements essentially foreclose the possibility of a "serious health condition," such as when a physician reports that an employee is not incapacitated and could perform all of his or her job functions. Without specifically endorsing the concept of "negative" certifications, the Court of Appeals emphasized that the certification offered by Hansler did not fall into that category because it provided no affirmative statements from Hansler's physician indicating that she would not be required to miss work. Instead, Hansler's certification was "vague and nonresponsive" because it requested intermittent leave for one month but failed to specify whether the one month duration referred only to the length of her requested leave or to the duration of the condition. As such, Hansler's certification was "insufficient," and Hansler should have been afforded seven days to cure the deficiency.

By making an assumption about a vague entry on the certification form instead of seeking clarification, Lehigh Valley was found to have interfered with Hansler's FMLA rights. Employers are often presented with medical certifications in which the condition described or the anticipated duration isn't clear. This case serves as a reminder to employers to exercise caution when denying FMLA leave based on what may seem like a "negative certification." When in doubt, it is always better to seek additional information.

The sufficiency of a medical certification was called into question in Kossowski v. City of Naples, (M.D.Fla. Feb. 6, 2015), where a health care provider contradicted his own certifications during litigation. There, the critical issue was whether the plaintiff had a serious health condition under the "incapacity and treatment" prong of the definition when he was out of work due to bronchitis. The

FMLA certification form on which the employer relied in denying leave indicated that the plaintiff's physician treated him only once on Feb.4, 2013. However, during litigation, the plaintiff contended that he was also treated on Feb. 11 when he saw his physician to have his FMLA paperwork completed, a fact confirmed by the doctor in his deposition. The U.S. District Court for the Middle of District of Florida concluded that the analysis of whether an individual has a serious health condition does not end with the information available to the employer at the time it makes an adverse decision with respect to leave. Because of the conflicting evidence about whether the physician treated the plaintiff once or twice, the court denied the employer's motion for summary judgment. The decision is particularly troubling for employers, who must rely on information provided by health care providers on medical certification forms to make decisions regarding whether to grant or deny FMLA leave. If health care providers can later contradict their own statements in medical certifications, even the most cautious employers are at risk.

Conclusion

While compliance with the FMLA's detailed technical requirements can be challenging, an employer's best defense is always to review the regulations, keep abreast of case developments, and use extreme caution whenever denying a leave request. Part three of this series, the concluding section, will address the issues of intermittent leave, discuss the actions that can constitute interference with FMLA rights, and then provide practical guidance for dealing with the FMLA's myriad technical requirements.

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