

Addressing Abuse of Intermittent FMLA Through Recertification



The Family and Medical Leave Act (FMLA) does not provide employers with many tools to deal with overuse or misuse of intermittent leave. An employer may require an employee to furnish a medical certification when leave is requested due to a serious health condition. Under certain circumstances, an employer may also request a recertification. A Department of Labor (DOL) opinion letter clarifies when recertification may be used.

Section §825.308 of the federal regulations provides that for pregnancy, or chronic or permanent/long-term conditions, an employer may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless:

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


According to a DOL opinion letter, "a pattern of Friday/Monday absences can constitute information that casts doubt upon the employee's stated reason for absence... thus allowing an employer to request recertification more frequently than every 30 days... provided there is not evidence that provides a medical reason for the time of such absences and the request for recertification is made in conjunction with an absence." This reasoning also applies if the certification states a need for intermittent leave of a certain frequency (i.e., two days a month) and the employee significantly exceeds the expected frequencies (i.e., two days a week).

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The opinion letter states that it is permissible for an employer to include an employee's absence record along with the request for certification or recertification and to add a question to the certification or recertification asking whether the pattern of absence is consistent with the employee's (or immediate family member's) serious health condition. Since the employer may not have direct contact with the employee's health care provider, the certification or recertification should be given to the employee. In the alternative, with the employee's permission, a health care provider representing the employer may contact the employee's health care provider to clarify the information.

While a DOL opinion letter does not carry the weight of the regulations, and may be affected by changes to the regulations and court decisions, the governing agency's guidance is helpful for employers.

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