

Medical information an employer can obtain under amended FMLA regulations

Current 29 CFR Section 825.306 addresses how much information an employer can obtain in the medical certification to substantiate the existence of a serious health condition (of the employee or a family member) and the employee's need for leave due to the condition. This section also explains that the Department of Labor provides optional forms (Form WH-380-E and WH-380-F) for use in the medical certification process; other forms may be used, but they may only seek information related to the condition for which leave is sought, and no additional information beyond that contained in Section 825.306 may be required.

Section 825.306(a): Required information:

(1) The name, address, telephone number, and fax number of the health care provider and type of medical practice/specialization; (2) The approximate date on which the serious health condition commenced, and its probable duration; (3) A statement or description of appropriate medical facts regarding the patient's health condition for which FMLA leave is requested. The medical facts must be sufficient to support the need for leave. Such medical facts may include information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation or treatment (physical therapy, for example), or any other regimen of continuing treatment; (4) If the employee is the patient, information sufficient to establish that the employee cannot perform the essential functions of the employee's job as well as the nature of any other work restrictions, and the likely duration of such inability (see §825.123(b) and (c)); (5) If the patient is a covered family member with a serious health condition, information sufficient to establish that the family member is in need of care, as described in §825.124, and an estimate of the frequency and duration of the leave required to care for the family member; (6) If an employee requests leave on an intermittent or reduced schedule basis for planned medical treatment of the employee's or a covered family member's serious health condition, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the dates and duration of such treatments and any periods of recovery; (7) If an employee requests leave on an intermittent or reduced schedule basis for the employee's serious health condition, including pregnancy, that may result in unforeseeable episodes of incapacity, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the frequency and duration of the episodes of incapacity; and (8) If an employee requests leave

on an intermittent or reduced schedule basis to care for a covered family member with a serious health condition, a statement that such leave is medically necessary to care for the family member, as described in §§ 825.124 and 825.203(b), which can include assisting in the family member's recovery, and an estimate of the frequency and duration of the required leave. (See §825.123(a)-(b) below.)

Section 825.306(d)-(e):

(d) If an employee's serious health condition may also be a disability within the meaning of the Americans with Disabilities Act (ADA), as amended, the FMLA does not prevent the employer from following the procedures for requesting medical information under the ADA. Any information received pursuant to these procedures may be considered in determining the employee's entitlement to FMLA-protected leave.

(e) While an employee may choose to comply with the certification requirement by providing the employer with an authorization, release, or waiver allowing the employer to communicate directly with the health care provider of the employee or his or her covered family member, the employee may not be required to provide such an authorization, release, or waiver. In all instances in which certification is requested, it is the employee's responsibility to provide the employer with complete and sufficient certification and failure to do so may result in the denial of FMLA leave. See §825.305(d). (See §825.305(c) for complete and sufficient certification.)

With respect to Section 825.306(a)(3), it is important to note that the preamble explained what the DOL meant when it referenced examples of medical facts that may be included in the medical certification. The DOL preamble at 73 FR 68014 (November 17, 2008) stated that:

The Department notes that the determination of what medical facts are appropriate for inclusion on the certification form will vary depending on the nature of the serious health condition at issue, and **is appropriately left to the health care provider.** Accordingly, the Department **declines to set forth a mandatory list of medical facts that must be included in the FMLA certification.** Similarly, the Department continues to believe that it would not be appropriate **to require a diagnosis as part of a complete and sufficient FMLA certification. Whether a diagnosis is included in the certification form is left to the discretion of the health care provider and an employer may not reject a complete and sufficient certification because it lacks a diagnosis.** (Emphasis added.)

The USPS may try to rebut the above by stating that if a diagnosis is not required, why would the DOL have

Medical information (continued)

questions 3 and 4 under Part A: Medical Facts on optional Forms WH-380-E and WH-380-F? The DOL preamble at 73 FR 68016 (November 17, 2008) responded to that question by stating that:

Several commenters objected to the wording of question 3, which asks the health care provider to describe the relevant medical facts, arguing that as worded in the proposed form health care providers would not be aware that the medical facts listed, including diagnosis, were not mandatory.

...As discussed above regarding proposed §825.306 (a)(3), the determination of what medical facts are appropriate for inclusion on the certification form is within the discretion of the health care provider and will vary depending on the nature of the condition for which leave is sought. The Department has revised the certification form to clearly indicate that the medical facts listed are merely examples and are not required in all cases.

Section 825.306(a)(4) references Section 825.123(b) and (c). Please note, there is no Section 825.123(c) in 29 CFR Part 825. With respect to the essential functions of the employee's job referenced in Section 825.306(a)(4) and the use of the phrase "unable to perform the functions of the position" referenced in Section 825.123(a), the DOL preamble at 73 FR 67953 (November 17, 2008) responded by stating:

In response to the concern of some commenters, the Department notes that the rule gives employers the option of providing a list of essential functions when it requires a medical certification; an employer is not required to do so. Finally, in order to explain why the term "functions" and not "essential functions" is used in paragraph [§825.123](b), **the final rule clarifies that a certification will be sufficient if it provides information regarding the functions the employee is unable to perform so that an employer can then determine whether the employee is unable to perform one or more essential functions of the job.** This revision reflects the fact that the determination of whether a particular job duty is an essential function is a legal, not a medical, conclusion, and is in accord with the medical certification requirements in § 825.306 and the Department's prototype medical certification form. (Emphasis added.)

Section 825.123(a)-(b):

(a) Definition. An employee is "unable to perform the functions of the position" where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within

the meaning of the Americans with Disabilities Act (ADA), as amended, 42 U.S.C. 12101 et seq., and the regulations at 29 CFR 1630.2(n). An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment.

(b) Statement of functions. An employer has the option, in requiring certification from a health care provider, to provide a statement of the essential functions of the employee's position for the health care provider to review. A sufficient medical certification must specify what functions of the employee's position the employee is unable to perform so that the employer can then determine whether the employee is unable to perform one or more essential functions of the employee's position. For purposes of FMLA, the essential functions of the employee's position are to be determined with reference to the position the employee held at the time notice is given or leave commenced, whichever is earlier. See §825.306.

You can submit an FMLA medical certification using NALC's FMLA forms, the DOL's optional forms WH-380-E, WH-380-F or another form. If the USPS notifies you that your certification is not complete and sufficient, the USPS is required to "state in writing what additional information is necessary to make the certification complete and sufficient." See Section 825.305(c) below.

Section 825.305(c):

(c) Complete and sufficient certification. The employee must provide a complete and sufficient certification to the employer if required by the employer in accordance with §§ 825.306, 825.309, and 825.310. The employer shall advise an employee whenever the employer finds a certification incomplete or insufficient, and shall state in writing what additional information is necessary to make the certification complete and sufficient. A certification is considered incomplete if the employer receives a certification, but one or more of the applicable entries have not been completed. A certification is considered insufficient if the employer receives a complete certification, but the information provided is vague, ambiguous, or non-responsive. The employer must provide the employee with seven calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any such deficiency. If the deficiencies specified by the employer are not cured in the resubmitted certification, the employer may deny the taking of FMLA leave, in accordance with §825.313. A certification that is not returned to the employer is not considered incomplete or insufficient, but constitutes a failure to provide certification. ☒