

# Expert Opinion

## With New Effort, Employers Can Get Through Challenging FMLA Issues

By Howard Sandler, M.D.



The FMLA is designed to allow individuals with personal or family health problems to take reasonable, unpaid leave for “serious” health problems and for the most part, the system has worked well. However, over the years, a not-insignificant proportion of cases have become the “chinks in the armor” that I and

others were invited to testify about and discuss with the U.S. Department of Labor (DOL) at its recent FMLA stakeholders meeting (see November 2007 newsletter).

Businesses have come face-to-face with a number of challenging issues:

- restriction of information flow and contact;
- difficulties in medical certification verification;
- return-to-work and fitness-for-duty assurance; and
- intermittent leave for chronic medical conditions.

The leave certification process sounds simple and straightforward on the surface; but a number of problems

have arisen over the past 14 years. As noted repeatedly at the DOL hearing, the certification form is long, redundant and a burden for the average clinician to complete, especially for uncomplicated medical cases.

An unintended consequence is that many health care providers are charging up to \$50 or more to complete FMLA certifications. Moreover, the definition of “serious health condition” under the FMLA is easy to meet and there are no checks and balances at the provider level to assure that indeed a covered medical condition exists. This becomes even more problematic when chronic conditions are involved.

Anyone who has been involved in the workers’ compensation process knows the difficulty in receiving appropriate work restrictions, even from qualified physicians who understand worker/workplace issues. Few, if any, physicians and other providers outside of the occupational health field have the training, experience and expertise necessary to determine, among other issues:

- how long a worker needs to be off the job for medical reasons;
- the anticipated clinical course of a condition, and to what extent and how much additional leave may be necessary;
- what constitutes an essential job function;
- what medically necessary job restrictions are needed and for how long; and
- the level of impairment actually produced by a given acute or chronic disorder

Unfortunately, there are no criteria, guidance or definitions provided under the FMLA to address these uncharted territories. The good intentions of providing limited “private” information all too often means that a time-consuming process ensues, comprised of a series of questions and, hopefully, appropriate answers.

There is little published and less scientifically validated guidance available to employers and providers to determine the appropriate leave time for a large percentage of conditions, including both acute and chronic disorders.

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A quick example will illustrate. A worker with a non-job-related, acute back disorder stays off work the typical two to six weeks, but the pain really never resolves. The average family practitioner without occupational health expertise may simply ask, "Well, Mr. Jones, how long do you feel you need to be off work?" and "What functions do you think you can do at your job?" The debate over how many treatments and level of restrictions necessary is fraught with pitfalls and subjective criteria are too frequently the determining factors.

### **Second, Third Opinions**

The second and third opinion process for certification of FMLA leave has not proven to be as reliable and responsive as hoped. It is very difficult to find high-level experts willing to work in the FMLA arena. Our experience over the years is that we often are unable to obtain through the second opinion process the actual requested information and opinion for the issue(s) in question.

Importantly, once the condition is certified, no such additional second opinion process is allowed for recertification. There are presently no networks of medical specialists readily available with appropriate FMLA knowledge and expertise to assist with the second/third opinion process.

In our experience, building on the employer's case experience one by one, including the provision of appropriate job information, decisionmaking matrices and similar factors are the only way that the second and third opinion process has provided even limited utility.

### **Return to Work, Fitness for Duty**

Under the FMLA, once the treating physician provides a release, the employee is to be returned to work.

## **Real-World Solutions** (continued from page 10)

In the meantime, Paul's employer must act quickly to avoid litigation in his particular situation. The employer is well-advised to return Paul to his current position, communicate to him his rights under the FMLA, seek additional information about his need for leave and, finally, seek medical certification of his mother's medical condition. This approach will ensure the employer is in the best position to assess Paul's request for leave and adhere to the mandates set out by the FMLA.

*Note: This article is based loosely on the facts in Williams v. Illinois Department of Corrections, U.S. Dist. LEXIS 17119 (S.D. Ill. March 9, 2007). ⚡*

This may present a difficult situation for the employer and one with potential safety concerns. Few treating providers truly understand the job and how performance of the job tasks integrate with the employee's condition.

Merely sending the provider a description of essential functions of the job is usually insufficient, unless there are accompanying job-specific medical standards that interpret what level of function, for example vision and hearing, an individual needs to safely perform the essential functions. Our experience over 20 years of creating job-specific medical standards and fitness-for-duty criteria shows that without such information, establishing medical restriction and release recommendations becomes mere guesswork.

One option for the employer that is consistent with the FMLA, while ensuring medically appropriate return to work, is to return the employee to his or her usual pay, but refrain from actively placing the employee in his or her job if there are medically based concerns until an appropriate, job-specific return-to-work evaluation is performed. This may include various objective functional assessments, such as musculoskeletal, pulmonary and/or cardiovascular tests, as indicated by the medical condition being evaluated.

One critical issue for the employer in appropriate return-to-work determinations is to ensure regulatory compliance when job-specific medical standards are dictated by regulation. An example is the Department of Transportation medical requirements for commercial drivers. Again, the provider's acceptance by the patient of "Hey, doc, I'm ready to go back to work" just does not cut it.

But remember, once the employer has notice that the employee may have a condition that affects his or her ability to perform the essential functions of the job without increased material risk of harm to him- or herself, co-workers or the general public, the Americans With Disabilities Act "qualified" criteria will likely be tripped, and the reasonable job accommodation process will undoubtedly come into play.

Our solution, which has been proven successful and legally compliant, is to have an integrated, coordinated job-specific medical evaluation process in place that employs the same standards, practices, criteria and evaluation approach for all phases of hiring and return to work, including contingent- and full-hires (pre-placement medical evaluation), current fitness for duty and return-to-work medical evaluations, whether the evaluation is the result of the ADA, FMLA, disability policies or other medical leave categories.

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## **Expert Opinion** (continued from page 11)


The FMLA allows for intermittent leave for a chronic condition. While there is limited published guidance for acute condition disability duration and work-restriction requirements, there are essentially no similar parameters for chronic medical conditions. There is no scientifically derived assistance available to physicians, nurses, human resources and other professionals to determine what medical leave duration and frequency of such leave is appropriate for a given individual with one or more chronic conditions.

Further, the presence of multiple chronic medical conditions in the same individual introduces the potential for separate, multiple FMLA certifications for the same employee. Then there is the potential for such conditions to affect each other, thus making tracking FMLA leave by condition challenging at best. Further, some conditions, such as migraine headaches, may mean that someone requires limited leave durations, such as a few hours per episode.

Despite these challenges, certain approaches to FMLA leave have proven useful, including:

- tracking increases and decreases of employee leave patterns to determine a reasonable future leave pattern and re-certification requirements;
- monitoring day-of-the-week patterns to leave requests to identify possible secondary gain practices;

- encouraging physician-to-physician peer relationships to help achieve individual goals, including treatment compliance;
- updating the provider with leave tracking information and job-specific medical standard requirements to modify leave recommendations as appropriate; and
- assuring that the employee is indeed being regularly monitored by the provider.

Until statutory and regulatory changes are made to the law to assist employers with genuine concern for their employees as well as solutions for effectively running their businesses while still complying with FMLA requirements, creative medical management strategies can provide for critical management guidance, assistance in assuring employee health and avoidance of legal concerns. 

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