

Does the FMLA cover leave for cosmetic surgery?

Employees can take job-protected leave under the Family and Medical Leave Act (FMLA) for serious health conditions. But the U.S. Department of Labor's FMLA regulations say, "conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not 'serious health conditions' unless inpatient hospital care is required or unless complications develop." (*FMLA 29 C.F.R. § 825.113(d)*)

Therefore, whether your employee's leave falls under the FMLA would depend in part on whether the employee needs to stay overnight at the hospital or whether the surgery causes complications that then rise to the level of a "serious" medical condition (*see below*). Challenge such leave requests by asking for the second and third certifications that the FMLA allows.

The regulations do say that, "Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met."

Recent case: Chicago city worker Gladys Alcazar-Anselmo filed an FMLA retaliation lawsuit, saying her firing came soon after she requested FMLA leave for a scheduled surgery.

The city argued that Alcazar-Anselmo wasn't eligible for FMLA because the surgery was an elective, cosmetic procedure. She presented a doctor's opinion saying the surgery was medically necessary. The city countered with its own expert who said it wasn't. The judge ruled that a jury should sort out the medical evidence and decide. (*Alcazar-Anselmo v. City of Chicago*, No. 07-C-5246, ND IL, 2010)

Final note: The best approach is to use the FMLA's certification process before turning down a request. Few judges will second-guess a denial based on two independent medical assessments that say the surgery was not medically necessary.

Definition of an FMLA-qualifying 'serious health condition'

From the U.S. Department of Labor's regulations relating to the Family and Medical Leave Act (*FMLA 29 C.F.R. § 825.113*):

(a) For purposes of FMLA, "serious health condition" entitling an employee to FMLA leave means an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in §825.114 or continuing treatment by a health care provider as defined in §825.115.

(b) The term "incapacity" means inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom.

(c) The term "treatment" includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. A regimen of continuing treatment includes, for example, a course of

prescription medication (e.g. , an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g. , oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(d) Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not “serious health conditions” unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, *etc.* , are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness or allergies may be serious health conditions, but only if all the conditions of this section are met.