

How to Wipe Out Fraud and Abuse Under FMLA

by *The HR Specialist Employment Law* newsletter



Use of the medical certification process is the biggest weapon employers have in combating potential fraud under the Family and Medical Leave Act (FMLA). It gives you the right to obtain information from the employee's physician about the medical condition and, at least for the first certification, to obtain a second or third opinion from an independent physician.

Because of the strict limits on what an employer may ask an employee, the following steps are important parts of an effective anti-fraud program:

1. Obtain a medical certification for each request for leave due to a serious health condition. It's important that the employer's sick leave or attendance policies require a doctor's certification for all absences of three or more days for the leave to be excused. If there is no such requirement and the employer intends to require paid leave to run concurrent with FMLA leave, the employer might not be able to require a medical certification, which is the first step in the anti-fraud program. (Find links to Department of Labor-approved certification forms at www.dol.gov/whd/fmla)

2. Enforce a policy denying the leave request if an employee fails to submit certification within 15 days. In each instance, assess any appropriate penalties for failure to be at work. Do make a final request for the certification before handing down the discipline--FMLA rules do allow an extension of time if it's not possible to obtain the form within the 15 days.

3. Examine the certification closely to ensure that it has been properly and fully completed. Many doctors will complete the form in a hurried fashion. In some cases, they'll intentionally leave some sections incomplete in order to remain "truthful" while accommodating the desires of the patient/employee for leave.

If you're not satisfied with an employee's certification, you may contact the employee's health care provider directly to clarify or authenticate a certification form so long as you first give the employee seven days to clear up any deficiencies on the form.

Of course, if the medical certification does not support the existence of a serious health condition, the leave request should be denied.

4. Require a second opinion if the circumstances are even slightly suspicious and it is an original certification.

5. Once the certification is approved, make a limited inquiry each time the employee requests more

leave, particularly in the case of intermittent leave. The goal is to determine whether the leave is for the same qualifying reason.

6. Watch the schedule of absences closely in cases of intermittent leave to determine whether a suspicious pattern develops (e.g., immediately before and after weekends or days off) or whether there is a change in the frequency or timing. Such actions could suggest a change in condition that enables the employer to request a recertification. Require that employees who take intermittent leave follow your normal call-in procedures for reporting an absence, unless there are unusual circumstances.

7. Request recertifications as often as the law allows. The frequency of recertification permitted will differ depending on the type of leave and the type of serious health condition.

8. Require accrued leave to run concurrently with FMLA leave when allowed by law. When an employee realizes that taking leave today will affect future vacation time, he or she is more likely to take FMLA only when the need is legitimate.

9. Ask the physician to verify that the medical certification is exactly as he or she signed it and has not been altered.

10. Inquire about the intended method of transportation if an employee requests to leave work early because of his or her own serious health condition. If the employee cannot work, perhaps an ambulance is needed.

11. Aggressively pursue potential fraud and, if strong, concrete evidence of fraud is discovered, take appropriate disciplinary action. Always follow up on reports from fellow employees or other sources that the employee does not, in fact, need leave.

Following these steps will help eliminate fraud by employees who are inclined to “work” the system. Because of the limitations placed on the employer, however, determined efforts are unlikely to be detected. Yet even if no fraud is uncovered, your efforts will still reap dividends.

Once employees become aware that you intend to use these tools to detect fraud, many of those otherwise inclined to take inappropriate advantage of the FMLA will wait until a legitimate need arises.