

## **FMLA – BACK TO BASICS – RECERTIFICATION AND NEW CERTIFICATION**

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In addition to obtaining an initial medical certification when an employee first requests leave under the Family and Medical Leave Act (“FMLA”), employers are permitted to seek a “recertification” and even a “new” certification in appropriate circumstances. This post discusses the differences between these certifications and the processes surrounding them.

### **Initial Certification**

After receiving an initial request for FMLA leave for a qualifying reason involving the employee’s own serious health condition or the employee’s family member’s serious health condition, employers are permitted to require the employee to submit a medical certification establishing the need for leave for a qualifying reason and setting forth the anticipated frequency and duration of the leave.

Certification forms are available on the Department of Labor’s website (<https://www.dol.gov/agencies/whd/fmla/forms>) that can and should be used to obtain this information. Employers can require that the certification be “complete” (all applicable entries filled out) and sufficient (no vague, ambiguous, or non-responsive information). Employers also can obtain authentication (verification that the information in the certification was completed or authorized by the health care provider who signed it) and clarification (to understand the handwriting or meaning of a response) regarding the certification. In addition, employers can require a second (and third) opinion if there is a reason to doubt the validity of the certification. Employers must then either approve or not approve the request for FMLA leave for that qualifying reason.

If an employee who has been approved for FMLA leave for one qualifying reason requests FMLA leave for a different reason, employers can obtain a medical certification supporting the need for leave for the new reason.

### **Recertification**

After an employee’s FMLA leave request for a particular qualifying reason has been approved, the employer’s ability to obtain additional medical support for the need for leave for that reason – i.e.,

an additional medical certification, referred to as a “recertification” – is restricted. For example, employers *may not* require additional certification (or other documentation like a doctor’s note) in connection with each use of intermittent leave for that reason. Nonetheless, there are still times when obtaining a recertification is permitted.

### *Why Is Recertification Useful?*

In order to be FMLA-protected, leave must be taken in accordance with the information set forth in the medical certification. Requiring recertification in appropriate circumstances enables employers to better manage FMLA leave and ensure it is being used for a proper purpose and in accordance with the actual need for leave.

### *When Can Recertification Be Obtained?*

The regulations establish specific timeframes and situations in which a recertification may be obtained:

- General Rule: Recertification may be requested every 30 days in connection with an absence by the employee for the FMLA qualifying reason. *However*, if the certification indicates that the minimum duration of the condition is more than 30 days, recertification may not be requested until that minimum duration expires.
- Exceptions to the General Rule:
  - Recertification may be requested every six months in connection with an absence by the employee for the FMLA qualifying reason (even if the minimum duration of the condition is more than six months, e.g., “12 months” or “lifetime”).
  - Recertification may be requested in less than 30 days if:
    - The employee requests an extension of the leave;
    - The circumstances described in the certification have “changed significantly” (e.g., intermittent, unforeseeable absences routinely occur in connection with other time off of the employee);
    - The employer receives information casting doubt on the employee’s stated reason for an absence or the continuing validity of the certification.

### *How Is Recertification Obtained?*

The same certification form is used for recertification purposes. The employee must be given at least 15 calendar days to return the completed certification form. The certification must be complete and sufficient, and authentication and clarification may be sought as necessary.

### *What Restrictions Apply To A Recertification?*

- Unlike the initial certification process, employers are not permitted to request a second or third opinion with respect to a recertification.
- Recertification may not be obtained with respect to military caregiver leave or leave for a qualifying exigency.
- The recertification process should be used for legitimate reasons relating to managing FMLA leave requests and ensuring that leave is used for a proper, FMLA-qualifying, medically-certified purpose. It should not be used as a tool to harass employees who are using their FMLA entitlement in a legitimate manner.

### **New Certification**

Twelve months after an employee first uses FMLA leave for a particular qualifying reason, employers may request a *new* certification in connection with a request for leave for that same reason. The same certification form is used, and the same rules apply as apply with respect to the initial certification, including the ability of the employer to obtain a second and third opinion as needed.

### **Recommendations:**

- Calendar dates to request recertification. Make note of the minimum duration of the condition as set forth in the certification and, if it is more than 30 days, calendar the (approximate) date to request recertification according to the rules set forth above.
- Keep an eye on the employee's use of leave as compared to the frequency and duration of the leave estimated in the original certification. If the employee exceeds the certified amount of leave, the employee may be required to obtain a recertification.
- Watch for patterns of leave usage that suggest a significant change in circumstances or questionable use of FMLA leave. When requesting recertification, a record of the employee's absence pattern may be provided to the healthcare provider, and the provider can be asked to indicate whether the serious health condition and need for leave is consistent with such a pattern.
- Use the recertification process as one tool to respond to suspected FMLA abuse.
- Make note of an employee's first use of leave for a particular qualifying reason. Once 12 months have passed, if the employee requests additional (or continued) leave for the same reason, a new certification (not a recertification) may be obtained.

For any questions, please reach out to your Bryan Cave Leighton Paisner attorney contact.

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