FMLA Insights
Guidance & Solutions for Employers

Employee Who Refuses to Provide Sufficient Medical Certification under FMLA is Lawfully Terminated

By Jeff Nowak on May 31, 2011

One the biggest FMLA headaches for employers is when an employee fails or refuses to provide information to cure insufficient or incomplete medical certification. When the employer does not have the information to determine whether an absence qualifies as FMLA leave, it is left with a true dilemma: Try and obtain permission to talk to the health care provider? Delay or deny the leave and face possible litigation? Or simply approve the leave and go on with your day (after all, it's easier to avoid the confrontation, right)?

Employers: Fear no more! In a recent case decided by the employee-friendly Ninth Circuit, an employer has the right to deny FMLA leave where the employee refuses or fails to provide adequate certification to support the need for leave under the Family and Medical Leave Act. Lewis v. United States and Donley (pdf). This case has excellent practical take aways for employers.

Facts

Plaintiff Janet Lewis was the director of a child development center on a U.S. Air Force Base. After she was not selected for a promotion, she requested FMLA leave. In response, the Air Force asked her to return a completed medical certification (WH-380E pdf) form. After the Air Force gave her additional time to submit medical certification, Lewis provided certification stating that she was "diagnosed with Post-Traumatic Stress Disorder and needed therapy, medical treatment, bed rest, two prescription medications, and 120 days off work." Shortly thereafter, Lewis' supervisor informed her that the information she provided was insufficient to support the need for FMLA leave. Lewis refused to provide additional information. As a result, the Air Force immediately converted the leave to Absence Without Leave (AWOL) and later terminated her employment as a result.

Termination Upheld

Lewis contested her termination internally and filed a lawsuit claiming that the Air Force interfered with her FMLA rights when it refused to provide FMLA leave. The Court disagreed.

Strike One: First, the court found that the employee failed to provide medical certification that showed she suffered from a serious health condition that rendered her incapable of performing the duties of her job. Take note of what was significant to the Court:

The form, however, fails to provide a summary of the medical facts that support [Lewis'] diagnosis . . . [and] contains no explanation as to why Lewis was unable to perform her work duties and no discussion about whether additional treatments would be required for her condition.

Strike two: Interestingly, the employee argued that the Air Force should have sought a second opinion if it questioned the adequacy of the certification and desired additional information. The Court quickly rejected this argument, holding that an employer clearly has the right to obtain information from an employee when it questions the *sufficiency* of the medical certification. Only when an employer doubts the *validity* of the certification is a second opinion appropriate.

Strike three: Finally, on a related but separate issue, the Court found that the Air Force's willingness to provide Lewis 22 days to return medical certification (instead of the customary 15 days) was reasonable under the circumstances. Thus, the employee could not argue she did not have enough time to return sufficient medical certification. Case dismissed.

Insights for Employers

What an outstanding win for employers and, frankly, a vindication to those employers and HR professionals who wisely follow the regulations and appropriately ask for additional information when an employee's certification is insufficient or incomplete. This case provides a great practical guide for employers when dealing with a difficult or non-responsive employee during the medical certification process:

1. Employers should take note of what basic information the Court found they are entitled to: medical facts supporting the employee's serious health condition; explanation from the health care provider as to the reasons why the employee could not perform the job in question; and whether additional treatments would be required. As I have shared before, the employer has the right to ask these questions *and more* of an employee to determine whether the FMLA is at issue, and to insist upon complete and sufficient medical certification.

2. Use the DOL model FMLA forms or forms properly modified by your employment counsel. Although the DOL forms aren't the best, and modification is appropriate (see post here), using these forms can help avoid liability, as evidenced by this decision, where the Court specifically adopted the requisite inquiries contained in Form WH-380E.

3. Don't be so quick to think that your only recourse is a second opinion. As the Court pointed out, when an employer questions the sufficiency of certification, it has the right to obtain the information first through the employee. The employer is not (yet) required to proceed directly to a second opinion.

4. ***Keep communicating with your employee***. Where certification is insufficient, tell your employee precisely what information is missing/insufficient and give them time to cure (at least seven days). Where they fail to cure the deficiency, considering obtaining their permission to talk directly with their health care provider to obtain the information. In this situation, the employee has two choices: either cure the certification or grant permission for the employer to contact the health care provider. We have prepared model correspondence and HIPAA-compliant releases for our clients to assist with this process, so communicate with your employment counsel to ensure you have the appropriate documents as well.