



PROPOSED AMENDMENTS TO THE FMLA REGULATIONS WILL AFFECT PHYSICIANS

Peter G. Pappas, Esq
Nexsen Pruet, LLC

The U.S. Department of Labor has proposed amendments to the Family and Medical Leave Act (FMLA) regulations, some of which will impact physicians. Public comment on the proposed amendments ended on April 11, 2008. The Department has not announced when the regulations will be finalized and published, although it is expected to occur before the end of the Bush Presidential term of office.

Changes in Medical Certification Forms

Several of the proposed changes concern the Certification of Health Care Providers form (WH-380) that physicians complete in order to certify that an employee's leave from work is medically necessary.

- First, it is believed that the current Medical Certification form makes it difficult for a physician to explain the relevant symptoms and patient history because the form has a series of narrow questions. The proposed Certification form attempts to "streamline" the process by giving health care providers an open-ended question to discuss any additional information they believe relevant. Also, the Department proposes that medical facts might include symptoms, hospitalizations, doctor's visits, whether medication has been prescribed, and referrals for evaluation and treatment, or continuing treatment.
- Second, the current Medical Certification form does not require a physician to certify the *medical* necessity for intermittent leave. The proposed Certification form would require a health care provider to certify that the intermittent or reduced schedule leave is *medically* necessary.
- Third, the current Medical Certification form requires physicians to provide their name, address, and type of medical practice. The proposed Certification form would require physicians to add their fax number and pertinent specialization. This addition is intended to allow the employer to more efficiently contact the health care provider for purposes of clarification and authentication as appropriate and in accordance with proposed amendments that are discussed below.

Employer Communications with Physicians

Another proposed change to the FMLA regulations would allow employers to directly contact physicians in order to clarify and authenticate the Medical Certification. This contact, though, is intended to be narrow in scope.

The current regulations provide that a health care provider who is working for an employer can contact the employee's health care provider with the employee's permission for purposes of clarification and authentication of the Medical Certification.

The proposed amendments provide that if an employee submits a complete and sufficient Medical Certification signed by the employee's health care provider, the employer may not request additional information from the employee's health care provider. If it is not complete and sufficient, however, the employer could contact the employee's health care provider under the proposed regulations for purposes of "clarification" and "authentication" of the Medical Certification, after the employer has given the employee an opportunity to cure any deficiencies.

In this context, the word "authentication" means that an employer may provide the health care provider with a copy of the Medical Certification and request verification that the information contained on the Certification form was completed and/or authorized by the health care provider who signed the document. Because no additional medical information can be requested for authentication from the health care provider, the employee's permission is not required.

The term "clarification" is slightly broader. The proposed amendments would allow an employer to contact the health care provider to understand the handwriting on the Medical Certification or the meaning of a response. An employer would not be authorized to ask for information beyond the information required by the Certification. Further, any contact and exchange of information would have to conform to HIPAA standards. This means that the employee would have to consent in writing to the employee's doctor discussing medical records with the employer and follow the HIPAA requirements for providing authorization for this type of disclosure. If the employee does not provide a HIPAA compliant disclosure authorization in order to allow the employer to clarify the Certification with the employee's health care provider and does not clarify the Certification, the employer may deny the FMLA leave if the Certification is unclear. Also, if a physician is asked to send a completed Medical Certification directly to the employer, instead of returning it to the employee, the physician should require a HIPAA compliant authorization from the employee in advance.

If the proposed amendments to the FMLA regulations are adopted, physicians will be asked to provide more specific information on the Medical Certification forms for FMLA leave and may also be asked to speak with a patient's employer in order to clarify or authenticate the Certification if proper procedures are followed.

We should know more in a few months about the regulations that are adopted by the Department of Labor. The physician's work will almost certainly become a bit more complicated.

Peter G. Pappas is a Partner in Nexsen Pruet's Employment and Labor Law and Business Litigation Practice Groups. He can be reached at ppappas@nexsenpruet.com Casey Jennings, a Nexsen Pruet summer associate, also assisted with this article.