

LABOR AND EMPLOYMENT LAW

INFORMATION MEMO

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In Managing FMLA Leaves, Medical Certifications Are Critical But Not Necessarily Controlling

One of the challenging aspects of managing FMLA leaves, particularly intermittent leaves, is determining whether a certain absence is appropriately treated as a covered FMLA leave. In many such circumstances, if the absence is not within the protection of the FMLA, it may be unauthorized and subject the employee to discipline, or even discharge, under the employer's attendance policy or otherwise. In these situations, employers properly consider the FMLA Certification from the employee's health care provider which, in the case of intermittent leaves, should include the following information:

Due to the [employee's medical] condition, it (was/is/will be) medically necessary for the employee to be absent from work on an intermittent basis (periodically), including for any episodes of incapacity i.e., episodic flare-ups. Provide your best estimate of how often (frequency) and how long (duration) the episodes of incapacity will likely last.

Over the next 6 months, episodes of incapacity are estimated to occur ____ times per (day/week/month) and are likely to last approximately ____ (hours/days) per episode.

So, for example, a health care provider may report that the employee will experience flare-ups from his medical condition 4 times in 6 months with each flare-up lasting 2 days per episode. A recent appeals court ruling cautions employers that such a specific certification is not necessarily controlling in the determination of whether a particular absence (e.g., the fifth or sixth episode within 6 months) is a covered FMLA absence.

Davis v. Illinois Department of Human Resources involved a pregnant employee who, in 2017, provided an FMLA medical certification advising her employer that her pregnancy was "high-risk" and authorized intermittent leave for frequent medical appointments, but stated that her condition would not cause episodic flare-ups requiring leave. The employee was subsequently terminated under the employer's attendance policy with the final unexcused absence being due to morning sickness related to her pregnancy, which the employer concluded was not authorized FMLA leave based on the medical certification she had presented. The district court granted the employer summary judgment dismissing the FMLA claim.

On appeal, the Seventh Circuit reversed and sent the case back for a jury trial. We need to look beyond the pregnancy aspects of this case to understand the significance of the holding¹. The employer and the district court focused on the medical certification and the fact that the absence at issue was not covered by that certification. However, the appeals court held that "an employee's entitlement to FMLA leave is not strictly bound by the precise parameters laid out in the medical certification." Instead, the employer is charged, under the FMLA, with making a reasonable determination based on all of the information

¹ Not only is morning sickness a recognized symptom of pregnancy, but the FMLA regulations expressly identify morning sickness as a condition associated with pregnancy that does not require treatment from a health care provider to qualify as an FMLA serious health condition. 29 C.F.R. §825.115(f).

available to it. In *Davis*, for example, the court relied on the fact that the employer first provided the FMLA paperwork to the employee following an absence due to morning sickness as evidence that a jury might reasonably conclude that such absences were entitled to FMLA protection.

In making the determination of whether an absence is covered by the FMLA, employers must recognize that the medical certification only represents the health care provider's "best estimate" of the frequency and duration of the flare-ups that could cause future intermittent absences. Employers should consider whether the absence in question was "not so far in excess" of the frequency or duration stated in the certification so as to retain FMLA protection.

The *Davis* court also highlighted the employers' obligation, under the FMLA regulations, to notify the employee in writing if his/her medical certification is incomplete or insufficient and what additional information is required. In *Davis*, given the employer's knowledge of the employee's morning sickness, a jury could find that this obligation was triggered when the certification failed to mention the need for intermittent leave on this basis.

Managing intermittent FMLA leaves is a complex and often difficult responsibility for employers. This function requires a holistic, reasoned and reasonable assessment process to minimize potential legal risks, including lengthy (8 years(!) and counting in *Davis*) and costly litigation.

If you have any questions, please contact [Thomas G. Eron](#), any attorney in the firm's [labor and employment](#) practice or the Bond attorney with whom you have regular contact.

