

FMLA Intermittent Leave

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The U.S. District Court for the District of Oregon has recently held that it may be a violation of the Family and Medical Leave Act for an employer to seek medical certification for each incident of FMLA approved intermittent leave. The Act permits an employer to request recertification every 30 days of leave time.

The Court held the employer may only request recertification in fewer than 30 days when there are changed circumstances or when the employer has reason to question the continuing validity of the original certification. This appears to be the first case that has so held.

Twenty-nine CFR section 825.305(b) provides that, following initial certification, re-certifications can be requested if an employer has reason to question the appropriateness or duration of a leave.

Section 825.308(a) further provides that re-certification may be requested every 30 days if leave is for the employee unless leave exceeds 30 days or is intermittent. In that case, the employer must wait until the minimum duration of the leave occurs. [Section 825.308(b)] However, if circumstances of the leave significantly change or if the employer receives information that casts doubt on the stated reasons for the absence or continued validity of the certification, then an employer may request re-certification in fewer than 30 days, including intermittent leave.

There are no other rules regarding re-certification directed specifically to intermittent leave.

Employers are cautioned to be sure that the statute and regulations are carefully followed and that in the absence of changed circumstances or doubts about the validity of the certifications submitted, employers should be very leery of any requirement that each time an employee takes his or her intermittent leave pursuant to the FMLA, he or she must submit a doctor's note.

Employers are further cautioned to be sure to check with other applicable state laws, collective bargaining agreements, and anti-discrimination laws which may have an impact on re-certification of intermittent leave under the FMLA.

For more information on the Family Medical Leave Act, see our full archive of FMLA blog entries.

By John Gilbert

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