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EMPLOYER BULLETIN: **INDIVIDUAL LIABILITY** **UNDER THE FMLA &** **QUICK FACTS ABOUT FMLA** **CERTIFICATIONS**

INDIVIDUAL LIABILITY EXISTS UNDER THE FAMILY MEDICAL LEAVE ACT

WHAT IS THE FMLA? The Family Medical Leave Act (“FMLA”) entitles eligible employees to take up to twelve weeks of unpaid leave in any twelve-month period for qualifying medical or family reasons. The FMLA prohibits employers from discharging or discriminating against employees who take FMLA leave or oppose employer actions made unlawful under the FMLA (i.e., retaliation). The statute creates a private right of action entitling eligible employees to seek both equitable relief and money damages against any employer in any federal or state court of competent jurisdiction if the employer interferes with or denies the exercise of FMLA rights.

WHO IS AN EMPLOYER UNDER THE FMLA? The FMLA defines an employer as:

1. any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current proceeding calendar year;
2. any person who acts directly or indirectly in the interest of an employer to any employees of such employer; and
3. any successor in interest of the employer.

The majority position, including that of Michigan federal courts, is that individual exercising sufficient control over the decision to terminate may be held liable for violations of the FMLA. As such, individuals such as corporate officers and human resources managers, acting in the interest of an employer, may be held individually liable for violations of the FMLA.

WHAT CAN EMPLOYERS DO TO PROTECT THEMSELVES? Employers should make sure their supervisory employees and human resource managers are knowledgeable about and trained in handling FMLA leaves of absence. Managerial employees responsible for FMLA compliance and termination decisions must understand the FMLA and implement it properly. Specifically, ensure management understands:

1. what is a “serious health condition”;
2. intermittent leave and how to calculate it;
3. what to do if an employee fails to return the required medical certifications within the required time period;
4. the employer’s rights regarding obtaining a second opinion if it questions the validity or sufficiency of the information provided by the employee’s health care provider;
5. the employer’s obligation to reinstate the employee after FMLA leave expires;
6. how FMLA leave relates to workers compensation leave and short term/long term disability leave;
7. how the FMLA interfaces with the employer’s obligations under the Americans with Disabilities Act and the Michigan Persons with Disabilities Civil Rights Act;
8. the employer’s and employee’s notification requirements; and
9. how FMLA leave affects an employee’s benefits and health care benefits.

QUICK FACTS SHEET REGARDING THE FMLA MEDICAL CERTIFICATIONS

WHAT ARE AN EMPLOYER'S OBLIGATIONS REGARDING MEDICAL CERTIFICATIONS? An employer may require an employee to submit a certification from the employee's or the employee's ill family member's health care provider. An employer must give notice of the need for certification each time it is required. When leave is foreseeable and at least 30 days notice has been provided, the certification should be provided before the leave begins. However, recognizing leave is not always foreseeable, an employee must provide the requested certification within at least 15 calendar days after the employer's request for the certification. The employer must make the request for the certification at the time the employee gives notice of the need for leave or within two business days thereafter. If the employer questions the appropriateness of the leave or its duration, it may request the certification at a later date.

WHAT CAN AN EMPLOYER DO IF IT RECEIVES AN INCOMPLETE CERTIFICATION OR QUESTIONS THE AUTHENTICITY OF THE CERTIFICATION? At the time the employer requests certification, it must also advise an employee of the possible consequences for failure to return adequate certification. If an employee finds a certification incomplete, it must advise the employee and provide the employee reasonable opportunity to cure any deficiencies. The employer may also obtain the employee's written consent for a health care provider representing the employee to contact the employee's health care provider for purposes of clarification and authenticity of the medical certification. The employer may not directly contact the employee's health care provider.

CAN AN EMPLOYER REQUEST SUBSEQUENT CERTIFICATIONS OF MEDICAL CONDITIONS? For pregnancy, chronic or permanent/long term conditions under continuing supervision of a health care provider, an employer may request recertification no more than every 30 days and only in connection with an absence by the employee unless: (1) circumstances described in the original certification have changed significantly; (2) the employer receives information casting doubt on the employee's stated reason for the leave. Recertification also may be requested at reasonable

intervals, not more often than every 30 days if (1) the employee requests an extension; (2) circumstances have changed significantly; or (3) the employer receives information casting doubt on the employee's stated reason for the leave.

UNDER WHAT CIRCUMSTANCES CAN AN EMPLOYER REQUIRE A RETURN TO WORK CERTIFICATE/FITNESS FOR DUTY REPORT? As a condition of restoring an employee from FMLA leave for his/her own serious condition, an employer may have a uniformly applied policy requiring all similarly situated employees, who take leave for such conditions, to obtain and present certification that the employee is able to resume work. Any return to work physical must be job related and consistent with job necessity. An employer should provide the employee with a written job description to give to the health care provider who can make a determination whether the employee is able to return to work and perform the job's essential functions with or without a reasonable accommodation.

The fitness for duty certification may only be sought with regard to the particular health condition that causing the need for leave. The certification need only be a simple statement that the employee is able to return to work. The employer must include in the initial FMLA notice (or in the handbook) whether it will require fitness for duty certification to return to work. An employer may also delay restoration to employment until a required fitness for duty certificate is provided unless the employer failed to provide the required notice that such certificate is required.

Any FMLA questions should be directed to Heather Ptasznik or John Below at (313) 259-8300.

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