



EMPLOYER BULLETIN: FMLA and Medical Certifications

Typically, when an employee engages in excessive absenteeism, even after a health care provider completes a medical certification that the employee is able to return to work, an employer may deny the employee additional FMLA leave. Further, if the employee fails to return to work after submitting such medical certification, an employee may typically be terminated as a voluntary quit. However, on an issue of first impression, the Sixth Circuit Court of Appeals recently addressed the situation where an employee provided a “negative certification” (a certification that the employee was not incapacitated), and whether the employer had to wait the full 15 days prescribed by the FMLA prior to denying leave based on the negative certification.

FACTS: The employee was absent from work from November 7 and 8, 2006 due to her son’s illness. The employee advised her supervisor of this absence by telephone. On November 9 and 10, 2006, the employee left a voice mail message stating she was sick and would be absent. On November 13, 2006, the employee’s husband left a voicemail message that she was sick and would be going to her doctor. At this appointment, the employee’s physician advised she could return to “full work duty” on November 14, 2006. Later that day, the employee verbally told her supervisor she had been released to return to work but she was not feeling well and would need to be absent to attend other doctor appointments. The supervisor told the employee to come to work, sign a short term disability form and that she could do some work from home or after hours to help out.

The employee did not show for work on November 14, but went to the office at night to complete some paperwork and a medical certification form. The employee faxed the certification form to her doctor’s office, who faxed the completed certification form back to the employer on November 17. The certification indicated the employee’s condition began on November 10, that she could perform her full duties as of November 14, and that she did not require intermittent leave.

The employee then remained absent through the Thanksgiving holiday. Although the supervisor and human resources department advised the employee she needed to provide a medical certification to support her continued absences, she did not. On November 24, the company decided to terminate the employee’s employment and sent her a termination letter. At 6:00 p.m. on the following day, a nurse practitioner, who had previously seen the employee, sent the company a medical certification stating the employee had an illness that began on May 6, 2006 and that she would not be able to return to work until January 1, 2007.

THE LAWSUIT: The employee filed a lawsuit alleging the company violated the FMLA by interfering with her use of FMLA and by terminating her in retaliation for seeking FMLA leave. The employer filed a motion seeking summary judgment to have the complaint dismissed. The trial court granted the motion finding the employer was entitled to terminate the employee when it received the “negative certification” that she did not need continued FMLA leave. The trial court further explained the employer was not required to delay its termination decision until receipt of the second, unanticipated medical certification indicating the employee needed leave. The employee appealed this decision to the Sixth Circuit Court of Appeals.

The Sixth Circuit reversed the trial court’s ruling and found the employer could not rely upon the employee’s failure to return a medical certification supporting her need for FMLA leave because the employer never properly triggered the duty to provide a medical certification in the first place. Although the trial court found the employee’s supervisor orally requested a certification on November 13, the Sixth Circuit held the employer failed to make the request in writing, as it was required to do under the applicable FMLA regulations. As a result, the employer could not rely upon the employee’s failure to provide a medical certification as a basis for terminating her employment.

WHAT DOES THIS MEAN: Employers must ensure that when an employee seeks FMLA leave, the best practice is to always ask the employee, in writing, for a medical certification. Further, the employee should be notified, at that time, of the possible consequences for failing to provide the adequate certification within fifteen days. It is essential to ensure your company is using the proper eligibility forms/notices and has a current FMLA policy in order to eliminate any potential risks for FMLA violations. Additionally, before terminating an employee based upon medical certifications, it is important to review all the facts and circumstances to ensure the employee has received all proper notices and has adequate opportunity to provide the proper medical certification.

We are experienced, proactive and aggressive legal counsel providing superior service in all areas of employment law. If you would like further information regarding the issues raised in this newsletter or any other employment related issues, please contact Heather G. Ptaszniak at (313) 259-8586, John T. Below at (313) 259-8597, or Matthew S. Derby at (313) 259-8653. For more information about Kotz Sangster, please visit us at www.kotzsangster.com. This newsletter is provided as general information service and should not be construed as and does not contain legal advice on any specific matter, nor does this message create an attorney-client relationship.