# Can my employer disagree with my doctor's FMLA certification in Texas?

Posted by Adam Kielich
in Employee rights, Retaliation

Under the Family Medical Leave Act (FMLA), eligible employees of covered employers can request up to twelve weeks of medical leave within a one year period for a serious medical condition of the employee or a family member as well as the birth or adoption of the employee's child. When the employee requests FMLA leave for a serious medical condition, the employer can request certification of the medical condition.

Employers can request information about the medical condition, the need for leave, contact information for the physician among other facts. Employers may reject the certification or require additional information in limited circumstances and through specific procedures. When employers exceed what FMLA allows then the employer may become liable for interfering with the employee's FMLA rights.

Today's post discusses general rules when an employer can reject FMLA certification and when an employer may request additional information. We will discuss some ways violate FMLA rights in Dallas and Fort Worth. FMLA regulations are highly technical regulations and a claim may arise through violating

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The legal information presented is based on Texas law and Texas courts.
Although federal law is discussed here, the law may applied or interpreted differently by both federal and state

1 of 8

January

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one of these technical requirements. If you believe your employer violated your FMLA rights then you should speak with employment lawyers right away.

### WHEN AN EMPLOYER MAY OUTRIGHT REJECT AN FMLA CERTIFICATION

Employers are only allowed to outright reject an FMLA certification if:

- the employee is ineligible for FMLA leave;
- the employer determines the certification is not authentic (meaning not filled out and signed by the employee's treating physician); and/or
- the employee's certification does not request leave for a serious medical condition under the meaning of FMLA.

If the employer rejects the certification because it believes the medical condition is not a serious medical condition under FMLA then the employer better be right. An incorrect determination on this point is a surefire claim against the employer for violating the employee's FMLA rights. Instead of rejecting it, many employers will return it to the employee and ask for an amended certification.

## WHEN AN EMPLOYER MAY REQUEST ADDITIONAL INFORMATION IN AN FMLA CERTIFICATION

Far more commonly, employers reject FMLA certifications because it is incomplete and the employer needs additional information. Employers can reject the certification with notice of the missing

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information. It must give the employee a reasonable opportunity to cure the defects and provide a complete FMLA certification. If the employer believes the medical condition described in the certification does not meet the serious medical condition standard in FMLA then it may choose to ask the employee to provide an amended certification with more information so it can make a better determination whether the condition meets the FMLA standard.

Your employer cannot directly communicate with your physician except for specific purposes and through specific procedures. Your physician can be contacted if the employer believes the FMLA request may be a disability under the ADA. In that case the employer must follow ADA regulations for communicating with the physician. Your employer may also communicate with your physician for clarification (e.g. doctor's illegible handwriting) or to authenticate (i.e. not a forgery). When an employer contacts your physician, it must be through the benefits or human resources staff. Your direct supervisor cannot make direct contact with your physician. This is to ensure a level of privacy between you and your supervisor.

# WHEN AN EMPLOYER CAN REQUEST A SECOND OR THIRD OPINION ABOUT YOUR FMLA CERTIFICATION

If an employer does not believe the certification states an adequate need for FMLA leave or that the medical condition fails to meet the definition under the statute, the employer is permitted to seek a second opinion from another physician. The employer must pay all of the costs associated with obtaining the second opinion. If the second opinion agrees with your

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- RACIALDISCRIMINATION(22)
- RELIGIOUS
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  (18)
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- RETIREMENTPLAN/401K/PENSION (26)
- SEX
  DISCRIMINATION
  (23)
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physician then your employer may not pursue additional medical exams on your FMLA leave request.

If, however, the second opinion disagrees with your physician then the employer is permitted to request a third opinion. The employer must again pay the costs of the medical exam. What's unique about the third opinion is that the employer and employee must jointly agree on the physician who will provide the third opinion. The parties must attempt to reach an agreement in good faith. If either party acts in bad faith in refusing to reach an agreement then the opinion of the other party's physician is the final word on the certification. If a third opinion is necessary then it is the final word on the certification.

#### WAYS EMPLOYERS VIOLATE THESE FMLA CERTIFICATION RULES

Your employer is not allowed go far beyond these procedures. When an employer exceeds these limitations it is likely interfering with your FMLA rights and subject to your claims to recover against it. Even when the employer eventually grants your FMLA leave, you may have claims against the employer for interference with your FMLA rights as a form of harassment when the employer uses unnecessary or prohibited methods to determine whether the certification entitles you to FMLA medical leave. Let's talk about some ways employers unlawfully violate your FMLA rights when reviewing your FMLA certification:

## TAKING TOO LONG TO GRANT OR REJECT YOUR FMLA LEAVE REQUEST

DIVISION (34)

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   ORDERS AND
   EMERGENCY
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- LITIGATION (21)
  - BODILY INJURY(6)
  - CAR WRECKS (17)
  - CIVIL RIGHTS (3)
  - DTPA (1)
  - SLIP AND FALLINJURIES (2)

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Employers must review and make a determination on your FMLA request within five business days and give notice in writing. If your employer exceeds this timeframe then it is interfering with your FMLA rights.

#### REQUIRING YOU TO GO TO A COMPANY DOCTOR FOR THE SECOND OPINION

Although employers may select the physician who will provide the second opinion, the employer may not use a doctor regularly employed by the employer. This is usually only an issue for companies that are medical providers who have physicians on staff for their regular business purposes or companies with a substantial number of worker's compensation or disability claims that makes it cheaper to keep a physician on staff instead of outsourcing the work reviewing those claims. However, if you are in a situation where the employer has a company doctor then it is a violation of your FMLA rights for the employer to require you to submit to an exam by that physician before approving or denying your FMLA request.

## BEING EVASIVE ABOUT WHY IT REJECTED AN FMLA REQUEST

FMLA regulations require your employer to provide notice with the reason or reasons why your FMLA request or certification on your FMLA request was rejected. The reason or reasons must be specific and clear. The employer cannot just reject your request without specific information. Nor can it give you oral notice of the rejection to avoid creating a paper trail of an unlawful rejection of your FMLA leave request. If the employer determines the certification is incomplete, it must state the areas where the

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certification is incomplete so the employee knows what to request of his or her employer.

# REQUESTING MORE INFORMATION ON YOUR CERTIFICATION ONCE SUFFICIENT INFORMATION HAS BEEN PROVIDED

Employers who want to frustrate employees into giving up on their FMLA requests commonly use this technique to avoid rejecting the FMLA request but having the same effect as rejecting the FMLA request. Employers can request that an employee obtain a certification with complete information to allow the employer to asses the leave request but once the FMLA certification provides complete information the employer cannot continue to request more information or more details to avoid making a determination. Once a complete certification is provided the employer must approve or deny the FMLA leave request. The employer may not ask for extraneous detail. Nor can it continue to come up with different reasons why the certification is incomplete.

Whether the certification is complete or whether the employer has a legitimate need for additional information is not always clear. Each side may have honest disagreement about whether the certification is complete. The final word on the issue may only come when the employee sues the employer for interfering with FMLA rights. However, the more the employer dribbles out requests for additional information or changes the reasons why the certification is incomplete the more likely it is that the employer is interfering with your FMLA rights. Ultimately you may have to talk to an employment lawyer in Fort Worth or Dallas.

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# DISAGREEING WITH THE FMLA CERTIFICATION WITHOUT A LEGITIMATE BASIS

An employer cannot reject your FMLA certification merely because it feels leave really isn't necessary for the medical condition. The difference between a legitimate determination of your FMLA certification and an unlawful rejection of the certification is nuanced. The employer must determine whether the medical condition meets the FMLA definition of a serious medical condition; and whether the certification articulates the necessary information for FMLA leave. If the certification meets the FMLA requirements (and the employee is eligible) then you cannot be denied FMLA leave.

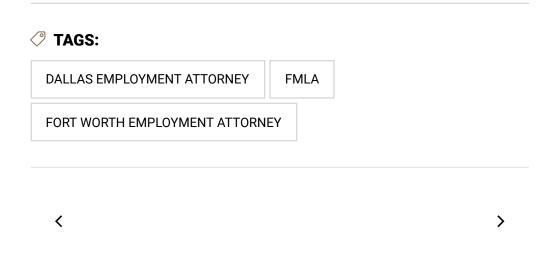
The employer may not substitute its opinion to decide it does not believe the medical condition exists. Nor can it come up with alternatives to FMLA leave because it does not want to grant the requested leave. If the employer disagrees then its remedy is to request a second opinion or third opinion, if appropriate. An employer may not substitute its opinion for the opinions of physicians.

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8 of 8