THE USE OF MEDICAL EXPERTS
PRE-LITIGATION

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I. INTRODUCTION

Medical experts have become commonplace in employment litigation. Historically, medical professionals testified about emotional distress damages and the related issue of causation. More recently, medical professionals have appeared in employment cases to evaluate whether a plaintiff is disabled, to assess accommodations, to evaluate whether a plaintiff had a serious health condition warranting job-protected leave and the like. In analyzing the use of medical professionals as expert witnesses in employment litigation, it is important not to overlook the role that is often played by these medical professionals before litigation is filed. The proper use of medical professionals before employment litigation is filed can often avoid problematic litigation or create a sound evidentiary basis for prosecuting or defending against a claim should a dispute develop. This paper will focus on two of the most important areas where medical experts play a role in the pre-litigation context: the administration of leaves of absence and the accommodation of disabled employees.

II. ADMINISTRATION OF LEAVES

A. Family and Medical Leave Act

Medical professionals often play a crucial pre-litigation role in determining whether an employee is entitled to leave under the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 et seq. This role is specifically codified by statute and regulation.

The FMLA requires that up to 12 weeks of job protected leave be granted during a 12-month period to eligible employees:

a. For the birth of the employee’s child or to care for the employee’s newborn child (so long as the leave is completed within 12 months after the birth);

b. For the placement of a child with the employee for adoption or foster care (within 12 months after the placement);

c. To care for the employee’s spouse, child or parent with a serious health condition;

d. Because the employee has a serious health condition that makes the employee unable to perform one or more of the essential functions of his or her job; and
e. For a qualifying exigency that arises when a spouse, parent or child is on or has been called to covered active duty.

The FMLA also requires that up to 26 weeks of job protected leave be granted during a single 12-month period to a spouse, son, daughter, parent or next of kin who is needed to care for a covered servicemember who suffers from a serious injury or illness incurred on active duty (“military caregiver family leave”). 29 U.S.C. §§ 2612(a)(1) and (a)(3); 29 CFR §§ 825.112(a)(1)–(6), .200(a), .200(f). Medical professionals have critical roles to play regarding three of the foregoing types of FMLA leave: (1) leaves due to the employee’s own serious health condition; (2) leaves due to the serious health condition of a child, parent or spouse; and (3) military caregiver family leave.

B. What is a Serious Health Condition?

The FMLA defines a serious health condition as an illness, injury, impairment, or physical or mental condition that involves either (1) inpatient care at a hospital or other medical facility or (2) continuing treatment by a health care provider. 29 U.S.C. § 2611(11); 29 CFR §§ 825.113(a); .800. Although the definition of a serious health condition can be stated simply, the regulations interpreting the definition – and particularly those defining what constitutes continuing treatment by a health care provider – are complicated and difficult to apply.

The definition of continuing treatment by a health care provider has five different elements:

1. **Incapacitated for More than Three Days:** A period of incapacity of more than three consecutive calendar days (which includes non-working days), provided that this incapacity also involves two or more visits to a health care provider or one visit to a health care provider that results in a regimen of continuing treatment supervised by the health care provider. 29 CFR § 825.115(a)(3). The first visit has to occur within seven days of the commencement of the incapacity and the second visit has to occur within 30 days of the commencement of the incapacity. 29 CFR § 825.115(a)(3). If the employee relies on one visit plus a continuing regimen of treatment under the supervision of a health care provider, the one visit must occur within seven days of the first day of incapacity. *Id.*

2. **Pregnancy:** A period of incapacity, which can occur in partial day increments, due to pregnancy or for prenatal care. For example, an eligible pregnant employee who arrives late to work because of severe morning sickness is protected by the FMLA. 29 CFR §§ 825.115(b), .120.

3. **Chronic Serious Health Condition:** A period of incapacity or treatment, which can occur in partial day increments, due to a chronic serious health condition such as diabetes, migraine headaches or epilepsy. A chronic serious health condition requires periodic visits to a health care provider for treatment, but these visits need only occur twice a year. 29 CFR § 825.115(c).
4. **Long-Term or Incurable Illness:** A period of incapacity, which can occur in partial day increments, that is permanent or long-term because of a condition for which treatment might not be effective, such as a severe stroke or the terminal stages of a disease. 29 CFR § 825.115(d).

5. **Multiple Treatments:** Any period of incapacity, which can occur in partial day increments, due to multiple treatments for restorative surgery or a condition that would likely result in a period of incapacity of more than three consecutive calendar days if untreated such as physical therapy, dialysis, or chemotherapy. 29 CFR § 825.115(e).

The “two visits within 30 days” rule was criticized when it was proposed by the DOL as part of the newly amended FMLA regulations because it created the potential for employees to make a second visit to the same or a different health care provider, purportedly for the same condition, after an adverse action was taken by an employer that believed the employee did not qualify for an FMLA leave based on the results of the initial visit and the absence of any treatment regimen. *See, e.g.*, 73 FR 67834, 67946-49 (November 17, 2008). A recent problematic decision from the Sixth Circuit, *Branham v. Gannett Satellite Information Network, Inc.*, ___ F.3d ___, 2010 WL 2421617 (6th Cir. September 2, 2010), highlights this problem. In that case, the employee submitted documentation from her treating physician when she missed work on Friday, November 10 and Monday, November 13. The documentation excused the plaintiff from work but stated that the physician’s examination of the plaintiff on November 13 was “normal” and that the plaintiff would be able to return to work the next day. The plaintiff did not return to work. Gannett ultimately terminated the plaintiff effective November 24 for failing to return to work after being released by her physician. On November 28, four days *after* she was terminated, the plaintiff was examined by a nurse practitioner who contradicted the documentation previously provided by the plaintiff’s treating physician. According to the Sixth Circuit, this second visit during a 30-day period, which resulted in a contradictory medical opinion, was enough to raise a fact question as to whether the plaintiff had a serious health condition warranting FMLA leave. “It is irrelevant that [the plaintiff] saw [the nurse practitioner] after Gannett received Dr. Singer’s negative certification and after Gannett terminated her.”

C. **Military Caregiver Family Leave**

The FMLA permits a “spouse, son, daughter, parent or next of kin” to take up to 26 weeks of leave during a single 12-month period to care for a “covered service member” who suffers from a “serious injury or illness” incurred on active duty. 29 U.S.C. § 2612(a)(3).

A covered servicemember is a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness. A covered servicemember is also a veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness and who was a member of the Armed Forces, including a member of the National Guard or Reserves, at any time during the period of 5 years
preceding the date on which the veteran undergoes that medical treatment, recuperation or therapy. 29 U.S.C. § 2611(16); 29 CFR §§ 800.127(a), 825.800.

In the case of a member of the Armed Forces, a serious injury or illness means an injury or illness incurred by a servicemember in the line of duty on active duty, or that existed before the active duty and was aggravated by service in the line of duty on active duty that may render the member medically unfit to perform the duties of the member’s office, grade, rank, or rating. In the case of a veteran who was a member of the Armed Forces at any time during the period of 5 years preceding the date on which the veteran undergoes medical treatment, recuperation or therapy, a serious injury or illness means an injury or illness that was incurred by the servicemember in the line of duty on active duty in the Armed Forces, or that existed before the active duty and was aggravated by service in the line of duty on active duty, and that manifested itself before or after the servicemember became a veteran. 29 U.S.C. § 2611(19); 29 CFR §§ 825.127(a)(1), 825.800. (Emphasis added).

An employee is needed to care for a covered servicemember when the servicemember requires either physical (medical, hygienic, transportation or nutritional and safety needs) or psychological (comfort and reassurance) care. 29 CFR § 825.124(a).

D. Who is Considered a Health Care Provider under the FMLA?

The FMLA defines health care providers quite broadly, including both physicians and others who provide health care services and are authorized to do so under state law, e.g., podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners, nurse-midwives, clinical social workers, and Christian Science practitioners listed with the First Church of Christ in Boston, Massachusetts. 29 CFR § 825.118(a)–(c). Chiropractors are considered health care providers only with regard to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X ray to exist. FMLA Admin Op No 63 (June 19, 1995). The definition of a “health care provider” has been recently expanded in the new FMLA regulations to include Physician Assistants “who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law.” 29 CFR § 825.125(b)(2).

E. The Medical Certification Process for Serious Health Conditions

1. Seeking Medical Certification

Employers may require an employee who is seeking a leave for a serious health condition or to care for a seriously ill child, parent, or spouse to obtain medical certification of the serious health condition from a health care provider. 29 U.S.C. § 2613(a). The Department of Labor (“DOL”) has prepared two prototype medical certification forms which replace the prototype forms in use prior to 2009, Form WH-380E entitled “Certification of Health Care Provider for Employee’s Serious Health Condition,” and Form WH-380F entitled “Certification of Health Care Provider for Family Member’s Serious Health Condition.” 29 CFR § 825.306(b). These forms contain all of the information that the employer may request in obtaining medical certification of an FMLA leave. As with the other prototype forms created by the DOL, use of
these medical certification forms is optional but any employer-created medical certification form must relate to the serious health condition at issue, contain the same basic information as the prototype forms and cannot seek additional information. *Id.* Both forms are available on the DOL’s FMLA web page.

The employer must give the employee specific notice of the requirement for medical certification and the consequences for failing to obtain such certification and may not rely on certification requirements set forth in an employee handbook. 29 CFR § 825.305(a), (d). The notification must be sent each time a medical certification is required. *Id.*; *Perry v. Jaguar of Troy*, 353 F.3d 510 (6th Cir. 2003); *Conrad v. Eaton Corporation*, 303 F. Supp. 2d 987 (N.D. Iowa 2004); *Stubl v. TA Sys.*, 984 F. Supp. 1075 (E.D. Mich. 1997). A request for medical certification should be made within five business days after the request for leave is made in the case of foreseeable leaves and within five business days after the leave commences in the case of unforeseeable leaves. 29 CFR § 825.305(b). The medical certification should be provided within the time period requested by the employer, provided that the employee is given at least 15 days to obtain the certification, unless it is not practicable to do so despite the employee’s diligent, good faith efforts. *Id.*

Under the new FMLA regulations, if the employer does not request medical certification when it first receives notice of a leave, the employer is not precluded from later requesting certification “if the employer later has reason to question the appropriateness of the leave or its duration.” 29 CFR § 825.305(b). An oral request for a medical excuse will not suffice if the employer has not notified the employee within the past six months of his/her rights and responsibilities under the FMLA and the consequences of failing to provide timely medical certification. *Cooper v. Fulton County, Ga.*, 458 F.3d 1282 (11th Cir. 2006). If adequate notice is given regarding the certification requirement and the employee fails to return the medical certification in a timely manner, the employer can apply its attendance policy to the employee’s absences, even if the application of the attendance policy may result in termination. 29 CFR §§ 825.305(d), .313; *Frazier v. Honda of America Mfg., Inc.*, 431 F.3d 563 (6th Cir. 2005).

The new medical certification forms are totally reorganized and no longer ask health care providers to designate which type of FMLA-qualifying serious health condition (e.g., absence plus treatment, pregnancy, chronic, etc.) applies. The new forms, Forms WH-380E and WH-380F, contain a more detailed set of questions about each type of serious health condition. The forms require that health care providers include “medical facts” that are sufficient to support the need for FMLA leave, which can include “information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation or treatment (physical therapy, for example), or any other regimen of continuing treatment.” 29 CFR 825.306(a)(3). See, e.g., *Novak v. MetroHealth Med. Ctr.*, 503 F.3d 572 (6th Cir. 2007). According to the DOL, the determination of what medical facts are appropriate for inclusion on the certification form will vary depending on the nature of the condition at issue “and is best left to the health care provider.” 73 FR at 68014. Accordingly, the DOL does not set forth a mandatory definition of sufficient “medical facts” and specifically notes that a medical certification form cannot be rejected simply because it does not include a diagnosis. *Id.*
The new regulations adopt previous opinion letters of the DOL establishing that when a serious health condition lasts longer than a year, a new medical certification can be obtained in each subsequent year and will be subject to second and third opinions. 29 CFR § 825.305(e). A medical certification or a doctor’s note cannot be requested every time an employee misses work due to a previously approved intermittent FMLA leave.

The new regulations address the Health Insurance Portability and Accountability Act (HIPAA) and the HIPAA Privacy Rule by stating that the employee can choose to provide but cannot be required to provide an authorization, release or waiver allowing the employer to communicate with the health care provider. However, if the employee refuses, he/she does so at his/her peril because it is the employee’s responsibility to provide the employer with complete and sufficient certification, and FMLA leave can be denied if the employee fails to do so. 29 CFR § 825.306(e).

The ADA requires employers to keep information regarding a disabled employee’s medical condition confidential. 29 CFR § 1630.14(b), (c). Because many employees who have serious health conditions can qualify as disabled under the ADA, employers should likewise keep information regarding FMLA medical certifications confidential. The medical certifications should be stored in separate medical files that should not be shared with supervision in the absence of a specific need to know.

2. Deficient Medical Certifications

Under 29 CFR § 825.305(c), if an employer determines that a medical certification is incomplete or insufficient, the employer must notify the employee in writing, state what additional information is necessary to make the certification complete and sufficient, and give the employee seven calendar days, “unless not practicable under the particular circumstances despite the employee’s diligent good faith efforts,” to cure the deficiency. A certification is considered incomplete when certain applicable entries have not been filled out. A certification is considered insufficient when the information provided is “vague, ambiguous, or non-responsive.” Id. Sorrell v. Rinker Materials Corp., 395 F 3d 332 (6th Cir 2005); Hoffman v. Professional Med. Team, 394 F.3d 414 (6th Cir. 2005). If the employee or the employee’s health care provider do not cooperate in curing the deficiency, FMLA leave may be denied.

In Davis v. Henderson, 238 F.3d 420, reported in full, No. 99-3028, 2000 WL 1828476 (6th Cir. Dec 4, 2000), the Sixth Circuit found that the medical certification submitted by the employee, in which the doctor had simply checked that the employee was totally incapacitated for the relevant period, was insufficient medical certification. The certification was insufficient because it did not provide a statement from plaintiff’s doctor discussing the condition or diagnosis. Moreover, plaintiff had been given an opportunity to provide additional documentation. In Novak v. MetroHealth Med. Ctr., 503 F.3d 572 (6th Cir. 2007), the employer satisfied the standard by attempting to authenticate plaintiff’s previously submitted certification forms and by allowing plaintiff to submit three additional forms. In Bailey v. Southwest Gas Company, 275 F.3d 1181 (9th Cir. 2002), an employee’s health care provider supplied the employer with an incomplete medical certification, and the employee refused to request that he provide complete information in response to all questions asked on the certification form.
Ninth Circuit upheld the termination of the employee for insubordination, holding that the FMLA did not protect the employee because she did not “shoulder her burden” under the FMLA.

The failure to provide a timely medical certification is not a deficiency that an employee must be given an opportunity to cure. *Urban v. Dolgencorp of Texas, Inc.*, 393 F.3d 572 (5th Cir. 2004), clarified, 398 F.3d 699 (5th Cir. 2005) (if a “nonexistent” certification were equated with a “deficient” certification under the FMLA regulations, “an employer could never set a real deadline for the return of a medical certification. In effect, whenever an employee failed to return a medical certification within the appropriate time period, the employer would be required to notify the employee of that fact and provide the employee with an opportunity to cure the deficiency by allowing the employee to submit the certification within a new, extended deadline – a scenario that could, in theory, repeat itself *ad infinitum*.“); *Taylor v. Ameritech Services, Inc.*, 501 F. Supp. 2d 1201 (E.D. Wis. 2007) (FMLA claims of husband and wife rejected because both fail to submit timely medical certification forms, despite being granted an extension beyond the 15-day period within which to do so); *Heard v. SBC Ameritech Corp.*, No. 05-71712, 2005 WL 1802086 (E.D. Mich. July 27, 2005) (“An employer has no duty under the FMLA to provide notice and an additional 15-day period to cure when an employee fails to provide timely certification in the first instance” even when the health care provider allegedly misplaced the certification form).

An expired medical certification will not excuse subsequent absences. *Muhammad v. Indiana Bell Telephone Co., Inc.*, No. 05-4118, 2006 WL 1476146 (7th Cir. May 26, 2006). In addition, in the case of intermittent leave, “the employer is entitled to know how long the doctor thinks that need will continue, . . . and the frequency and duration of each episode. . . .” *Id.* If this information is not provided in the medical certification, the employer must give the employee a reasonable opportunity to provide the missing information, but if the employee fails to do so, the applicable absences will not be covered by the FMLA.

Most courts have held that employers are entitled to rely on reasonable interpretations of medical certifications, even if the employee subsequently attempts to modify their contents or refuses to provide clarification of the restrictions contained in the certifications. In *Dry v. The Boeing Company*, No. 01-3294, 2004 WL 309323 (10th Cir. Feb 19, 2004), the court rejected the FMLA claim of an employee who provided a medical certification which stated that the plaintiff had been needed at home to care for his wife but could now return to work. The plaintiff, however, failed to return and was terminated. Subsequent to his termination, he produced a “corrected” note extending his leave. The Tenth Circuit held that this was too little, too late. The employer was permitted to rely on the original return to work date in the physician’s first medical certification. See also, *Nawrocki v. United Methodist Retirement Communities, Inc.*, No. 05-1058, 2006 WL 890685 (6th Cir. March 31, 2006) (an employer is entitled to rely on a “negative certification” that states the employee does not require a leave, even if the certification also states that the employee has a serious health condition).

In a recent case, however, the employer’s failure to properly notify the employee of the medical certification requirement precluded the employer from relying on a “negative certification” that the employee disputed by obtaining a second contrary certification. *Branham v. Gannett Satellite Information Network, Inc.*, ___ F.3d ___. 2010 WL 3431617 (6th Cir.
September 2, 2010. In *Branham*, the employer’s short-term disability certification form doubled as its FMLA certification form, but the employer’s representative admitted that when she gave the plaintiff the short-term disability certification form, she communicated no information to the plaintiff about the FMLA certification requirement, the fact that it was due in 15 days or the consequences under the FMLA for failing to return the certification.

**3. Contesting Medical Certifications**

Under the FMLA, if an employer contests a health care provider’s determination that a serious health condition exists, it may challenge the certification by requiring that the employee obtain a second opinion. 29 U.S.C. § 2613(c)–(d); 29 CFR § 825.307(b). The second opinion may be obtained from any health care provider selected and paid for by the employer. The selected health care provider may not, however, be employed or consulted on a regular basis by the employer. 29 CFR § 825.307(b)(1)–(2). If the second opinion disagrees with the employee’s medical certification, a third opinion may be obtained, once again at the expense of the employer. The employer and employee must mutually agree on the third health care provider. The opinion of the third health care provider is final and binding. 29 CFR § 825.307(c). The new regulations clarify that the second and third opinion health care providers can request “all relevant medical information” pertaining to the serious health condition from the employee’s health care provider. *Id*.

An employer may not deny an FMLA leave based on a report from its own physician. *Price v. City of Fort Wayne*, 117 F.3d 1022 (7th Cir. 1997). Interestingly, in FMLA Admin Op No 48 (Oct 19, 1994), the DOL opined that the prohibition against using a health care provider employed by the employer does not exist with respect to third opinions, provided that the employer and employee jointly select the employer’s health care provider.

If an employee submits a medical certification that does not certify that the employee or a family member has a serious health condition, the employer has no obligation to seek a second opinion but can instead rely on the certification to determine that the leave is not FMLA-qualifying. *Rogers v. Bell Helicopter Textron, Inc.*, No. 3-99- 988, 2000 WL 1175647 (N.D. Tex Aug 17, 2000), *aff’d*, 252 F.3d 436 (5th Cir. 2001) (treating physician states that employee does not have a serious health condition but employee secures contrary opinion from second physician shortly after being terminated for absenteeism); *Dillon v Carlton*, 977 F Supp 1155 (MD Fla 1997), *aff’d without opinion*, 161 F3d 21 (11th Cir 1998). But see, *Branham v. Gannett Satellite Information Network, Inc.*, *aff’d* F.3d ___, 2010 WL 3431617 (6th Cir. September 2, 2010) (Plaintiff created a fact issue about whether she had a serious health condition even though the employer received a certification from a physician that she was capable of returning to work when the plaintiff obtained a second, contrary opinion from a nurse practitioner two weeks later, *after* her termination for failing to return to work).

The FMLA does not prevent an employee from seeking a second opinion about his or her own illness that might conflict with a prior opinion. *Stoops v. One Call Communications, Inc.*, 141 F.3d 309, 313 (7th Cir. 1998). In *Electrolux Home Products v. UAW*, 416 F.3d 848 (8th Cir. 2005), the Eighth Circuit refused to overturn an arbitration award in favor of a grievant who left work due to a stomach ailment and claimed that she should have been granted intermittent
FMLA leave for this absence. The first health care provider she visited, a physician’s assistant, refused to certify the absence as FMLA-qualifying. Her physician refused to override the opinion of the physician’s assistant. The grievant therefore went to a second health care provider, a nurse practitioner, who certified the absence as FMLA-qualifying. The court stated that the arbitrator did not disregard the FMLA in holding that the employer should have granted intermittent FMLA leave based on the employee’s second opinion.

If an employer decides not to seek a second opinion but later contests the validity of an FMLA leave, the employer is not precluded from arguing that the employee does not have a serious health condition. Darst v. Interstate Brands Corp., 512 F.3d 903 (7th Cir. 2008); Novak v. MetroHealth Med. Ctr., 503 F.3d 572 (6th Cir. 2007); Stekloff v. St John’s Mercy Health Systems, 218 F.3d 858 (8th Cir. 2000); Rhoads v. FDIC, 257 F.3d 373 (4th Cir. 2001), cert. denied, 535 U.S. 933 (2002) (“the plain language of the Act does not suggest that an employer must pursue these procedures or be forever foreclosed from challenging whether an employee suffered from a serious health condition”).

4. Recertification of Serious Health Conditions

Employers may require periodic medical recertifications no more often than every 30 days and only in connection with an absence by the employee. 29 CFR § 825.308(a). See LeGrand v. Village of McCook, No. 96 C 5951, 1998 WL 182462 (N.D. Ill. April 15, 1998) (requesting recertification every 14 days violates FMLA). There are two exceptions to this rule. If the medical certification indicates that the minimum duration of a condition is more than 30 days, the employer must wait until the minimum duration of the condition has lapsed before seeking recertification, unless the employee requests an extension of the leave, the circumstances described in the previous certification have changed, or the employer receives information that casts doubt on the continuing validity of the certification. 29 CFR § 825.308(b). Notwithstanding this rule, an employer can request recertification “[i]n all cases” every six months, provided that the request is in connection with an absence. Id.

If the minimum duration of a condition is less than 30 days, the employer can request recertification if the employee requests an extension of the leave, the circumstances described in the previous certification have changed, or the employer receives information that casts doubt on the continuing validity of the certification. 29 CFR § 825.308(c).

If there are suspicious circumstances surrounding an intermittent leave (e.g., a pattern of Monday/Friday absences or more frequent absences than were anticipated in the original certification), this information should be supplied to the health care provider along with the medical certification form, and the health care provider should be asked whether such a pattern of absences is consistent with the employee’s serious health condition. FMLA Admin Op, 2004 DOL FMLA LEXIS 2 (May 25, 2004). The new regulations provide examples of when the circumstances of the leave have changed (an increase in the frequency of migraine headaches or a pattern of using unscheduled FMLA leave for migraine headaches in conjunction with scheduled days off) and when information casts doubt on the continuing validity of the certification (an employee on FMLA leave due to knee surgery is observed playing softball). 29 CFR § 825.308(c)(2)-(3).
Any recertification requested by the company will be at the employee’s expense, unless the company provides otherwise. There is no ability, however, to seek a second or third opinion on recertifications. 29 CFR § 825.308(f).

An employee must provide the recertification within the time period requested by the employer, as long as it is at least 15 calendar days. 29 CFR § 825.313(c). If an employee fails to obtain a recertification in accordance with the requirements of 29 CFR § 825.308, a continued absence will not be covered by the FMLA. Id.; Brumbalough v. Camelot Care Centers, Inc., 427 F.3d 996 (6th Cir. 2005).

F. The Medical Certification Process for Military Caregiver Family Leave

An employer may also require that an employee seeking Military Caregiver Family Leave provide certification that a covered servicemember has suffered a serious injury or illness incurred in line of duty on active duty “that may render the member medically unfit to perform the duties of the member’s office, grade, rank, or rating.” 29 U.S.C. § 2611(19); 29 CFR §§ 825.127(a)(1), .800.

Whether an injury or illness is incurred in line of duty on active duty is to be determined by the Department of Defense (DOD), or its authorized health care representative, and an employer will be permitted to obtain certification that a servicemember’s serious injury or illness was incurred in line of duty on active duty. 73 FR at 67965. See also, 29 CFR §§ 825.305(a), .310(a).

Any one of the following health care providers are authorized to provide such a certification: (a) DOD health care provider; (b) Department of Veterans Affairs health care provider; (c) DOD TRICARE network authorized private health care provider; or (d) DOD non-network TRICARE authorized health care provider. 29 CFR § 825.310(a). DOL has developed an optional form (Form WH-385), entitled “Certification for Serious Injury or Illness of a Covered Servicemember,” to be used in connection with Military Caregiver Family Leaves. Form WH-385 is available on the DOL’s FMLA web page. Employers can use their own forms, so long as the information requested does not exceed the information permitted to be obtained by 29 CFR § 825.310.

Form WH-385 permits employers to obtain the following types of information from the health care provider:

1. Contact and medical specialty information about the health care provider;
2. Whether the injury or illness was incurred in the line of duty on active duty;
3. The commencement date and probable duration of the injury or illness;
4. A description of the medical facts regarding the covered servicemember’s health condition which includes information on whether the injury or illness renders the covered servicemember medically unfit to perform his/her military duty;
5. Whether the covered servicemember is in need of care and an estimate of the beginning and ending dates for this care; and

6. If the employee seeks Military Caregiver Family Leave on an intermittent or reduced schedule basis for either planned medical treatment or for other types of care, whether there is a medical necessity for the covered servicemember to have such periodic care and an estimate of the frequency and duration of the periodic care.

29 CFR § 825.310(b)(1)-(7).

In lieu of Form WH-385 or an employer’s own certification form, an employer must accept “Invitational Travel Orders” (ITOs) or “Invitational Travel Authorizations” (ITAs) issued to any family member to join an injured or ill servicemember at his/her bedside. 29 CFR § 825.310(e). An ITO or ITA is sufficient certification “regardless of whether the employee is named in the order or authorization.” Id. This means that if a parent who is not employed by the employer receives an ITO or ITA, a next of kin who is employed by the employer but who does not receive an ITO or ITA can nonetheless rely on these documents as sufficient certification for a Military Caregiver Family Leave.

No second and third opinions or recertifications are permitted for Military Caregiver Family Leaves. 29 CFR § 825.310(d).

G. Contact with the Health Care Provider

The FMLA regulations previously prohibited employers from having direct contact with an employee’s health care provider. If an employer had a concern about a medical certification, a health care provider representing the employer could contact the employee’s health care provider but only with the employee’s permission and only for purposes of clarifying and authenticating the medical certification. 29 CFR § 825.307(a) (previous regulation); FMLA Admin Op No 75 (Nov. 14, 1995).

Under the new FMLA regulations, employers may now contact the health care provider directly for the purposes of authentication and clarification, and they do not need the employee’s permission in order to do so. In making the contact, the employer may use a health care provider, an HR professional, a leave administrator or a management official, but the employer cannot use the employee’s direct supervisor. 29 CFR § 825.307(a). “Authentication” means providing the health care provider with a copy of the submitted certification and requesting verification that the information in the form was completed and/or authorized by the health care provider who signed the document. Id. “Clarification” means contacting the health care provider to understand the handwriting on the certification form or the meaning of a response. Id. As in the past, employers cannot request additional information from health care providers. Id. HIPAA requirements must be satisfied when individually-identifiable health information of an employee is shared with an employer by a HIPAA-covered health care provider. However, if the employee refuses to cooperate in executing the HIPAA authorization, “the employer may deny the taking of FMLA leave if the certification is unclear.” Id.
H. Fitness for Duty Certifications

When an FMLA leave is based on a serious health condition, the return to work can be contingent on a fitness-for-duty certification from the employee’s health care provider. The requirement must be applied to all similarly situated employees (same position, same serious health condition). 29 CFR § 825.312(a). According to the Eighth Circuit in *Bloom v. Metro Heart Group of St. Louis*, 440 F.3d 1025 (8th Cir. 2006), the fitness-for-duty requirement need not apply to all employees, as long as the requirement is applied to all employees on FMLA leave.

The certification from the employee’s health care provider must certify that the employee is able to resume work. The employer may require “that the certification specifically address the employee’s ability to perform the essential functions of the employee’s job,” provided that the employer has provided a list of the essential functions of the employee’s job along with the Designation Notice. 29 CFR § 825.312(b). *See Brumbalough v. Camelot Care Ctrs., Inc.*, 427 F.3d 996 (6th Cir. 2005). The employer can delay reinstatement if the employee shows up for work following an FMLA leave without prior notice as to the likely duration of the leave and without a fitness-for-duty certification. *Drago v. Jenne*, 453 F.3d 1301 (11th Cir. 2006). Once an employee submits a fitness for duty certification from a health care provider indicating that he or she may return to work, the employer’s duty to reinstate under the FMLA is triggered. *Brumbalough, supra.*

The employer may not contest the fitness-for-duty certification through second and third opinions. 29 CFR § 825.312(b); *Albert v. Runyon*, 6 F. Supp. 2d 57 (D. Mass. 1998). The employer may, however, contact the health care provider for purposes of clarifying and authenticating the fitness-for-duty certification but cannot delay the employee’s return to work by doing so. 29 CFR § 825.312(b). The employee must bear the cost of the certification. 29 CFR § 825.312(c). Employers may delay an employee’s return to work until a fitness-for-duty certification is provided but only if the employer has provided notice of this requirement in the Designation Notice (see DOL Form WH-382). 29 CFR § 825.310(e). Employers should also include any such requirement in the FMLA policy. If notice of the requirement for a fitness-for-duty certification is given, but the employee does not provide the certification, the employee is no longer entitled to reinstatement and may be terminated. 29 CFR §§ 825.312(d), .313(d). Likewise, an employee cannot contest a termination for job abandonment by claiming that the employer failed to provide the employee with notice of a fitness-for-duty certification requirement when the employer had no such requirement and did not base the termination on the employee’s failure to submit a fitness-for-duty certification. *Tucker v. Middleburg-Legacy Place, LLC*, 539 F.3d 545 (6th Cir. 2008).

No fitness-for-duty requirement may be imposed for most types of intermittent leaves. 29 CFR § 825.312(f). Under the new FMLA regulations, however, “if reasonable safety concerns exist regarding the employee’s ability to perform his or her duties, based on the serious health condition for which the employee took leave,” the employer may require a fitness-for-duty certification once every 30 days, provided that the employer informs the employee of the requirement in the Designation Notice. “Reasonable safety concerns means a reasonable belief
of significant risk of harm to the individual employee or others,” considering the nature and severity of potential harm and the likelihood of potential harm. 29 CFR § 825.312(f).

The new FMLA regulations provide that if state law or a collective bargaining agreement govern an employee’s return to work, “those provisions shall be applied.” 29 CFR § 825.312(g). Accordingly, if a collective bargaining agreement requires that employees be evaluated by the company’s health care provider upon a return to work, the employer can enforce this provision, but it cannot delay restoration of employment in order to do so, nor can it make restoration of employment contingent on this company medical examination. See 73 FR at 68033. The examination must also be job-related and consistent with business necessity as required by the ADA. Id.

Court decisions predating the new FMLA regulations generally agree that the FMLA permits a collective bargaining agreement to establish its own procedures for an employee’s return to work and these procedures can supersede those of the FMLA. These procedures, however, cannot be more restrictive to the employee than that of the FMLA. See Conroy v. Township of Lower Merion, No. 00- 3528, 2001 WL 894051 (E.D. Pa. Aug 7, 2001), aff’d 77 No. 02-3217, 2003 WL 22121002 (3d Cir. 2003) (holding that a procedure requiring an employee to submit to an independent medical exam where her medical certification was unclear did not violate the FMLA. The certificate was ambiguous and, under such circumstances, the CBA provided that employees submit to a medical examination. The same procedure had been applied in 26 earlier situations where an employee’s medical certification was unclear or confusing.); Harris v. Emergency Providers, Inc., No. 02-1056, 2002 WL 1972997 (8th Cir. Aug 28, 2002) (employer did not violate FMLA by insisting on a fitness-for-duty examination where it was required by the CBA and the employee presented no evidence that this requirement was being applied inconsistently). The Seventh Circuit, in Harrell v. United States Postal Service, 445 F.3d 913 (7th Cir.), cert. denied, 549 U.S. 1095 (2006), agreed with the above reasoning. The court held that a collective bargaining agreement can impose a stricter fitness for duty requirement than the FMLA’s requirement of a simple statement that the employee is able to return to work, such as a requirement that an employee obtain clearance to return to work from a physician contracted by the employer.

Consistent with the ADA, the new FMLA regulations provide that after an employee returns from FMLA leave, a medical examination of an employee is permissible at the employer’s expense as long as it is job-related and consistent with business necessity. 29 CFR § 825.312(h). In Porter v. United States Alumoweld Co., 125 F.3d 243 (4th Cir. 1997), the plaintiff, who had a history of back problems, submitted a doctor’s note at the end of an FMLA leave due to a back injury stating that he was able to return to work without restrictions. The company did not accept this note and insisted that the employee complete a functional capacity evaluation. The plaintiff was terminated when he refused to have this evaluation performed. The plaintiff claimed that the FMLA was violated based on the regulation stating that a fitness-for-duty certification need only be “a simple statement of an employee’s ability to return to work.” The Fourth Circuit disagreed, stating that the fitness-for-duty examination requested by the employer was both job related and consistent with business necessity and therefore consistent with the ADA. According to the court, the regulations suggest that the fitness requirements of both the FMLA and the ADA may be applied by employers:
Under [the plaintiff’s] reading of the FMLA, the Act would be violated every time an employer requested a fitness for duty exam under the ADA, a request which requires the disclosure of more medical information than would be available from the FMLA’s “simple statement of an employee’s ability to return to work.” We reject [the plaintiff’s] attempt to so restrict the operation of the ADA.

_Id_ at 247.

Employers may not insist on independent fitness for duty certifications. _Routes v. Henderson_, 58 F. Supp. 2d 959 (S.D. Ind. 1999); _Underhill v. Willamina Lumber Co._, No. 98-630, 1999 WL 421596 (D. Or. May 20, 1999) (court held that plaintiff’s informing his employer that he was ready to return to work was sufficient to trigger the employer’s obligation to restore him to his former position, regardless of the employer’s concerns that he would be unable to perform the duties of his job. Although the FMLA allows the employer to clarify whether the medical condition affected plaintiff’s ability to work, plaintiff was entitled to be employed as soon as he provided medical certification during the period that the inquiry was being made).

The importance of a medical professional’s fitness-for-duty certification should not be underestimated. If an employee cannot return to the same or an equivalent position at the end of an FMLA leave because he or she cannot perform an essential function of the position due to a physical or mental condition, the employee has no right to restoration to another position under the FMLA. 29 CFR § 825.216(c); _Hatchett v. Philander Smith Coll._, 251 F.3d 670, 677 (8th Cir. 2001) (“The FMLA does not require an employer to allow an employee to stay in a position that the employee cannot perform.”); _Joostberns v. United Parcel Services, Inc._, No. 04-2370, 2006 WL 41189 (6th Cir. Jan 9, 2006); _Bloom v. Metro Heart Group of St. Louis_, 440 F.3d 1025 (8th Cir. 2006); _Battle v. United Parcel Service_, 438 F.3d 856 (8th Cir. 2006); _Tardie v. Rehabilitation Hospital of Rhode Island_, 6 F. Supp. 2d 125 (D. R.I. 1999), aff’d, 168 F.3d 538 (1st Cir. 1999); _Cehrs v. Northeast Ohio Alzheimer Research Ctr._, 959 F. Supp. 441 (N.D. Ohio 1997), aff’d in part and rev’d in part, 155 F.3d 775 (6th Cir. 1998); _Urbano v. Continental Airlines_, No. 95-3508, 1996 WL 767426, (S.D. Tex. Nov 1, 1996), aff’d, 138 F.3d 204 (5th Cir.), _cert. denied_, 119 S. Ct. 509 (1998); _Pert v. Value RX_, No. 96-73153, 1996 WL 1089866 (E.D. Mich. Oct 9, 1996). If the employee is disabled, however, the employer can be required under the ADA to provide a reasonable accommodation to the employee, such as restoration to a different vacant position or to a part-time position, provided that this would not constitute an undue hardship for the employer. 29 CFR §§ 825.216(c), .702(c)(4).

I. The Overlap between FMLA Leaves and Short-Term Disability and Workers’ Compensation Leaves

Health care providers obviously have an important pre-litigation role to play in administering short-term disability and workers’ compensation leaves. The manner in which health care providers are used with respect to disability plans or workers’ compensation leaves often differs from the requirements of the FMLA. A disability plan may, for example, require that medical certification of the disabling condition be provided in less than 15 days, that the certification be provided only be a treating physician, that information beyond the scope of the
medical information permitted to be obtained under the FMLA be provided and that certain medical records be submitted. These differing certification requirements frequently collide because, under the FMLA, paid disability leave provided for under an employer’s policies may in certain circumstances be substituted for unpaid FMLA leave while at the same time counting against an employee’s entitlement to FMLA leave. 29 U.S.C. § 2612(c)–(d); 29 CFR § 825.207(b)–(e). Moreover, the new FMLA regulations clarify that an employee’s ability to substitute paid leave is determined by the terms and conditions of the employer’s applicable paid leave policies. 29 CFR § 825.207(a).

The new FMLA regulations clarify for employers the proper use of information obtained to administer workers compensation benefits and paid disability leave programs. If, in order to administer such benefits, an employer is entitled to more information than is permitted under the FMLA’s medical certification rules, the employer can request this information, provided that it informs the employee that the information is only being requested in connection with these other benefits. Moreover, “[a]ny information received . . . may be considered in determining the employee’s entitlement to FMLA-protected leave.” 29 § CFR 825.306(c). If the employee fails to supply the information requested in connection with workers compensation or paid disability benefits, however, this failure cannot affect the employee’s entitlement to FMLA leave. Id. The new FMLA regulations further clarify that when an employee’s serious health condition also constitutes a disability under the ADA, the FMLA “does not prevent the employer from following the procedures for requesting medical information under the ADA” and the information obtained may be considered in determining the employee’s entitlement to FMLA leave. 29 CFR § 825.306(d).

III. EMPLOYEES WITH DISABILITIES

A. Americans with Disabilities Act

After the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq., was enacted, health care professionals began to play an increasingly important role in the accommodation of disabled employees and in disability-related employment litigation. Although federal protections against disability discrimination had existed since 1973, when the Rehabilitation Act of 1973 was enacted, the ADA expanded and extended those protections to employees of private employers and state and local governmental agencies. Unlike the FMLA, however, the role of health care professionals in ADA matters has not been codified by statute or regulation.

The ADA prohibits covered employers from discriminating against qualified individuals because of their disabilities. Covered employers are prohibited from discriminating against a qualified individual with a disability in relation to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a). To enjoy the protections of the ADA, an employee of a covered employer must be a qualified individual with a disability who can perform the essential functions of his/her job, with or without a reasonable accommodation. 42 U.S.C. § 12111(8). The ADA not only prohibits discriminatory conduct, but it also affirmatively requires employers to provide reasonable accommodations to employees as a
means of overcoming disability-related barriers that prevent or restrict employment opportunities to disabled individuals who are otherwise qualified to perform a job. 42 U.S.C. § 12112(b)(5)(A).

In the ADA context, health care professionals have been used as experts to assess the nature and extent of an employee’s physical or mental impairment, to determine whether an impairment substantially limits one or more major life activities, to evaluate the employee’s ability to perform essential job functions, to determine whether an employee’s disability is a direct threat to himself or others and to identify possible accommodations and their viability. Employers should not wait until litigation is filed to initiate a dialogue with medical professionals about accommodating a disabled employee.

B. Is the Employee Disabled?

Until the end of 2008, health care professionals played an important role in determining whether employees were in fact disabled and subject to the protections of the ADA. On September 25, 2008, however, President Bush signed the ADA Amendments Act of 2008 (ADAAA). This statute, which received widespread bipartisan support, swept away a panoply of Supreme Court precedent interpreting the ADA, and redefined or clarified key terms in the ADA. The ADAAA became effective on January 1, 2009.

The ADAAA was designed to expand the coverage and protections of the ADA. Promoted as a statute to restore the original purpose and scope of the ADA, the ADAAA expressly overturned a series of Supreme Court decisions that, beginning in 1999, narrowed the definition of what constitutes a “disability” under the ADA. The ADAAA focuses almost entirely on ADA coverage and definitional issues. The ADAAA states that “the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.” Pub.L. 110-325, § 2, Sept. 25, 2008, 122 Stat. 3553. Instead, “[t]he definition of a disability in this Act shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.” 42 U.S.C. § 12102(4)(A). The statute leaves intact existing statutory language and case law concerning other important ADA concepts, such as reasonable accommodation, essential functions, undue hardship, direct threat and qualified individuals.

Only those impairments which “substantially limit” one or more major life activities are protected by the ADA. Although the ADAAA continues to utilize “substantially limits” as a standard, the Act makes significant changes to the interpretation of this standard. Under the existing EEOC regulations, a person is “substantially limited” if he or she cannot perform or is “significantly restricted” in the ability to perform a major life activity that average persons in the general population can perform. 29 C.F.R. § 1630.2(j)(1). The ADAAA requires that the EEOC amend its regulations to change the existing view that the phrase “substantially limits” means “significantly restricted as to the condition, manner or duration under which an individual can perform a major life activity.” According to the ADAAA, the EEOC’s existing interpretation is “inconsistent with congressional intent, by expressing too high a standard.” Pub.L. 110-325, § 2, Sept. 25, 2008, 122 Stat. 3553.
In response to the ADAAA, the EEOC has issued proposed regulations providing that: “An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered a disability.” 74 FR 48431, 48440 (September 23, 2009); 29 CFR § 1630.2(j) (Proposed). According to the proposed regulations, an individual whose impairment substantially limits a major life activity “need not also demonstrate a limitation in the ability to perform activities of central importance to daily life in order to be considered an individual with a disability,” thereby abrogating the Supreme Court’s decision in Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184 (2002). 74 FR at 48440; 29 CFR § 1630.2(j)(2)(ii) (Proposed); see also, Pub.L. 110-325, § 2, Sept. 25, 2008, 122 Stat. 3553. Nor must such an individual establish that his or her impairment substantially limits more than one major life activity, likewise abrogating Toyota. 74 FR at 48440; 29 CFR § 1630.2(j)(2)(iii) (Proposed). The determination of whether an individual is disabled must be made without regard to whether the individual’s impairment is controlled through medication or other mitigating measures, such as medication, medical supplies, appliances, low-vision devises, prosthetics, hearing aids, mobility devices or oxygen therapy equipment and supplies, the use of adaptive technology, reasonable accommodations or auxiliary aids or services, or learned behavioral or adaptive neurological modifications. 42 U.S.C. § 12102(E)(i); 74 FR at 48440-41; 29 CFR § 1630.2(j)(2)(3) (Proposed). In this regard, the ADAAA abrogates longstanding case law that mitigating measures must be taken into account in determining the existence of a disability. See, e.g., Sutton v. United Air Lines, 527 U.S. 471 (1999); Albertson’s Inc. v. Kirkingburg, 527 U.S. 555 (1999); Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999). The only exception to the rule that mitigating measures must not be taken into consideration is the use of “ordinary” eyeglasses and contact lenses “that are intended to fully correct visual acuity or eliminate refractive error.” 42 U.S.C. § 12102(E)(ii) and (iii). Similarly, medical conditions that are episodic or in remission now constitute disabilities if they “would substantially limit a major life activity when active.” 42 U.S.C. § 12202(D).

The proposed regulations underscore the purpose of the ADAAA by stating that “the focus of an ADA case should be on whether discrimination occurred, not on whether an individual meets the definition of ‘disability.’” 74 FR at 48440; 29 CFR § 1630.2(j)(2)(i) (Proposed). Accordingly, the focus of disability issues both in the workplace and in litigation is shifting away from determinations of whether employees are disabled or “regarded as” disabled and toward assessments of the employer’s duty to reasonably accommodate, the interactive process, what constitutes an essential function and when an accommodation constitutes an undue hardship. The utility of using health care professionals to make pre-litigation assessments of whether an employee is substantially limited in a major life activity as a prerequisite to engaging the employee in a discussion of reasonable accommodations has been rendered largely obsolete by the ADAAA. In fact, the EEOC’s proposed regulations attempt to limit the use of health care professionals in making substantial limitation determinations by stating:

The comparison of an individual’s limitation to the ability of most people in the general population often may be made using a common-sense standard, without resorting to scientific or medical evidence.

74 FR at 48440; 29 CFR § 1630.2(j)(2)(iv) (Proposed). (Emphasis added)
In short, although health care professionals can certainly be consulted pre-litigation by employers attempting to determine whether an employee has a claimed disability, this inquiry is no longer as potentially fruitful as it once was from the perspective of an employer. The ADAAA quickly moves the inquiry beyond whether an employee is disabled to the thornier issue of whether the employee can be reasonably accommodated. On this issue, health care providers can play a pivotal role pre-litigation.

C. Assessing Reasonable Accommodations

The ADA divides responsibility for reasonable accommodations between the employer and the employee. Generally, the employer is obligated to make a reasonable accommodation only for the known or obvious disability of an employee or applicant. See *Smith v. Grattan Family Enterprises, LLC*, No. 08-14314, 2009 WL 3627953, at *10-11 (E.D. Mich. Oct. 30, 2009) (no recovery under ADA where employer was unaware of plaintiff’s alleged disability); *Morisky v. Broward County*, 80 F.3d 445, 448 (11th Cir. 1996) (no recovery under ADA when prospective employer had no actual knowledge of applicant’s disability); *Miller v. National Cas. Co.*, 61 F.3d 627, 630 (8th Cir.1995) (no relief under the ADA when employer did not know that employee had a manic depressive condition); 29 CFR § 1630.9; Interpretative Guidance on Title I, pp. 629-630. The ADA places the initial burden on the employee to inform the employer of a need for an accommodation. The employee or applicant with a disability is responsible for informing the employer that an accommodation is needed in the application process or in order to perform essential functions of the job and/or to receive equal benefits and privileges of employment. EEOC Technical Assistance Manual § 3.6; *Jones v. United Parcel Service*, 214 F.3d 402 (3d Cir. 2000); *Davoll v. Webb*, 194 F.3d 1116 (10th Cir. 1999); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999).

Once an employee has notified the employer that he or she needs an accommodation, the ADA regulations place significant responsibility for determining the appropriate accommodation on the employer. In executing this responsibility, the regulations suggest that the employer should engage in the interactive process:

To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

29 C.F.R. § 1630.2(o)(3). (Emphasis added) Although the regulation uses permissive language – “it may be necessary” – the EEOC clearly views an employer’s obligation to engage in an interactive process with the disabled employee to be mandatory.

Once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability.
As part of the interactive process, the employer should meet with the employee and discuss frankly and calmly the need for an accommodation. This will necessarily require that the employer obtain detailed information from the employee about the nature of the employee’s disability, how the disability affects the employee’s ability to perform the essential functions of his or her job, and any work restrictions imposed by the employee’s physician.¹ The courts have not been sympathetic to employees who have refused to cooperate with an employer’s efforts to obtain such information. See, e.g., *Kennedy v. Superior Printing Co.*, 215 F.3d 650 (6th Cir. 2000) (court upholds the discharge of an employee for failing to attend a second scheduled independent medical examination to verify his disability status); *Beck v. University of Wisconsin Bd. of Regents*, 75 F.3d 1130 (7th Cir. 1996) (employee responsible for the breakdown in the interactive process where she would not sign a medical release seeking information from her physician or attend meetings regarding accommodations).

To the extent that there is a need to clarify any issues regarding the nature of the employee’s disability, the accommodations needed or the work restrictions imposed by the employee’s health care provider, employers can and should communicate with the employee’s health care provider. A helpful approach for such a communication, particularly if the employer believes that there may be a dispute regarding accommodations, is to prepare specific questions in a letter or other communication to the health care provider which solicits a written response. A suggested format for such a communication is attached to this paper as Attachment 1. The foregoing communication should not be sent directly to the health care provider but should instead be supplied to the employee with a request that he or she obtain responses from his or her health care provider. If the employee asks the employer to contact the health care provider directly, the employer should get that request in writing. When the information is returned from the health care provider, if there is a need for clarification, provide the employee with a written explanation of the clarification needed and request that the employee obtain the clarification from the health care provider. Depending on the nature of the accommodation request, employers should also consider consulting with other experts such as occupational therapists, rehabilitation specialists, etc. in determining appropriate alternatives accommodations.

Employers will need to supply the health care providers and any other experts with detailed job descriptions and, in appropriate cases, allow them to tour the facility to observe the performance of the job at issue in order to obtain advice regarding possible accommodations. Another possibility is to provide the health care provider or other expert with a video-tape of the job being performed so that the health care provider or other expert can evaluate the range of motion required, the frequency with which certain tasks are performed, and the like. It is useful

¹ The EEOC’s Interpretive Guidance on the ADA states that employers should: “[c]onsult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual’s disability. . . .” 29 C.F.R. § 1630.9, App.
to consult with the health care provider or other expert to determine the best source of
information for his or her evaluation of possible accommodations.

If necessary, it is permissible for the employer to conduct a medical examination in order
to determine whether the employee has a disability that is covered by the ADA and, if so, to
assist in determining the appropriate accommodation. 29 C.F.R. § 1630.14(c); 20 C.F.R. §

Medical inquiries related to an employee’s disability and functional limitations
may include consultations with knowledgeable professional sources, such as
occupational and physical therapists, rehabilitation specialists, and organizations
with expertise in adaptations for specific disabilities.

EEOC Technical Compliance Manual, § 6.6. Although some courts have held that an
employee’s treating health care provider “does not have the final word on determining what is or
(W.D.N.Y. 1993), the EEOC’s Enforcement Guidance on Disability-Related Inquiries and
Medical Examinations of Employees, § B(11), provides that such independent examinations
should only occur if the employee provides insufficient documentation from his or her treating
health care provider to substantiate that the employee has a disability and needs a reasonable
accommodation. See also, Enforcement Guidance on Reasonable Accommodation and Under
Hardship. According to the EEOC, documentation from the employee’s health care provider is
insufficient “if it does not specify the existence of an ADA disability and explain the need for
reasonable accommodation.” Id. The documentation may also be insufficient if the health care
professional does not have the expertise to given an opinion about the employee’s medical
condition and limitations, the information supplied does not specify the functional limitations
caused by the disability, or the information supplied does not appear to be credible or is
fraudulent. Id.

Medical examinations conducted by the employer’s health care professional must be job-
related and consistent with business necessity. Id. According to the EEOC:

This means that the examination must be limited to determining the existence of
an ADA disability and the functional limitations that require reasonable
accommodation.

Id. Keep in mind that if an employer requires an employee to go to a health care professional of
the employer’s choice, the employer must pay all of the costs associated with the visit. Id.

The courts have acknowledged that “obtaining a physician’s detailed assessment and then
acting in accordance with it can be persuasive evidence that an employer has based its decision
on an individualized inquiry into the applicant’s [or employee’s] capabilities.” Gillon v. Fallon
Ambulance Service, Inc., 283 F.3d 11, 31 (1st Cir. 2002). Notwithstanding the fact that a
medical opinion is often cogent evidence of nondiscriminatory intent,” the existence of such an
opinion does not provide an employer with “complete insulation” under the ADA. Id. “[A]n
employer cannot slavishly defer to a physician’s opinion without first pausing to assess the
objective reasonableness of the physician’s conclusions.” In Holiday v. City of Chattanooga, 206 F.3d 637, 645 (6th Cir. 2000), the Sixth Circuit stated:

Courts need not defer to an individual doctor’s opinion that is neither based on the individualized inquiry mandated by the ADA nor supported by objective scientific and medical evidence. The Supreme Court has expressly rejected the notion “that an individual physician’s state of mind could excuse discrimination without regard to the objective reasonableness of his actions.” Bragdon v. Abbott, 524 U.S. 624, 118 S.Ct. 2196, 2210, 141 L.Ed.2d 540 (1998) (holding that an individual doctor’s unsupported belief that a patient’s HIV status rendered her a health risk was not dispositive under the ADA). Instead, “courts should assess the objective reasonableness of the views of health care professionals without deferring to their individual judgments.” Id.

See also, Thompson v. City of Arlington, Tex., 838 F. Supp. 1137, 1147 (N.D. Tex. 1993) (“Defendants were not obligated to defer to the opinions of the mental health specialists as to whether plaintiff was fit to return to regular duty. . . . Total reliance on opinions of the health providers would carry with it the obvious risks of deception caused by therapeutic-type recommendations, made in the interests of the patient rather than with the goal of ensuring that the objectives of the police department have been satisfied.”).

Employees who do not cooperate with an employer’s attempts to obtain medical information substantiating the disability and the employee’s limitations either through the employee’s physician or by conducting medical examinations will not be protected by the ADA. For example, in Kennedy v. Superior Printing Co., 215 F.3d 650 (6th Cir. 2000), the employee was discharged for failing to attend a second scheduled independent medical examination to verify his disability status. The employer questioned a note from the employee’s physician because it was 15 months old. The court dismissed the lawsuit, holding that employers may make inquiries or require medical examinations necessary to the reasonable accommodation process. The employer need not take the employee’s word that he has an illness that may require a special accommodation. EEOC v. Prevo’s Family Market, Inc., 135 F.3d 1089, 1094 (6th Cir. 1998). Likewise, in Steffes v. Stepan Co., 144 F.3d 1070 (7th Cir. 1998), when the physician’s documentation provided by the employee was not responsive to the employer’s request for information, the plaintiff was deemed to be responsible for the breakdown of the interactive process and should have obtained more responsive information from her health care provider. See also, Williams v. Prison Health Services, Inc., 159 F. Supp.2d 1301 (D. Kan. 2001) (ADA claim rejected where employee interfered with the interactive process by refusing to permit her physician to release any medical information to the employer except through her attorney).

D. Fitness for Duty

If an employer has a reasonable belief that an employee’s current ability to perform an essential function(s) of his or her job may be impaired by a medical condition or that he or she may pose a direct threat to him or herself or others, the employer can require the employee to submit to a medical examination conducted by a health care provider of the employer’s choice or to respond to disability-related inquiries. See Enforcement Guidance on Disability-Related
Any inquiries or examinations must be “limited in scope to what is needed to make an assessment of the employee’s ability to work.” Id. Not only is such a tool available when an employee is returning to work following a leave of absence, but it can be used to address concerns over a potentially violent employee.
ATTACHMENT 1

Medical Inquiry Form for a Reasonable Accommodation Request

This form should be completed by a health care provider to assist in determining if an individual has a disability under the Americans with Disabilities Act (ADA) and/or state disability laws and will require a reasonable accommodation.

Name: ___________________________________
(Please print)

<table>
<thead>
<tr>
<th>Question</th>
<th>YES</th>
<th>NO</th>
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<tbody>
<tr>
<td>Does the individual listed above have a physical or mental impairment?</td>
<td></td>
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<tr>
<td>If so, what is the impairment?</td>
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<tr>
<td>Is the impairment long-term or permanent?</td>
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<tr>
<td>If not permanent, how long will the impairment likely last?</td>
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<td>Does the impairment affect a major life activity?</td>
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<td>If yes, what major life activity(s) is affected, and how is the major life activity(s) affected?</td>
<td></td>
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</tbody>
</table>

B. Questions to help determine whether an accommodation is needed:

If the associate has a disability, the following questions may help determine whether an accommodation is needed because of the disability. A description of the associate’s job has been provided along with this form to assist you in responding to these questions:

1. Is the individual incapacitated and unable to perform work of any kind?   |     |    |
2. If the individual is able to perform some work, please identify which, if any, job functions of a ___________ that this individual is totally restricted from performing with or without an accommodation and how long you anticipate those restrictions will last.
3. Identify which, if any, ____________________ job functions this individual is currently able to perform with some restrictions as to magnitude, duration, method or manner, and specifically identify the applicable restrictions and how long you anticipate those restrictions will last?

_______________________________________________________________________________

_______________________________________________________________________________

_______________________________________________________________________________

_______________________________________________________________________________

_______________________________________________________________________________

C. Questions to help determine an accommodation (if applicable):

1. Identify any and all accommodations that you are aware of that could be made to enable the individual to perform any of the job functions discussed in Part B(3) above.

_______________________________________________________________________________

_______________________________________________________________________________

_______________________________________________________________________________

2. Can this individual safely perform his/her job with or without accommodation(s) without creating a significant risk of harm to him/herself or others? If not, when, if ever, do you believe the individual will be able to perform his/her job safely as stated previously?

_______________________________________________________________________________

_______________________________________________________________________________

_______________________________________________________________________________

3. Please respond to the following additional questions:

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_______________________________________________________________________________
Attached is the individual’s job description