

Tricky Rules Surround FMLA Fitness for Duty Certifications

HR Daily Advisor: Tuesday, January 17, 2012 by Steve Bruce

A member of Miller & Martin PLLC in Chattanooga, Tennessee, Caraway made her remarks at BLR's Advanced Employment Issues Symposium, held recently in Las Vegas.

Return-to-Work Certifications

First of all, return-to-work or fitness-for-duty certifications are only applicable if the employee's leave is related to his or her own serious health condition, says Caraway. And certifications may generally only be requested for "regular" FMLA leave, not intermittent leave.

If the employer intends to require a fitness-for-duty certification before return to work at the end of an FMLA leave, the employer must notify the employee of this fact no later than the FMLA designation notice.

The notice must also specify whether the fitness-for-duty certification must address whether the employee will need a simple statement that he or she is cleared to return to work, or whether the certification must assess the employee's ability to perform the essential functions of the employee's job. If so, the employer must attach a list of essential functions that the certification will assess.

DOL's *Designation Notice* (Form WH-382) contains a statement to this effect. Employers need only check off the fitness-for-duty statement on the WH-382 and, if appropriate, attach a list of essential job functions to the WH-382 to comply.

Other factors around fitness-for-duty certifications:

Uniform policy. Fitness-for-duty certification requirements must be made as part of a "uniformly applied policy or practice" that requires all similarly situated employees who take leave for certain medical conditions to obtain fitness-for-duty certification (e.g., all airport luggage handlers with back injuries must obtain fitness-for-duty certification before returning to work).

ADA. Be aware that the ADA may apply if the employee's serious health condition is also a disability, Caraway reminds employers.

Second and third opinions. You may not require a second or third opinions on a fitness-for-duty certification.

Cost of the certification. The employee is responsible for the cost of the fitness-for-duty certification. The employee is not entitled to be paid for the time or travel costs spent in acquiring the certification.

Failure to provide fitness-for-duty certification. If the employer properly notified the employee of the fitness-for-duty certification requirements, and no certification is returned *within 15 days* (and the employee provides no information regarding his or her diligent good-faith efforts to secure certification), the employer may delay job restoration until the employee provides the certification. If the employee never provides the certification, he or she may be denied reinstatement.