QUALIFYING REASONS FOR

FMLA LEAVE

J. J. Keller® FMLA Manager

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WHITEPAPER

An employee suddenly needs time off. She calls in to her supervisor to let the company know of the need. The reason the employee needs time off could be anything from taking her injured dog to the vet to her coming down with an illness that results in hospitalization.

Until employers dig a bit deeper, they won't know if the reason for the absence qualifies for the Family and Medical Leave Act's (FMLA) potent protections.

The FMLA can seem deceptively simple on the surface, but once its surface is scratched, the challenges begin to emerge.

On the surface, eligible employees may take up to 12 weeks of FMLA leave for the following reasons:

- The birth of a son or daughter and to bond with the newborn child;
- Placement of a son or daughter with the employee for adoption or foster care and to bond with the newly placed child;
- For a serious health condition that makes the employee unable to perform the functions of his or her job, including incapacity due to pregnancy and for prenatal medical care;
- To care for the employee's spouse, son, daughter, or parent who has a serious health condition, including incapacity due to pregnancy and for prenatal medical care; or
- For any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty or call to covered active-duty status.

Eligible employees may also take up to 26 workweeks of leave during a single 12-month period to care for a covered servicemember with a serious injury or illness, when the employee is the spouse, son, daughter, parent, or next of kin of the servicemember.

Eligible employees are limited to a combined total of 26 workweeks of leave for any FMLA-qualifying reasons during the single 12-month period.

The devil is, however, in the details, and there are many.

BIRTH OF A CHILD

For purposes of the FMLA, the birth of a child doesn't include only the actual birth of the child and recovery from the delivery. Employees may take a full 12 weeks of FMLA leave

before the birth, for the birth/recovery, and to bond with a newborn. Employers need to be aware that leave to bond with a child is to be taken within 12 months of the birth.

While employers might think that pregnancy is part of the concept of "birth of a child" — and it sort of is — pregnancy, delivery, and recovery are generally covered under the serious health condition part of the reasons.

Leave taken for the birth and care for the newborn is not limited only to the child's mother. Male employees who become new fathers would be entitled to leave to bond with the child.

FAQ:

Q: Do the parents of the child need to be married? Joe Employee might not, for example, be married, but his girlfriend is having his child.

A: No. The couple need not be married for Joe to be entitled to the 12 weeks of leave for the birth of his child. A father is a father for the purposes of FMLA.

If the couple is married, both work for you, and want to take FMLA leave to bond with their healthy child, you may require that they "share" the 12 weeks of FMLA taken for bonding.

The FMLA defines a "child" as biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis (standing in as a parent).

The latter refers to a relationship in which a person puts himself or herself in the situation of a parent by assuming and discharging the obligations of a parent to a child. In the FMLA world, the *in loco parentis* relationship exists when an employee intends to take on the role of a parent to a child who is under 18 or 18 years of age or older and incapable of self-care because of a mental or physical disability.

No legal or biological relationship is necessary for an in-loco parentis relationship. An employee, for example, who will co-parent a same-sex partner's biological child may take FMLA leave for the birth or placement of the child and for bonding.

Documentation

Unlike leave due to a serious health condition, employers may not ask for a certification supporting the need for leave for bonding with a healthy child. Since no one has a serious health condition (bonding leave begins after recovery from the delivery), a doctor would have no input on a medical condition.

Employers may, however, ask for documentation of family relationship, such as a birth certificate, but this could also take the form of a simple statement asserting the relationship.
If an employee provides a simple statement, employers may ask that it be put into writing.

For an employee who stands in loco parentis to a child, such statement may include, for example, the name of the child and a statement of the employee's in loco parentis relationship to the child.

Employees should provide sufficient information to make the employer aware of the in loco parentis relationship. When suspected, however, employers are expected to inquire as to whether the situation involves an in loco relationship. If, for example, an employee requests leave to care for a grandparent, the employer should ask if the grandparent stood in as a parent to the employee when the employee was a child.

PLACEMENT OF A CHILD

FMLA leave may be taken when an employee adopts a child or receives foster placement of a child. Unless an adoption or foster care placement (or birth) is involved, the employee would not be entitled to FMLA leave to bond with the child. Often, employees wish to take time off because they are somehow awarded custody of a child but have not gone through adoption or foster care placement.

While such employees may be entitled to take FMLA leave to care for a child with a serious health condition, as they are standing in as parents to the child, they may not take FMLA leave to bond with a child outside of adoption or foster care placement.

FMLA leave may also include time prior to the actual placement for related issues, such as the following:

- Meeting with professionals (e.g., doctors, attorneys);
- Attending counseling sessions;
- Making court appearances; and
- Submitting to examinations.

FAQ:

Q: What if adoption involves travel; does the travel time also count as FMLA leave?

A: Yes. Let's say Joe Employee is adopting a child from China and has repeatedly missed work due to meetings with doctors, lawyers, and the adoption agency, and now wants to travel to China and back and subsequently take time off to bond with the child for several weeks after returning home. All these reasons, including the travel, would qualify as FMLA leave.

An employee may be standing in as a parent to a child obtained through adoption or foster care placement, and the same provisions for the birth of a child would also apply to adoption or foster care placement.

As with FMLA leave to bond with a child by birth, leave for bonding with an adopted or newly placed child through foster care needs to be taken within 12 months of the placement.

Documentation

Documentation for an adoption or foster care placement generally would not involve a certification from a healthcare provider. It could, however, include a court document or a simple statement of the family relationship.

Employers are entitled to examine official documents but must return them to the employee. The employee generally gets to choose what to provide, but if the employee provides a simple statement, employers may require that the statement be put into writing.

EMPLOYEE'S OWN CONDITION

One of the most frequent questions employers may have when it comes to the FMLA is:

"Is _____ covered by the FMLA?"

Generally, the question addresses whether a particular medical condition or procedure is protected by the law. The name of a condition or procedure, however, is not the determining factor. The determining factor is whether the condition meets the definition of a serious health condition, as defined by the FMLA.

A disability plan or even a workers' compensation law might have different definitions regarding who is entitled to benefits under those provisions. For purposes of the FMLA, however, the condition needs to meet the FMLA's own definition of what constitutes a serious health condition.

SERIOUS HEALTH CONDITION

A serious health condition is an illness, injury, impairment, or physical or mental condition that involves **inpatient care** or **continuing treatment** by a healthcare provider.

For all conditions, "incapacity" means inability to work, including being unable to perform any one of the essential functions of the employee's position. For family members, this involves the inability to attend school, or perform other regular daily activities due to the serious health condition. Incapacity also includes treatment of the serious health condition, or recovery from the serious health condition.

An employee is "unable to perform the functions of the position" where the healthcare provider finds that the employee is unable to:

- Work at all, or
- Perform any one of the essential functions of the employee's position.

An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment.

The term "treatment" includes but is not limited to examinations to determine if a serious health condition exists and evaluations of the condition.

Not all conditions are FMLA serious health conditions. The common cold or flu or headaches would likely not be one unless complications develop — unless the condition ends up meeting the definition.

FAQ:

Q: Can the flu ever be a serious health condition?

A: Yes, as long as it meets the definition. The flu often won't require an overnight stay in a healthcare facility and, although it might be incapacitating for a while, it might not need treatment from a healthcare provider; it is not a chronic or permanent condition, nor is it likely to require multiple treatments. Therefore, it wouldn't normally meet the definition of a serious health condition.

If, however, complications set in, the flu can certainly be a serious health condition.

The FMLA is not intended to cover minor, short-term conditions since these would normally be covered by the company's sick leave policies.

Serious health conditions are generally defined as follows:

Inpatient Care
An overnight stay in a hospital, hospice, or residential medical care facility. Includes any period of incapacity or any subsequent treatment in connection with the overnight stay.
Continuing Treatment by a Healthcare Provider (any one or more of the following)
Incapacity Plus Treatment
A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves: • Two or more in-person visits to a healthcare provider for treatment within 30 days of the first day of incapacity unless extenuating circumstances exist. The first visit must be within seven days of the first day of incapacity; or, • At least one in-person visit to a healthcare provider for treatment within seven days of the first day of incapacity, which results in a regimen of continuing treatment under the supervision of the healthcare provider. For example, the health provider might prescribe a course of prescription medication or therapy requiring special equipment.
Pregnancy
Any period of incapacity due to pregnancy or for prenatal care.

Common ailments like a **cold or the flu may fit the definition** of a serious health condition if certain criteria are met.

Chronic Conditions
Any period of incapacity due to or treatment for a chronic serious health condition, such as diabetes, asthma, migraine headaches. A chronic serious health condition is one which requires visits to a healthcare provider (or nurse supervised by the provider) at least twice a year and recurs over an extended period of time. A chronic condition may cause episodic rather than a continuing period of incapacity.
Permanent or Long-term Conditions
A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective, but which requires the continuing supervision of a healthcare provider, such as Alzheimer's disease or the terminal stages of cancer.
Conditions Requiring Multiple Treatments
• Restorative surgery after an accident or other injury; or • A condition that would likely result in a period of incapacity of more than three consecutive, full calendar days if the employee or employee's family member did not receive the treatment.

This definition will apply to an employee's condition as well as that of a family member.

Employers often ask whether elective procedures are covered. If an eligible employee requests FMLA leave for surgery or procedure that requires and/or results in an overnight stay in the hospital, the leave request would meet the definition of a serious health condition under the inpatient care criteria, even if the surgery is considered elective.

If, for example, Joe Employee elected to donate one of his kidneys, he would have a serious health condition once the surgery has begun. It would not matter that he was perfectly healthy before the donation. The procedure would likely result in an overnight stay in a hospital.

FAQ:

Q: What is an overnight stay?

A: At least one court found that an overnight stay means a stay for a substantial period of time from one calendar day to the next as measured by the individual's time of admission and the time of discharge.

> Elective procedures may be protected by the FMLA.

This does not mean that an overnight stay is required for a condition to be a serious one. The definition speaks to conditions that require an overnight stay OR continuing treatment.

Not all of the situations under Continuing Treatment require a period of incapacity of more than three days. Only situations that involve the incapacity and treatment part of the definition involve three days. For pregnancy, chronic conditions, permanent/long-term conditions, and conditions that require multiple treatments, *any* period of incapacity need be involved.

Remember, the *more than three days* refers to a period of incapacity, not necessarily a period of absence. If, for example, Joe Employee is incapacitated on Wednesday, Thursday, and Friday, and is still incapacitated on Saturday, even though he is not scheduled to work on Saturday, the condition would be a serious health condition because he was incapacitated for more than three days. Therefore, the absence would qualify for FMLA protections, even though he missed only three days of work.

Pregnancy is a serious health condition, so employees may take FMLA leave when they (or their spouses) are incapacitated by pregnancy. Being incapacitated includes being absent for treatment, so employees would be entitled to FMLA leave to attend prenatal visits. This applies to the pregnant individual and the spouse.

In addition to a condition, treatments for the condition might result in incapacity. If Joe Employee is undergoing chemotherapy, for example, he may need FMLA leave due to the side effects of the chemotherapy.

The treatment must be provided by or on referral of a "healthcare provider." Healthcare providers include the following:

- Doctor of medicine
- Doctor of osteopath
- Podiatrist
- Dentist
- Clinical psychologist
- Optometrist
- Physician assistant
- Chiropractor
- Nurse practitioner
- Nurse midwife
- Clinical social worker
- Christian Science Practitioner

Chiropractors are limited to treatment consisting of manual manipulation to correct a subluxation as demonstrated by X-ray to exist.

Also included are any providers from whom a company's health plan's benefit manager will accept certification supporting a claim for benefits, so employers might need to look at their benefits information to see who might be included as a healthcare provider for FMLA purposes.

CARE FOR A FAMILY MEMBER

Employees may take FMLA leave to care for a family member, but those family members are limited to a spouse, parent, or child.

Spouse

Spouse means a husband or wife as defined or recognized in the state where the individual was married and includes individuals in a same-sex marriage or common law marriage. Spouse also includes a husband or wife in a marriage that was validly entered into outside of the U. S. if the marriage could have been entered into in at least one state.

Parent

Parent means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee when the employee was a child. This term does not include parents "in law."

Child

Child means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and "incapable of self-care because of a mental or physical disability" at the time that FMLA leave is to commence.

Don't forget that in loco parentis relationships — those with day-to-day responsibilities to care for or financially support a child — have no need for a biological or legal relationship.

A power power of attorney, however, does not automatically automatically create a parent/child relationship for purposes of the FMLA. If, for example, Joe Employee were to obtain power of attorney for his uncle, that power of attorney would not necessarily create the required parent/child relationship.

FAQ:

Q: May employees take FMLA leave to care for a partner in a domestic partnership?

A: No, it must be a legal marriage as defined by state law. This could include common law marriages. The gender of the spouses is not a consideration. State leave laws, however, could include family members beyond the federal FMLA, including domestic partnerships, siblings, grandparents, grandchildren, and so on.

LEAVE TO CARE FOR AN ADULT CHILD

Employees may take FMLA leave to care for a child who is 18 or over, but in order to do so, the child must:

- Have a disability as defined by the Americans with Disabilities Act (ADA) at the time the leave is to begin,
- Be incapable of self-care because of the disability,
- Have a serious health condition, and
- Need care because of the serious health condition.

A disability is an impairment that substantially limits one or more major life activities. Incapable of self-care means needing help or supervision in three or more daily life activities such as taking care of hygiene, dressing, eating, cleaning, paying bills, maintaining a residence, and so on.

Of course, the condition must also be an FMLA serious health condition.

The bottom line is that an employee is not entitled to FMLA leave to care for a child over age 18 who does not have a disability within the meaning of the ADA, including a daughter over 18 who is pregnant or is recovering from childbirth. Pregnancy, by itself, is not a disability under the ADA. Pregnancy-related disabilities, such as preeclampsia or gestational diabetes, however, could be disabilities under the ADA.

NEEDED TO CARE FOR

If an FMLA request is for a family member with a serious health condition, you need to examine whether or not the employee is needed to care for the family member.

This term is fairly broad. It encompasses both physical and psychological care. Physical care includes situations where the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport themselves to the doctor, etc.

Psychological care includes providing comfort and reassurance that would be beneficial to the family member who is receiving inpatient or home care. This can include simply holding the family member's hand.

Obviously, the term involves many and varied circumstances, and is quite generous with regard to the types of care which may be provided for the family member. The family member and the employee should be physically near each other. Taking two weeks off to prepare a house for a family member's safe homecoming from the hospital may not qualify as FMLA leave.

An employee's need to care for a family member with a serious health condition may encompass both physical and psychological care.

FAQ:

Q: What if others are available to provide care to a family member?

A: Whether others are there to provide care doesn't matter. The employee need not be the only individual available to provide care, nor does he or she need to be the primary caregiver. It wouldn't matter, for example, if Joe Employee had nine siblings who might also be providing care for his parent. If Joe were providing care, he would be entitled to the FMLA leave.

QUALIFYING EXIGENCY

Eligible employees may take FMLA leave when a family member (spouse, parent, or child – of any age) is in the military and the military duty causes a qualifying exigency – an urgent need or demand. There are basically nine "qualifying" exigencies:

1. Short-notice deployment
2. Military events and related activities
3. Childcare and school activities

4. Financial and legal arrangements
5. Counselings
6. Rest and recuperation
7. Post-deployment activities
8. Parental care
9. Additional activities

The first two exigencies are fairly straightforward. Employees would be able to take FMLA leave to address issues that arise from a covered service member's notification of an impending call or order to active duty.

Employees would also be entitled to take FMLA leave to attend official ceremonies, programs, or events sponsored by the military. This includes attending family support or assistance programs and informational briefings by the military or an organization like the American Red Cross.

The third one, childcare and school activities, may be used to arrange for alternative childcare. Providing childcare must be only on an urgent, immediate-need basis. It is not to be used for routine, regular, or everyday childcare/babysitting. If the employee knew about the deployment three months in advance, it'd be hard for the employee to argue that the childcare need was urgent or immediate.

FAQ:

Q: What are additional activities?

A: The additional activities are whatever is agreed upon between employer and employee. Employers should also agree to the timing and the duration of such leave. Of course, documenting this is always suggested.

These qualifying exigencies generally do not involve medical situations.

MILITARY CAREGIVER

Eligible employees are entitled to up to 26 weeks of leave in the 12 months measured forward from when the leave begins. Unlike the exigencies, military caregiver involves medical situations.

For military caregivers, the definition of family member is expanded to include the next-of-kin. Next-of-kin is the nearest blood relative, other than spouse, parent, son, or daughter. Again, for the military family leave, the son or daughter may be of any age.

This provision includes family members who are veterans with an injury or illness that was incurred or aggravated in the line of duty. The employee must begin leave to care for a veteran within five years of the veteran's military duty.

DETERMINING IF LEAVE QUALIFIES

When an employee puts an employer on notice of the need for leave, employers may ask a few questions, such as whether the employee is unable to perform his or her job, whether the employee is under the care of a healthcare provider, and so on — basically the questions follow the qualifying reasons for leave. Employers may also ask about the timing and duration of the leave.

Certifications are where employers get most of the information to determine whether the reason qualifies for FMLA leave. When an employee puts the employer on notice of the need for leave, the employer must give the employee an eligibility/rights and responsibilities notice within five business days. The employer may also provide a certification form for the employee to have completed and returned. Employees have at least 15 calendar days to return a requested certification.

These certifications are often completed by medical professionals, but those for qualifying exigencies are not.

Except for leave for bonding with a healthy child, employers may request certification supporting the need for leave.

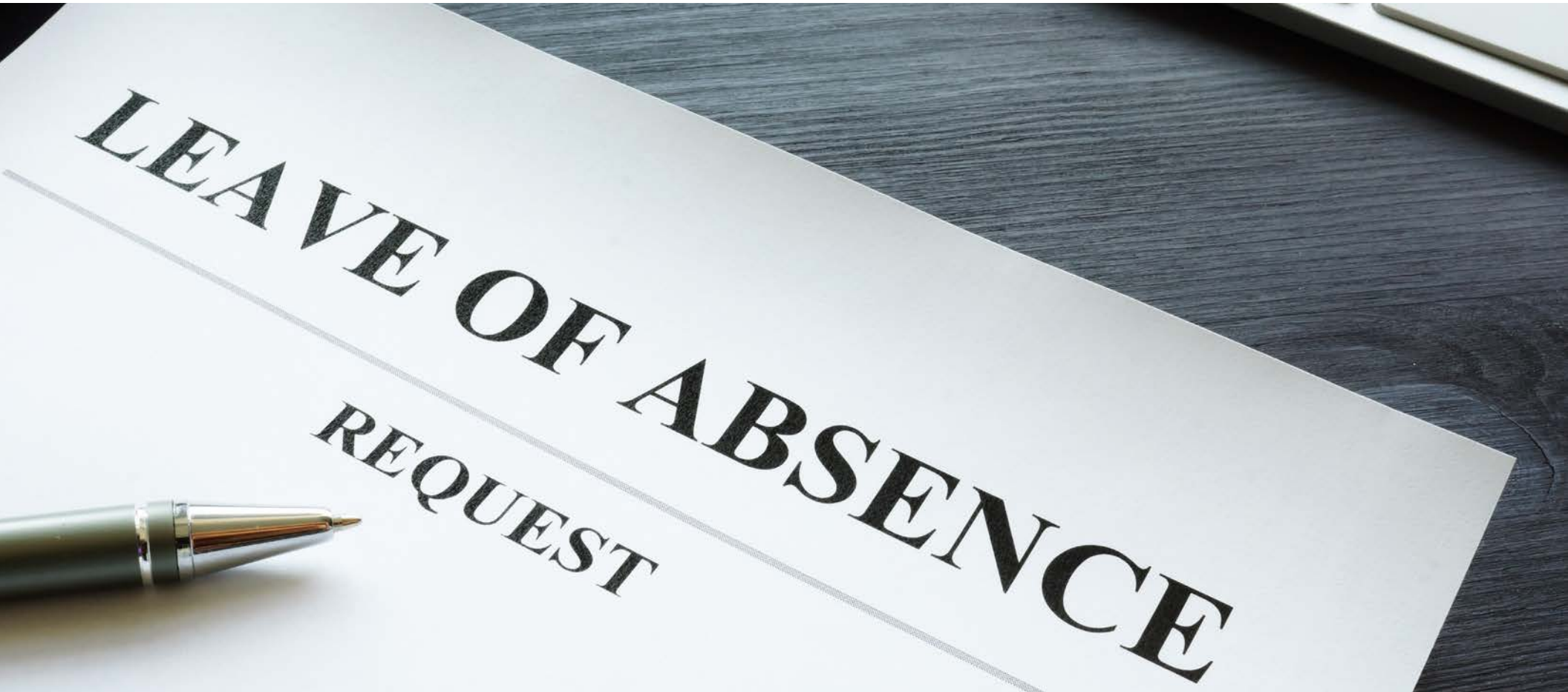
Once received, employers are to look over the certification carefully and compare it to the definition of a serious health condition. The latest certification forms from the DOL are laid out nicely and have a checklist of the parts of the definition on the second page. The health care provider can check one.

If the certification is incomplete or insufficient, the employer is to return it to the employee with a written list of what would make it complete and sufficient, and the employee has at least seven days to cure any deficiencies.

If the information in the certification indicates that the condition is a serious one, the reason would qualify for FMLA protections. If it does not, the reason would not qualify for FMLA protections.

Of course, once employers have enough information to determine if an absence qualifies for FMLA protections, they have five days to give the employee a designation notice.

Employers may also ask for recertification every now and then, but that's a whole different ball of wax!



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