HR COMPLIANCE BULLETIN

7th Circuit Employers May Have to Look Beyond FMLA Certification

Employers are permitted to require medical certifications from employees seeking leave under the federal Family and Medical Leave Act (FMLA). However, the U.S. Court of Appeals for the 7th Circuit recently held in *Davis v. Illinois Department of Human Services* that employees may be entitled to FMLA leave even if the reason for that leave is not stated in the employee's medical certification.

The case involved a pregnant employee who was terminated for taking FMLA leave for morning sickness, a condition her employer was aware of but that was not mentioned in her FMLA medical certification. The court also found that the employer's notice procedures for substituting paid leave did not comply with the FMLA.

The 7th Circuit's jurisdiction covers Illinois, Indiana and Wisconsin, and employers operating in those states must follow the court's opinion.

Employer Resources

- The Employer's Guide to the FMLA
- FMLA Fact Sheet #28G: Medical Certifications
- FMLA regulations

Highlights

- Employees may be entitled to FMLA leave for conditions not indicated in the medical certification if the employer is aware of them.
- Employees who fail to meet the requirements of an employer's paid leave policy may not be denied FMLA leave on that basis, even where the employer requires substitution of paid leave.

Action Steps

- 7th Circuit employers should review FMLA medical certifications carefully. Employers may want to return for supplementation any certifications that do not cover conditions the employer knows about.
- Employers must ensure that their FMLA substitution of paid leave procedures and policies comply with the FMLA and its regulations.

Provided to you by **McGohan Brabender**

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Background

The *Davis* case addresses FMLA rules surrounding medical certification and the substitution of paid leave. A high-level understanding of the rules relevant to the case is helpful in considering the court's opinion.

MEDICAL CERTIFICATION UNDER THE FMLA

The federal FMLA allows eligible employees of covered employers up to 12 weeks of job-protected leave for specified reasons related their and their family members' health and well-being, including for their own serious health condition.

Under the FMLA, employers may require employees to provide certification from their health care provider if their need for leave under the statute is due to a serious health condition. The certification includes specific information, such as:

- The date the serious health condition began and how long it will last;
- Appropriate medical facts about the condition, such as symptoms, hospitalization or doctor's visits;
- Information showing that the employee cannot perform the essential functions of the job, if the leave is for the employee's own serious health condition; and
- An estimate of how much time will be needed for each absence, how often absences may occur, and information establishing the medical necessity for taking the leave, if the leave is intermittent.

The FMLA statute and regulations provide a detailed process for requesting and submitting medical certifications. As part of that process, employees must provide a complete and sufficient certification. Certificates with applicable entries left blank are incomplete, and those with vague, ambiguous or nonresponsive information are insufficient. If the employer finds the certification incomplete or insufficient, it must inform the employee, stating in writing what additional information is necessary. The employee then has seven days to correct the certification.

SUBSTITUTION OF PAID LEAVE UNDER THE FMLA

The FMLA allows employees to substitute accrued paid leave for unpaid FMLA leave, during which both leaves run at the same time and the employee is paid for the leave that would otherwise be unpaid. The FMLA also allows employers to require this substitution.

When an employee chooses, or an employer requires, substitution of accrued paid leave, the employer must inform the employee that they are required to satisfy procedural requirements of the paid leave policy only in connection with the receipt of payment under that policy. Importantly, the employee remains entitled to take unpaid FMLA leave even if they fail to meet the procedural requirements of the paid leave and are therefore ineligible for the substitution.

Davis v. Illinois Department of Human Services

Dyamond Davis was an employee of the Illinois Department of Human Services when she became pregnant and developed morning sickness, which resulted in her taking FMLA leave on a number of occasions. Davis informed her supervisor of the reason for the leave in at least one instance. Davis filled out the required FMLA timekeeping paperwork, including substituting her accrued paid leave for the FMLA leave (which the department required); however, her designated bank of paid leave was 30 minutes short of the actual leave time she took on one occasion.

Eventually, the department fired Davis for taking leave that went beyond the scope of its FMLA approval and for violating its policies requiring the substitution of accrued paid leave. The lower court granted the department's motion for summary

judgment. On Davis' appeal, the 7th Circuit reversed the lower court's decision and remanded the case back to the lower court for further proceedings.

DAVIS' MEDICAL CERTIFICATION

The medical certification Davis submitted from her obstetrician in support of her request for FMLA leave noted that because she had lupus, Davis would require monthly medical appointments until a certain date, followed by biweekly and then weekly appointments for defined periods, and at least six weeks of recuperation following childbirth. The certification indicated that the condition would not cause episodic flare-ups that would prevent Davis from working, and it did not mention morning sickness.

Davis' request for FMLA leave was approved for the appointments and the post-childbirth periods mentioned in the certification. The department argued that it was justified in firing Davis because her FMLA approval did not cover leave for morning sickness.

The 7th Circuit noted in its decision that the department was "well aware" of Davis' need to take intermittent leave for morning sickness when it approved her FMLA request. It stated that **where the employer is aware of the employee's need to take leave beyond what is specified in the medical certification, "an employee's entitlement to FMLA leave is not strictly bound by the [certification's] precise parameters."** The court also held that a reasonable jury could find that the department knew the medical certification was incomplete, given its knowledge of Davis' morning sickness, and it should have provided Davis with an opportunity to supplement the certificate, pursuant to FMLA regulations.

THE DEPARTMENT'S SUBSTITUTION OF PAID LEAVE POLICY

The department's policy requiring employees to substitute accrued paid leave for FMLA absences stated that if the employee did not have the requested accrued benefit time to cover the absence, the absence would remain unauthorized "whether or not it is an FMLA-related absence" and that "disciplinary action may be taken." The department partly based its termination of Davis on the fact that one of her FMLA absences exceeded her available designated substituted paid leave by 30 minutes. The department therefore viewed the absence as unauthorized and subject to disciplinary action under its policy.

The appeals court found that the FMLA does not permit an employer to discipline an employee for failing to meet its paid leave substitution policy, particularly where the FMLA leave has been approved. It also noted that the department's FMLA policy did not inform employees that they were still entitled to take unpaid FMLA leave if they did not meet the conditions for paid leave, as required by FMLA regulations.

Employer Takeaways

Employers may be accustomed to treating FMLA leave as unauthorized if it does not fit within the terms of an employee's medical certification. In light of the *Davis* decision, employers—particularly those in the 7th Circuit—should carefully review required FMLA medical certifications for omitted conditions of which they are aware. It would be prudent for employers wishing to avoid a *Davis*-like outcome to return certifications that seem deficient, giving the employee an opportunity to obtain a more complete description from their health care provider.

Additionally, employers should ensure their substitution of paid leave policies inform employees that FMLA is still available even if an employee fails to satisfy the requirements for paid leave.