

VI. The Medical Certification and Verification Process

The Department asked several questions in the Request for Information regarding the medical certification and verification process. This chapter addresses the Department's request for comments on the following issues: whether the regulatory restriction in section 825.307(a) that permits an employer to contact the employee's health care provider for purposes of clarification and authentication only through the employer's health care provider results in unnecessary expense or delay and what are the benefits of the restriction; whether the optional model certification form (WH-380) seeks the appropriate information and how it could be improved; whether the general 30-day period for recertification set forth in section 825.308 is an appropriate time frame; whether second opinions should be allowed on recertifications; and whether employers should be allowed to request a fitness for duty certification for an employee returning from intermittent leave. This chapter also addresses other comments received regarding the medical certification process including comments related to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub. L. 104-191, a law that was discussed in Request for Information but was not directly referenced in any specific questions.

A. Statutory and Regulatory Provisions Regarding Medical Certification and Verification

The medical certification process implicates several statutory and regulatory provisions under the FMLA. While the Act does not require employers to obtain medical certification in support of an employee's request for leave, if an employer chooses to do so, it is limited in what medical information it may seek as well as the process it must go through to obtain that information.

¹³ The certification provision does not apply to requests for leave to care for a healthy newborn or newly placed child under 29 U.S.C. §§ 2612(a)(1)(A) and (B).

1. Statutory Provisions Regarding the Medical Certification and Verification Process

Employers have the option of requiring employees who request leave due to their own serious health condition or to care for a covered family member with a serious health condition to support their need for leave with a certification issued by their (or their family member's) health care provider. *See* 29 U.S.C. § 2613(a).¹³ The information necessary for a sufficient certification is set forth in section 103 of the Act. *See* 29 U.S.C. § 2613(b). The statute states that a medical certification "shall be sufficient" if it states the following: the date the condition commenced; the probable duration of the condition; "appropriate medical facts" regarding the condition; a statement that the employee is needed to care for a covered family member or a statement that the employee is unable to perform the functions of his/her position (as applicable); dates and duration of any planned treatment; and a statement of the medical necessity for intermittent leave and expected duration of such leave. *Id.*

In cases in which the employer has reason to doubt the validity of the certification provided by the employee, the statute allows the employer to require the employee to obtain a second opinion from a health care provider of the employer's choice and at the employer's expense. *See* 29 U.S.C. § 2613(c). Where the first and second opinions differ, the employer may require the employee to obtain a binding third opinion from a health care provider selected jointly by the employer and employee (and paid for by the employer). *See* 29 U.S.C. § 2613(d). Finally, the statute allows the employer to require the employee to provide subsequent recertifications from the employee's health care provider on a reasonable basis. *See* 29 U.S.C. § 2613(e).

In addition to the certification of the need for leave due to the employee's or a covered family member's serious health condition, the statute also allows employers to require certification of the employee's ability to return to work following

leave for his or her own serious health condition as a precondition to job restoration under certain circumstances. *See* 29 U.S.C. § 2614(a)(4). An employer's request for a return-to-work certification must be pursuant to a uniformly applied practice or policy. *Id.* Where an employee's return to work is governed by the terms of a collective bargaining agreement or State or local law, however, the FMLA does not supersede those procedures. *Id.*

2. Regulatory Provisions Regarding the Medical Certification and Verification Process

The regulations flesh out the procedures employers must follow when utilizing the tools provided them in the Act for verifying an employee's need for FMLA leave. In general, sections 825.305 and 825.306 address the initial medical certification, section 825.307 sets forth the employer's options for verifying the information in the initial certification, section 825.308 details the employer's right to seek subsequent recertification, and sections 825.309 and 825.310 address the employer's ability to require certification of the employee's ability to return to work following FMLA leave due to their own serious health condition.

Section 825.305 requires an employer to notify the employee in writing if the employer is going to require medical certification for the leave (subsequent requests for recertification may be oral). *See* 29 C.F.R. § 825.305(a). Section 825.305 also sets forth the general rule that employers must allow employees at least 15 calendar days to provide the certification and that, where time allows, employees should provide the certification prior to the commencement of foreseeable leave. *See* 29 C.F.R. § 825.305(b). While employers are generally expected to inform employees that certification will be required at the time the leave is requested or, if the leave is unforeseen, within two business days of the leave commencing, employers may request certification at a later time if they have reason to question the appropriateness or duration of the leave. *See* 29

C.F.R. § 825.305(c). Employers are required to inform employees of the consequences of not providing the requested certification and to advise the employee if the certification is incomplete and allow an opportunity for the employee to cure any deficiency. *See* 29 C.F.R. § 825.305(d). If the employer's sick leave plan's certification requirements are less stringent and the employee or the employer exercises the option to substitute paid sick leave for unpaid FMLA leave, the employer may only require compliance with the less stringent certification requirements of the paid leave plan. *See* 29 C.F.R. § 825.305(e).

Section 825.306 of the regulations sets forth the information required for a complete certification, which may be provided on the Department's optional WH-380 form or any other form containing the same information. *See* 29 C.F.R. § 825.306. Section 307 governs the employer's ability to seek clarification and authentication of, and a second and/or third opinion on, the employee's medical certification. *See* 29 C.F.R. § 825.307. This section makes clear that an employer may not require information beyond that set forth in section 306, but that the employer's health care provider may seek clarification or authentication of the information in the certification from the employee's health care provider with the employee's permission. *See* 29 C.F.R. § 825.307(a). Section 307 also makes clear that where an employee's FMLA leave is also covered by workers' compensation, the employer may follow the workers' compensation procedures if they allow for direct contact with the employee's health care provider. *See* 29 C.F.R. § 825.307(a)(1). If the employer has reason to question the validity of the certification, the employer may require the employee to obtain a second opinion at the employer's expense and with a health care provider selected by the employer. *See* 29 C.F.R. § 825.307(a)(2). If the second opinion conflicts with the employee's original certification, the employer may require the employee to obtain a binding third opinion at the employer's expense from a health

care provider selected jointly by the employer and the employee. *See* 29 C.F.R. § 825.307(c). If it is ultimately determined as a result of the second and/or third opinion process that the employee is not entitled to FMLA-protected leave, the leave shall not be designated as FMLA-covered and the employer may treat the leave under its established policies. *See* 29 C.F.R. § 825.307(a)(2).

Section 308 of the regulations sets forth the conditions under which an employer may request recertification of the employee's (or covered family member's) serious health condition. *See* 29 C.F.R. § 825.308. Generally, employers may not request recertification more often than once every 30 days and only in connection with an absence. Where the initial certification indicates a minimum period of incapacity in excess of 30 days, recertification may not be requested until the initial period of incapacity indicated has passed. *See* 29 C.F.R. § 825.308(b)(1). In all instances, employers are allowed to request recertification if there is a significant change in circumstances regarding the leave or if the employer receives information that casts doubt on the employee's stated reason for the absence. *See* 29 C.F.R. § 825.308(a)-(c). Employers must allow employees at least 15 days to provide recertification. *See* 29 C.F.R. § 825.308(d). Recertifications are at the employee's expense and completed by the employee's health care practitioner. Employers are not permitted to request second opinions on recertifications. *See* 29 C.F.R. § 825.308(e).

Finally, sections 825.309 and 825.310 of the regulations govern requirements for the employee's return to work. Employers may require employees to report periodically on their intention to return to work. *See* 29 C.F.R. § 825.309(a). If an employee states an unequivocal intention not to return to work the employer's obligations under the FMLA cease. *See* 29 C.F.R. § 825.309(b). Where an employee needs more or less leave than originally requested, the employer may require the employee to provide notice of the changed circumstances within two

business days where foreseeable. *See* 29 C.F.R. § 825.309(c). Employers may have a uniformly applied policy of requiring similarly situated employees who take leave for their own serious health condition to submit certification of their ability to return to work. *See* 29 C.F.R. § 825.310(a). Such certification need only be a simple statement of the employee's ability to work. *See* 29 C.F.R. § 825.310(c). The employer's health care provider may contact the employee's health care provider, with the employee's permission, to clarify the return-to-work certification but may not request additional information and may not delay the employee's return to work. *Id.* The employee bears the cost of providing the return to work certification. *See* 29 C.F.R. § 825.310(d). Where state or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall apply. *See* 29 C.F.R. § 825.310(b). Employers are required to provide employees with advance notice of the requirement to provide a return-to-work certification. *See* 29 C.F.R. § 825.310(e). Where an employee has been given appropriate notice of the requirement to provide a return-to-work certification, the employee's return from leave may be delayed until the certification is provided. *See* 29 C.F.R. § 825.310(f). Return-to-work certifications may not be required for employees taking intermittent leave. *See* 29 C.F.R. § 825.310(g). Employers may not require a second opinion on return-to-work certifications. *See* 29 C.F.R. § 825.310(e).

B. Comments Regarding the Medical Certification and Verification Process

1. Medical Certification Process

Both employers and employees expressed frustration with the medical certification process. As discussed below, employers generally expressed frustration with their ability to obtain complete and clear certifications. Employees expressed frustration with employers determining that a certification

is incomplete but not informing the employee what additional information is necessary to satisfy the employer's concerns. Some commenters noted that these repeated requests for additional information are causing tension in the doctor/patient relationship. Overall, the comments make clear that the certification process is a significant source of friction between employees and employers: the two groups, however, attribute the source of the friction to very different causes.

a. Complete Certifications

Multiple employers commented that a complete certification should require not just that the certification form is filled-out, but that meaningful responses are given to the questions. *See, e.g.,* Jackson Lewis LLP, Doc. FL71, at 5 (“The rule prohibiting employers from asking any additional information once an employee submits a completed medical certification ignores the reality that a technically ‘completed’ certification may offer little insight into the need for FMLA leave, much less the medical necessity for leave on an intermittent basis.”); National Coalition to Protect Family Leave, Doc. 10172A, at 47 (“If health care providers . . . do not provide direct responses to the questions, the regulations should be modified to specify that the certification is not considered ‘complete’ for purposes of the employee’s certification obligations, thereby not qualifying the employee for FMLA leave.”); South Central Human Resource Management Association, Doc. 10136, at 11 (“We recommend the Regulations make clear that a ‘complete’ certification is required, that meaningful answers have to be furnished for all questions, and that a certification is ‘incomplete’ if a doctor provides ‘unknown’ or ‘as needed’ to any question.”). A commenter who had represented several employees in FMLA suits disagreed, however, stating that “in order to avoid protracted litigation over these issues, once completed and signed by a physician, the model certification form should be considered final and binding.” Kennedy Reeve & Knoll, Doc. 4763A, at 14.

Commenters’ frustration with vague and nonspecific responses on certifications was greatest in regard to certifications for intermittent leave due to chronic conditions. *See, e.g.,* Federal Reserve Bank of Chicago, Doc. FL56, at 2 (“We often see health care providers list the duration of an employee’s chronic condition as ‘indefinite’ or ‘lifetime’ and indicate that the frequency of the episodes of incapacity as ‘unknown.’ This makes it very difficult to manage employee attendance.”); City of Portland, Doc. 10161A, at 2 (“The certifications, particularly for chronic conditions, are often so vague as to be useless.”); South Central Human Resource Management Association, Doc. 10136, at 11 (“If a doctor cannot venture an estimate as to how often an employee will have a true medical need to be absent, we question whether the doctor is competent to evaluate the condition.”); Society for Human Resource Management, Doc. 10154A, at 8 (“Notations such as ‘lifetime,’ ‘as needed,’ or other similarly vague statements ought not suffice. Health care providers in particular should be required to provide as much detail as possible on the total amount of intermittent leave that is needed or allow employers to deny the leave.”). The American Academy of Family Physicians, however, noted that such responses are appropriate in some circumstances:

Intermittent leave is problematic for the certifying physician and employer. Employers have noted that with respect to the frequency of the episode of incapacity, the physician might write “unknown.” Employers argue that this leaves them in the difficult position of guessing about the employee’s regular attendance. However, the frequency of incapacity in chronic conditions such as migraine headaches is not predictable, making “unknown” the appropriate answer to the question. . . . It is worth noting that despite medical advances, absolute cures do not exist for all conditions making the duration of these conditions “indefinite” or “lifetime” from the current medical perspective.

American Academy of Family Physicians, Doc. FL25, at 2-3. Other commenters echoed the point that specific estimates of the frequency and duration of intermittent leave due to the flare-up of a chronic condition cannot always be made. *See, e.g.*, An Employee Comment, Doc. 4668, at 1 (“The Doctor should simply state that the person has a covered condition and how long the person will need to take time off and when, if known. If unknown the Doctor should be able to say just that.”); Association of Professional Flight Attendants, Doc. 10056A, at 10 (recounting employee’s sending over 25 pages of medical documentation in an effort to satisfy employer’s questions regarding frequency and duration of need for leave due to chronic conditions); Mark Blick DO, Rene Darveaux MD, Eric Reiner MD, Susan R. Manuel PA-C, Doc. FL292, at 1 (“The form also asks us to estimate how often a patient may need to miss work and then wants patient to fill a new form if they miss more than we estimate. Unfortunately, we in health care do not have a crystal ball to know the precise number of days patients may miss.”). As the Communication Workers of America noted, when it comes to the frequency and duration of leave due to a chronic condition employers are searching for certainty in response to a question which asks the health care provider for an estimate. Doc. R346A, at 10 (“The current certification form recommended by DOL makes it clear that the doctor is being asked to *estimate* the likely frequency and duration of any absences (‘probable duration’; ‘likely duration and frequency’), yet many employers seem to expect a definitive prediction and deny leaves that exceed the estimates provided on the original certification form.”) (emphasis in original).

b. Incomplete Certifications

Multiple commenters also expressed frustration with what they perceived to be the open-ended nature of the certification process and sought clarification of how many opportunities an employee must be provided to cure a defective certification. *See, e.g.*, Waste Management, Inc., Doc. 10240A, at

2 (“The current regulation is open to interpretation regarding when information is due and how much additional time should be afforded to employees who do not share the FMLA certification forms timely.”); Ken Lawrence, Doc. 5228, at 1 (“At the present time the employee is really not limited to any particular time (could be months) if they are making ‘good faith’ efforts to obtain the certification.”); Federal Reserve Bank of Chicago, Doc. FL56, at 2 (“There should be an absolute cut off when an employer can require the employee to submit a completed certification form and the consequence of not meeting that deadline is that the absence(s) is not covered by the FMLA.”); Society for Human Resource Management, Doc. 10154A, at 18 (“HR professionals often have difficulty in determining how many times an employer must give an employee an opportunity to ‘cure’ a deficiency, and how long to allow them to provide such a complete certification.”). Commenters also sought clarification regarding the consequences to the employee if leave is taken during the certification process but a complete and sufficient certification is not ultimately provided.

Delaying a leave for the tardy return of a completed certification is meaningless because by the time the delayed certification has been returned, the employee has likely already taken leave (perhaps for weeks) and the employer can only revoke the FMLA designation for time already taken. The situation is exacerbated because the employer cannot reduce any of the employee’s FMLA balance despite the fact the employee was absent. As a result, the employee is rewarded by having the opportunity to take more than 12 weeks of leave in that given year. While the employer technically could terminate or discipline the employee for this non-FMLA time already taken, in all likelihood employers would be concerned that such an action would run afoul of the law’s sweeping prohibitions from interfering with, restraining or denying an employee’s leave.

Hewitt Associates, Doc. 10135A, at 19; *see also* United Parcel Service, Doc. 10276A, at 11 (“The remedy specified in the regulations for an employee’s failure to provide adequate notice is to deny or delay the employee’s leave, but in these cases, leave has already been taken.”); Foley & Lardner LLP, Doc. 10129A, at 4 (“The provision does not explain how long the delay may last or what the consequences of a ‘delay’ can be.”); Sherman & Howard L.L.C., Doc. 10252A, at 1 (“The regulations should make clear that if an employee does not ultimately qualify for FMLA leave, or fails to provide medical certification to support the requested leave, the employee’s absence will be unprotected. This means that the employer may appropriately enforce its attendance policy which may result in disciplinary action being taken against the employee.”).

c. Employer Requests for Additional Information

Employee commenters expressed related frustrations with the certification process. In particular, several commenters stated that employers repeatedly reject certifications as incomplete without specifying what additional information is necessary, leading to a prolonged and frustrating back-and-forth process. *See, e.g.*, International Association of Machinists and Aerospace Workers, Doc. 10269A, at 4 (“We have many members who have their doctors fill out the paper work only to be told it is not properly filled out. The employee fixes *that* problem and the Company tells them there is another problem with the paper work. This occurs over and over until finally the doctor or the employee, or both give up.”) (emphasis in original); Association of Professional Flight Attendants, Doc. 10056A, at 18 (“[I]t is simply unfair to send FMLA leave requests back to the

employees and their treating health care providers for more medical facts, without ever indicating what kinds of additional medical facts are required before the employer will make a determination of medical eligibility or medical ineligibility.”). The commenters noted that these repeated requests for additional information force the employee to make additional visits to his or her health care provider (resulting in additional missed work and expense) and discourage the employee from pursuing FMLA protection. *See, e.g.*, Association of Professional Flight Attendants, Doc. 10056A, at 12 (“[T]he Company’s decision to challenge somewhat routinely the health care provider’s estimate of frequency and duration imposes substantial burdens on the employee – both in terms of the cost of a second or third visit to the doctor’s office, and in terms of the time required to complete what is becoming a paperwork nightmare.”); An Employee Comment, Doc. 4395, at 1 (recounting her personal experience with repeated employer requests for additional information regarding her daughter’s medical condition); An Employee Comment, Doc. 4668, at 1 (“It should not be up to the employer to nitpick a request for FMLA coverage.”).¹⁴ Commenters noted that repeated requests for additional information were creating tension between employees and their health care providers. *See* International Association of Machinists and Aerospace Workers, Doc. 10269A, at 4 (“Some doctors refuse to fill out the exact same paperwork every 30 days, particularly for life-long chronic conditions like colitis or migraines.”); Kennedy Reeve & Knoll, Doc. 4763A, at 15 (“I have been hearing more and more stories of doctors refusing to fill out the forms, thereby leaving the employee without recourse.”); Lucy Walsh, Director, Human Resources, Providence Health Ministry, Doc. 10064A, at 1-2 (“Some physicians have absolutely refused to deal with the forms at all which leaves both the employee and employer in a dilemma.”); Coalition of Labor Union Women, R352A, at 5 (“Many doctors are refusing to complete duplicative paperwork, resulting in leave denials that must be

¹⁴ Several commenters also expressed concern that health care providers are charging employees to complete the certification form (and, in some cases, to respond to employer requests for clarification). *See, e.g.*, Sun Microsystems, Inc., Doc. 10070A, at 2 (reporting that their employees have been charged between \$25 and \$200 to fill out a medical certification); FNG Human Resources, Doc. FL13, at 3-4 (employees charged up to \$50 for certification); Shelly Johnson, Oklahoma State University, Doc. 5185, at 1 (same).

either appealed or pursued through the contract's grievance procedures.").

Some commenters viewed repeated employer requests for additional medical information as an inappropriate attempt by the employer to substitute its determination of the seriousness of the employee's health condition for the employee's health care provider's judgment. *See* Coalition of Labor Union Women, Doc. R352A, at 4 ("We have heard disturbing reports from our members that many employers are often 'second-guessing' the diagnoses of workers' doctors and other health care providers by insisting on additional certifications or challenging intermittent leave requests if the doctor's estimate of the likely time needed is exceeded even by one or two days or in some minor respect. We believe that DOL should issue a strong reminder that employers are obligated to utilize the second opinion process established in the regulations."); Communications Workers of America, Doc. R346A, at 7 ("In CWA's experience, many employers evidence their distaste for FMLA leaves by needlessly quarreling with the information provided by health care providers in support of the employee's request for leave or 'second-guessing' the doctor under the guise of 'clarifying' the information provided on the form."); Association of Professional Flight Attendants, Doc. 10056A, at 15 (identifying "employer's rejection of [FMLA] applications based on its medical staff's disagreement with the health care provider's estimate of duration and frequency, or treatment plan, without invoking the second doctor review" as one of three primary concerns with medical certification process).

Not all commenters, however, felt the current certification process needed to be revised. One commenter noted that the current certification process works well in its workplace.

We have trained our supervisory workforce to recognize even the slightest possibility of a covered absence. The supervisory personnel notify H.R. to mail out contingent FMLA notice and

we include Certification paperwork with instructions on how to have it completed. We immediately place the employee on possible FMLA pending the receipt of certification paperwork. The notice covers all provisions of FMLA and necessary steps to rights and responsibilities. We actually give the employees 20 days to return the certification to cover the mailing time and some providers slow completion rate. Once all certification paperwork is received we keep both the employee and supervisory personnel abreast of updates and approvals.

FNG Human Resources, Doc. FL13, at 4; *see also* Legal Aid Society-Employment Law Center, Doc. 10199A, at 3 ("It is the [certification procedure] that establishes the objective basis for leave based upon the informed opinion of the health care provider of the employee or family member. Despite this useful, practical, and common sense system that was designed to evaluate whether any condition constitutes a 'serious health condition,' many employers refuse to use it or use it improperly."). Several commenters suggested that there was no need to change the current certification procedure. *See, e.g.,* National Partnership for Women & Families, Doc. 10204A, at 19 ("The existing regulations appropriately balance a worker's interest in a manageable certification process that does not impose unreasonable burdens, with the employer's interest in the accurate certification of medical conditions."); Faculty & Staff Federation of Community College of Philadelphia, Local 2026 of the American Federation of Teachers, Doc. 10242A, at 6 (same); Center for Law and Social Policy, Doc. 10053A, at 4 (same); OWL, The Voice of Midlife and Older Women, Doc. FL180, at 2 (opposing any change in certification rules).

2. Employer Contact with Employee's Health Care Provider—Process and Privacy Concerns

Both employers and employees commented extensively on the subject of employer contact

with the employee's health care provider. Section 825.307(a) of the regulations requires that employers may contact the employee's health care practitioner for clarification of the medical certification only with the employee's consent and the contact must be made through a health care practitioner. The employer may not use the clarification process to request additional information beyond the information required in the initial certification. *See* 29 C.F.R. § 825.307(a). In general, employers were frustrated with the regulatory restrictions on contact with the employee's health care provider and employees were concerned that any changes to the current process would impinge on their medical privacy.

a. Requirement that Employer Communicate Through a Health Care Provider

Many employers commented that the requirement that they communicate only through a health care practitioner resulted in significant cost and delay. *See, e.g.,* Milwaukee Transport Services, Inc., Doc. FL80, at 3 ("In 2006 alone, MTS spent \$23,000.00 for the services of a designated health care provider because it was not itself permitted under the FMLA regulations to ask questions which that provider was then forced to ask on its behalf."); City of Portland, Doc. 10161A, at 2 ("The Act requires employers to use the employee as an intermediary to communicate with doctors or incur substantial costs hiring additional doctors to consult with employee physicians or, in narrow circumstances, to give second and third opinions. Greater flexibility in obtaining information for medical certification would streamline FMLA approvals."); Hewitt Associates, Doc. 10135A, at 15 ("The employer's engagement of its own health care provider is expensive, takes additional time and ultimately delays the decision to approve or deny a leave request. Moreover, in cases when the employer simply wants clarification on the amount of time off required, it provides no true benefit to either the employer or the employee."). The AFL-CIO, however, commented that "[a]ny

expense caused by the requirement that employers use their own health care professional to contact the employee's treatment provider, rather than making contact directly, is necessary to the preserve employee privacy." Doc. R329A, at 42.

Some commenters suggested that employers' expenses could be reduced by permitting registered nurses to contact the employee's health care provider. *See, e.g.,* United Parcel Service, Doc. 10276A, at 8-9 (noting that even employers that have nurses on their staff are required to hire a health care provider to comply with section 825.307(a) of the regulations); MedStar Health, Inc., Doc. 10144A, at 16-17 (same); Manufacturers Alliance/MAPI, Doc. 10063A, at 7 (suggesting inclusion of RNs, LPNs, and physician's assistants under the term "health care provider"); *see also* American Academy of Physician Assistants, Doc. 10004A, at 1 (suggesting that definition of health care provider in regulations should be broadened to include physician assistants). The Coalition of Labor Union Women, however, objected to broadening the definition of health care providers allowed to contact the employee's treating physician, noting that its members "complain that employers use nurses or physician's assistants who are not adequately trained and who repeatedly challenge their doctor's diagnoses and predictions of leave duration and frequency, leading to the need for additional certifications and forcing the employee to take personal leave time to obtain new paperwork." Coalition of Labor Union Women, Doc. R352A, at 6. Other commenters suggested that their human resources professionals could more efficiently clarify the certification with the employee's health care provider because they were both better versed in the FMLA and more familiar with the employee's job duties and the work environment than the employer's health care provider. *See, e.g.,* Association of Corporate Counsel, Doc. FL31, at 10 ("[T]he employer's staff members – often its Human Resources employees – are usually more knowledgeable about the specific

job requirements and other information that may be relevant or helpful to the employee's health care provider in making his/her assessment."); Milwaukee Transport Services, Inc., Doc. FL80 at 3-4 (same). One commenter, however, suggested that it was appropriate that medical inquiries be handled by medical professionals. *See* Unum Group, Doc. 10008A, at 3 ("The regulatory requirement that the employee's health care provider be contacted only through the employer's health care representative is beneficial in that it not only protects the privacy of employees but also ensures that medical information discussed and terminology used while clarifying and authenticating complete medical certifications are understood and correctly interpreted.").

Employers also expressed frustration with the scope of information they could request when clarifying a medical certification. *See* Sally L. Burnell, Program Director, Indiana State Personnel Department, Doc. 10244C, at 6 ("The requirement to have another health care provider contact the submitting health care provider, and then only for clarification of the form, not for additional information, unnecessarily complicates and lengthens the approval process, often beyond the length of the absence itself."); Jackson Lewis LLP, Doc. FL71, at 5 ("The rule prohibiting employers from asking for any additional information once an employee submits a completed medical certification ignores the reality that a technically 'completed' certification may offer little insight into the need for FMLA leave, much less the medical necessity for leave on an intermittent basis."). Several employee commenters, however, asserted that employers are already using the clarification process improperly to seek additional information beyond that included in the certification form or even to challenge the employee's health care provider's medical judgment. *See* United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Doc. 10237A, at 4 ("It has been our experience that some employers

contact the health care provider and attempt to reschedule appointments, ask questions that go beyond the certification of serious health condition at issue, or even try to get the health care provider to change the medical certification, all without employee consent."); Communications Workers of America, Doc. R346A, at 10 ("In CWA's experience, there is currently widespread non-compliance with the intent of the current regulation [29 CFR 825.307] limiting employer contact with employee health care providers to those circumstances where 'clarification' or 'authentication' are necessary.").

b. Requirement of Employee Consent for Contact

Several commenters asserted that the requirement that an employer obtain employee consent prior to contacting the employee's health care provider makes it extremely difficult for employers to investigate suspected fraud related to medical certifications. *See, e.g.,* Robert Haynes, HR-Compliance Supervisor, Pemco Aeroplex, Inc, Doc. 10100, at 1 (noting difficulty in investigating fraud when employee's consent is necessary for the employer to authenticate form with employee's health care provider); Ohio Public Employer Labor Relations Association, Doc. FL93, at 5-6 (same); United States Postal Service, Doc. 10184A, at 15 (suggesting that a "simple and fair way to remedy this problem is to allow an employer to make contact with the provider for the purpose of confirming authenticity"); Taft, Stettinius & Hollister LLP, Doc. FL107, at 6 ("Where authenticity is suspect, the employer's inquiry is not medically related but rather, is intended to determine whether the employee's health care provider issued the certificate and that it has not been altered. In such circumstances, the restrictions contained in Section 825.307(a) serve no useful purpose, impose unnecessary expense on employers, and are not justified by any language in the Act."). Honda suggested that the regulations should distinguish between contacts by the employer to confirm administrative details and contacts related to substantive medical discussions: "[T]he FMLA

Regulations should be amended to permit the employer to contact the employee's health care provider's office to confirm date, time and place of appointments, but *not* permit the employer to discuss the medical facts, the need for leave and the frequency and duration of leave with the employee's health care provider." Honda, Doc. 10255A, at 11- 12 (emphasis in original). Other commenters suggested that the process for seeking medical information under the FMLA should be consistent with the procedure set forth under the Americans with Disabilities Act. *See infra* Chapter VII.

c. *Employee Privacy Concerns*

Finally, many commenters expressed concern that any changes to the regulations governing contact between their employers and their health care providers would compromise their right to medical privacy. *See, e.g.,* An Employee Comment, Doc. 4019, at 1 ("I also oppose any regulatory changes that would allow employers to directly contact a worker's health care provider, which unnecessarily violates the worker's right to keep medical information confidential."); 9to5, National Association of Working Women, Doc. 10210A, at 4 ("We also oppose any regulatory changes that would allow employers to directly contact a worker's health care provider, which unnecessarily violates the worker's right to keep medical information confidential."); Faculty & Staff Federation of Community College of Philadelphia, Local 2026 of the American Federation of Teachers, Doc. 10242A, at 6 (same); United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Doc. 10237A, at 4 (same). Another commenter stated, "[w]orkers have the right to keep their medical information confidential and not have irrelevant health status information affect their employers' decisions." Families USA, Doc. 10327A, at 5. Moreover, the National Partnership for Women and Families noted that the Department already considered issues relating to the employer's need for medical information and the employee's right to

medical privacy and struck the appropriate balance back in 1995 with the final regulations: "DOL has already considered comments regarding concerns about an employer's ability to obtain medical information from a health care provider. The interim [1993] FMLA regulations entirely prohibited an employer from contacting the health care provider of the employee or the employee's family member. In response to a number of comments, . . . DOL amended the regulations to allow an employer's health care provider to contact an employee's or a family member's health care provider to clarify or authenticate the information in this medical certification. In arriving at this compromise, DOL limited this contact to an employer's health care provider to protect the privacy interests of employees and their families and ensure that their medical information was only being shared between medical professionals." Doc. 10204A, at 20 (footnotes omitted); *see also* Service Employees International Union District 1199P, Doc. FL104, at 5 (same); American Federation of Labor and Congress of Industrial Organizations, Doc. R329A, at 42-43 (same).

3. Interaction of Health Insurance Portability and Accountability Act and Medical Certification Process

As noted in the Request for Information, the most significant law passed since the FMLA with regard to employee medical information is the Health Insurance Portability and Accountability Act ("HIPAA"). HIPAA addresses in part the privacy of individually identifiable health information. The Department of Health and Human Services ("HHS") issued regulations found at 45 C.F.R. Parts 160 and 164 that provide standards for the privacy of individually identifiable health information. The HIPAA regulations do not impede the disclosure of protected health information for FMLA reasons if the employee has the health care provider complete the medical certification form or a document containing the equivalent information and requests a copy of

that form to personally take or send to the employer. HIPAA regulations, however, clearly do come into play if the employee asks the health care provider to send the *completed certification* form or other medical information *directly* to the employer. In such situations, HIPAA will generally require the health care provider to first receive a valid authorization from the employee before sending the information to the employer.

There is no requirement under the FMLA that employees sign a release allowing employers to access their medical information. In the preamble to the final regulations, the Department specifically rejected the idea of requiring employees to execute a medical release as part of the certification process as unnecessary. *See* 60 Fed. Reg. 2180, 2222 (Jan. 6, 1995) (“The Department has not adopted the suggestion that a waiver by the employee is necessary for FMLA purposes. The process provides for the health care provider to release the information to the patient (employee or family member). The employee then releases the information (form) to the employer. There should be no concern regarding ethical or confidential considerations, as the health care provider’s release is to the patient.”). Employers, however, always have the statutory right under the Act to obtain sufficient medical information to determine whether an employee’s leave qualifies for FMLA protection, and it is the employee’s responsibility to ensure that such information is provided to the employer. If an employee does not fulfill his or her obligation to provide such information upon the employer’s request, the employee will not be entitled to FMLA leave. *See* 29 C.F.R. §§ 825.307-.308; Wage and Hour Opinion Letter FMLA-2004-2-A (May 25, 2004). Some commenters believe that the HIPAA regulations restricting the flow of medical information from health care providers to third parties have created tension with the employer’s right to medical information under the FMLA and have caused difficulties for employees seeking to exercise their FMLA rights. *See, e.g.,* Krukowski & Costello, S.C. (on behalf of Legislative

Committee of the Human Resource Management Association of Southeastern Wisconsin), Doc. 10185A, at 3 (“[W]hen an employer may attempt to ascertain the true nature of any given absence, the employee then uses HIPAA as a shield designed to prevent the employer from obtaining any further information in order to clear up any ambiguities (or discover potential abuses.”); Methodist Hospital, Thomas Jefferson University Hospital, Doc. FL76, at 2 (“With HIPAA regulations physicians are reluctant to share information with Employers who are trying to accommodate Employee medical conditions to minimize absence.”); American Academy of Family Physicians, Doc. FL25, at 3 (“We agree with comments that the Health Insurance Portability and Accountability Act (HIPAA) has created confusion about the disclosure of information on the FMLA form. As employers are not covered entities, disclosure directly to the employer is prohibited without an authorization by the patient.”)

Several commenters reported that they have experienced increased difficulties with obtaining medical certifications from health care providers as a result of HIPAA. *See, e.g.,* AIG Employee Benefit Solutions’ Disability Claims Center, Doc. 10085A, at 2-3 (“More than one Provider has written ‘HIPAA’ across the Form and returned it.”); Briggs & Stratton Corporation, Doc. FL37, at 4 (“[M]any physicians still insist that they are prohibited by HIPAA from responding to questions on the Certification.”). As a result of these difficulties, several commenters – including some medical providers – suggested that employees be required to sign a release as part of the certification requirement allowing the employer to communicate directly with the employee’s health care provider. *See, e.g.,* American Academy of Family Physicians, Doc. FL25, at 3 (“The specific information required by the FMLA certification form and lack of an authorization on the form releasing the information may lead to inadvertent HIPAA violations. We would recommend the addition of an authorization to release medical information to the

certification form which would allow the patient to indicate their authorization to release information to a family member or directly to the employer.”); Ed Carpenter, Human Resource Manager, Tecumseh Power Company, Doc. R123, at 1 (certification process would be made easier if employee signed a release allowing the employer to contact employee’s health care provider); Williams Mullen, Doc. FL124, at 3 (“DOL should coordinate HIPAA and FMLA issues, including medical certifications with HIPAA waivers, to make the process of medical information consistent.”). Other commenters, however, objected to requiring employees to provide medical releases in exchange for requesting FMLA leave. *See* United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Doc. 10237A, at 4 (“The USW asks the DOL to clarify that employees are not required to provide a release of medical information to the employer as a condition of applying for or receiving FMLA leave.”).

Finally, some commenters suggested that the protections afforded to employee medical information by HIPAA have obviated the need for employers to get employee consent for clarification of FMLA certifications. *See* Ohio Public Employer Labor Relations Association, Doc. FL93, at 6 (“With HIPAA laws protecting confidential medical information, the excessive restrictions found in 29 C.F.R. § 825.307 are unnecessary and should be removed.”); Taft, Stettinius & Hollister LLP, Doc. FL107, at 5 (“HIPAA and similar laws provide ample protection for personal health data and the employee’s health care provider can always refuse to disclose information if he or she considers a request for clarification to implicate privacy issues.”); Hewitt Associates, Doc. 10135A, at 15 (“[G]iven HIPAA concerns, it’s likely that the employee will still have a check over the process as the health care provider would require the employee’s permission before he or she would speak with the employer.”); *see also* National Retail Federation, Doc. 10186A, at 17 (“The professional standards binding health care providers serve as a

sufficient ‘check’ on the scope of the inquiry.”).

4. Recertification and Second and Third Opinions

The medical verification process does not end with the initial medical certification. Employers who question the validity of an employee’s medical certification have the right to require a second opinion from a health care provider of their choosing. *See* 29 C.F.R. § 825.307. Where the second opinion conflicts with the initial certification, the regulations allow the employer to obtain a final and binding third opinion from a jointly-designated health care provider. *See id.* Additionally, employers have the right to require employees to provide subsequent recertification for conditions that persist over time. *See* 29 C.F.R. § 825.308. The Request for Information sought comments regarding several aspects of the recertification and second opinion processes. Comments were sought regarding the time frame for recertification and the requirement that requests for recertification be made only in connection with an absence. Comments were also sought on whether the second and third opinion process should be extended to apply to recertifications in addition to the initial certification.

a. Timing of Recertifications

Several commenters recommended that employers should be allowed to seek recertification every thirty days regardless of the minimum duration of the need for leave set forth in the certification. *See, e.g.,* United Parcel Service, Doc. 10276A, at 11 (“As currently drafted, [the] language permits employees to evade the 30-day recertification requirement by having their health care provider specify a longer period of time.”); University of Minnesota, Doc. 4777A, at 1 (“In all cases, employers should have the right to request recertification from an employee on FMLA leave every thirty days.”); Carolyn Cooper, FMLA Coordinator, City of Los Angeles, Doc. 4709, at 1 (“A remedy to this manipulation or gaming of the medical certification

restriction pertaining to *intermittent/reduced work schedule leaves* is to *allow employers to request recertification every 30 days, regardless if the duration indicated in the initial medical certification is greater than 30 days.*"). The National Coalition to Protect Leave made a related point that recertifications should be permitted every thirty days irrespective of whether there was an absence during that period. *See National Coalition to Protect Family Leave, Doc. 10172A, at 49* ("Employers should always be allowed to obtain recertification every 30 days as long as the initial certification indicates the leave needed is ongoing; the right of an employer to request recertification in such circumstances should not be limited to whether an employee had an 'absence.'"); *see also Hewitt Associates, Doc. 10135A, at 17* ("Simplify § 825.308 by deleting the requirement that employers can only request recertification 'in connection with an absence' allowing employers to ask for a recertification every 30 days.").

Many of the commenters seeking more frequent recertifications cited the desire to control unforeseen, intermittent absences due to chronic conditions. *See Pierce Atwood, LLP (on behalf of Maine Pulp & Paper Association), Doc. 10191A, at 2-3* ("Given the fact that intermittent leave is widely abused, employers need *more* flexibility to request recertification for intermittent leave than for serious health conditions that render the employee unable to work for the full 12 weeks.") (emphasis in original); Nancy Dering Martin, Deputy Secretary for Human Resources and Management, Commonwealth of Pennsylvania, Doc. FL95, at 4 ("Also, because of the potential for abuse, we recommend *Section 825.308* be further revised to allow employers to require a medical excuse indicating the time of the appointment or treatment when leave is used intermittently, the absence is unexpected, or the employer suspects abuse."); Milwaukee Transport Services, Doc. FL80, at 2 ("One regulatory change that would assist employers such as MTS in curbing intermittent leave abuse

would involve revising the current recertification regulation, 29 C.F.R. [§] 825.308, by allowing an employer to require medical documentation of the need for intermittent FMLA leave on *any* occasion on which such leave is taken."). Several of these commenters suggested that employers should be allowed to obtain medical verification of each intermittent absence even if that verification were more summary than a recertification. *See Northrup Grumman Newport News Shipbuilding and Dry Dock Company, Doc. FL92, at 2* ("A rule could be added to require employees to provide documentation from the healthcare provider each time they exercise intermittent leave, documenting specifically that the intermittent condition prevented attendance at work."); Spencer Fane Britt & Browne LLP, Doc. 10133C, at 32 ("The employee should not be permitted to be the only party who determines the medical necessity of an absence on any particular day. . . . If an employee is ill enough to miss work, the employee should be required to visit or at least consult by phone with his/her doctor."); Seyfarth Shaw LLP (on behalf of a not-for-profit health care organization), Doc. 10132A, at 4 ("We suggest as an alternative an amendment to the regulations so that an employer can request documentation from the employee's health care provider pursuant to a uniformly applied policy for similarly-situated employees for any unforeseen, intermittent absence of less than a work day due to a chronic serious health condition.").

Employee commenters objected to more frequent recertifications, however, because of the additional burden placed on employees. *See, e.g., International Association of Machinists and Aerospace Workers, Doc. 10269A, at 4* ("[O]ur members find that the requirement to recertify every thirty days is incredibly burdensome. . . . [I]t is very expensive for employees to get re-certifications. Some employees, particularly in rural areas, have to travel long distances to even see their doctors. It is ironic that often these employees actually have to miss

more work time just to get the recertification.”); An Employee Comment, Doc. 4738, at 1 (“For an employer to repeatedly request for recertifications every 30 days, for an chronic Asthmatic who has an *unforeseeable mild flare-up* that can be taken care of with prescription medication, seems unreasonable and repetitious.”); Kennedy Reeve & Knoll, Doc. 4763A, at 17 (“The frequency with which some employers are requiring notes and recertification is both logistically (due to the availability of doctor’s appointment times) and financially burdensome on the employee and physician.”); An Employee Comment, Doc. 4582, at 1 (“[E]ven though my mother’s illness is terminal and my father’s condition is considered lifetime, I still am required to fill out forms and have a doctor sign them every 3 months. The physician’s office now charges me \$20 for each form I have to have them sign. As you can imagine, this takes a lot of time and money.”).

Physicians also objected to allowing recertifications every 30 days for conditions that are medically stable: “This is a burden to physicians who spend time completing the form to indicate that a chronic condition is still being managed. It would lessen this burden to allow recertification only for those conditions which are not categorized as chronic care or permanent disability.” American Academy of Family Physicians, Doc. FL25 at 3; *see also* Mark Blick DO, Rene Darveaux MD, Eric Reiner MD, Susan R. Manuel PA-C, Doc. FL292, at 1 (“One employer requires us to complete the form every 60 days (ATT/SBC), one employer every 90 days and another every year. Chronic conditions extending a patient’s lifetime such as diabetes and hypertension are not going to change and there is no reason the form has to be updated multiple times throughout the year.”). Another commenter suggested that employers are abusing the recertification process and using repeated requests for recertification to discourage employees from taking FMLA leave:

[E]mployees bear the expense and burden of having to secure re-

certifications and run the risk of denials if health care providers do not cooperate (or fail to do so in the relatively short time required by the employer), even though the serious and chronic nature of their medical condition is well documented. In fact, we believe that, in some work locations, these recertification requests are thinly veiled efforts to discourage employees from taking intermittent FMLA leave and/or to retaliate against them for needing to do so.

Communications Workers of America, Doc. R346A, at 12.

b. Second and Third Opinion Process

Several employers commented on the expense involved in the second and third opinion process. *See, e.g.*, Honda, Doc. 10255A, at 11 (“Based upon Honda’s experience, second and third opinions average over \$700 per second or third opinion, and cost the employees their time.”); Spencer Fane Britt & Browne LLP, Doc. 10133C, at 25 (“Second and third opinions have proven expensive and difficult to obtain.”); Yellow Book USA, Doc. 10021A, at 2 (asserting that second opinions are so expensive they are not used); Zimbrick, Inc., Doc. FL125, at 12 (“We have not requested a second opinion. The cost, time and negative impact on employee morale is prohibitive.”). Other commenters noted practical concerns regarding finding physicians to perform second opinions. *See, e.g.*, United States Postal Service, Doc. 10184A, at 19 (“We are experiencing increasing difficulty finding physicians who will perform a second opinion medical exam. Although we do not keep numbers on refusal rates, our national FMLA coordinators regularly voice concerns about this problem.”); Foley & Lardner LLP, Doc. 10129A, at 5 (“Our experience shows that second opinions are rarely used due to delay inherent in locating a health care provider and scheduling an examination and due to the expense associated with obtaining these opinions.”); Coolidge Wall Co., Doc. 5168, at 1 (“Even in larger cities it can be difficult

to find doctors in a specialty who are willing to do FMLA second opinion examinations.”); FNG Human Resources, Doc. FL13, at 5 (“Requesting a second opinion is neither economically feasible nor beneficial in our area. We do not find healthcare providers willing to state that another provider is incorrect in his/her diagnosis.”).

Some commenters suggested that employers should be allowed to use doctors with whom they have relationships for second opinions because these health care providers are more familiar with the work environment and job requirements. *See, e.g.*, Air Conference, Doc. 10160A, at 13 (“[O]ur member carriers have developed relationships with health care providers who understand our industry and operating environment and who are very familiar with the essential functions of airline jobs.”).

Two commenters expressed frustration that even where the second and third opinion process resulted in a determination that the employee was not entitled to FMLA leave, employees have attempted to subvert the process by submitting a new certification for the same condition thus initiating the review process anew. *See* United States Postal Service, Doc. 10184A, at 19 (“[A] number of employees . . . subsequently submit a new medical certification from their original health care provider which counters the information in that second/third opinion. The employees then argue that the employer must go through the second opinion process again.”); Exelon, Doc. 10146A, at 6 (“Even if both the second and third opinion providers disagree with the employee’s own provider, after the process has been concluded, the regulations do not preclude the employee from submitting a new certification to support a new absence, and subsequent absences, from work for the same medical condition for which a second and third opinion were obtained.”).

c. *Expanding Second Opinions to Recertification*

Despite employer frustrations with the costs and utility of the second and third opinion process, however, some employers sought to expand the use

of the process to recertifications. *See, e.g.*, National Coalition to Protect Family Leave, Doc. 10172A, at 49 (“Permitting second and third opinions [on recertifications] will provide substantial benefits to both employers and employees. Employers will not have to incur the unnecessary expense of obtaining second and third opinions based on a doubtful initial certification unless a pattern of abuse in fact develops without losing the opportunity to challenge the certification at a later date. Employees will also benefit, since they will not have to go for second and third opinions if they do not abuse FMLA leave even if their original medical certification creates doubt as to the validity of the need for leave.”); United States Postal Service, Doc. 10184A, at 17 (“[A] second opinion should be allowed during the lifetime of an employee’s condition, so long as there is reason to doubt the validity of the information in the certification.”); Air Conference, Doc. 10160A, at 13 (“Second and third opinions should also be available to employers on a medical recertification.”).

Commenters noted that the statute is silent as to the availability of second opinions on recertification and argued that the Department should not prohibit their use by regulation. *See* City of New York, Doc. 10103A, at 9 (“Under 29 C.F.R. 825.308(e), employers are specifically barred from seeking a second or third opinion on a recertification. The FMLA, however, does not bar an employer from seeking additional opinions for a subsequent recertification.”); National Coalition to Protect Family Leave, Doc. 10172A, at 49 (“Subsection 29 C.F.R. § 825.308(e) prohibits employers from obtaining second and third opinions in connection with recertifications despite the fact that no statutory prohibition exists with regard to such requests.”); Association of American Railroads, Doc. 10193A, at 4 (noting that the prohibition on second and third opinions on recertification is not based on the Act). Other commenters, however, viewed the statutory silence differently, arguing that the statute only provides for second opinions on the initial certification and therefore they should not be permitted on recertification. *See* American Federation

of Labor and Congress of Industrial Organizations, Doc. R329A, at 44; National Partnership for Women & Families, Doc. 10204A, at 22-23 (“The regulations do not allow employers to request second opinions for medical recertifications because the statute itself only provides for second opinions in the context of initial certifications.”). Honda urged that the Department’s 2005 opinion letter concerning reinitiating the medical certification process on an annual basis, and with it the availability of the second opinion process, be incorporated into the regulations. *See* Honda, Doc. 10255A, at 15; *see also* American Federation of Labor and Congress of Industrial Organizations, Doc. R329A, at 44 (“[T]he regulations currently permit employers to reinitiate the medical certification process twelve months after leave commences, including requests for second and third opinions, regardless of past certification for the same health condition.”); Wage and Hour Opinion Letter FMLA-2005-2-A (Sept. 14, 2005).

The United States Postal Service argued that allowing second opinions on recertifications would ultimately inure to the benefit of employees. *See* Doc. 10184A, at 19 (“When an employer knows that it has the option of a second opinion if later needed, it is more likely to allow the protection at the outset even in instances where it may have some concern about the certification. The employee will be more content, as the leave request is quickly approved and he/she is spared a second medical exam.”). The National Partnership for Women & Families disagreed, however, stating that the extension of the second and third opinion process to recertifications would burden employees. *See* Doc. 10204A, at 22-23 (“[A]llowing employers to request second opinions on recertifications would unfairly burden employees for taking leave to which they are entitled.”).

d. Adequacy and Use of Current Medical Verification Process

Finally, some commenters suggested that, if properly used, the recertification and second and third opinion processes set forth in the current

regulations provided employers with ample tools to control FMLA leave usage.

At present, we believe that the regulations provide a manageable balancing of the employer’s need for accurate information demonstrating that the leave is covered by the Act and the employee’s important privacy interest. The regulations also establish a clear framework within which to evaluate leave requests when good faith questions arise – the second and third opinion process. Because of the concerns that this existing process is not being followed by many employers, we urge DOL to take steps to evaluate whether that process is being utilized appropriately.

Coalition of Labor Union Women, Doc. R352A, at 6; *see also* 9to5, National Association of Working Women, Doc. 10210A, at 4 (“Robust employer safeguards already exist in the current regulations. Employers are allowed to ask for second and third opinions from alternate doctors for an FMLA request. Employers have always had the ability to handle suspicious patterns of time off, just like any other personnel problem.”); Kennedy Reeve & Knoll, Doc. 4763A, at 14-15 (“Instead of utilizing the certification process and the second and third opinion process within the regulations, many employers are now choosing to forgo some or all of those processes, and instead litigating these issues at a high price to everyone, including the courts. In order to avoid costly litigation and in order to provide more stability in the administration of leaves of absences, the regulations should require the use of a consistent form and also require the utilization of the regulatory enforcement procedures[.]”).

5. Medical Certification of the Employee’s Ability to Return to Work (“Fitness for Duty Certifications”)

Section 825.310 of the regulations allows employers to require medical certification of the

employee's fitness to return to work under certain circumstances. Section 825.310(g), however, bars employers from seeking a fitness for duty certification from employees returning to work after taking intermittent leave. *See* 29 C.F.R. § 825.310(g). The Request for Information sought comments on the benefits and burdens of removing this restriction and allowing fitness for duty certifications for employees returning from intermittent leave.

Many commenters questioned the rationale for the different treatment the regulations accorded to different types of leave and argued that safety concerns support requiring fitness for duty certifications for intermittent leave.

Exempting chronic conditions from return to work clearance seems to make little sense because those conditions are just as likely as any other to compromise the health or safety of the workforce. Indeed, some chronic conditions are even more likely to give rise to a justifiable need for return to work clearance than the other serious health conditions under the FMLA. For example, an employer may have little concern about the clerical assistant returning to work after giving birth, but far more (and legitimate) concern about allowing a utility worker to return after a series of epileptic seizures on the job.

United States Postal Service, Doc. 10184A, at 20; *see also* Honda, Doc. 10255A, at 14 ("Not permitting fitness-for-duty medical forms for FMLA Intermittent Leaves puts employers and employees at risk. Such a prohibition creates an exception to most employers' policies or practices when an employee has been incapacitated for any medical reason for more than a brief period."); MGM Mirage, Doc. 10130A, at 10 ("Quite simply, an employee places his/her physical condition at issue by requesting FMLA leave. This is true regardless of whether the employee was absent as result of continuous or intermittent leave.").

Some employers noted that the particular safety concerns inherent in their workplaces necessitated

that they obtain clear information regarding an employee's ability to safely return from leave. *See* Union Pacific Railroad, Doc. 10148A, at 6 (noting that clear information regarding their employees ability to work is critical as "those very employees are entrusted with jobs that affect the safety and security of the general public"); Honda, Doc. 10255A, at 14 ("In manufacturing, many of the jobs include safety-sensitive duties. Therefore, the current regulation prohibiting a fitness-for-duty form for intermittent leaves puts the employee and his/her co-workers at risk and requires the employer to assume a legal risk for liability, if there is an accident caused by the reinstated employee."); City of New York, Doc. 10103A, at 7 ("Fitness for Duty Certifications for employees in safety-sensitive positions who are intermittently absent should be an option for employers. For example, if a sanitation worker responsible for driving a two-ton truck on public roadways takes intermittent leave to treat high blood pressure, a fitness for duty certification should be required before the employee is restored to the position which carries an extreme responsibility to the public."). These employers suggested that the FMLA return to work process undercuts legitimate employer safety programs. For example, the Maine Pulp & Paper Association submitted the following statement:

Employees in the paper industry routinely work with hazardous materials in close proximity to heavy machinery. Forcing employers to accept the employee's medical provider's simple statement that the employee "is able to resume work," or worse, in the case of an intermittent leave-taker, accept the employee's word alone with no medical verification whatsoever jeopardizes the safety of co-workers and increases exposure to expensive workers' compensation claims. MPPA's members have strong safety programs which should not be undercut by administrative requirements of the FMLA.

Pierce Atwood, LLP (on behalf of Maine Pulp & Paper Association), Doc. 10191A, at 4.

Several employers suggested the Department should delete or revise this section of the regulations so that employers would have the same right to seek fitness for duty certifications from employees returning to work from intermittent leave. *See, e.g.,* Willcox & Savage, Doc. 10088A, at 6; Foley & Lardner LLP, Doc. 10129A, at 5; National Coalition to Protect Family Leave, Doc. 10172A, at 50. The National Partnership for Women & Families, however, argued that requiring employees returning from intermittent leave to provide fitness for duty certifications—which are to the employee’s expense—would significantly undermine the statutory purpose behind allowing employees to take intermittent leave. *See* Doc. 10204A, at 23 (“Any benefit to the employer of obtaining fitness for duty statements from intermittent leave-takers is far outstripped by the unwarranted burden that such a change in the regulations would impose on employees. . . . The intermittent leave option helps to take some of the financial strain off employees by enabling them to continue to earn a paycheck while addressing serious health or family needs, and allows employees to preserve as much of the twelve weeks of leave as possible.”) (footnotes omitted). The AFL-CIO also noted that “[r]equiring employees who take intermittent leave to present fitness for duty certifications for potentially every absence is burdensome and unnecessary.” Doc. R329A, at 44. *See also* National Business Group on Health, Doc. 10268A, at 4 (“It would be an administrative headache to require a fitness for duty statement from an employee who is absent intermittently. The added paperwork to cover this would be overly burdensome.”); Kennedy Reeve & Knoll, Doc. 4763A, at 18 (“[T]he logistical impossibility and financial burdens of allowing employers to require fitness-for-duty statements for each and every day of absence make such a policy not feasible.”). In an attempt to address the costs concern, one commenter suggested that employers bear the cost for fitness for duty

certifications when the employee is returning from intermittent leave. *See* United Parcel Service, Doc. 10276A, at 6.

Finally, some commenters commented that the return to work process under the FMLA conflicted with the return to work process under the ADA, with the latter providing a better model because it allows both more substantive information and physical examinations. *See infra* Chapter VII.

6. WH-380 Form

The Department provides an optional model certification form titled “WH-380” to assist employers who require employees to provide medical certification of their need for FMLA leave. The form can be used for initial certification or recertification, as well as for second and third opinions. While employers may use a form other than the WH-380, they may not require information beyond what is required by the sample form. 29 C.F.R. § 825.306(b). The Request for Information sought comments on how this form is working and what improvements could be made to it to facilitate the certification process.

Several commenters expressed frustration with the current form, finding it overly long and complicated. *See, e.g.,* American Academy of Family Physicians, Doc. FL25, at 2 (“The form WH-380 is overly complicated and confusing in its format.”); Spencer Fane Britt & Browne LLP, Doc. 10133C, at 27 (“DOL’s prototype medical certification form . . . is confusing to employers, employees, and health care providers.”); United Parcel Service, 10276A, at 10 (“The current WH-380 form is poorly drafted and confusing.”); Courier Corporation, Doc. 10018A, at 3 (“We feel the Certification of Health Care Provider (Optional Form WH-380) is far too vague.”); Association of Corporate Counsel, Doc. FL31, at 10 (“The current form is confusing and often results in incomplete or vague responses by health care providers that are insufficient to assess the employee’s eligibility for leave or the timing of the leave.”).

Several commenters suggested that the form could be simplified if it was broken into multiple forms, with separate forms either for intermittent and block leave, or for leave for the employee and leave for the employee's family member. *See, e.g.,* Yellow Book USA, Doc. 10021A, at 3 (suggesting separate forms for block and intermittent leave); National Counsel of Chain Restaurants, Doc. 10157A, at 16 (suggesting separate forms for employee and family members); Indiana University, School of Medicine, Department of Orthopedic Surgery, Doc. FL70, at 1 (same); Ohio Department of Administrative Services, Doc. 10205A, at 6 (same). Spencer Fane recommended that the Department actually develop four different versions of the form for: "(a) continuous leave for employee's own serious health condition; (b) continuous leave for serious health condition of a family member; (c) reduced schedule/intermittent leave for employee's own serious health condition; and (d) reduced schedule/intermittent leave for serious health condition of a family member." Doc. 10133C, at 32.

Commenters also suggested ways to make the current form more useful to employers and easier for health care providers to understand and to complete. *See, e.g.,* Courier Corp., Doc. 10018A, at 4 (Suggesting that the "form could be modified to be in more of a checkbox format, that might facilitate the physician's office in actually completing it more fully and providing better information for the employer to evaluate the need for leave."); United States Postal Service, Doc. 10184A, at 12 (advocating elimination of serious health condition checklist in favor of description of medical facts); National Coalition to Protect Family Leave, Doc. 10172A, at 47 ("DOL can make the form more user-friendly by streamlining the information requested instead of asking the health care providers to respond to a page and a half of specific questions.") (footnote omitted). A physicians group suggested that use of a standard form, as opposed to individual employer variations, would reduce the burden on health care providers.

See American Academy of Family Physicians, Doc. FL25, at 2; *see also* Kennedy Reeve & Knoll, Doc. 4763A, at 14 ("The model certification form must be simplified, and then it must be the required form for employers to use.").

Several commenters suggested that the Department "allow an employer the option of identifying key job skills and tasks, similar to the [ADA], to allow the doctor to make a more informed decision about the necessity of leave with respect to the specified essential job functions[.]" U.S. Chamber of Commerce, Doc. 10142A, at 8; *see also* United States Postal Service, Doc. 10184A, at 14 (form should include "a statement that the provider has been informed of the employee's essential job functions"). Another commenter, however, noted that the FMLA regulations already permit employers to "include a job description with the medical certification form given to the treating physician" but that few employers utilize this process. Kennedy Reeve & Knoll, Doc. 4763A, at 5.

Commenters also suggested that the WH-380 should include a diagnosis, something that was included in the form published with the interim FMLA regulations but was removed from the form when the regulations were finalized. *See* Preamble to Final FMLA Regulations, 60 Fed. Reg. 2180, 2222 (Jan. 6, 1995) ("The regulation and form no longer provide for diagnosis."); *see also* South Central Human Resource Management Association, Doc. 10136A, at 11 ("an employer should be permitted to obtain diagnosis and prognosis"); Detroit Medical Center, Doc. 10152A, at 2 ("It is critical that the regulations and WH-380 form be changed to require actual diagnoses to determine whether an employee's absences correlate with the medical certification."). One such commenter stated that "the FMLA's current restriction on obtaining a diagnosis creates an unnecessary and awkward limitation on the employee's health care provider in completing the medical certification form and the employer's health care provider in seeking clarification of information

contained in that form. Generally, meaningful communications between the health care providers cannot take place without some discussion about the actual diagnosis, particularly if second and third opinions are involved.” MedStar Health, Inc., Doc. 10144A, at 17.

Finally, some commenters noted that the WH-380 does not include all of the information that an employer is entitled to under the Act. Importantly, multiple commenters noted that the current form does not require the health care provider to certify the medical necessity for intermittent leave, which is a statutory requirement for the taking of such leave. *See* 29 U.S.C. § 2612 (b); *see also* National Coalition to Protect Family Leave, Doc. 10172A, at 47 (“In the case of intermittent leave, the medical necessity for the intermittent or reduced schedule also should be specified in accordance with 29 C.F.R. § 825.117 (not currently asked on the model form).”); Society for Human Resource Management, Doc. 10154A, at 18 (same); American Electric Power, Doc. FL28, at 5 (“Unfortunately, the statutory requirement that ‘medical necessity’ be demonstrated by employees seeking intermittent leave has been effectively eliminated by the Department’s regulations.”). Another commenter noted that the current form also does not solicit the information necessary to allow employers to determine whether an employee is entitled to FMLA leave to care for a child who is 18 years old or older. Honda, Doc. 10255A, at 13 (suggesting that in order for employers to determine whether an adult child is covered under the FMLA the form should be amended to include: “[1] Whether the adult child has a physical or mental disability; [2] Whether the physical or mental disability has caused the child to be incapable of self-care; and [3] A checklist of ‘activities of daily living’ and ‘instrumental activities of daily living’ that the adult child cannot perform.”).