

15-day time frames as the original certification.

Section 825.305(e) has also been revised to clarify the certification requirements when the employer's paid leave plan contains lesser obligations and paid leave is substituted for unpaid FMLA leave. If the employer's sick or medical leave plan contains less stringent certification requirements than those of FMLA, and paid sick, vacation, personal or family leave is substituted for unpaid FMLA leave as provided in § 825.207, only the employer's less stringent sick leave certification requirements may be imposed. See, also, § 825.207(h).

Information Required in Medical Certifications (§ 825.306)

Ten commenters questioned the necessity for the health care provider to provide a diagnosis when providing a medical certification of the existence of a serious health condition, and suggested that providing appropriate medical facts is sufficient for this purpose. The Women's Legal Defense Fund comments were reasonably representative of these commenters. They observed that the optional certification form provides more information to the employer than statutorily required (for example, diagnosis and regimen of treatment), and that inquiries regarding such matters may be a violation of the ADA. They noted that health care providers may be reluctant to provide detailed medical information due to ethical and privacy concerns, and expressed concerns regarding confidentiality and employee waivers. They recommended that the form include space for an employee signature which would provide a limited waiver from the employee to release the information to the employer for purposes of FMLA leave only.

Other commenters questioned the absence of a box to check on the form to indicate that an employee has been prescribed medicine, an indication of continuing treatment under the Interim Final Rule. The Hyman Construction Co. observed that it would be helpful if the form provided space for the health care provider's address and telephone number. Still others wanted the health care provider's Employer Identification Number and Social Security Number.

After a review of these comments, and significant revisions to the definition of "serious health condition" in § 825.114 of the regulations, this section and Form WH-380 have been completely revised. In general, the purpose of the revisions is to allow employers to obtain information from a health care provider

to verify that an employee in fact has a serious health condition, and the likely periods of absence by the employee, but no unnecessary information. The form has been revised, for example, to require certification as to which aspect of the definition applies, and to state the medical facts to support the definition. The regulation and form no longer provide for diagnosis, and make clear, consistent with the ADA and privacy concerns, that all information on the form relates only to the condition for which the employee is taking FMLA leave. However, it is considered necessary to include information regarding the regimen of treatment in general terms (e.g., prescription drugs) since this is one of the specific requirements of a serious health condition under § 825.114(a)(2)(i)(B).

The suggestion that the health care provider be required to furnish an Employer Identification Number and/or Social Security Number has not been adopted. The optional medical certification form is not a substitute for an insurance claims form; its use is intended for purposes of confirming the existence of a serious health condition, and thus the need for FMLA leave. The information provided by the form is required to be kept confidential by the employer and it would be inappropriate for the employer to place this form into the ordinary business process for insurance claims.

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. The employee may choose to withhold the certification from the employer. In so doing, however, the opportunity to take FMLA leave is sacrificed, but that would be the employee's decision. In the more than 12 months that have elapsed since the Interim Final Rule became effective, the Department has received no feedback that the absence of an employee waiver on the optional medical certification form has created any difficulty for the health care community, employers, or employees.

The Equal Employment Opportunity Commission provided comments regarding the medical certification process. EEOC suggested that questions 5 and 6 of the form are too broad. Question 5 asks for the probable duration of a condition. EEOC

recommended the question be revised to ask the probable duration of the condition for which the leave is requested, and suggested Question 6 is overly broad for the same reason, i.e., asking about the regimen of treatment to be prescribed. Question 5 has been revised. Question 6 has not been deleted because the information is necessary to determine if a serious health condition exists. However, the form makes clear that all information relates to the condition for which leave is needed.

The Burroughs Wellcome Company and Joan L. Kalafatas observed that sometimes employers need other medical information for purposes other than FMLA leave, and suggested that the FMLA regulations indicate that other information may be requested although it may not be used to make decisions required under FMLA. The Department disagrees with this comment. If the employer needs medical information for some other purpose, the employer needs to make an additional, perhaps simultaneous, request.

Massmutual Life Insurance Company recommends an employer with a paid leave program be allowed to use a single certification form for FMLA and paid leave purposes, asking that the form be permitted to include information in addition to that identified by the FMLA regulations only if the additional information would be used to verify eligibility for paid leave. It would not be appropriate to permit employers to request additional medical information to support an employee's desire to substitute accrued paid leave for FMLA leave. The regulations provide that any such requirements may not be more stringent than those required by FMLA. If the commenter is referring to eligibility for *benefit plans* rather than paid leave, the Department has included a provision in the Final Rule that if an employee must meet higher standards to qualify for *payments* from an employee benefit plan, e.g., a disability benefit plan, the employee is required to comply with the requirements of the benefit plan in order to receive payments. The employee may choose not to meet the higher standards of the benefit plan and thereby not receive payments from the plan; however, the employee continues to be entitled to FMLA leave. Section 825.207(d) has been amended to incorporate this guidance.

The California Department of Fair Employment and Housing urged that § 825.306(b) be amended to reflect that collection of this information by the employer is discretionary and that it is appropriate for the employer to comply