

with State or local law. California law does not permit an employer to require that the medical certification specify the serious health condition which led to the leave request. Section 825.701 of the regulations provides guidance to employers regarding the responsibility to comply with applicable State statutes. If the provisions of the State statute are more beneficial to the employee or more restrictive in terms of the rights of the employer (such as by prohibiting a requirement that more medical information be required), the employer must comply with that State statute.

The law firm of Fisher and Phillips contended that the provision that employers may use another type of medical certification only if no additional information is required is not supported by FMLA § 104(c)(3). The Department disagrees, with one exception. The provisions of § 104(c)(3) relate to the circumstances when an employee is unable to return from FMLA leave due to the onset or continuation of a serious health condition. The information required by this section of the statute and the regulations is the maximum which can be requested. Nothing in § 104(c)(3) implies that an employer may ask for more information than is required by § 825.306. Section 825.207(d) has been amended to permit the employer to request a greater amount of information if required in order for an employee to qualify for payments from an employer benefit plan, or in the event the employee is on a worker's compensation absence and the applicable worker's compensation statute permits the employer to acquire additional information.

Michael Meaney suggested that certification of a disability should be strictly limited to medical doctors (M.D.s). The Department is unable to adopt this suggestion in light of the guidance provided by the Congress and the Department's deliberations over the definition of a health care provider. For example, FMLA's legislative history indicates clear Congressional intent that Christian Science Practitioners be included in the definition of health care provider. These individuals are clearly not M.D.s. In considering the types of health care providers available to the general population, particularly those who live in rural areas which do not have ready access to a doctor (MD), but regularly rely on nurse practitioners and midwives, the Department concluded that it is appropriate to include these professions in the definition of a health care provider. Rather than further limit the definition of a health care provider in § 825.118 of the regulations, the Final

Rule expands the practitioners that may qualify as health care providers.

This section has also been revised to clarify the certification requirements when the employer's paid leave plan contains lesser obligations. Only the employer's lesser certification requirements may be imposed when paid leave is substituted for FMLA leave, as provided in § 825.306(c). See also § 825.207(h).

Adequacy of Medical Certification (§ 835.307)

Six commenters (four working women advocacy groups and two unions) urged that when an employer requires a second or third medical opinion, not only the costs of obtaining the opinion by the health care provider be at the employer's expense, but because the employee is expending time at the employer's direction, the employer should also be required to pay the employee for the time spent in acquiring the required medical opinions. The Department has considered these comments carefully but has concluded that Congress did not intend that employees on unpaid FMLA leave be paid for the time spent obtaining second and third medical opinions. Section 825.307(d) has been amended, however, to make it clear that an employer must in all cases reimburse an employee or family member for any reasonable "out-of-pocket" travel expenses incurred in obtaining the required second and third opinions.

The Equal Rights Advocates requested an exception be provided where obtaining the second or third opinion for an immediate family member would be onerous. Further, they suggest that when the employer requires a second or third medical opinion and the employee's leave has already begun, the employee should be allowed to continue on leave and the employer should be restrained from demanding reimbursement for insurance premiums. If the third opinion disputes the original medical certification, the employee may be required to return to work; the employer may not take any unfavorable action against the employee; the employer shall not be entitled to reimbursement for insurance premiums paid during the leave; and, the employee's FMLA leave entitlement shall be reduced by the period of leave actually taken.

The third medical opinion becomes necessary only when the second opinion disagrees with the original opinion. In the suggestion, the third opinion now agrees with the second, which means that either the employee or the employee's family member does

not or did not have a serious health condition. If a serious health condition did not exist, the employee was not entitled to take *any* FMLA leave, as the absence was not for an FMLA reason. Thus, the employer is prohibited from charging or deducting the time of the absence from the employee's FMLA leave entitlement, and the employee does not have the rights and protections of the statute for that absence. The Department is unable to incorporate this suggestion in the regulations. The Department agrees, however, that pending the ultimate resolution of the employee's entitlement to leave through the certification process, the employee is provisionally entitled to the benefits of the Act, including maintenance of group health benefits. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave will not be counted as FMLA-qualifying and may be treated as paid or unpaid leave under the employer's established leave policies. This section is so revised.

The Equal Rights Advocates further suggest that the second and third medical opinion should only be allowed if it is not unduly burdensome to the family member. The right of the employer to require a second medical opinion when the employer has reason to question the validity of the original medical certification is statutory. Consequently, the employer is entitled to the second opinion, and the third opinion if the second opinion disagrees with the original opinion. The alternative is for the employee to forego FMLA leave. However, § 825.307 has been amended to provide that an employer may not ordinarily require an employee to travel outside normal commuting distances in obtaining the required opinions.

The Women Employed Institute and Women's Legal Defense Fund suggest that when an employer requires a second or third medical opinion, the employee should be provided a copy of the results. The Department agrees and has added § 825.307(c)(1) to require the employer, upon request from the employee, to provide copies within two business days.

Nineteen commenters commented on the provision that prohibits an employer from obtaining a second medical opinion from a health care provider that the employer employs or regularly utilizes. Several of the commenters are large hospital facilities or Health Maintenance Organizations (HMOs) who have large numbers of doctors either on the payroll or with whom they regularly contract to provide medical care to their patients. Kaiser Permanente