FMLA

INTERPLAY OF SICK TIME AND FMLA

FMLA CERTIFICATION FORMS

When a teacher uses paid sick leave for a medical absence, as provided by the parties' collective bargaining agreement, the teacher is not required to request FMLA leave, although a district can designate the time as FMLA leave.

When a teacher uses paid sick leave and specifically does not request FMLA leave, the teacher is not required to provide FMLA medical certification.

I. Sick Leave and FMLA Leave Are Concurrent, Not Stacked

FMLA creates a mechanism whereby an employee with a "qualifying event" is able to use paid sick leave, as provided by employer policy and/or the parties' collective bargaining agreement, concurrently with the statutorily provided FMLA leave allowance. By using these allowances concurrently (e.g. using a paid leave allowance at the same time as the 12 week FMLA leave allowance) rather than "stacking" available leave, the risk of long-term staffing issues created by "stacked leave" and the resulting burden on the employer are eliminated.

II. Information to be Provided in an FMLA Medical Certification Form

The standard FMLA medical certification forms available from the U.S. Department of Labor are samples, listing the full range of questions that an employer may pose. There is, however, no statutory obligation that an employee respond to the questions presented in the standard FMLA medical certification form. In other words, while these medical certification questions may be asked, the employer has no statutory authority to compel the employee to reply. There is no statutory obligation compelling the employee and/or the medical provider to disclose the specifics of a medical condition; rather, only brief information, sufficient to establish that a qualifying FMLA event exists, is required.[1] The medical provider can simply state that the employee is unable to work due for a particular period of time due to a medical condition.

[1] U.S. Department of Labor, Wage & Hour Division, opinion letter #FMLA-71, dated September 14, 1995.

III. "Qualifying Event" Determination

Regardless of the amount information provided by the employee, the employer is ultimately obligated to determine whether or not an employee's leave, including extended paid sick leave, involves a qualifying event and is appropriately designated as FMLA leave.

If an employer chooses not to designate leave as FMLA qualifying, then the guarantees and protections of FMLA are not extended to the employee; however, the employer's decision regarding FMLA designation does not alter the benefits defined in the parties' collective bargaining agreement.

Once an employee requests medical leave -- using either earned/accumulated paid sick leave or FMLA leave -- it is incumbent upon the employer to determine whether or not this leave involves a "qualifying event." ***If a qualifying event exists, the employer is obligated to designate that absence as FMLA leave.***

Specifically, 29 C.F.R. §825.300(d) ("Designation notice") states in pertinent part:

> (1) The employer is responsible in all circumstances for designating leave as FMLA-qualifying, and for giving notice of the designation to the employee as provided in this section. When the employer has enough information to determine whether the leave is being taken for a FMLA-qualifying reason (e.g., after receiving a certification), the employer must notify the employee whether the leave will be designated and will be counted as FMLA leave within five business days absent extenuating circumstances. ***Only one notice of designation is required for each FMLA-qualifying reason per applicable 12-month period, regardless of whether the leave taken due to the qualifying reason will be a continuous block of leave or intermittent or reduced schedule leave.*** If the employer determines that the leave will not be designated as FMLA-qualifying (e.g., if the leave is not for a reason covered by FMLA or the FMLA leave entitlement has been exhausted), the employer must notify the employee of that determination. ***If the employer requires paid leave to be substituted for unpaid FMLA leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, the employer must inform the employee of this designation at the time of designating the FMLA leave.*** (Emphasis added.)
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> (2) If the employer has sufficient information to designate the leave as FMLA leave immediately after receiving notice of the employee's need for leave, the employer may provide the employee with the designation notice at that time.

An employee may reasonably consider the employer's request for information and/or the generic Department of Labor Certification form to be intrusive and cumbersome and, thus, simply refuse to provide additional information if they do not request FMLA leave. If an employee does not provide medical certification, then the employer must use whatever available information it does have to determine whether or not the circumstances, as understood by the employer, constitute a qualifying event for designation as FMLA leave. In some cases (e.g. pregnancy, hospitalization, etc.), the existence of a qualifying event is obvious; however, other conditions, which are bona fide FMLA qualifying events, may not be evident to the employer. Nevertheless, if the employer concludes that a FMLA qualifying event exists, based on available information, the employer will legitimately designate the leave as FMLA and debit that time from the total leave allowance (e.g. 12 weeks or whatever amount of time is then available). In addition, once designated as a qualifying event subject to FMLA leave, the employer will extend to the employee all FMLA statutory guarantees and protections. Conversely, if an employer does not have sufficient information, the employer may deny FMLA leave, including the associated guarantees and protections. (*See*, 29 C.F.R. §825.305 "Certification, general rule.")

IV. Contractual Rights v. FMLA

When an employer is a party to a collective bargaining agreement that provides employees with rights and/or benefits beyond those established under FMLA, the employer must observe all contractual rights.

Although there is limited case law addressing this situation, these precise facts are found in a New Jersey-based case. In the Matter of Township of Parsippany-Troy Hills, Petitioner-Appellant and Parsippany Public Employees Local 1, Respondent-Respondent, 419 N.J. Super. 512, 17 A.3d 834 (2011).

> ***Holding:*** When an employee was using paid sick leave as provided by the parties' collective bargaining agreement and had explicitly stated that he was not requesting FMLA leave, the employer did not have managerial prerogative to compel the employee to submit FMLA medical certification.
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> ***Facts:*** An employee wanted to use paid sick leave, rather than unpaid FMLA leave, to care for a sick family member. The employer asked the employee to submit FMLA medical certification. Initially, the employee refused to provide certification; however, when faced with the possibility of indefinite suspension, the employee complied. The Union filed an unfair labor practice complaint, asserting that, since the employee was using paid sick leave as provided by the parties' collective bargaining agreement, the employer had no authority to demand medical certification from the employee since the request did not involve FMLA leave.

Discussion: In ruling on the unfair labor practice complaint, the New Jersey state labor board[1] held that, when the parties have not reached an agreement requiring that paid leave and FMLA leave be taken concurrently and the employee declines to take the FMLA leave, the employer has "neither a managerial prerogative nor a preemptive right to require employees to complete the (medical certification) form." While the employer has the prerogative to require employees to produce a doctor's note to document sickness, it does not give an employer carte blanche access to request details of an employee's illness. Unlike a doctor's note, a medical certification form requests detailed information about an illness, information which is not needed to verify sick leave. Absent an allegation of sick leave abuse, an employee's privacy ultimately outweighs the employers' right to details of an illness or injury.

The New Jersey superior court upheld this decision, stating that the employer did not have managerial prerogative to compel an employee, who was using paid sick leave as provided by the parties' collective bargaining agreement and not requesting FMLA leave, to submit FMLA medical certification.

V. CONCLUSION

An employee may legitimately request to use available paid sick leave and not request FMLA leave. In relying upon available paid sick leave, in lieu of designated FMLA leave, the employee may also refuse to submit a FMLA medical certification, if requested by the employer. Nevertheless, even without an employee's medical certification and with no provision in the parties' collective bargaining agreement, an employer may choose to rely on available information to determine whether or not to designate an employee's paid sick leave as concurrent FMLA leave.

[1] Town of Parsippany-Troy Hills v. Parsippany Public Employees Local 1, Case # SN-2010-041.