

The regulations recognize and require compliance with HIPAA as they now permit more detailed information about the employee's medical condition. Provided the employee signs the necessary authorization for the release of information, an employer may obtain a description of symptoms, diagnosis, hospitalizations, doctor visits, whether medication has been prescribed, referrals for evaluation or treatment or any other regimen of continuing treatment. As this information may be needed to determine whether the leave is properly designated as FMLA leave, the employee will understand the importance of providing the necessary permission. Without providing the information, the employee can lose his/her FMLA protections.

The certification must establish that the employee cannot perform the essential job functions and what the anticipated duration of the restriction will be. The certification must estimate the frequency and duration of episodes of incapacity related to intermittent unforeseen leave needs.

If the employer finds that the information provided is insufficient or incomplete, it can deny the leave, but it must advise the employee in writing what additional information is needed and give the employee at least 7 calendar days (depending on how practical it is for the employee to be able to get the response for the doctor) to provide the needed information or clarification.

If an employee has a serious health condition which may be a disability under the ADA, the employer can follow the ADA's guidelines for requesting information and to determine what, if any, accommodation is appropriate.

In order to provide the employee some protection, there are limitations on who may contact the employee's health care provider(s). It can never be the employee's supervisor! The contacts with the employee's health care provider can only come after the period to cure deficiencies in the medical documentation response. The people authorized by the regulations to make the contact are a human resources professional, a leave administrator, a management official or the employer's health care provider. Whoever makes the contact must be aware that they are obtaining sensitive personal information and must safeguard it as they would with any HIPAA protected information.

The regulations clarify that the employee is required to provide a release for medical information so that the second or third provider can obtain and review the information. The employer must provide the employee with a copy of the second and third opinions within 5 business days of a request for such information.