

## FMLA Certifications: When “Unknown” And “Probably” Aren’t Enough

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The words on the FMLA Certification jump out at us: “Unknown.” “Unpredictable.” “Probably.” Instead of the certainty we were looking for, we have more questions. The DOL regulations require that the FMLA Certifications not only be “complete,” but also “sufficient.” What is “sufficient?” In looking at this issue recently, we found no DOL advisory opinions, although there are some court rulings to guide us. As an initial matter, rely on the regulations: a medical certification is incomplete if information requested is not provided, and it is insufficient if the information provided is vague, ambiguous or non-responsive. 29 C.F.R. 825.305(c). “Vague, ambiguous or non-responsive.” Words (drafted by a lawyer, no doubt) that mean when the details of the certification are unclear, or inherently inconsistent, we *can* ask more questions.

- A district court in New York that found the certification was “incomplete” where the answer “unknown” was provided in response to several questions. *See Potter v. Potter*, No. 07-cv-0124 BMC, 2010 U.S. Dist. LEXI 145243, \*18-19 (E.D.N.Y. January 21, 2010).
- The Seventh Circuit Court of Appeals in the case of *Muhammad v. Indiana Bell Tel. Co., Inc.*, 182 Fed. Appx. 551, 554 (7<sup>th</sup> Cir. 2006) determined that an employee’s certification was insufficient where -- in response to the question that asks about duration and frequency of intermittent leave -- the provider wrote only that the need for leave was “patient driven, so when she experiences this pain she may need 1-2 days off work.”)
- A Pennsylvania district court rejected the patient certification as insufficient where “[i]n response to a portion of the form requesting ‘the likely duration and frequency of episodes of incapacity,’ [the doctor] responded that the ‘Frequency of episodes is COMPLETELY UNPREDICTABLE.’” *See Tome v. Harley Davidson Motor Co.*, No. 1: CV-06-2155, 2007 U.S. Dist. LEXIS 78789, 2007 WL 3125090, at \*6 (M.D. Pa. October 24, 2007).

So, here is your reminder to carefully read those certifications when they first arrive. If the certification includes a statement that the employee is “unable to perform job functions,” but fails to specify those job functions, then it is unclear or non-responsive. *Ask for more.* Or, if the certification includes the terms, “unknown” and “probably,” look at it closely. “Unknown” and “probably”

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do not provide clear answers to the questions about the period of incapacity and the estimated treatment schedule or part-time or reduced work schedule. *Ask for clarification.* Remember, you can't just deny the leave. You may say that the certification is insufficient or incomplete. Use the Designation Form (Form WH-382) and be specific about what is missing, what is unclear and what needs clarification. The FMLA can be daunting, so don't settle for vague and ambiguous. *Seek clarity.*