

# United States Department of Labor

## Wage and Hour Division

### Wage and Hour Division (WHD)

#### FMLA-87

December 12, 1996

Dear **Name\***:

This is in response to two letters from your office asking a number of questions regarding the definition of the term "serious health condition" under the Family and Medical Leave Act of 1993 (FMLA). I regret that, due to the volume of inquiries and other work associated with administering FMLA, we were not able to respond earlier.

Before answering your specific questions, it may be helpful to first examine the pertinent sections of the FMLA and its implementing regulations, 29 CFR Part 825, and explain their underlying rationale. Under FMLA, "eligible employees" may take leave for, among other reasons, their own serious health conditions that make them unable to perform the essential functions of their position, or to care for immediate family members (i.e., spouse, child, or parent) with serious health conditions. Section 101(11) of FMLA defines serious health condition as "an illness, injury, impairment, or physical or mental condition that involves:

- A. inpatient care in a hospital, hospice, or residential medical care facility; or
- B. continuing treatment by a health care provider."

Under the express statutory language, any absence involving inpatient care qualifies as a serious health condition. A more difficult task, however, has been to define those illnesses that would qualify as serious health conditions because they involved "continuing treatment by a health care provider."

The legislative history states that the meaning of **serious health condition** "is broad and intended to cover various types of physical and mental conditions" and "is intended to cover conditions or illnesses that affect an employee's health to the extent that he or she must be absent from work on a recurring basis or for more than a few days for treatment or recovery." Similar standards apply to a child, spouse, or parent of the employee who is unable to participate in school or in regular daily activities. The legislative history also states that the term "is not intended to cover short-term conditions for which treatment and recovery are very brief" and "minor illnesses which last only a few days and surgical procedures that typically do not involve hospitalization and require only a brief recovery period. Complications arising out of such procedures that develop into 'serious health conditions' will be covered by the act. \* \* \*"

In developing the final regulatory definition of "serious health condition" at section 825.114, the Wage and Hour Division carefully reviewed the statute, the legislative history, the public comments received during rulemaking, and its enforcement experience under the interim regulations. As a result of this review, separate definitions were established for: (1) any period of incapacity due to pregnancy and prenatal care (825.114(a)(2)(ii)); (2) a chronic serious health condition (such as asthma, diabetes, etc., section 825.114(a)(2)(iii)); (3) a permanent or long-term condition for which treatment may not be effective (such as Alzheimers, strokes, terminal diseases, etc., section 825.114(a)(2)(iv)); and (4) to receive multiple treatments (including recovery there from) either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment (such as dialysis, chemotherapy, etc., section 825.114(a)(2)(v)).

In addition, the "three-day incapacity" rule coupled with "continuing treatment" portion of the definition was clarified at section 825.114(a)(2)(i) to mean –

A period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery there from) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

- A. Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or
- B. Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

A "regimen of continuing treatment" is defined in section 825.114(b) to include, for example, a course of prescription medication (e.g., an

antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). But the regulations also clarify that the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, a regimen of continuing treatment for purposes of FMLA leave.

The final regulations also provide examples, in section 825.114(c), of conditions that ordinarily, unless complications arise, would not meet the regulatory definition of a serious health condition and would not, therefore, qualify for FMLA leave: the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc. Ordinarily, these health conditions would not meet the definition in 825.114(a)(2), as they would not be expected to last for more than three consecutive calendar days and require continuing treatment by a health care provider as defined in the regulations. If, however, any of these conditions met the regulatory criteria for a serious health condition, e.g., an incapacity of more than three consecutive calendar days that also involves qualifying treatment, then the absence would be protected by the FMLA. For example, if an individual with the flu is incapacitated for more than three consecutive calendar days and receives continuing treatment, e.g., a visit to a health care provider followed by a regimen of care such as prescription drugs like antibiotics, the individual has a qualifying "serious health condition" for purposes of FMLA.

An employer may, when an employee requests FMLA leave for a serious health condition, request a medical certification by the employee's health care provider to confirm that a serious health condition exists. If the employer has reason to doubt the validity of the certification provided, the employer may require that the employee obtain a second opinion from another health care provider (at the employer's expense). Conflicting opinions are resolved by obtaining a third medical opinion as provided in section 103 of FMLA and sections 825.305 through 825.308 of the regulations.

Turning to your particular questions, we have rephrased and amplified them slightly in the discussion below. These answers should be viewed as general guidance that might not be applicable in a particular situation where other significant factors are present.

**Question 1A: People on occasion will go to their doctor if their cold or flu lasts more than three days. The doctor may prescribe an antibiotic (which the patient may or may not fill) in case there is a bacterial infection. The regulations state that, ordinarily, unless complications arise, the common cold and flu are not serious health conditions for purposes of FMLA. Can a cold or the flu ever be a serious health condition for purposes of FMLA?**

**Answer 1A:** Yes, the cold or flu may be a serious health condition for FMLA purposes, if the individual is incapacitated for more than three consecutive calendar days and receives continuing treatment by a health care provider, as defined in the regulations.

**Question 1B: What if the employee telephones the doctor but does not actually see the doctor for an examination?**

**Answer 1B:** If an employee who has the flu only telephones the doctor but is not seen or examined by the doctor, those circumstances would not qualify as "treatment" under the regulations. Treatment means an examination to determine if a serious health condition exists, evaluations of the condition, and actual treatment by the health care provider to resolve or alleviate the condition. A telephone conversation is not an examination. An examination or treatment requires a visit to the health care provider to qualify under FMLA.

**Question 1C: What if the doctor only prescribes medication "in case your cold turns into something more serious"? What if the employee does not have the prescription filled or does not follow the doctor's orders?**

**Answer 1C:** A prescription that is given "in case your cold develops into something serious" raises the question of whether the existing condition is a serious health condition for purposes of FMLA. In all likelihood, the employee has not yet suffered the "complications" that would qualify the illness as a serious health condition for FMLA leave purposes. An employee who does not follow the doctor's instructions is probably not under a "regimen of continuing treatment by or under the supervision of the health care provider" within the meaning of the FMLA regulations.

**Question 1D: What if the doctor advises the employee to stay at home, drink plenty of fluids, and stay in bed for a few days?**

**Answer 1D:** Staying at home, drinking fluids, and staying in bed are activities which can be initiated without a visit to a health care provider and do not constitute "continuing treatment" under the FMLA regulations. See section 825.114(b).

**Question 2A: What if the absence is for strep throat or an ear infection, and the employee goes to the doctor and gets a prescription for an antibiotic, is that a serious health condition?**

**Answer 2A:** The circumstances surrounding each illness must be evaluated to see if it meets one of the regulatory definitions of a serious health condition. If either a strep throat or ear infection results in an incapacity of more than three consecutive calendar days and involves continuing treatment by a health care provider (which can include a course of prescription medication like an antibiotic), the illness would be considered a serious health condition for purposes of FMLA.

**Question 2B: Is strep throat without complications a "serious health condition" just because an antibiotic was prescribed?**

**Answer 2B:** If an illness such as strep throat incapacitates someone for a period of more than three consecutive calendar days and involves continuing treatment by a health care provider (including a course of prescription medication like an antibiotic), the condition qualifies as a serious health condition for purposes of FMLA.

**Question 3A: What if the employee stays out because her child has bronchitis? She goes to the doctor and medication may or may not be prescribed. Does this meet the criteria for a "serious health condition"?**

**Answer 3A:** Bronchitis may itself be a serious health condition if it meets one of the regulatory definitions. Bronchitis ordinarily may not be a serious health condition because typically it does not involve incapacity of more than three consecutive calendar days and continuing treatment by a health care provider as defined by the regulations. In the case where the doctor does not prescribe any course of medication to resolve or alleviate the health condition, it would not qualify as "a regimen of continuing treatment" within the meaning of the regulations.

**Question 3B: If bronchitis may qualify as a serious health condition, does section 825.208(d) of the regulations contradict this when it says "e.g., bronchitis that turns into bronchial pneumonia"?**

**Answer 3B:** No. The complications of an illness that is not itself ordinarily a serious health condition, i.e., does not routinely meet FMLA's definition of a serious health condition, may convert a routine illness into a serious health condition for FMLA leave purposes (e.g., when bronchitis turns into bronchial pneumonia). In such a situation, it may be difficult to determine when the initial illness became a serious health condition for FMLA leave purposes as a result of complications. Any question regarding the onset of a serious health condition may be resolved by obtaining a medical certification from the employee's health care provider and, where there is reason to doubt the validity of the certification provided, a second medical opinion.

**Question 4A: Employees occasionally stay home for a week or more with a child who has chicken pox. Assuming there are no complications, is the employee entitled to leave under FMLA?**

**Answer 4A:** Based on the limited information in the situation you describe, there appears to be no continuing treatment by a health care provider that would qualify the absence for FMLA leave.

**Question 4B: What if the employee gets chicken pox unrelated to a pregnancy?**

**Answer 4B:** In the absence of additional information, there appears to be no continuing treatment by a health care provider that would qualify the absence for FMLA leave.

**Question 4C: What if a doctor advises the employee to stay home for a week?**

**Answer 4C:** The regimen of care described in your question appears to be treatment or activities that can be initiated without a visit to a health care provider. Under those circumstances, without other factors, the situations would not qualify as serious health conditions for FMLA leave purposes.

We are providing the additional information you requested on the FMLA under separate cover. I hope you will find this information responsive to your requests.

Sincerely,

Maria Echaveste  
Administrator

*\* Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. 552 (b)(7).*