American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

**To:** Local and State Presidents
National Business Agents
Regional Coordinators
National Advocates
Resident Officers

**From:** Greg Bell, Director
Industrial Relations

**Date:** October 29, 2008

**Re:** Award of Arbitrator Nolan on FMLA Form Letters

In a recent national-level award, Arbitrator Dennis Nolan ruled that certain form letters that the Postal Service planned to use when employees seek family and medical leave violate the Family and Medical Leave Act (FMLA). Arbitrator Nolan ordered the Postal Service to revise the form letters as necessary to comply with the law. *(USPS #Q98N-4Q-C 01167325, 10/13/2008)*

This grievance was filed by the NALC in 2001 after the Postal Service notified the postal unions of its plans to issue 19 form letters regarding FMLA leave. Following lengthy discussions, the NALC and the USPS were able to resolve their differences regarding some of the form letters in pre-arbitration. However, seven letters still remained in dispute and the grievance over the letters was scheduled for arbitration. The APWU and the NPMHU intervened in this case. The APWU supported the NALC's position, and noted that the Postal Service never provided the disputed letters to the APWU.

After considering the parties' evidence during arbitration, Arbitrator Nolan sustained the grievance in part and denied it in part. While he found that some of the letters comply with FMLA law, the arbitrator decided that three of the letters in dispute are inconsistent with the FMLA.

**The FMLA**

The crux of the grievance was whether the sample form letters violate the FMLA, thereby also violating Articles 5 and 19 of the National Agreement.

Under the FMLA, employers may require an employee to submit medical certification issued by a health care provider (HCP) in order to support his/her leave request. Section 825.306 of the Department of Labor's (DOL) regulations outlines how much information an employer may

require in a medical certification. The regulations expressly state that an employer may not require additional information beyond that listed in the DOL's Standard Form WH-380. Moreover, regardless of the form that is used, the information sought "must relate only to the serious health condition for which the current need for leave exists."

Furthermore, Section 825.307 of DOL's regulations outlines the employer's options if it questions the adequacy of a medical certification. Under Section 825.307, the employer may, with the employee's permission, contact the employee's HCP to seek clarification or to authenticate the medical certification. Alternatively, the employer may invoke the second and third opinion process if the employer "has reason to doubt the validity" of the medical certification.

**Form Letters Ruled Inconsistent with the FMLA**

Arbitrator Nolan ruled that the three following letters are inconsistent with the FMLA:

**Sample Form Letter #12B –** The Postal Service planned to send this form letter to employees whose medical certification is considered to be "incomplete" or "non-responsive" as to the expected frequency and duration of incapacity due to a chronic condition (i.e. if the HCP simply noted the frequency and duration as "unknown"). The letter states that the employee has 15 days to submit a complete certification. The letter also suggests that the employee provide their general "medical history," as well as the doctor's experience with the condition, in order to give the Postal Service "guidance as to how frequently the employee might be incapacitated and for how long."

The Unions argued that Letter 12B asks the employee for more information than the regulations allow. We also argued that it asks for information that would arguably supplement rather than clarify the submitted certification. Finally, the Unions argued that by referring to the employee's general medical history, the Postal Service is seeking information beyond the scope of the medical condition at issue.

Arbitrator Nolan found that, under the FMLA, the Postal Service may not write directly to an employee to clarify the ambiguity. It may only seek the employee's permission for its medical officer to seek clarification from the employee's HCP. Thus, he ruled that Letter 12B conflicts with FMLA law.

**Sample Form Letter #13A –** Like Letter 12B, Letter 13A was to be sent to employees when the Postal Service determined that it needed clarification with regard to the frequency and duration of the employee's incapacity. Letter 13A required that the employee give Letter 13B (clarification inquiry) to his/her HCP and ask that the HCP address the concerns stated in the letter. Letter 13A also stated that the employee "must sign" an authorization form that would allow their health care provider to release their relevant medical information to the Postal Service. Attached to Letter 13A was a copy of PS Form 2488 (Authorization for Medical Report). The letter also gives the employee the option of using a form provided by their HCP.

The Unions objected to Letter 13A on the ground that it asks the employee to cure the deficiencies in the medical certification rather than simply requesting the employee to grant permission for the USPS medical officer to do so. The Unions also argued that, while it is true that the employee's authorization is necessary for the employer to have its medical officer make inquiries of the employee's HCP, by stating that the employee "must sign" an authorization form, Letter 13A could mislead employees into believing that they are obligated to do so.

Arbitrator Nolan agreed with the Unions. He found that Letter 13A conflicts with §825.207(a) of the FMLA regulations in that the letter asks the employee to forward the request for clarification to the HCP. Under §825.207(a), "the employer may only seek the employee's permission to contact the HCP. If the employee grants permission, then the Postal Service's medical officer, not the employee, must send the request to the HCP." Arbitrator Nolan also agreed that the language stating that the employee "must sign" an authorization form, while literally correct, could be misinterpreted, leading employees to take "must sign" as a command rather than a request for permission. According to the arbitrator, in order for the Postal service to seek an employee's release in this situation, the cover letter must avoid any implication that the employee "'must' sign the release."

**Sample Form Letter #14A –** Letter 14A is sent directly to employees to seek clarification on the extent of the employee's incapacitation (i.e. whether the employee is unable to perform work of any kind, unable to perform certain essential functions of their job, or must be absent for treatment as a result of their condition). Similar to Letter 13A, Letter 14A asks the employee to give their HCP a copy of Letter 14B (clarification inquiry addressed to the HCP).

The Unions argued that Letter 14A improperly asks the employee to convey the request to the HCP rather than doing it directly, and that he/she sign a release that may be broader than necessary. The Unions also objected to the fact that Letter 14A omits reference to the employee's option to use a release form other than the PS Form 2488.

In siding with the Unions on this remaining issue, Arbitrator Nolan found that Letter 14A violates the FMLA because it asks the employee to forward the clarification inquiry (Letter 14B) to the employee's HCP instead of contacting the employee's HCP directly. The arbitrator noted that the Postal Service promised in their post-hearing brief to correct the omission and to revise the "you must sign" language in this instance so that employees are made aware that they "may use" form 2488 or an alternative release provided by the HCP.

**Form Letters Ruled Consistent with the FMLA**

Arbitrator Nolan ruled that the four following letters are consistent with the FMLA:

**Sample Letter #12A** - Letter 12A is sent to an employee whose medical certification is considered to be "non-responsive" or "incomplete" as to the basis for finding a chronic condition to be a serious health condition. The letter states that the employee's HCP submitted medical

certification that merely checked the definition of a serious health condition he/she believed applied without providing "medical facts" to support the diagnosis and how those facts meet the criteria of the definition. It says that that the employee "will need to obtain a complete and responsive certification which provides some specificity about the condition" within 15 days of receiving the letter, and failure to provide the requested certification in a timely manner will result in denial of FMLA protection.

The Unions argued that the letter improperly characterized the certification as incomplete merely because it lacked the amount of detail the Postal Service wanted. We maintained that the regulations don't specify the level of detail that is necessary and therefore sending an employee this letter is improper.

Arbitrator Nolan rejected the Unions' argument. He said that Section 2613(b)(3) of the FMLA says that a certification is "sufficient" only if it contains "medical facts supporting a diagnosis of a qualifying medical condition." Nolan thus ruled that "[t]he Postal Service may properly treat a certification lacking such information as incomplete and may therefore write to the employee so that the employee can correct the error."

**Sample Letter #13B** – Letter 13B is sent to an employee's HCP and notes that medical documentation that he/she sent indicates that the frequency and duration of an employee's absences due to "episodes of incapacity" are "unknown." It asks for "some information concerning the anticipated frequency and duration" of an employee's absences due to a health condition. It further suggests that the patient's "medical history" should provide guidance and encloses the employee's attendance record for the previous 12 months including absences that might may not be related to a chronic serious health condition.

The Unions argued that the Postal Service improperly was seeking information that would supplement rather than clarify a certification. We maintained that management only needs an HCP's conclusions rather than other medical information leading to such conclusions. In addition, we objected to the employer sending the doctor a patient's absentee record.

Arbitrator Nolan found that "[a]sking for clarification" when an employee's HCP describes the frequency and duration of episodes of incapacity as "unknown" doesn't violate the FMLA. He further determined that there was no basis for the union's objection to the employer sending the physician the patient's absenteeism record. To support this finding, he relied on DOL Opinion Letter 2004-2-A (May 25, 2004).[1]

[1] The DOL Letter provided the following: "The FMLA does not prohibit an employer from including a record of an employee's absences along with the medical certification form for the health care provider's consideration in determining the employee's likely period of future absences"

**Sample Letter #14B** – Letter 14B is sent to an employee's HCP, along with a statement of the essential functions of the employee's job, and seeks clarification as to whether the employee's medical condition will make the employee "unable to perform work of any kind, or unable to perform specific essential functions of his/her position."

The Unions argued that similar to Letter 13B, the Postal Service improperly seeks information that is supplementary rather than clarifying. Arbitrator Nolan rejected this argument, however. He said that in accordance with Section 825.306(b)(1) of the FMLA regulations, "an employer may insist on receiving the medical facts supporting the certification, 'including a brief statement as to how the medical facts meet the criteria of the definition.'" Moreover, the arbitrator stressed that requesting that an HCP explain whether "an employee will be unable to perform *any* work, or would just be unable to perform *specific* essential job functions" constitutes the kind of "clarification anticipated by Section 825.307(a)[of the FMLA regulations]."

**Sample Letter #17** – Letter 17 is sent to a doctor who an employee has been referred to for an FMLA second opinion. It requests information from the doctor about the medical condition's impact on the employee's ability to perform the essential functions of his/her job, and forwards a copy of the job description as well as a list of the job's physical capacity requirements.

The Unions argued that the letter exceeded the scope of FMLA requirements since the purpose of a second opinion is merely to verify the validity of an initial certification. We argued that the Postal Service improperly was seeking new information about the condition that wasn't included in the certification.

Arbitrator Nolan found that a doctor who is giving a second opinion may properly undergo a complete review of the employee's medical problem since he/she doesn't merely "sit in the position of an appellate court reviewing a lower court decision for clear error" and isn't limited to the "record" established by the first doctor. To support this finding, the arbitrator cited Sections 2613(b)(3) and (b)(4)(B) of the FMLA which provide that a doctor's opinion must address "medical facts within the doctor's knowledge" and provide "a statement as to whether an employee is unable to perform the functions of the job."

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AFL-CIO

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**In the Matter of the National Level Arbitration Between**

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| **UNITED STATES POSTAL SERVICE** | ) | |
| | ) | |
| **and** | ) | |
| | ) | |
| **NATIONAL ASSOCIATION OF LETTER CARRIERS (NALC), AFL-CIO** | ) | |
| | ) | |
| **and** | ) | **Case No. Q98N-4Q-C01167325** |
| | ) | |
| **NATIONAL POSTAL MAIL HANDLERS UNION (NPMHU), INTERVENOR** | ) | |
| | ) | |
| **and** | ) | |
| | ) | |
| **AMERICAN POSTAL WORKERS UNION (APWU), INTERVENOR** | ) | |

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**Before:** Dennis R. Nolan, Arbitrator

**Appearances:**

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| **For the USPS:** | Dedra S. Curteman (Nancy T. Forden, Laura K. Teresinski, and Chris A. Jordan, on brief), USPS Headquarters, Washington, DC |
| **For the NALC:** | Thomas A. Ciantra, Cohen, Weiss and Simon, LLP, New York, NY |
| **For the NPMHU:** | Bruce R. Lerner, Bredhoff & Kaiser, PLLC, Washington, DC |
| **For the APWU:** | Darryl J. Anderson, O'Donnell, Schwartz & Anderson, P.C., Washington, DC |
| **Place of Hearing:** | Washington, D.C. |
| **Date of Hearing:** | June 20, 2008 |
| **Date of Award:** | October 13, 2008 |

**Relevant Contract Provision(s):** Articles 5, 10, and 19

**Contract Year:** 1998-2001

**Type of Grievance:** Contract Interpretation

**Award Summary:**

The Unions challenged seven form letters that the Postal Service planned to use when employees seek FMLA leave. For the reasons stated in the opinion, some of the letters comply with legal requirements and some do not. The grievance is sustained in part and denied in part, as explained in the accompanying Opinion. The Postal Service is directed to revise the form letters as necessary to comply with FMLA law.

Dennis R. Nolan, Arbitrator

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**In the Matter of the National Level Arbitration Between**

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|---|---|---|
| **UNITED STATES POSTAL SERVICE** | ) | |
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| | ) | |
| **and** | ) | |
| | ) | |
| **AMERICAN POSTAL WORKERS UNION (APWU), INTERVENOR** | ) | |

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## OPINION

### I. Statement of the Case

The NALC appealed Grievance No. Q98-N-4Q-C01167325 to national level arbitration on May 22, 2001 to challenge the Postal Service's issuance of certain form letters relating to Family and Medical Leave Act (FMLA) leave. Because the same issue affects members of other unions, the APWU and NPMHU intervened.

The arbitration hearing took place in Washington, DC on June 20, 2008. Both parties appeared and had full opportunity to testify, to examine and cross-examine witnesses, and to present all pertinent evidence. Both parties filed lengthy post-hearing briefs, the last of which arrived on September 5, 2008.

### II. Statement of the Facts and Positions of the Parties

Because this case involves only the parties' conflicting interpretations of complex statutory and regulatory provisions, it will be simpler to describe their positions as part of the statement of facts. I will therefore do so in subsection II.C. of this Opinion

## A. Background

On March 22, 2001, the Postal Service sought to guarantee uniformity in treatment of FMLA claims by issuing 19 form letters to be used in specific situations. The NALC believed that certain of the letters were inconsistent with the FMLA and its implementing regulations. It therefore filed this Article 19 appeal.

Over the next six years the parties worked diligently to resolve their differences. On March 1, 2007, the parties agreed that the Postal Service would revise Letters 1-11, 15, 16, 18, and 19 (NALC Exhibit 4). The Postal Service also agreed at that time to withdraw the remaining seven disputed letters, 12A and B, 13A and B, 14A and B, and 17, pending further discussions and this arbitration.[1]

The details of the remaining issues will be discussed below. For now, it suffices to say that the Unions believe that the letters impose an improper burden on employees and seek more information than the law allows employers to demand. The Agreement obliges the Postal Service to comply with federal law in setting terms and conditions of employment (Article 5) and to continue the existing leave program (Article 10). It also requires that all changes in this sort of document be consistent with the Agreement and be "fair, reasonable, and equitable" (Article 19). The Unions argue that the remaining seven disputed form letters violate those provisions.

Although this case is framed as a contract grievance, the most important questions involve statutory interpretation. If the letters conflict with Federal law, they would not be fair and reasonable, and would also constitute impermissible changes to the existing leave program. On the other hand, if they are consistent with Federal law, they would be permissible unless some other feature made them unfair or unreasonable. The only arguments the Unions made about the letters' fairness and reasonableness dealt with the alleged statutory conflicts.

## B. The FMLA

The FMLA grants employees the right to take leave without pay for certain medical reasons. Employers may require the employee to support the leave request with a certification issued by a health care provider (HCP). FMLA § 103, 29 U.S.C. § 2613(b), states that a certification is "sufficient" if it provides certain information. The essential elements are (1) the beginning date of the health condition; (2) the condition's probable duration; (3) the "appropriate medical facts" known by the HCP about the condition; (4)(B) a statement that the employee is unable to perform the essential functions of the position; (5) in the case of a request for intermittent leave for planned medical treatment, the dates on which the treatment is expected to be given and the duration of that

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[1] Despite the March 1 agreement, the NALC's brief omits mention of Letter 12A and adds Letter 16. The NPMHU and Postal Service briefs stuck to the agreement and concentrated on the seven letters mentioned there. Because the pre-hearing agreement anticipates arbitration only about the seven listed letters, it narrows the scope of the 2001 grievance. I will therefore address only those letters in this award.

treatment; and (6) in other cases of requests for intermittent leave, a statement of the medical necessity and expected duration for the requested leave. Comparable provisions deal with requests for leave to care for a relative. The U.S. Department of Labor (DOL) developed an optional form, Form WH-380, for use as a medical certification. It contains spaces covering all those essential elements.

Although § 2614(b) is stated positively — that is, that a certification containing the items listed in that section is sufficient to entitle the employee to FMLA leave — it contains an implied negative. Because the employee need submit no more than the subsection (b) items in order to receive FMLA leave, the employer needs no additional information and therefore may not ask for, or condition leave on receipt of more information.

The DOL's implementing regulations, §§ 325.305 through 825.307 (NALC Exhibit 7), naturally track the statutory provisions. They add a few new elements.

- Section 325.305(d), for example, obliges the employer, when requesting certification, to warn the employee of the "anticipated consequences" of failing to provide "adequate certification." If the employer "finds a certification incomplete," it must provide the employee a reasonable opportunity to cure any deficiency.

- Section 325.306 addresses the question of how much information an employer may require. That section begins in subsection (a) by referring to the Department of Labor's Form WH-380, an optional form that "reflects certification requirements so as to permit the health care provider to furnish appropriate medical information." Use of that form provides employers a safe harbor. Using a different form is not necessarily illegal, but doing so may raise serious questions about the employer's authority. Subsection (b) warns that an employer may not require additional information beyond that listed in Form WH-380. Regardless of the form used, the information sought "must relate only to the serious health condition for which the current need for leave exists." The obvious object of that statement is to keep employers from asking for information about other matters.

In describing Form WH-380, § 325.306(b) expands on the statute's list of items the employer may require. It provides that in addition to checking the part of the definition of "serious health condition" that applies to the patient, the HCP should list "the medical facts which support the certification, including a brief statement as to how the medical facts meet the criteria of the definition," subsection (b)(1). The HCP must also state the beginning and probable duration of the serious health condition, including the duration of the resulting incapacity, subsection (b)(2)(i), the probable number of additional treatments, including treatments by another HCP, a description of the treatment regimen, subsection (b)(3), and, in the case of a chronic condition, whether the employee is unable to perform any work or just one or more of the jobs essential functions, subsection (b)(4).

- Section 325.307 specifies the employer's options if it questions the adequacy of a medical certification. Once the employee submits a "complete" certification signed by the HCP, the employer may not directly seek "additional information" from the HCP. However, a health care

provider acting for the employer may, with the employee's permission, contact the employee's provider "for purposes of *clarification* and authenticity of the medical certification." (The italics are in the original, presumably to distinguish "clarification" from "additional information.") Alternatively, under Subsection (b), an employer who "has reason to doubt the validity" of a medical certification may require the employee to get a second opinion, at the employer's expense, from some medical care provider who is not employed on a regular basis by the employer. If the two opinions differ, the employer may require a third opinion at its expense. The parties must confer in good faith in an attempt to select the third HCP.

The line between needing clarification and doubting the validity of a certification may not always be clear. One important distinction, however, is the employer may only *request* information for clarification, while it may *require* the employee to seek a second opinion. If the employee refuses to give permission for the medical providers to consult over clarification, the employer's only remaining option is a second opinion.

To summarize, an employer who receives a medical certification has just three options other than simply granting the leave request. (1) If the certification is not "complete," the employer must inform the employee of the probably consequences of an incomplete certification and give the employee a chance to correct the problem, § 825.305(d). (2) If the certification is complete but unclear, the employer may ask the employee for permission to have its medical officer contact the employee's HCP for "clarification," § 825.307(a). (3) Finally, if the employer doubts the "validity" of the certification, it may arrange for a second or third medical opinion, § 825.307(a)(2).[2]

### C. The Remaining Disputes over the Form Letters

With that background, we can turn to the meat of the grievance. As mentioned above, this section will describe the parties' positions as well as the contents of the each letter. After describing a letter, I will summarize the parties' positions on it.

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[2] The Postal Service's brief extensively discusses proposed changes in the FMLA regulations. Were those proposed changes in effect, they might well affect this case. They are not, and thus they do not. The Postal Service ingeniously moves from the major premise that the Department of Labor's interpretation of a statute it administers merits significant deference to the minor premise that the proposal represents the DOL's interpretation, and then to the conclusion that its form letters are consistent with the statute because the proposed amendments to the regulations authorize the letters. The first premise is unarguable. The second premise, however, is flawed.

One important reason the Administrative Procedure Act requires administrative agencies to publish proposed regulations and receive comments from interested parties is to alert the agency to problems in the draft before the final version is released. At most, the proposal represents the agency's preliminary and tentative position, not a formal interpretation. The Postal Service cites no authority equating proposed changes with final regulations. Because the draft changes do not reflect the agency's fixed interpretation of the statute, the Postal Service's conclusion no longer follows. A reviewing court or arbitrator should not defer to a mere proposal.

The Unions' general objections, stated most fully in the NALC's brief, are that the letters (1) ask employees to seek additional information from their HCPs rather than merely sign an authorization that would allow the employer's HCP to do so; (2) seek supplemental information rather than just clarifications; and (3) seek too much information by referring to the employee's general medical history and asking for a general release rather than a release tailored to the specific medical condition at issue and, in the case of letter 17, asking for a statement of the symptoms likely to cause an incapacity rather than just a conclusion about the incapacity. The NPMHU's brief makes many of the same points but elaborates on the objections to certain forms. A letter from the APWU counsel on July 29 endorsed the positions of the other unions and noted that the Postal Service has not provided the disputed letters to the APWU in accordance with Article 19. The Unions argue that each of the disputed form letters conflicts with the statute and regulations in some respects.

The Postal Service contends that the letters are necessary and appropriate ways to obtain the information needed to grant or deny FMLA leave. When forms lack essential information, the law requires the employer to give the employee an opportunity to correct the problem. In the case of ambiguities, the letters seek only clarification rather than new information, and that only about the medical condition for which the employee seeks FMLA leave.

**1. Letters 12A and 12B**

**(a)** Letter 12A is to be sent to an employee if the HCP submitting a medical certification merely checked a serious health condition in item 3 of without providing the "medical facts" supporting that diagnosis and how those facts meet the criteria of the definition. The letter describes the certification as incomplete because it lacks that information. The letter concludes by telling the employee that "you will need to obtain a complete and responsive certification which provides some specificity about the condition" within 15 days of receiving Letter 12A. It warns that failure to provide the requested certification will result in the denial of FMLA protection.

The NPMHU argues that this letter is inconsistent with the FMLA because it mischaracterizes the certification as incomplete when it merely lacks the level of detail the Postal Service would like. The regulations do not specify what level of detail is necessary, so the type of certification described in Letter 12A must be understood as complete. Because it is complete, the employer may not directly contact the employee with this type of request, nor may the employer threaten to deny FMLA leave if the employee fails to obtain more information.

The Postal Service of course relies on the certification's alleged incompleteness. If the form is incomplete, then the employer must first give the employee a chance to correct the problem.

**(b)** Letter 12B is to be sent to an employee who submits an FMLA Certification that is, in the Postal Service's judgment, incomplete or non-responsive as to the expected frequency and duration of incapacity due to a chronic condition because the employee's HCP answered those items with "unknown." The letter gives the employee 15 days to have the provider submit a complete certification. The letter warns that the employee's FMLA protection for

absences related to that medical condition will be delayed until the Postal Service receives an adequate response. Letter 12B also refers to the employee's general "medical history," suggesting that such medical history might be relevant to determining te incapacity's frequency and duration.

Governing authority holds that an employer cannot require a strict schedule of incapacity on a certification but that it may seek an estimate. To avoid making that error, the letter distinguishes between the two types of information and asks only for the latter.

Letter 12B raises several problems, according to the Unions. One is that it asks the employee for more information, when the regulations only allow an employer to ask an employee for permission to seek clarification from the HCP. Another is that it asks for information that would arguably supplement rather than clarify the submitted certification. A third is that by referring to the employee's general medical history it may seek information not related to the medical condition at issue while that statute and regulations only allow employers to obtain information about that condition.

As with Letter 12A, the Postal Service explains that the certification is incomplete and the employer must therefore give the employee a chance to correct the problem.

**2. Letters 13A and 13B**

Letters 13A and 13B are similar in purpose to Letter 12B in that they seek information about one part of a certification. Unlike Letter 12B, however, these two do not claim that the certification is incomplete. Instead, they claim that it is unclear and needs clarification. The employer's first option in such a situation is to ask the employee for a release to that its medical officer can contact the employee's HCP for clarification.

Letter 13A goes from the medical officer to the employee. It asks the employee to give his or her HCP a copy of Letter 13B, which is an inquiry from the medical officer to the employee's HCP. The letter tells the employee that "you must sign an authorization" so that the HCP can provide the requested information. Letter 13A also encloses an authorization form identified as USPS Form 2488, although the letter also notes that the employee could instead sign a release provided by the employee's own HCP.

Form 2488 is a general medical release. The operative provision authorizes a hospital or doctor to furnish the postal medical officer "all medical information concerning the following problems." If someone fills in the appropriate blank (titled "Medical Problems") with the specific medical condition for which the employee seeks FMLA leave, the form will allow the employer to obtain the clarification it believes it needs but no more than that. It is at least possible that leaving that section blank could grant a broader release than necessary under the FMLA.

Letter 13B, which goes to the employee's HCP, asks for "some information" concerning frequency and duration rather than just the word "unknown." In order to prompt an estimate, the

medical director's letter suggests that the patient's "medical history" should provide guidance. The letter encloses the employee's attendance record for the previous 12 months, even though some or all of the absences might stem from other causes.

The Unions argue that these letters too violate the FMLA. Like Letter 12B, Letter 13A assumes that the word "unknown" is effectively a blank so that the form is incomplete rather than unclear. Because of that assumption, it asks the employee to cure the problem rather than merely asking the employee to grant permission so that the employer's medical officer could do so. That problem is aggravated by the "you must sign" language. Although it is correct that the employee's authorization is necessary for the employer to have its medical officer make inquiries, the phrasing could be read as implying that the employee had an obligation to grant permission, which is not true. Second, like Letter 12B, these letters could seek information that might supplement rather than clarify the certification. Finally, using the enclosed Form 2488 might authorize the employee's HCP to review information about medical conditions other than the ones involved in the leave request. Letter 13B also refers to the employee's medical history without clarifying that the Postal Service needs only the HCP's conclusions rather than other medical information leading to those conclusions.

The Postal Service defends those letters on grounds similar to its defense of letters 12A and 12B. It notes that a certification is required to include estimates of the frequency and duration of an employee's incapacity. "Unknown" is not an estimate, so the employer may seek clarification. Letter 13A merely asks the employee to sign a release — not necessarily the one on Form 2488 — and to forward Letter 13B to his or her HCP. Form 2488 is a reasonable release form because it would allow disclosure of information relating *only* to the medical problem the employee list on the form. Moreover, an employee doesn't want to use Form 2488 may us another one. Finally, Letter 13B's reference to the employee's absenteeism record is appropriate. DOL Opinion Letter 2004-2-A (May 25, 2004) specifically allows an employer to include a record of the employee's absences for the HCP's consideration when estimating future absences. The "you must sign" statement simply indicates that a release is necessary for the HCP to provide the information to the employer.

### 3. Letters 14A and 14B

Although they deal with the *extent* of incapacity rather than the *frequency and duration* of the incapacity, Letters 14A and 14B are similar to 13A and 13B. Like 13A, 14A goes from the employer's HCP directly to the employee and asks the employee to give his or her HCP the enclosed Letter 13B. Also like 13A, 14A includes a copy of Form 2488, the general release form. And, like 13B, 14B goes from HCP to HCP. Letter 14B is more precise than 13B. It forwards a statement of the essential functions of the employee's job and asks the employee's HCP to determine whether the employee's medical condition will make the employee unable work of any kind or unable to perform one or more of those essential functions.

According to the Unions, these letters replicate the problems with Letters 13A and 13B: asking the employee to convey the request to the HCP rather than doing it directly, asking for

information that is arguably supplementary rather than clarifying, and asking the employee to sign a release that might be broader than necessary to determine the validity of a certification.

The Postal Service's responses, too, are like its defense of Letters 13A and 13B. An employer may seek clarification by asking the employee to sign a release and to forward a letter to the HCP from the employer's medical officer. The employee himself or herself writes the medical condition at issue on the release form, so the form is not overly broad.

Unlike Letter 13A, Letter 14A accidentally omitted reference to the employee's option to use some other release form. The Postal Service commits in its brief (at p. 27) to "conform template letter 14A to letter 13A by including similar language." In addition, it commits to revising the "you must sign" statement to the following: "In order for your provider to relay the information to me, you may use the attached authorization form allowing him/her to disclose your medical information regarding this condition."

**4. Letter 17**

Letter 17 goes directly from the employer's medical officer to the doctor who is to provide a second opinion. The letter alerts the doctor to the employer's need for information about the medical condition's impact on the employee's ability to perform the essential functions of the job and forwards to the HCP a job description and a list of the job's physical capacity requirements. It demands from the HCP a "specific statement about what symptoms of this condition, if any, will cause the employee to be unable to perform essential functions of his/her position." The letter anticipates the possibility that the HCP may refer the employee to another provider. It asks the HCP, if that is the case, to indicate what services the HCP would recommend and "the likely schedule of such treatments and the probable duration of the treatment plan you would prescribe."

Letter 17 does not specify which documents if any are to be attached other than the reporting form, DOL Form WH-380. Letter 16 forwards a copy of Letter 17 to the employee and also encloses release Form 2488. If the employee uses Form 2488 but does not limit disclosure to the medical condition requiring FMLA leave, the doctor providing the second opinion might receive more information than actually needed to evaluate the claimed incapacitating medical condition. If the employee does write down the medical condition at issue, Form 2488 would present no problem.

The Unions object to Letter 17 because the inquires exceed the bounds of the FMLA. The permitted purpose of the second opinion is just to verify the validity of the initial certification. FMLA § 2613(c) limits the second opinion to "any information certified under subsection (b) of this section" — that is, the seven items contained in § 2613(b). The employer thus may not make new inquiries about the medical condition. Moreover, Letter 17 forwards a copy of Form 2488 without telling the employee that he or she need only execute a release tailored to the medical condition in the leave request. Finally, the letter asks for information not included on the certification form, namely the questions about a possible referral and treatment by other providers.

The Postal Service interprets the Union's objections to Letter 17 as urging that physicians rendering second opinions cannot recommend an additional course of treatment and as arguing that the second doctor may not offer an opinion about whether the employee can perform the job's essential functions. That is incorrect.

Section 2613(c) allows the employer to obtain the opinion of a second doctor concerning "any information certified" under subsection (b). Subsections (b)(3) and (b)(4)(B) therefore allow the second doctor to include "the appropriate medical facts" known by that doctor and "a statement that the employee is unable to perform the functions of the position." Letter 17 does not ask for an explanation, as the Unions argue. Rather, it asks only for a specific statement about which symptoms will cause the incapacity, and that statement comes within the "appropriate medical facts" referred to in § 2613(b)(3).

With regard to the letter's request for information about a referral and probably treatment, the Postal Service notes that § 825.306(3) says the certification should specify whether additional treatments will be required, the probable number of those treatments, and, if any of those treatments will be provided by another provider, the nature of te treatments and a general description of the regimen required. In other words, the regulations expressly authorize an employer to obtain that information, regardless whether it is a first opinion or a second.

## III. The Issue

Did the Postal Service violate the Agreement by issuing the current versions of the seven disputed form letters? If so, what shall the remedy be?

## IV. Pertinent Authorities

This section includes only the relevant contract provisions. The controlling statutory and regulatory provisions are attached to this award as Appendix A

**ARTICLE 5**
**PROHIBITION OF UNILATERAL ACTION**

The Employer will not take any actions affecting wages, hours and other terms and conditions of employment as defined in Section 8(d) of the National Labor Relations Act which violate the terms of this Agreement or are otherwise inconsistent with its obligations under law.

**ARTICLE 10**
**LEAVE**

**Section 5. Sick Leave**

The Employer agrees to continue the administration of the present sick leave program, which shall include the following specific items:

A. Credit employees with sick leave as earned.

B. Charge to annual leave or leave without pay (at employee's option) approved absence for which employee has insufficient sick leave.

C. Employee becoming ill while on annual leave may have leave charged to sick leave upon request.

D. For periods of absence of three (3) days or less, a supervisor may accept an employee's certification as reason for an absence.

**ARTICLE 19**
**HANDBOOKS AND MANUALS**

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions.

Notice of such proposed changes that directly relate to wages, hours or working conditions will be furnished to the Union at the national level at least sixty (60) days prior to issuance. At the request of the Union, the parties shall meet concerning such changes. If the Union, after the meeting, believes the proposed changes violate the National Agreement (including this Article), it may then submit the issue to arbitration in accordance with the arbitration procedure, within sixty (60) days after receipt of the notice of proposed change. Copies of those parts of all new handbooks, manuals and regulations that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall be furnished the Union upon issuance.

**ELM**

515 **Absence for Family Care or Illness of Employee**

515.1 **Purpose**

Section 515 provides policies to comply with the Family and Medical Leave Act of 1993 (FMLA). Nothing in this section is intended to limit employees' rights or benefits available under other current policies (see 511, 512, 513, 514) or collective bargaining agreements. Likewise, nothing increase the amount of paid leave beyond what is provided for under current leave policies or in any collective bargaining agreement. The conditions for authorizing the use of annual leave, sick leave, or LWOP are modified only to the extent described in this section.

## V. Discussion

### A. Introduction

The Agreement imposes two tests for changes in manuals and similar documents. Article 5 provides that "The Employer will not take any actions affecting wages, hours and other terms and conditions of employment as defined in § 8(d) of the National Labor Relations Act which violate the terms of this Agreement or are otherwise inconsistent with its obligations under law." Article 19 provides that "Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain *nothing that conflicts with this Agreement*, and shall be continued in effect

except that the Employer shall have the right to make changes that are *not inconsistent with this Agreement and that are fair, reasonable, and equitable*" (emphasis added).

In brief, to the extent that the challenged letters adopt practices that are consistent with the FMLA, they do not breach the agreement. The Unions did not offer any evidence to show that the letters were, apart from the claimed inconsistency with the FMLA, unfair, unreasonable, or inequitable.

The Congress that passed the FMLA, and the Department of Labor that adopted implementing FMLA regulations, recognized the tension between the employer's and employee's interests in relevant medical information. The statute and the regulations attempted to resolve that tension by allowing employers to seek information needed to establish the degree of incapacity and the expected frequency and duration of absences due to the medical condition and its treatment, but only that information. Further, Congress minimized one burden on employees by allowing employers, once an employee has provided an appropriate authorization, to clarify doubtful parts of the medical certification by having its medical officer contact the employee's HCP directly.

FMLA § 2613 and its implementing regulations thus provide both a floor and a ceiling on disclosure of medical information. The employee and the employee's HCP must provide the listed items of information in order to obtain FMLA leave, and the employer may not ask for more than it needs to make that determination.

One other aspect of the legal balance between disclosure of necessary information and protection of other information is worth repeating at this point. The law gives employers just three ways to deal with possible problems in medical certifications.

- If the certification is incomplete — that is, if it omits required information or provides completely non-responsive comments on an essential item — the employer must notify the employee and provide an opportunity to correct the problem. Necessarily, then, direct contact with the employee in that situation is entirely appropriate, even required.

- Second, if the certification is unclear about a critical element, the employer may ask the employee to sign a release so that the Postal Service's medical officer can contact the employee's HCP for clarification.

- Finally, and regardless whether the employee grants permission for direct contact with his or her HCP, an employer who still has reason to doubt the validity of a certification may arrange for a second opinion and in some cases, a third.

The careful statement of those options in the statute and regulations implicitly excludes other options. In particular, in the certification is unclear rather than incomplete, the employer may not ask the employee for more than a release. It is not the employee's job to contact the HCP in such a case.

## B. The Disputed Letters

In a matter as complicated as this, it is hardly likely that either side will be completely right and the other completely wrong. The Postal Service reasonably tried to find consistent ways to obtain information it needed to decide FMLA requests. In some instances, it over-reached or used misleading language. The Unions reasonably tried to protect employees' privacy from invasion by over-broad information requests and to protect them from having to do more than the law requires in order to obtain FMLA leave. In some instances, the Unions thought the law restricted the employer more than it really does.

The following discussion tries to strike the balance between those conflicting interests in accordance with the statute and the regulations. Where problems occur simply because of wording errors in the form letters, I have suggested alternative phrasing that would meet the employer's legitimate needs while still complying with FMLA law.

### 1. Letter 12A

Letter 12A is to be used when the employee's HCP fails to provide the medical facts supporting a diagnosis of a qualifying medical condition. FMLA § 2613(b)(3) states that a certification is "sufficient" only if it contains that information. The Postal Service may properly treat a certification lacking that information as incomplete and may therefore write to the employee so that the employee can correct the error. That is what Letter 12A does. The portion of the grievance challenging Letter 12A is denied.

### 2. Letter 12B

Letter 12B is to be used when the certification simply states that the frequency and duration of the employee's incapacity are "unknown." Contrary to the Postal Service's argument, use of that word does not make the certification incomplete or non-responsive. Contrary to the Unions' position, the term is not always clear.

Unlike the situation in Letter 12A (when the HCP leaves an item blank), the certification at issue here might look facially complete because there is at least one word in the appropriate space. That is why the Postal service equated a "non-responsive" answer with "incomplete." The word "unknown" is not necessarily "non-responsive." Of course simply filling in a space with words isn't always responsive. If the HCP had written that "Mary has a little lamb," the employer would be entitled to regard the form as incomplete. In some cases, however, "unknown" might be the only reasonable response. One doctor using that term might mean that the condition is completely unpredictable. If so, the answer would be both responsive and accurate. Another doctor might mean that he or she hasn't bothered to make an estimate even though it might be possible to do so. "Unknown," therefore, is ambiguous even when it is responsive.

The legal rules are clear when an essential part of a certification contains a responsive but unclear answer. The Postal Service may not write directly to the employee to clarify the ambiguity. It may only seek the employee's permission for its medical officer to seek clarification from the employee's HCP. Letter 12B conflicts with FMLA law and thereby violates Articles 5 and 19 of the Agreement. That portion of the grievance is sustained.

### 3. Letter 13A

Letter 13A asks the employee to forward a request for clarification (Letter 13B) to the employee's HCP when, in the Postal Service's opinion, the certification is "not responsive and does not clearly establish the extent of your incapacitation." It also asks the employee to sign a release so that the HCP can forward the information to the Postal Service. That paragraph uses a peremptory tone, telling the employee that "you must sign" an authorization in order for the HCP to send the information. While literally correct, some employees might take that wording as a command rather than a request for permission. Letter 13A encloses a copy of the Postal Service's release form, Form 2488, but also notes that the employee "may sign an authorization given you by your provider."

Because Letter 13A admittedly seeks clarification rather than completion, FMLA Regulation § 825.307(a) applies. The employer may only seek the employee's permission to contact the HCP. If the employee grants permission, then the Postal Service's medical officer, not the employee, must send the request to the HCP. On its face, Letter 13A conflicts with that provision because it asks the employee to forward the request for clarification to the HCP. That portion of the grievance is sustained.

Properly introduced and completed, Form 2488 is a reasonable release for the purpose of seeking clarification. Letter 13A does not properly introduce the release or tell the employee how to complete the release so as to authorize disclosure of relevant information but no other information. If the Postal Service seeks an employee's release in this situation, the cover letter must avoid any implication that the employee "must" sign the release. The proper phrasing would be to track the regulation and ask the employee for "permission" to contact the HCP. If the employer includes Form 2488 with the release request, the cover letter should also direct the employee, if he or she is willing to grant permission, to fill in the "Medical Problems" section with the specific medical condition for which the employee is seeking FMLA leave. So long as the revised cover letter contains those corrections, using Form 2488 would not violate the FMLA.

### 4. Letter 13B

Letter 13B returns to the problem presented by a certification that describes the frequency and duration of episodes of incapacity as "unknown." It includes a list of the employee's absences during the previous 12 months to prompt or assist the doctor to estimate the frequency and duration. The letter properly goes from the employer's medical officer to the employee's HCP and properly seeks clarification of the ambiguous term "unknown." Asking for clarification in that situation does not violate the FMLA.

Authoritative DOL guidance rejects the Unions' objection to the employer's sending the doctor the patient's absenteeism record. Opinion Letter 2004-2-A (May 25, 2004) allows an employer to do just that. The facts in that case were somewhat different than the general issue here — there the employer sought to inform the doctor of a suspicious pattern of Monday and Friday absences ---- but the principle is the same. More importantly, the DOL's conclusion is broad enough to cover both cases:

> The FMLA does not prohibit an employer from including a record of an employee's absences along with the medical certification form for the health care provider's consideration in determining the employee's likely period of future absences.

The portion of the grievance dealing with Letter 13B is denied.

**5. Letter 14A**

Letter 14A also seeks clarification rather than completion. Like Letter 13A, therefore, it violates the FMLA because it asks the employee to forward the clarification inquiry (Letter 14B) to the employee's doctor. The employer's option in such a case is to seek the employee's permission for its medical director to contact the employee's HCP directly. It may not ask the employee to contact the HCP to seek clarification. That portion of the grievance is sustained.

As noted above, the Postal Service has promised to revise Letter 14A to state that the employee "may" use form 2488 or an alternative release provided by the HCP. If the Postal Service carries out that commitment and also revises the cover letter in the fashion described above regarding Letter 13A, its use of Form 2488 is consistent with the FMLA.

**6. Letter 14B**

Like Letter 13B, Letter 14B properly asks the employee's doctor for clarification of the extent of the employee's incapacity. Section 825.306(b)(1) makes it clear that an employer may insist on receiving the medical facts supporting the certification, "including a brief statement as to how the medical facts meet the criteria of the definition." Asking the HCP to explain whether the employee will be unable to perform *any* work, or would just be unable to perform *specific* essential job functions seems to be just the sort of clarification anticipated by § 825.307(a). The portion of the grievance relating to Letter 14B is denied.

**7. Letter 17**

Letter 17 asks the doctor who is to offer a second opinion for certain information, most importantly a specific statement about "what symptoms of this condition, if any, will cause the employee to be unable to perform essential functions" of the job. It also asks for information about a possible referral to another health care provider, including the services the HCP would recommend

and the likely schedule and duration of treatment. FMLA § 2613(c) describes the purpose of the second opinion as "concerning any information certified under subsection (b)."

The Unions argue that subsection (c) limits the second doctor to verifying the validity of the initial certification. The Postal Service interprets subsection (c) as allowing the second doctor to render an opinion on all of the items listed in subsection (b) and then argues that the second opinion may require a complete review of the employee's claimed medical problem. Of the two interpretations, the second is far more reasonable in the circumstances.

The second doctor does not sit in the position of an appellate court reviewing a lower court decision for clear error. Nor is the second doctor limited to the "record" established by the first. Rather, the second doctor is to render a second opinion. In normal usage a doctor's opinion requires an examination and an independent review of all the available evidence. That is what the second doctor is expected to do.

That doctor's opinion must address the factors listed in subsection (b), in particular the medical facts within the doctor's knowledge, § 2613(b)(3), and a statement as to whether the employee is unable to perform the functions of the job, § 2613(b)(4)(B). The DOL's recommended certification form, WH-380, includes blank spaces asking for just that information, e.g., "the medical facts which support your certification, including a brief statement as to how the medical facts meet the criteria" of the serious health condition at issue. Although the wording of Letter 17 differs somewhat from Form WH-380, the goal is the same: to learn from the doctor whether the employee's medical condition actually creates an incapacity requiring FMLA leave. This portion of the grievance is denied.

The Unions also object to the Postal Service's use of Form 2488 with Letter 17. Letter 17 does not refer to Form 2488, but it is likely that the employer would use its standard release form in this situation as in others. So long as the letter forwarding Form 2488 to the employee contains the protections described above in relation to Letters 13A and 14A, doing so would not violate the FMLA.

## AWARD

The grievance is sustained in part and denied in part, as explained in the Opinion. The Postal Service is directed to revise its form letters as specified above.

**Dennis R. Nolan, Arbitrator**

**October 13, 2008**
**Date**

# APPENDIX A

# STATUTORY AND REGULATORY PROVISIONS

## 29 USC § 2613

### § 2613. Certification

**(a) In general**

An employer may require that a request for leave under subparagraph (C) or (D) of section 2612 (a)(1) of this title be supported by a certification issued by the health care provider of the eligible employee or of the son, daughter, spouse, or parent of the employee, as appropriate. The employee shall provide, in a timely manner, a copy of such certification to the employer.

**(b) Sufficient certification**

Certification provided under subsection (a) of this section shall be sufficient if it states—

**(1)** the date on which the serious health condition commenced;
**(2)** the probable duration of the condition;
**(3)** the appropriate medical facts within the knowledge of the health care provider regarding the condition;
**(4)**

**(A)** for purposes of leave under section 2612 (a)(1)(C) of this title, a statement that the eligible employee is needed to care for the son, daughter, spouse, or parent and an estimate of the amount of time that such employee is needed to care for the son, daughter, spouse, or parent; and
**(B)** for purposes of leave under section 2612 (a)(1)(D) of this title, a statement that the employee is unable to perform the functions of the position of the employee;

**(5)** in the case of certification for intermittent leave, or leave on a reduced leave schedule, for planned medical treatment, the dates on which such treatment is expected to be given and the duration of such treatment;
**(6)** in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 2612 (a)(1)(D) of this title, a statement of the medical necessity for the intermittent leave or leave on a reduced leave schedule, and the expected duration of the intermittent leave or reduced leave schedule; and
**(7)** in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 2612 (a)(1)(C) of this title, a statement that the employee's intermittent leave or leave on a reduced leave schedule is necessary for the care of the son, daughter, parent, or spouse who has a serious health condition, or will assist in their recovery, and the expected duration and schedule of the intermittent leave or reduced leave schedule.

**(c) Second opinion**

**(1) In general**

In any case in which the employer has reason to doubt the validity of the certification provided under subsection (a) of this section for leave under subparagraph (C) or (D) of section 2612 (a)(1) of this title, the employer may require, at the expense of the employer, that the eligible employee obtain the opinion of a second health care provider designated or approved by the employer concerning any information certified under subsection (b) of this section for such leave.

**(2) Limitation**

A health care provider designated or approved under paragraph (1) shall not be employed on a regular basis by the employer.

**(d) Resolution of conflicting opinions**

**(1) In general**

In any case in which the second opinion described in subsection (c) of this section differs from the opinion in the original certification provided under subsection (a) of this section, the employer may require, at the expense of the employer, that the employee obtain the opinion of a third health care provider designated or approved jointly by the employer and the employee concerning the information certified under subsection (b) of this section.

**(2) Finality**

The opinion of the third health care provider concerning the information certified under subsection (b) of this section shall be considered to be final and shall be binding on the employer and the employee.

**(e) Subsequent decertification**

The employer may require that the eligible employee obtain subsequent recertifications on a reasonable basis.

**29 CFR PART 825**

**§ 825.305 When must an employee provide medical certification to support FMLA leave?**

**(a)** An employer may require that an employee's leave to care for the employee's seriously-ill spouse, son, daughter, or parent, or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's ill family member. An employer must give notice of a requirement for medical certification each time a certification is required; such notice must be written notice whenever required by §825.301. An employer's oral request to an employee to furnish any subsequent medical certification is sufficient. . . .

**(d)** At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. The employer shall advise an employee whenever the employer finds a certification incomplete, and provide the employee a reasonable opportunity to cure any such deficiency. . . .

**§ 825.306 How much information may be required in medical certifications of a serious health condition?**

**(a)** DOL has developed an optional form (Form WH–380, as revised) for employees' (or their family members') use in obtaining medical certification, including second and third opinions, from health care providers that meets FMLA's certification requirements. (See Appendix B to these regulations.) This optional form reflects certification requirements so as to permit the health care provider to furnish appropriate medical information within his or her knowledge.

**(b)** Form WH–380, as revised, or another form containing the same basic information, may be used by the employer; however, no additional information may be required. In all instances the information on the form must relate only to the serious health condition for which the current need for leave exists. The form identifies the health care provider and typed of medical practice (including pertinent specialization, if any), makes maximum use of checklist entries for ease in completing the form, and contains required entries for:

**(1)** A certification as to which part of the definition of "serious health condition" (see § 825.114), if any, applies to the patient's condition, and the medical facts which support the certification, including a brief statement as to how the medical facts meet the criteria of the definition.

**(2) (i)** The approximate date the serious health condition commenced, and its probable duration, including the probable duration of the patient's present incapacity (defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) if different.

**(ii)** Whether it will be necessary for the employee to take leave intermittently or to work on a reduced leave schedule basis (i.e., part-time) as a result of the serious health condition (see Sec. 825.117 and Sec. 825.203), and if so, the probable duration of such schedule.

**(iii)** If the condition is pregnancy or a chronic condition within the meaning of Sec. 825.114(a)(2)(iii), whether the patient is presently incapacitated and the likely duration and frequency of episodes of incapacity.

**(3)(i)(A)** If additional treatments will be required for the condition, an estimate of the probable number of such treatments.

**(B)** If the patient's incapacity will be intermittent, or will require a reduced leave schedule, an estimate of the probable number and interval between such treatments, actual or estimated dates of treatment if known, and period required for recovery if any.

**(ii)** If any of the treatments referred to in subparagraph (i) will be provided by another provider of health services (e.g., physical therapist), the nature of the treatments.

**(iii)** If a regimen of continuing treatment by the patient is required under the supervision of the health care provider, a general description of the regimen (see Sec. 825.114(b)).

**(4)** If medical leave is required for the employee's absence from work because of the employee's own condition (including absences due to pregnancy or a chronic condition), whether the employee:

**(i)** Is unable to perform work of any kind;

**(ii)** Is unable to perform any one or more of the essential functions of the employee's position, including a statement of the essential functions the employee is unable to perform (see Sec. 825.115), based on either information provided on a statement from the employer of the essential functions of the position or, if not provided, discussion with the employee about the employee's job functions; or

**(iii)** Must be absent from work for treatment. . . .

**§ 825.307 What may an employer do if it questions the adequacy of a medical certification?**

**(a)** If an employee submits a complete certification signed by the health care provider, the employer may not request additional information from the employee's health care provider. However, a health care provider representing the employer may contact the employee's health care provider, with the employee's permission, for purposes of clarification and authenticity of the medical certification. . . .

**(2)** An employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employer's expense. Pending receipt of the second (or third) medical opinion, 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 shall not be designated as FMLA leave and may be treated as paid or unpaid leave under the employer's established leave policies. The employer is permitted to designate the health care provider to furnish the second opinion, but the selected health care provider may not be employed on a regular basis by the employer. See also paragraphs (e) and (f) of this section.

**(b)** The employer may not regularly contract with or otherwise regularly utilize the services of the health care provider furnishing the second opinion unless the employer is located in an area where access to health care is extremely limited ( e.g., a rural area where no more than one or two doctors practice in the relevant specialty in the vicinity).

**(c)** If the opinions of the employee's and the employer's designated health care providers differ, the employer may require the employee to obtain certification from a third health care provider, again at the employer's expense. This third opinion shall be final and binding. The third health care provider must be designated or approved jointly by the employer and the employee. The employer and the employee must each act in good faith to attempt to reach agreement on whom to select for the third opinion provider. . . .