

**HERE'S MY DOCTOR'S
NOTE, NOW WHAT?
-- NAVIGATING THE MOST
CHALLENGING ADA AND
FMLA DILEMMAS**

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Guidelines

- Proceed with extreme caution
- Avoid assumptions and boiler plate approaches
- Consider both ADA and FMLA implications
- Apply statutes/regulations precisely and carefully
- Work to obtain sufficient information from doctor/employee to make informed decisions

Scenario 1

The Extremely Vague Note

Scenario 1 – Background

John has been out sick for two weeks. He has no sick leave available.

Upon his return, he requests FMLA leave and presents the following...

The “Note”

I.M. KILLINGU, M.D., B.D., XYZ
555 GOING SOUTH ST.
LAS VEGAS, NV 89100

March 4, 2005

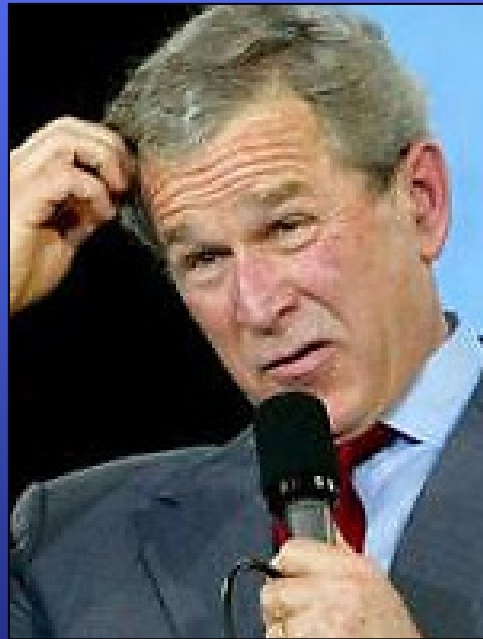
John has been ill and under my care. Please excuse John from work during this time.

Sincerely,

Killingu

I.M. Killingu, M.D., B.D., XYZ

Huh?



Sufficient Information

- Employee inquiry:
 - John notifies you that during his absence, he was suffering from the flu, was under a doctor's care, and that the doctor prescribed medication
 - John also mentions that he just saw the doctor before returning to work

Serious Health Condition

- Colds, flu, headaches do not generally qualify
- But see “continuing treatment” definition
 - A period of incapacity of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:
 - Treatment two or more times by a health care provider
 - 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.

Sufficient Information

- Inquire of doctor
 - Obtain certification for serious health condition
 - Allow at least 15 days (for unforeseeable leave)
 - Consider WH-380 or create custom certification
 - Consider requirements of sick or medical leave plan
- Preliminary designation of leave

Sufficient Information

- Doctor's response
 - Patient called office on February 29
 - He was advised to rest, increase fluids, take Tylenol
- Inconsistency between employee and doctor
 - Follow up with employee
 - FMLA limits clarification from doctor

Serious Health Condition

- Does one telephone consultation constitute treatment under “continuing treatment” definition?
- Was John treated two or more times?
- Was John under a regimen of continuing treatment?

Scenario 1 - Conclusion

- Have right to clarify/investigate vague notes
- Common ailments *may* qualify for FMLA under “continuing treatment” definition of serious health condition
- Must obtain sufficient information from doctor
- Resolve conflicts in information reasonably and seek clarification within allowances of law

Scenario 2

The Extremely **Flexible**
Accommodation Request

Scenario 2 – Background

Sue is the receptionist for a small Company.

Her schedule corresponds directly to the Company's business hours.

There is no coverage for Sue during her lunch or breaks. During those time periods, calls are answered by an answering machine.

The “Letter”

DR. STEVEN P. FANTASY, M.D.
8300 Lost Wages Bullavard South
Las Vegas, NV 21100

DR. STEVEN P. FANTASY, M.D.
8300 Las Vegas Bullavard South
Lost Wages NV 21100

To Whom It May Concern:

Sue suffers from cluster headaches which strike without warning and cause such severe pain she cannot function in any fashion. After such episodes, she is left exhausted and often will sleep for several hours. She needs to be excused from the attendance policy and a flexible schedule such that she can report to work when she is able to do so.

Truly,



DR. STEVEN P. FANTASY, M.D.

Sue suffers from cluster headaches which strike without warning and cause such severe pain she cannot function in any fashion. After such episodes, she is left exhausted and often will sleep for several hours. She needs to be excused from the attendance policy and a flexible schedule such that she can report to work when she is able to do so.

Flexible Accommodation – Now What?

- Consider ADA and FMLA
- Obtain sufficient information
 - Doctor legitimate?
 - Condition and symptoms legitimate?
 - Research both
 - Consider consultation with expert

Disability Definitions

- ✓ **DISABILITY** - physical or mental impairment that substantially limits one or more major life activities
- ✓ **IMPAIRMENT** - disorder, condition, disfigurement, or anatomical loss affecting one or more body systems or any mental or psychological disorder
- ✓ **MAJOR LIFE ACTIVITIES** - caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

Disability Definitions

- ✓ **SUBSTANTIALLY LIMITS** - unable to perform a major life activity, or significantly restricted as to the condition, manner or duration under which can perform a major life activity.

Consider: *nature and severity of the impairment; duration or expected duration of the impairment; and the permanent or long term impact, or expected impact, of or resulting from the impairment*

Sufficient Information

- Inquiry to doctor
 - Release/permission from employee
 - Essential functions of position
- Preliminary designation of employee's status

Sufficient Information

- Doctor's response
 - Explains cluster headaches, effects and medications
 - Substantially limits ability to sleep, drive, take care of oneself, and function physically and mentally during episodes

Application - Disability

- Impairment
- Major life activity
- Substantially limited
- Mitigation measures
- Qualified = a disabled individual who, with or without reasonable accommodation, can perform the essential functions of the position

Interactive Process

- Employer has a mandatory obligation to engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations
- Duty is *continuing*

Reasonable Accommodations

- Excuse from attendance policy
- Flexible schedule
- Other alternatives – *e.g.* leave
 - May be appropriate where it would permit employee, upon his return, to perform the essential functions of the job

Undue Hardship

UNDUE HARDSHIP - significant difficulty or expense incurred by employer

Consider:

- nature and net cost of the accommodation;
- overall financial resources, the number of persons employed, and the effect on expenses and resources;
- type of operation, relationship to other facilities;
- impact upon operation, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

Scenario 2 - Conclusion

- Avoid jumping to conclusions
- Gather sufficient information to analyze each element of the disability definition
- Employer's burden re: interactive process is heavy – carefully consider *all* options

Scenario 3

The Changing Opinion

Scenario 3 – Background

As an ADA accommodation, Bill has been off of work for 6 months for depression and bipolar disorder in order to allow him and his doctors time to establish an effective treatment regimen.

Shortly before his leave expires, you receive the following...

Dr. Kwak's First Opinion

KWAK MEDICAL GROUP

1313 Mockingbird Lane
Las Vegas, NV 89100

March 18, 2005

Bill is released to full duty. He will require intermittent time off to attend appointments with me and his other physicians.

Sincerely,

A handwritten signature in black ink, appearing to read 'K Kwak', written in a cursive style.

Karl Kwak, M.D.

Your Reaction



Scenario 3 – The Changing Opinion

- You make arrangements for Bill to return to work. Bill cannot return 3/21 as you request, because he will be out of town assisting his mother who is being moved into a nursing home. You agree he will return to work April 4.
- You then receive the following note from Dr. Kwak...

Dr. Kwak's Second Opinion

KWAK MEDICAL GROUP

1313 Mockingbird Lane
Las Vegas, NV 89100

April 1, 2005

Bill is still struggling with his ability to cope with stress. He can return to work in a low-stress, non-hectic environment where he can focus on one item at a time. He should not be placed under the supervision of his previous supervisor.

Sincerely,

A handwritten signature in black ink, appearing to read 'K Kwak'.

Karl Kwak, M.D.

Changing Opinion – Now What?

- Continuing duty to accommodate
- Inquire of doctor
 - Release/approval of employee
 - Determine basis for change of opinion
- Determine whether present limitations meet disability definitions
- Preliminary status of employee

Changing Opinion – Now What?

- Analyze doctor's response
- Goal = is he disabled and qualified?
 - Consider disability definitions
 - Consider essential job functions

Reasonable Accommodations

- Changing supervisor
- Low stress environment
- Focus on only one task at a time
- Duty to provide alternative accommodations
 - Additional leave
 - Transfer
 - Working from home

Scenario 3 - Conclusion

- One accommodation does not automatically bar others
- Hold a conflicting doctor's feet to the fire
- Proceed through the disability analysis again
- Consider alternative accommodations – keep an open mind

**THANK YOU
FOR
YOUR ATTENTION**