An employer properly received an employee’s medical certification for leave under the Family and Medical Act, but subsequently learns information that casts doubt on the person’s medical condition. The FMLA does provide avenues to investigate further — the ability to request second, and even third, medical opinions when FMLA abuse is suspected. Attorneys Dena Calo and Anne Di Salvo use a hypothetical scenario to explain how this process works.

Dear Employment Law Specialists,

Two weeks ago, one of my employees, “Sally,” requested leave and provided me with a medical certification from her primary care physician. The certification stated that she was completely incapacitated and unable to work because she had recently been involved in a car accident in which she severely injured her back. A few days after I received the certification, I saw Sally on the street carrying several boxes into what appeared to be a moving truck. More recently, another employee, who is Facebook friends with Sally, forwarded me several photographs that Sally posted of herself on Facebook drinking beer with friends at a local bar. Can my company request a second medical opinion regarding Sally’s condition? If so, can I deny Sally’s request for FMLA leave if the second medical opinion differs from the certification that she originally submitted? — HR Director, ABC Company

Dear HR Director,

Generally speaking, if an employee submits a complete and sufficient FMLA medical certification signed by a health care provider, the employer may not request additional information from the employee’s own HCP. However, the employer is not without recourse when there is an objective basis to question the legitimacy of the medical condition and/or the facts on the employee’s medical certification. If the employer has reason to doubt the validity of the employee’s certification, the employer may, at its own expense, require the employee to obtain a second medical opinion. Although the FMLA regulations do not specify what type of “reason” will suffice, suspicions concerning the condition’s legitimacy will certainly support an employer’s decision to obtain a second opinion. In your case, you have seen and received objective reports that Sally’s condition is questionable. As a result, you may want to consider requesting a second opinion.

Second Medical Opinions

When obtaining a second opinion, an employer may designate an HCP of its choice provided that the HCP is not employed by the employer on a regular basis. With limited exceptions, this means that the employer may not regularly contract with or otherwise regularly use the services of the HCP who furnishes the second medical opinion.

While the FMLA regulations are silent on the period of time in which an employer may exercise its right to seek
a second opinion from the HCP of its choice, an employer that wishes to seek a second medical opinion should
do so as soon as it has reason to doubt the validity of an employee’s original medical certification. The longer an
employer waits, the more the employee can argue over the validity of the original certification or the legitimacy
and objectiveness of the employer’s suspicions.

An employee generally must comply with an employer’s request for a second medical opinion. Furthermore, if
the employer’s designated HCP requests relevant medical information pertaining to an employee’s serious health
condition and the employee fails to authorize his or her own HCP to release it, the employer may deny the em-
ployee’s request for FMLA leave. 29 C.F.R. §825.307(b)

Pending the receipt of the second medical opinion, an employee is provisionally entitled to FMLA leave. If the
second medical opinion conflicts with the original medical certification and concludes that the employee is not
suffering from a serious health condition, the employer should not take adverse action based on the second opin-
ion. The method of resolution for conflicting medical opinions under the FMLA regulations is to request a third
(and binding) medical opinion.

Third Medical Opinions

If there is a conflict between the opinions of an employee’s HCP and an employer’s designated HCP, an employer
may require, also at its own expense, that the employee obtain the opinion of a third HCP. The third medical
opinion is binding on both the employer and the employee.

The third HCP must be designated or approved jointly by the employer and the employee. The employer and the
employee are both required to act in good faith to reach agreement on whom to select as the third-opinion HCP.
For example, an employee who refuses to agree to see a doctor in the specialty in question likely fails to act in
good faith. Similarly, an employer that refuses to agree to any doctor on a list of specialists in the appropriate field
provided by the employee and whom the employee has not previously consulted also likely fails to act in good
faith. An employer that does not attempt in good faith to reach agreement on the third-opinion HCP is bound by
the first certification. An employee who does not attempt in good faith to reach agreement on the third-opinion
HCP is bound by the second medical opinion.

As is the case for second medical opinions, if a third-opinion HCP requests information pertaining to an em-
ployee’s serious health condition to render a sufficient and complete third medical opinion and the employee fails
to authorize his or her HCP to furnish the information, the employer may deny the employee’s request for FMLA
leave. 29 C.F.R. §825.307(c)

Pending the receipt of the third medical opinion, the employee remains provisionally entitled to FMLA benefits,
including maintenance of group health benefits. If the third medical opinion does not ultimately establish that the
employee is entitled to FMLA leave, the leave the employee has taken shall not be designated as FMLA leave and
may be treated as paid or unpaid leave under the employer’s established leave policies.

Copies of Opinions and Travel Expenses
When an employer elects to require an employee to obtain a second or third medical opinion, the employer is required to provide the employee with a copy of the second and third medical opinions, where applicable, upon the employee’s request. 29 C.F.R. §825.307(d) Additionally, if the employer requires the employee to obtain either a second or a third medical opinion, the employer must reimburse the employee for any reasonable “out of pocket” travel expenses incurred to obtain those medical opinions. 29 C.F.R. §825.307(e)

Re-certifications

In addition to allowing an employer to seek second and third medical opinions where it has reasonable doubts about an employee’s original medical certification, the FMLA regulations also provide a number of opportunities for the employer to ask for re-certification of an employee’s serious health condition. In general, the employer may ask for the same information in a recertification that is permitted in the original medical certification. An employer may additionally provide an employee’s HCP with a record of the employee’s absences and ask if the serious health condition and need for leave is consistent with an employee’s leave pattern. It is important to note, though, that employers cannot seek second or third medical opinions on re-certification.

Employers generally cannot request re-certification more often than every 30 days. But there are some occasions upon which employers may request re-certification more frequently. For example, when an employer receives information that casts doubt upon the employee’s stated reason for the absence or the continuing validity of the certification, the employer may request recertification more often than every 30 days. For example, if an employee is out on FMLA leave for four weeks due to the employee’s recent knee surgery, and the employee plays in the company’s softball league games during the employee’s third week of FMLA leave, this information may be sufficient to cast doubt on the continuing validity of the certification, allowing the employer to request a recertification in fewer than 30 days. 29 C.F.R. §825.308(c)