

## **Employers, not Doctors, Bear Responsibility for Proper Designation of Family Leave**

### **Question:**

I employ 76 employees, all in the Portland metropolitan area. Therefore, I am covered by both the Federal Family and Medical Leave Act (FMLA) and the Oregon Family Leave Act (OFLA).

About a month ago, one of my employees told me that her husband was having arthroscopic knee surgery, and she would have to miss this coming Wednesday, Thursday and Friday to care for him after the procedure. She also said he would be incapacitated over the weekend.

It looked to me like this was a classic case of “absence plus treatment” under both FMLA and OFLA: My employee had a family member (husband) who was making at least two visits to the doctor or one visit with a continuing regimen of medical treatment, and who would be incapacitated for more than three consecutive days. So I told the employee that I was sure the absence was covered but that we had to go through the formalities, and I filled out the standard FMLA designation form (WH 381) and gave it to her.

Because I know I have the right to require medical certification for family medical leave, I also gave my employee the standard medical certification form (WH 380) and told her to have her husband ask the doctor to fill it out. That form has a place for the doctor to identify the patient’s limitations and to indicate the type of “serious health condition” from which the patient suffers.-

The employee’s husband then gave the form to his doctor, who filled it out and signed it. The employee returned it to me and I was just about to designate the absence as FMLA/OFLA when I noticed that the doctor had written that the husband would probably only be incapacitated for “a couple of days.” This confused me, because that took it out of the “absence plus treatment” category, and there is no other type of serious health condition that would apply.

So how should I classify this absence? The doctor was clearly too hurried and didn’t understand the form. He probably doesn’t understand very much about family medical leave, either. But now that he has (probably mistakenly) certified this as a FMLA/OFLA absence, do I have to go along with it? Does it matter that I had already told the employee that her leave would be covered by FMLA/OFLA?

### **Answer:**

Even though you are obviously going to review what the doctor says, it is ultimately the employer’s responsibility to determine whether an absence is covered under FMLA/OFLA, and to be sure that FMLA/OFLA absences are properly classified as such. The doctor’s role is to take care of the patient and give you the medical information you

need to make the proper designation, not to make a legal determination about whether an absence qualifies according to FMLA/OFLA.

After receiving information from your employee and her doctor, the next step is to review the definition of a “serious health condition,” found in Oregon Administrative Rule 839-009-0210(14), to determine whether these absences meet the definition.

If the doctor’s documentation is ambiguous, such as here, you can always “provisionally” designate the leave as FMLA/OFLA, pending medical clarification. And if the husband’s treatment doesn’t meet any of the definitions of “serious health condition,” you must then decide if you are still going to grant the employee her requested time off (paid or unpaid, according to your policy).

Remember that both FMLA and OFLA prohibit you from directly contacting the doctor to clarify information on a medical certification. However, you can either have the employee ask the doctor for more information, or you can arrange for another medical provider to contact the doctor (with the employee’s permission) for the additional information.

In answer to your second question, it could well be a problem if your employee had relied on your assertion that the absence would be covered by FMLA/OFLA. You should determine if changing the designation at this late date might prejudice the employee, and if the employee might even have an “implied contract” action against you. While this seems unlikely, stranger things have happened in the law.

For more information on this and other important issues affecting Oregon employers, contact our website at [www.oregon.gov/boli/ta](http://www.oregon.gov/boli/ta).