

FMLA Leave – Do employees have to say how long they will be gone?

AUTHOR: SANDBERG PHOENIX

By Courtney Cox

 not found or type unknown

The short answer – if an employee knows the duration they must tell the employer. If they don't know the duration, they don't have to say.

In this 7th Circuit case, the employee of a nursing facility in Illinois requested FMLA leave to care for her daughter who was being treated for thyroid cancer. When the employee mailed in the FMLA form, she failed to respond to the question about the duration of the leave. The employer did not ask her to fill in the portion of the form asking about the duration or pose any questions to her about the duration.

The physician stated on the form that the daughter's recovery was uncertain and if she did recover she would need assistance at least through July 2011. The employer inferred from this statement that the employee would be unable to return to work before April 1, when the 12 week leave period would end.

In mid-February the employer hired a replacement for the employee. When the employee reported for work in March (before the 12 weeks ended) she was told she no longer had a job.

A lawsuit followed. The District Court ruled in favor of the employer, saying that the employee had failed to say exactly how long she would be on leave.

The Court of Appeals reversed and ruled in favor of the employee. The court found the employee did not fail to provide essential information as to the duration of the leave because she did not know the duration herself. The FMLA requires that an employee give notice to her employer of the need for leave. The employee gave the employer this notice and the employer granted the leave. Because the daughter's health was uncertain, the employee was unable to provide a firm return date.

The Department of Labor calls this leave “unforeseeable.” The notice requirements for unforeseeable leave are found under 29 CFR § 825.302 and discussed in *Righi v. SMC Corp.*, 632 F.3d 404 (7th Cir. 2011). This regulation makes it clear that employees are not required to tell employers how much leave they need if they do not yet know themselves.

The lesson for employers? Wait until the outer limit of the leave time has passed before replacing the employee.

For more information on the Family Medical Leave Act, see our full archive of FMLA blog entries.