



American Postal Workers Union, AFL-CIO

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Via Facsimile and First Class Mail

Anthony J. Vegliante, Executive Vice President
and Chief Human Resources Officer
United States Postal Service
475 L'Enfant Plaza, SW
Washington, DC 20260-4100

RE: Regulations for Returning Bargaining Unit Employees to Work Following FMLA-Protected Absences

Dear Mr. Vegliante:

I am writing to determine whether the APWU and the Postal Service have a disagreement regarding the regulations for returning bargaining unit employees to work following FMLA-protected absences pursuant to the FMLA. I have received from the field a copy of your July 26, 2005, Memorandum to Postal Service Vice Presidents, Area Operations and Manager, Capital Metro Operations on the subject of employees returning to work following FMLA absences. This inquiry is prompted in part by your Memorandum.

In light of the fact that *the Court's decision in Harrell v. U.S. Postal Service is final and there are no contrary or competing decisions in the other circuits*, the APWU had anticipated that the Postal Service would discontinue requiring anything more than a simple statement provided by the employee's own health care provider of an employee's ability to return to work when an employee wishes to return to duty following FMLA leave. Your Memorandum seems to suggest, however, that in some parts of the country management may still require additional medical documentation (i.e. more than a simple statement from the employee's health care provider of their ability to return to work) whenever "management has a reasonable belief, based upon reliable and objective information, that the employee may be unable to perform the essential functions of his/her position or may pose a direct threat to health or safety." As you are aware, the Postal Service has an obligation to administer its leave and related policies on an equitable basis for all employees.

The following represents the APWU's position regarding the regulations for bargaining unit employees when returning to work from FMLA-absences

pursuant to the FMLA. Please provide the information requested below and indicate whether you agree or disagree:

1. Pursuant to the FMLA, bargaining unit employees may be required *only* to provide the Postal Service with fitness-for-duty certification” in the form of a simple statement from their own health care provider of their ability to return to work. If you disagree, please explain why and identify any regulations that support your position.

In addition, such FMLA regulations apply to all bargaining unit employees on a nationwide basis. If you are in disagreement, please explain why and identify relevant FMLA regulations that permit the Postal Service, as an Employer covered by the FMLA, to apply FMLA return to work regulations differently from one postal facility to another or from one state to another.

2. The FMLA simply requires the Postal Service to rely on the evaluation of the employee’s own health care provider and that the Postal Service cannot impose any return-to-duty regulations that impose a greater burden on employees than those imposed by the FMLA and its regulations. If you disagree, please explain why and identify any regulations that support your position.

In addition, such FMLA regulations apply to all bargaining unit employees on a nationwide basis. If you are in disagreement, please explain why and identify relevant FMLA regulations that permit the Postal Service, as an Employer covered by the FMLA, to apply FMLA regulations for employees returning to work, differently from one postal facility to another or from one state to another.

3. Pursuant to the FMLA, collective bargaining agreements, including handbooks, manuals or published postal regulations incorporated into the Agreement pursuant to Article 19, or *any employment benefit program or plan* cannot diminish the rights established for employees under the Act or any amendment made by the Act. If you disagree, please explain why and identify any regulations that support your position.

In addition, such FMLA regulations apply to all bargaining unit employees on a nationwide basis. If you are in disagreement, please explain why and identify relevant FMLA regulations that permit the Postal Service as an Employer covered by the FMLA to apply FMLA regulations for employees returning to work, differently from one postal facility to another or from one state to another.

4. Nothing in the FMLA, or its implementing regulations, forbids a more stringent fitness-for-duty examination once the employee has returned to work from FMLA leave, so long as any such examination is job-related and consistent with business necessity in accordance with Americans with Disabilities Act guidelines. In other words, the employee has to have already returned to work by providing the required FMLA certification. If you disagree, please explain why and identify any regulations that support your position.

5. The requirement that a more stringent fitness-for-duty examination, imposed “after an employee has returned to work by providing the required FMLA certification”, must be “job-related and consistent with business necessity” requires the Postal Service to have a reasonable belief supported by objective evidence that an employee’s ability to perform essential job functions will be impaired by a medical condition; *or* that an employee will pose a direct threat due to a medical condition. If you disagree, please explain why and identify any regulations that support your position.

In addition, the above regulations apply to all bargaining unit employees on a nationwide basis. If you are in disagreement, please explain why and identify relevant FMLA regulations that permit the Postal Service as an Employer covered by the FMLA to apply FMLA regulations for employees returning to work, differently from one postal facility to another or from one state to another.

6. For bargaining unit employees returning to work for non-FMLA absences, under certain circumstances, the Postal Service may require medical certification that provides sufficient information to make a determination that the employee can perform the essential functions of his/her job and without posing a impose a direct threat on self or others. However, the decision to require such medical documentation must be “job-related and consistent with business necessity” which requires the Postal Service to have a reasonable belief supported by objective evidence that an employee’s ability to perform essential job functions will be impaired by a medical condition; *or* that an employee will pose a direct threat due to a medical condition. If you disagree, please explain why and identify any regulations that support your position.

Your cooperation in this matter would be greatly appreciated. I look forward to your prompt reply.

A copy of your Memorandum which appears to be dated July 26, 2005 is enclosed for your reference. It would also be appreciated if your offices provide me with a better copy of your memorandum that is more legible.

Sincerely,


Greg Bell, Director
Industrial Relations

Attachment



July 26, 2005

VICE PRESIDENTS, AREA OPERATIONS
MANAGER, CAPITAL METRO OPERATIONS

SUBJECT: Procedures for Returning Craft Employees to Work Following FMLA-Protected Absences

The purpose of this memorandum is to clarify the procedures for clearing craft employees to return to work following FMLA-protected absences.

On July 19, 2005, in the case of *Harrell v. U.S. Postal Service*, the United States Court of Appeals for the Seventh Circuit ruled that the Postal Service's return to work provisions in ELM 865 cannot be applied to bargaining unit employees returning from FMLA-protected absences. Instead, the court determined that the Postal Service can only require a short statement from an employee's medical provider to the effect that the employee is fit to return to duty. The court reasoned that "the provisions of the FMLA simply require an employer to rely on the evaluation of the employee's own health care provider" and, therefore, the Postal Service cannot impose its "more burdensome" return to work requirements on its employees. It is important to note that the Postal Service is bound to follow this decision in Indiana, Illinois, and Wisconsin, as these states fall within the area covered by the Seventh Circuit.

The ELM provisions before the court in *Harrell* allowed management, prior to an employee's return to work from a FMLA-protected absence, to request detailed medical information when the absence was caused by a number of specified medical conditions, or if the absence exceeded 21 days. These ELM provisions recently changed. The new ELM provisions authorize return to work clearance when management has a reasonable belief, based upon reliable and objective information, that the employee may be unable to perform the essential functions of his/her position or may pose a direct threat to health or safety. This standard comports with the requirements of the Rehabilitation Act that employers make medical inquiries only when there is a reasonable, objective basis to do so.

The Postal Service will comply with the *Harrell* decision in those facilities located within the three states subject to the court's jurisdiction: Indiana, Illinois, and Wisconsin. Effective immediately, in facilities located in these three states, management may not request any of the information contained in ELM 865.1 *before* a craft employee returns to work from a FMLA-protected absence. In these three states, employees must be allowed to return to work upon presenting a simple statement from their health care providers that they are able to return to work. Once these employees have returned to work, consistent with the Rehabilitation Act, management may request information concerning an employee's fitness for duty, providing management has a reasonable belief, based upon reliable and objective information, that:

- The employee may not be able to perform the essential functions of his/her position, or
- The employee may pose a direct threat to the health or safety of him/herself or others due to that medical condition.

In all facilities *not* located within Illinois, Indiana, or Wisconsin, continue to apply ELM 865.1 as written. That is, under the circumstances set out in ELM 865.1, management may request medical information prior to allowing a craft employee to return to duty after a FMLA-protected absence.

For those Areas and Districts having facilities located within Illinois, Indiana, and Wisconsin, additional instructions will be issued shortly by the Labor Relations Department at Headquarters.



Anthony J. Vegliante

cc: Mr. Donahoe
Ms. Gibbons
Mr. Harris
Mr. Tulino