

**FMLA2018-2-A**

August 28, 2018

Dear **Name***:

This letter responds to your request for an opinion letter concerning whether organ-donation surgery can qualify as a “serious health condition” under the Family and Medical Leave Act of 1993 (FMLA). As discussed below, we conclude that it can. This opinion is based exclusively on the facts you have presented. You have represented that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating, or for use in any litigation that commenced prior to your request.

BACKGROUND

You inquire whether an employee who donates an organ can qualify for FMLA leave, even when the donor is in good health before the donation and chooses to donate the organ solely to improve someone else’s health. You also inquire whether an organ donor can use FMLA leave for post-operative treatment. You note in your letter that organ-donation surgery typically requires an overnight stay in a hospital.¹

GENERAL LEGAL PRINCIPLES

The FMLA entitles eligible employees of covered employers to unpaid, job-protected leave for specified family and medical reasons. Eligible employees may take up to 12 workweeks of leave in a 12-month period for, among other things, a serious health condition that renders the employee unable to perform the functions of his or her job. 29 U.S.C. § 2612(a)(1)(D); 29 C.F.R. § 825.112(a)(4). An employer may request medical certification from a health care provider concerning the serious health condition that is the basis for the FMLA leave request. 29 U.S.C. § 2613; 29 C.F.R. § 825.305. When requested, medical certification is a basic requirement for FMLA-qualifying leave for a serious health condition, and the employee is responsible for providing such certification to his or her employer. [WHD Opinion Letter FMLA2005-2-A](#), 2005 WL 3401779 (Sept. 14, 2005).

The FMLA defines “serious health condition” as an “illness, injury, impairment, or physical or mental condition that involves” either “inpatient care in a hospital, hospice, or residential medical care facility” or “continuing treatment by a health care provider.” 29 U.S.C. § 2611(11). Implementing regulations define “inpatient care” as “an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity... or any subsequent treatment in connection with such inpatient care.” 29 C.F.R. § 825.114. The regulations also specify that “continuing treatment” includes “incapacity and treatment,” “chronic conditions,”

¹ See also United Network for Organ Sharing (UNOS), *Recovery*, <https://transplantliving.org/living-donation/being-a-living-donor/recovery/> (“Donors usually stay in the hospital for four to seven days after surgery.”).

“permanent or long-term conditions,” and “conditions requiring multiple treatments.” 29 C.F.R. § 825.115. For all conditions, “incapacity” means “inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom,” and “treatment” includes “examinations to determine if a serious health condition exists and evaluations of the condition.” 29 C.F.R. § 825.113(b), (c). An employee is incapacitated if he or she is “unable to work at all or is unable to perform any one of the essential functions of the employee’s position,” including when the employee “must be absent from work to receive medical treatment.” 29 C.F.R. §§ 825.113(b), .123(a).

OPINION

An organ donation can qualify as an impairment or physical condition that is a serious health condition under the FMLA when it involves either “inpatient care” under § 825.114 or “continuing treatment” under § 825.115. Thus, as relevant to your letter, an organ donation would qualify as a serious medical condition whenever it results in an overnight stay in a hospital. Of course, that is not the only means for organ donation to involve “inpatient care” or “continuing treatment.” Organ-donation surgery, however, commonly requires overnight hospitalization, as you note in your letter, and that alone suffices for the surgery and the post-surgery recovery to qualify as a serious health condition.

We trust that this letter is responsive to your inquiry.

Sincerely,



Bryan Jarrett
Acting Administrator

***Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b)(7).**