

Employers Must Gear Up Now For New FMLA Regulations

New forms, new leave rights, and new employer and employee obligations under the new Family and Medical Leave Act regulations will require employers take steps to bring their organizations into compliance before the January 16, 2009 effective date.

The United States Department of Labor issued over 700 adobe-formatted pages of regulations which include a number of substantive changes to employer obligations in administering FMLA leave and to employee duties when taking FMLA leave, and provide clarification on the new military leave entitlements.

For employers, the new regulations will impose several compliance obligations including:

Policy Revisions: The new regulations provide for two new forms of leave and a new definition of serious health condition. As a result, employers will have to revise their FMLA policies to incorporate:

Military Caregiver Leave: The law provides for protections for family members caring for a covered service member with a serious injury or illness incurred in the line of duty on active duty. These family members are able to take up to 26 workweeks of leave in a 12-month period.

Leave for Qualifying Exigencies for Families of National Guard and Reserves: The law allows families of National Guard and Reserve personnel on active duty to take FMLA job-protected leave to manage their affairs — "qualifying exigencies." The rule defines "qualifying exigencies" as: 1) short notice deployment; 2) military events and related activities; 3) childcare and school activities; 4) financial and legal arrangements; 5) counseling; 6) rest and recuperation 7) post-deployment activities; and, 8) additional activities provided employer and employee agree to the leave.

Serious Health Condition: The new rule clarifies that if an employee is taking leave involving more than three consecutive calendar days of incapacity plus two visits to a health care provider, the two visits must occur within 30 days of the period of incapacity. Additionally, it defines "periodic visits to a health care provider" for chronic serious health conditions as at least two visits per year.

New Notices and Forms: In addition, the DOL consolidated all employer notice obligations into one section to help clarify what is required and the applicable time periods. There are two new notice requirements for employers when providing notice to employees taking FMLA leave: the first notifies employees of their FMLA eligibility and rights; the second notice is to formally designate the leave as FMLA leave.

Employers are now required to provide the following notices: a) General Notice – must be posted in conspicuous place explaining the Act and its procedures and include it in handbook or in writing to each employee; b) Eligibility notice – when an employee requests FMLA leave or an employer acquires knowledge that leave may be for an FMLA-qualifying leave, the employer must notify the employee of the employee's eligibility for FMLA leave within 5 business days, stating whether eligible or not and this notice can be orally or in writing; c) Rights and Responsibilities Notice – written notice detailing the specific expectations and obligations of the employee and the consequences of a failure to meet these obligation, to be provided each the eligibility notice is provided; and, d) Designation Notice – written notice to employee that leave is designated as FMLA-leave qualifying, to be provided within 5 business days absent extenuating circumstances, with notice of fitness-for-duty exam requirements if any.

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More on New FMLA Regulations

The regulations also modify the current provision that had been interpreted to allow some employees to notify their employers of need for FMLA leave up to two full business days after an absence, even if they could provide notice sooner. The final regulations, at § 825.302, provide that an employee must follow the employer's usual and customary notice and procedural policy for requesting leave absent unusual circumstances. Employers' procedures might require the request be in writing stating the dates of leave or the use of a call-in hotline on the day of absence.

Connecticut Law

For Connecticut employers, the new federal regulations will require an interpretation of the law under the federal regulations and an awareness of differences under the Connecticut Family and Medical Leave Act. The open question is whether the Connecticut regulations will be revised to reflect the new federal regulations.

Compliance

Given the volume and complexity of the regulations, employers are best advised to begin bringing their organizations into compliance prior to the effective date of the regulations. At the very least, employers must be conversant with the new definition of serious health condition, military leave entitlements, and notice obligations. The U.S. DOL recovered more than \$1.5 million from the more than 2,000 complaints (US DOL only) of FMLA violations filed in 2007.

Editor's Note: A Special Program on the new FMLA regulations with Atty. Robert Noonan, Atty. Jessica Wragg, and Atty. Heidi Lane of the Connecticut Department of Labor will be held on January 8, 2009 in the Four Points Sheraton in Meriden. Attendees will receive the new forms and poster insert at the program.

Termination for Failure to Attend Fitness of Duty Exam Okayed by Court

The Connecticut Appellate Court recently ruled that an employer did not wrongfully discharge an employee who would not submit to a return to work exam, finding an employer was justified in asking for a return to work medical examination and met the provisions of the Americans with Disabilities Act (ADA).

In *Joyner v. Simkins Industries, Inc.*, released on November 4th, the defendant employed the plaintiff for over 15 years. On August 11, 2003, the plaintiff did not report to her job and telephoned in that she was sick. On August 14, 2003, the plaintiff saw a physician who sent a note to the employer that the plaintiff was unable to return to work until August 25th due to a medical condition. The employer put several calls into the plaintiff, who did not answer or return the calls. On August 19th, the plaintiff received notice of a medical exam on Friday, August 22, scheduled by the employer. The plaintiff did not attend the exam and did not tell her employer she did not intend to attend. On August 25th, the employer notified the plaintiff that she was insubordinate for not complying with the order to attend the exam and that she was terminated effective August 22.

The plaintiff argued the discharge violated the ADA, that the medical exam was not job-related and consistent with business necessity. The Appellate Court held that business necessities may include ensuring the workplace is safe or reducing egregious absenteeism. Simkins had a legitimate interest in the exam because of the vague doctor's notes and the employee's refusal to discuss the matter, and Simkins clearly had a policy for employer-paid exams.

The specific facts permitted upholding the employer's legitimate interest in an exam and successive termination. Not all facts warrant pushing for a return to work exam, but employers should know that if they have a written policy on such exams and have a legitimate job-related, business necessity, employers can require them. Employers may even use such examinations where an employee provides limited or vague medical documentation or refuses to return to work, as long as they don't run afoul of the ADA.

Undocumented Workers Entitled to Workers' Compensation Benefits

A New York Appellate Court recently ruled that an undocumented worker has a right to receive workers' compensation benefits after an injury on the job.

In *Amoah v. Mallah Management, LLC*, the employee-claimant came to the U.S. from Ghana on a Visa, legally permitted to be in the country, but did not authorize him to work. The claimant used his roommate's driver's license, social security card, and other information to get a job. Claimant then stayed in the U.S. past his Visa period and continued working. In April 2005, Claimant was injured on the job; he filed a workers' compensation and personal injury claim under his roommate's name and social security number. After the roommate demanded a share of the compensation benefits, Claimant told the workers' compensation carrier the truth about his illegal work status.

The Compensation carrier sought to suspend benefits because of the fraud. New York Workers' Compensation appeal board ruled that the Claimant was entitled to benefits; the employer and carrier appealed to the Appellate Court. The employer and carrier argued that benefits should be suspended because the employee used fraudulent documents to get his job based on the Immigration Reform and Control Act of 1986 (IRCA) and Supreme Court decision, *Hoffman Plastic Compounds v. NLRB*.

The New York Appellate Court unanimously found that the undocumented worker is eligible for and

entitled to workers' compensation benefits, and that the comp claim is not preempted by the federal IRCA. The Court here viewed the IRCA as intended to deter employers from hiring undocumented workers. The court reasoned that by allowing employers to hire undocumented workers to avoid the payment of workers' compensation claims through indemnification to a carrier would encourage employers to hire undocumented workers.

The employer and carrier relied heavily on *Hoffman Plastic*, a case in which the U.S. Supreme Court ruled that federal immigration policies prohibit the NLRB from awarding undocumented workers back pay under the NLRA, federal National Labor Relations Act.

The NY Appellate Court distinguished this case, a claim for workers' compensation benefits, as based on a contractual right as a form of consideration that was part of the contract for services already performed. Further, since the claimant was totally disabled, NY law did not require the claimant to be able to work in the labor market (only required for partial disability comp benefits).

In 1998, the Connecticut Supreme Court, CT's highest court, similarly held that an illegal alien who worked as a domestic employee could claim workers' compensation benefits after an on-the-job injury. Should the NY employer or carrier appeal the matter to the Supreme Court, employers and carriers will all be hoping the Court reviews and reverses the NY Appellate Court's decision.

IRS Issues 2009 Mileage Rates

IRS issued its 2009 optional standard mileage rates. Beginning on Jan. 1, 2009, the standard mileage rates for the use of a car (also vans, pickups or panel trucks) will be:

- 55 cents per mile for business miles driven;
- 24 cents per mile driven for medical or moving purposes; and,
- 14 cents per mile driven in service of charitable organizations.

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