

FMLA, ADA and Paid Leave Update

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FMLA and ADA again?

- Follow up to the major changes in 2008
 - Status of statutory changes
 - Status of regulatory changes
- Final changes and what they mean to employers
- Are we there yet???

ADA Amendments Act

Americans with Disabilities Act (“ADA”)

- Title I prohibits employers from discriminating against qualified individuals with disabilities

“Disability”

- An individual with a disability is a person who:
 - Has a physical or mental impairment that substantially limits one or more major life activities;
 - Has a record of such an impairment; or
 - Is regarded as having such an impairment

ADA Amendments Act

- Passed just over a year ago, on September 25, 2008
- Findings and Purposes include explicit rejection of Supreme Court's “demanding standard” for interpreting definition of disability
- Disability to be construed *broadly* in favor of coverage (See ADA Amendments Act, § 4(a))

“Substantially limits” redefined

- Findings and Purposes expresses expectation that EEOC will revise definition consistent with Act- look for possible shift from “prevents or severely restricts”
- Express rejection of *Sutton* mitigating measures approach- except for contacts and glasses, individuals’ limitations must be evaluated without regard to ameliorative measures (*See ADA Amendments Act, § 4 (a)* (amending 42 U.S.C. § 12102))

Ameliorative measures

- Medication, medical supplies, equipment, or appliances, low-vision devices (**not including ordinary eyeglasses or contact lenses**), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies-

See ADA Amendments Act, § 4(a), codified at 42 U.S.C. § 12102 (4)(E)

Ameliorative measures continued

- use of assistive technology
- reasonable accommodations or auxiliary aids or services; or
- learned behavioral or adaptive neurological modifications.

See ADA Amendments Act, § 4(a), to be codified at 42 U.S.C.S. § 12102 (4)(E)

Major life activity expansion

- Incorporates and expands upon existing EEOC guidelines- includes but not limited to self-care, manual tasks, seeing, hearing, *eating, sleeping, walking, standing, lifting, bending, breathing, learning, reading, concentrating, thinking, communicating and working*
- *Also includes major bodily functions including immune system, cell growth, bowel, bladder, neurological, brain, respiratory, circulation, endocrine function and reproductive functions*

“Regarded as” redefined

- “Regarded as” disabled now includes individuals who have been “subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment *whether or not the impairment limits or is perceived to limit a major life activity*”

See ADA Amendments Act, § 4(a), to be codified at 42 U.S.C.S. § 12102 (3)(A)

Proposed Amendments

- Published last week
- Comments accepted until November 23, 2009
- “The effect of these changes is to make it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA.”

Hint, Hint Employers

- “should be construed in favor of broad coverage”
- “should not require extensive analysis”
- EEOC’s rejection of the “prevent or severely restrict” interpretation of “substantially limits”

Expected Response

- Best defense is a good offense?
- New regulations will greatly increase requirement for reasonable accommodations
- Heavy exploration of the economic impact of the regulations

Family and Medical Leave Act (“FMLA”)

Origin of FMLA Amendments

- Proposal for leave to care for wounded servicemember was part of report issued in July 2007 by Presidential “Wounded Warriors” Commission, which was formed in response to allegations of deteriorating care at veterans’ hospitals and rehabilitation centers.

Military Family Leave

- Available to FMLA eligible employees working for covered employers
- Up to 26 weeks of leave
- To care for spouse, son, daughter, parent or “next of kin” with
- “serious injury or illness” incurred in line of duty
- that may render the member medically unfit to perform the duties of his or her “office, grade, rank or rating”

Active Duty Leave

- Employees may take up to twelve weeks of leave “because of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation.

See 29 U.S.C. § 2612(a)(1)(e)

The Final Regulations: The Big Ten

The Big Ten

1. New Employer Notice Obligations

- Every covered employer must post a general notice to all employees of FMLA rights, either in handbook or by separate notice
- Such notice must be posted even if the employer has no FMLA-eligible employees

See § 825.300

Notice Obligations cont'd

- Upon request for FMLA leave (or enough information provided to the employer that the need for leave may qualify), the employer has 5 business days to issue Eligibility Notice and Rights and Responsibilities Notice.
- 29 C.F.R. § 825.300(b) and (c)

Notice of Eligibility and Rights & Responsibilities
(Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division



U.S. Wage and Hour Division

OMB Control Number: 1215-0181

Expires: 12/31/2011

In general, to be eligible an employee must have worked for an employer for at least 12 months, have worked at least 1,250 hours in the 12 months preceding the leave, and work at a site with at least 50 employees within 75 miles. While use of this form by employers is optional, a fully completed Form WH-381 provides employees with the information required by 29 C.F.R. § 825.300(b), which must be provided within five business days of the employee notifying the employer of the need for FMLA leave. Part B provides employees with information regarding their rights and responsibilities for taking FMLA leave, as required by 29 C.F.R. § 825.300(f), (c).

Part A – NOTICE OF ELIGIBILITY

TO: _____
Employee

FROM: _____
Employer Representative

DATE: _____

On _____, you informed us that you needed leave beginning on _____ for:

- The birth of a child, or placement of a child with you for adoption or foster care.
- Your own serious health condition;
- Because you are needed to care for your _____ spouse; _____ child; _____ parent due to his/her serious health condition.
- Because of a qualifying exigency arising out of the fact that your _____ spouse; _____ son or daughter; _____ parent is on active duty or call to active duty status in support of a contingency operation as a member of the National Guard or Reserves.
- Because you are the _____ spouse; _____ son or daughter; _____ parent; _____ next of kin of a covered servicemember with a serious injury or illness.

This Notice is to inform you that you:

- Are eligible for FMLA leave (See Part B below for Rights and Responsibilities)
- Are not eligible for FMLA leave, because (only one reason need be checked, although you may not be eligible for other reasons):
 - You have not met the FMLA's 12-month length of service requirement. As of the first date of requested leave, you will have worked approximately _____ months towards this requirement.
 - You have not met the FMLA's 1,250-hours-worked requirement.
 - You do not work and/or report to a site with 50 or more employees within 75-miles.

If you have any questions, contact _____ or view the

FMLA poster located in _____.

Part B-RIGHTS AND RESPONSIBILITIES FOR TAKING FMLA LEAVE

As explained in Part A, you meet the eligibility requirements for taking FMLA leave and will have FMLA leave available in the applicable 12-month period. However, in order for us to determine whether your absence qualifies as FMLA leave, you must return the following information to us by _____ (If a certification is requested, employers must allow at least 15 calendar days from receipt of this notice; additional time may be required in some circumstances.) If sufficient information is not provided in a timely manner, your leave may be denied.

- Sufficient certification to support your request for FMLA leave. A certification form that sets forth the information necessary to support your request _____ is/ is not enclosed.
- Sufficient documentation to establish the required relationship between you and your family member.
- Other information needed: _____

No additional information requested

CONTINUED ON NEXT PAGE

Form WH-381 Revised January 2009

If your leave does qualify as FMLA leave you will have the following responsibilities while on FMLA leave (only checked blanks open):

- Contact _____ at _____ to make arrangements to continue to make your share of the premium payments on your health insurance to maintain health benefits while you are on leave. You have a minimum 30-day _____ longer period, if applicable, grace period in which to make premium payments. If payment is not made timely, your group health insurance may be cancelled, provided we notify you in writing at least 15 days before the date that your health coverage will lapse, or, at our option, we may pay your share of the premiums during FMLA leave, and recover these payments from you upon your return to work.
- You will be required to use your available paid _____ sick _____ vacation, and/or _____ other leave during your FMLA absence. This means that you will receive your paid leave and the leave will also be considered pro-rated FMLA leave and counted against your FMLA leave entitlement.
- Due to your status within the company, you are considered a "key employee" as defined in the FMLA. As a "key employee," restoration to employment may be denied following FMLA leave on the grounds that such restoration will cause substantial and grievous economic injury to us. We _____ have not determined that restoring you to employment at the conclusion of FMLA leave will cause substantial and grievous economic harm to us.
- While on leave you will be required to furnish us with periodic reports of your status and intent to return to work every _____ (Indicate interval of periodic reports, as appropriate for the particular leave situation).

If the circumstances of your leave change, and you are able to return to work earlier than the date indicated on the reverse side of this form, you will be required to notify us at least two workdays prior to the date you intend to report for work.

If your leave does qualify as FMLA leave you will have the following rights while on FMLA leave:

- You have a right under the FMLA for up to 12 weeks of unpaid leave in a 12-month period calculated as:
 - _____ the calendar year (January – December).
 - _____ a fixed leave year based on _____
 - _____ the 12-month period measured forward from the date of your first FMLA leave usage.
 - _____ a "rolling" 12-month period measured backward from the date of any FMLA leave usage.
 - You have a right under the FMLA for up to 26 weeks of unpaid leave in a single 12-month period to care for a covered servicemember with a serious injury or illness. This single 12-month period commenced on _____.
 - Your health benefits must be maintained during any period of unpaid leave under the same conditions as if you continued to work.
 - You must be reinstated to the same or an equivalent job with the same pay, benefits, and terms and conditions of employment on your return from FMLA protected leave. (If your leave extends beyond the end of your FMLA entitlement, you do not have return rights under FMLA.)
 - If you do not return to work following FMLA leave for a reason other than: 1) the continuation, recurrence, or onset of a serious health condition which would entitle you to FMLA leave, 2) the continuation, recurrence, or onset of a covered servicemember's serious injury or illness which would entitle you to FMLA leave, or 3) other circumstances beyond your control, you may be required to reimburse us for our share of health insurance premiums paid on your behalf during your FMLA leave.
 - If we have not informed you above that you must use accrued paid leave while taking your unpaid FMLA leave entitlement, you have the right to have _____ sick _____ vacation, and/or _____ other leave run concurrently with your unpaid leave entitlement, provided you meet any applicable requirements of the leave policy. Applicable conditions related to the substitution of paid leave are referenced or set forth below. If you do not meet the requirements for taking paid leave, you remain entitled to take unpaid FMLA leave.
- _____ For a copy of conditions applicable to sick/vacation/other leave usage please refer to _____ available at: _____
- _____ Applicable conditions for use of paid leave _____

Once we obtain the information from you as specified above, we will inform you, within 5 business days, whether your leave will be designated as FMLA leave and count towards your FMLA leave entitlement. If you have any questions, please do not hesitate to contact:

_____ at _____

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT
It is mandatory for employers to provide employees with notice of their eligibility for FMLA protection and their rights and responsibilities. 29 U.S.C. § 2617; 29 C.F.R. § 825.300(f), (c). It is mandatory for employees to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.300. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 10 minutes for employers to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room 5-3502, 200 Constitution Ave., NW, Washington, DC 20030. DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION.

Notice Obligations Cont'd

- Once an employer has sufficient information to make a determination, the employer has 5 business days to designate the leave as FMLA. See 29 C.F.R. §825.300(d)
- If the physician's certification is insufficient (vague, ambiguous or nonresponsive), the employer must give the employee 7 days to cure the deficiency.
- If employee fails to return certification or fails to cure a deficiency, the employer can deny FMLA leave.

Designation Notice
(Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division



OMB Control Number: 1215-0181

Reg. No. 1215-2011

Leave covered under the Family and Medical Leave Act (FMLA) must be designated as FMLA-protected and the employer must inform the employee of the amount of leave that will be counted against the employee's FMLA leave entitlement. In order to determine whether leave is covered under the FMLA, the employer may request that the leave be supported by a certification. If the certification is incomplete or insufficient, the employer must state in writing what additional information is necessary to make the certification complete and sufficient. While use of this form by employers is optional, a fully completed Form WH-382 provides an easy method of providing employees with the written information required by 29 C.F.R. §§ 825.300(c), 825.301, and 825.305(c).

To: _____

Date: _____

We have reviewed your request for leave under the FMLA and any supporting documentation that you have provided. We received your most recent information on _____ and decided: _____

_____ Your FMLA leave request is approved. All leave taken for this reason will be designated as FMLA leave.

The FMLA requires that you notify us as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown. Based on the information you have provided to date, we are providing the following information about the amount of time that will be counted against your leave entitlement:

_____ Provided there is no deviation from your anticipated leave schedule, the following number of hours, days, or weeks will be counted against your leave entitlement: _____

_____ Because the leave you will need will be unscheduled, it is not possible to provide the hours, days, or weeks that will be counted against your FMLA entitlement at this time. You have the right to request this information once in a 30-day period (if leave was taken in the 30-day period).

Please be advised (check if applicable):

_____ You have requested to use paid leave during your FMLA leave. Any paid leave taken for this reason will count against your FMLA leave entitlement.

_____ We are requiring you to substitute or use paid leave during your FMLA leave.

_____ You will be required to present a fitness-for-duty certificate to be restored to employment. If such certification is not timely received, your return to work may be delayed until certification is provided. A list of the essential functions of your position _____ is not attached. If attached, the fitness-for-duty certification must address your ability to perform these functions.

Additional information is needed to determine if your FMLA leave request can be approved:

_____ The certification you have provided is not complete and sufficient to determine whether the FMLA applies to your leave request. You must provide the following information no later than _____, unless it is not practicable under the particular circumstances despite your diligent good faith efforts, or your leave may be denied. (Provide at least seven calendar days)

(Specify information needed to make the certification complete and sufficient)

_____ We are exercising our right to have you obtain a second or third opinion medical certification at our expense, and we will provide further details at a later time.

_____ Your FMLA Leave request is Not Approved.

_____ The FMLA does not apply to your leave request.

_____ You have exhausted your FMLA leave entitlement in the applicable 12-month period.

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT
It is mandatory for employers to inform employees in writing whether leave requested under the FMLA has been determined to be covered under the FMLA. 29 U.S.C. § 2617, 29 C.F.R. §§ 825.300(d), (e). It is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616, 29 C.F.R. § 825.300. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 10-30 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room 5-302, 200 Constitution Ave., NW, Washington, DC 20210. DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION.

Form WH-382 January 2009

2. Penalty for Failure to Designate

- Old regulation on retroactive designation, problems, and the Supreme Court influence
- New regulation bases the penalty decision on whether the employee suffers harm
- “Harm” considered broadly
- 29 C.F.R. §825.301(e)

3. Retrospective Waivers

- Split of authority created confusion for courts, the DOL, lawyers, and clients
- New regulation only bans waiver of prospective FMLA rights, not retrospective waivers
- 29 C.F.R. §825.220(d)

4. Deficiencies in Physician Certifications

- If the original certification is incomplete or insufficient, employer must state in writing what information is required
- Employee must cure the deficiency within 7 calendar days or FMLA leave may be denied
- 29 C.F.R. §825.305(c)

5. Contact with Physician

- 29 C.F.R. §825.307(a)
- Previously, no contact allowed
- Now, employer may contact employee's physician but . . .
 - Must be a named official (health care provider, HR professional, leave administrator, management official. **Not** a direct supervisor)
 - Must be only for the purpose of clarification

6. Bonuses

- “Equivalent pay” no longer requires an assumption that “the ghost employee” would meet every goal. 29 C.F.R. § 825.215(c)(2)
- Must treat non-FMLA employees on leave the same way
- Base bonuses on tasks performed or attendance
- Stay objective – this is not an employer’s license to give a bonus to only “dedicated employees” or the like

7. Medical Certifications

- 29 C.F.R. §825.306 permits disclosure of diagnostic and treatment information
- For employee's own medical condition, focus is on job functions and ability to perform
- For family member's care, focus is on the condition and need for caregiver

8. Call-in Procedures

- Need for FMLA does not trump an employer's call-in procedures
- Mostly for intermittent leaves
- But, consider unusual circumstances
- See 29 C.F.R. §825.303(c)

9. Actual Fitness for Duty

- No more “simple statements”
- Employer may provide list of essential functions and require physician to certify ability to do each
- Must be job-related
- Must do for class of jobs, all employees, employees with a particular condition, etc.
- 29 C.F.R. §825.312

10. Qualifying Exigencies

- What is an exigency?
- 29 C.F.R. §825.126
 - Child care arrangements
 - Counseling
 - Military events
 - Post-deployment activities

FMLA Summary

- Some help for employers
- Little relief from intermittent leave problems
- Better and easier forms from the DOL

Paid Leave Initiative

- Healthy Families Act, H.R. 2460/S.1152
- Revised and reintroduced
- Now based on hours worked
- 1 hour of paid sick time for every 30 hours worked, up to a maximum of 56 hours (7 days) per year

HFA cont'd

- Employee's personal illness or routine preventive care
- To care for child, parent, spouse or “any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.”

HFA cont'd

- Certification may only be required for 3 or more consecutive days
- New reason: medical or legal assistance related to domestic violence, sexual assault or stalking

Best Practices

- Update FMLA and ADA policies
- Use new FMLA model forms
- Broadly interpret “disability”
- Freshen up reasonable accommodation process
- Stay tuned!