

JUST WHEN YOU THOUGHT YOU HAD IT FIGURED OUT: FMLA CHANGES

Our final 2008 newsletter explained the extensive changes to the ADA. This time around, we've got a host of significant amendments to the Family and Medical Leave Act ("FMLA"). Effective January 16, 2009:

- A **New poster** is required (available through DOL: <http://www.dol.gov/esa/whd/regs/compliance/posters/fmla.htm>). Make sure you notify all employees and applicants of the new rules.
- New medical leave request, certification, and notice forms (available at <http://www.dol.gov/esa/whd/fmla/>).
- **Within 5 business days of a request for leave** (or change in employer's policies regarding leave), the employer must notify the employee whether s/he is eligible for leave and what his/her rights and responsibilities are (using form WH-381 **Notice of Rights and Responsibilities**), including whether or not you will require medical certification of the need for leave.
- Upon receipt of the requested information (including medical certification, if requested), the employer must notify the employee **within 5 business days** whether the leave qualifies for medical leave protection, and must provide an explanation if the request for medical leave has been denied (using form WH-382 **Designation Notice**).
- If the medical certification the employee provided is incomplete, the employee must return a completed form **within 7 calendar days** (unless that is "not practicable").



Susan Eggum will be presenting at the SES Employment Law Update on February 19, 2009. CLE and HRCI credit available. To register, call 715-855-0498 or go to www.sterlingeducation.com

- The employer **may now contact the medical care provider directly**, without authorization from the employee, to **authenticate** the certification and **obtain clarification of vague information** on the certification. Restrictions: The employee must first be allowed to "cure" an incomplete certification. The contact must be a member of upper level management or human resources, not the employee's own supervisor. No additional information may be sought.

CAUTIONARY NOTE: Direct contact without employee authorization on a HIPAA form is prohibited under the ADA, and medical providers may legitimately refuse to speak to you without a HIPAA form, so your best bet is still to ask for employee authorization. You may not require the employee to sign a HIPAA authorization, but you can deny leave for failure to provide complete enough information.

- If you will require a **fitness for duty certification** upon return to work, you must state that in your Designation Notice—otherwise you may not require the certification.
- Using paid leave concurrently with medical leave. The notice form requires the employer to let the employee know if he/she will be allowed to or required to use paid leave. Employees can be required to comply with the employer's written notice requirements for using paid leave (for instance, if you require a request for vacation time to be submitted at least 30 days in advance, you can stick to that requirement even when an employee is requesting to use paid leave concurrently with medical leave, and can deny the request to use paid leave if those notice requirements are not met).

UPDATE: In *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, ___ U.S. ___ (1/26/09), the Supreme Court held unanimously that Title VII protects employees from retaliation not only when they come forward to actively oppose unlawful actions, but also when they simply answer questions in the course of an internal investigation that was not initiated by the employee.

- Additional conditions/events qualifying for FMLA are now defined as follows:
 - **Qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is in active military duty or has been notified that s/he has been called to active duty (examples: preparing for short-notice deployment; childcare, financial and legal arrangements; rest and recuperation post-deployment);**
 - **To care for the serious injury or illness of a military servicemember who is a son, daughter, parent, or next of kin of the employee (26 weeks).**
 - Clarification to the definition of two of the conditions qualifying as a "serious health condition":
 - Incapacity for at least three full consecutive days, with continuing treatment (defined as at least **one visit to a healthcare provider within 7 days of the first day of incapacity, and either a second visit within 30 days, or a "regimen of continuing treatment"**)
 - Chronic conditions (**requiring visit to medical provider at least twice/year**)
 - Perfect attendance awards and other attendance-based bonuses may now be limited by FMLA leave [Prior cases had held that limiting or eliminating such an award or bonus to someone who hadn't met the criteria because s/he was absent on leave was a violation of FMLA].
 - Recertification:
 - Generally, for an ongoing condition, **the employer may request recertification every six months.** (There is no

Effective 1/1/09, the Board of Accountancy announced a new rule, that in the event the Board prevails in any contested case hearing, the Board may assess "(A) Attorney General Fees (B) Administrative Hearing Costs (C) Contract Investigator Fees (D) Expert Witness Fees [and] (E) Costs of Appeal." OAR 801-010-0010(8).

The effective date for using the revised Form I-9 has been delayed by 60 days, until 4/30/09. This form was originally scheduled to go into effect on 2/2/09. Employers who use the new form prior to 4/3/09 are subject to penalties.

In related news, there has been a suspension of the obligation on the part of federal contractors to use E-verify.

change to the rule that an employer may not request recertification more frequently than once every 30 days, unless the condition changes or the employer has reason to suspect the employee's stated reason for absence).

- **If a stated duration of the leave is given on the certification, the employer must wait that period of time before seeking recertification,** unless the condition changes or the employer has reason to suspect the employee's stated reason for absence.

Remember that the Oregon Family Leave Act includes additional coverage and provisions, including:

- Coverage of employers with 25 or more employees
- Eligibility after 180 days of work (at least 25 hours per week, on average, for all leave except maternity leave)
- Sick child care (without "serious health condition")
- "Family member" includes grandchild, grandparent, same-sex partner, and child or parent of same-sex partner
- Time off for a workers' compensation claim may not be characterized as medical leave and charged to an employee's medical leave usage.

Finally, per the Oregon Bureau of Labor & Industries, Oregon regulations will not be amended at this time to conform to the new FMLA regulations. As such, for an employer subject to both FMLA and OFLA, any time the FMLA regulations conflict with the Oregon regulations, the rule which is more beneficial to the employee must be applied. OAR 839-009-0220.