



FMLA GUIDANCE

The Department of Labor (DOL) published the final rule regarding the Family and Medical Leave Act (FMLA). New military leave entitlements were added to the amended language of FMLA. Amendments were also passed to make the law operate more smoothly by improving communication between employees, employers and health care providers. These changes will provide clarity for employees and employers about their responsibilities and rights under FMLA.

MILITARY FAMILY LEAVE

The new military leave entitlements provide leave for military caregivers and family members of the National Guard and Reserve. The new entitlement for military caregivers will allow qualified employees twenty-six workweeks of leave in a single twelve-month period. This clause allows employees to care for a servicemember with a serious illness or injury incurred in the line of active duty. Family members of the National Guard and Reserve will be able to take Qualifying Exigency Leave which allows family members to manage affairs that require immediate action for military members on active duty or called to active duty status. The Department of Labor has provided new certification forms to facilitate the certification requirements for the use of military leave.

SERIOUS HEALTH CONDITION

The new language also provides guidance on regulatory matters regarding definitions of serious health conditions. Serious health conditions under FMLA are defined as those that involve more than three consecutive, full calendar days of incapacity plus two visits to a health

care provider. This wording has been clarified by requiring that two visits to a health care provider must occur within the more-than-three day period of incapacity. The first visit must take place within seven days of the first day of incapacity and the second visit must occur within thirty days of the beginning period of incapacity.

EMPLOYER NOTICE OBLIGATIONS

Employer notice obligations require employers to better inform employees of their rights and responsibilities under FMLA. Employers will be obliged to provide employees with a general notice about FMLA in the form of a poster, and either in the employee handbook and upon hire. Employers must also provide an eligibility notice and rights and responsibilities notice within five days of hire.

MEDICAL CERTIFICATION PROCESS

The medical certification process has new amendments that consider Health Insurance Portability & Accountability Act requirements. When conducting the medical certification, the employer's representative contacting the health care provider may in no case be the employee's direct supervisor. Employers may not ask health care providers for more information beyond that required by the certification form. If an employer deems the medical certification to be incomplete, the employer can request that employee fill in the missing information. The employer must specify in writing what information is needed and the employee must resubmit the desired information within seven days.

Some other changes:

Employers may request a new medical

Who Do I Contact

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Employer Requirements for Layoffs

The Worker Adjustment and Retraining Notification Act (WARN) went into effect in 1989. The WARN Act is a federal law that requires employers with 100 or more employees to provide at least sixty calendar days advance notice of a plant closing and mass layoff affecting fifty or more employees at a single site of employment. WARN allows affected employees to adjust to their loss of employment, to enter skill training, and to find new employment after they have lost their jobs. WARN provides workers with sufficient time to prepare for the transition between the jobs they currently hold and their new job. Notice starts the Rapid Response process to assist the employees who might be affected.

Employees are entitled to WARN notice if the employee is terminated from employment, laid off for more than six months, or have regular hours of work reduced by more than half during each month of a six-month period. WARN does not apply if the employer transfers the employee to a job within a reasonable commuting distance, as determined by local jurisdictions. Employees covered under WARN are managers, supervisors, hourly, and salary

workers. Employees not covered under this statute are those who have worked less than six months in the last twelve months, employees who work an average of twenty hours a week, strikers, workers locked out in a union dispute, temporary workers, employees that have a separate employment relationship with another employer, or federal, state, or local government employees. If your employees are represented by unions, you must provide the union sixty days notice. The union is required to give the employees notification. Workers on leave like workers' compensation, maternity, medical or FMLA leave must receive notice.

Employers considering a layoff can contact the state Dislocated Worker Unit for information on notice requirements on the Department of Labor's website at www.doleta.gov/layoff/rapid-coord.cfm. Many states have their own legislation requiring employers to give their employees notice of closure. Companies performing layoffs can contact the State Dislocated Worker Unit to find out more information on notice requirements for their state.

The notice must contain an explanation of whether the layoff or closing is

permanent or temporary. The notice must also state the date of layoff or closing, date of separation, and contact information for the person in the company who can provide additional information. Preprinted notices in employees' paycheck and verbal notices do not meet the WARN Act requirements. Specific requirements of WARN can be found at www.doleta.gov/programs/factsht/warn.asp.

Violators are liable for each employee for an amount equal to back pay and benefits for the period of violation for up to sixty days. Employers who fail to provide required notice to local governments are subject to a \$500 fine for each day of violation.

If you are considering a layoff or closing, use objective criteria when selecting. Use pre-selected, non-discriminatory criteria such as performance ratings and seniority. If the information of a closing or layoff is leaked to your workforce before you are required to give adequate notice, communicate honestly and directly. Never convey that this decision is because of the bottom line. Hold a meeting or send a memo to alert employees about the possible layoff or reduction in force. Provide employees with an open door policy for them to ask questions or express concerns to avoid rumors.

FMLA, Continued

certification for each leave year for medical conditions that last longer than one year. Employers are allowed to request recertification of an ongoing condition every six months in conjunction with an absence.

Employers may require fit-for-duty certification that specifically addresses the employee's ability to perform the essential functions of the employee's job which is especially important for safety-sensitive positions.

Time spent on "light duty" does not count against an employee's FMLA leave entitlement.

Employees needing FMLA leave must follow the employer's call-in procedures for reporting an absence.

Employees are able to take, or employers may require employees to take any paid leave concurrently with FMLA leave.

PeopLease employees are required to take any paid-time-off available before unpaid FMLA leave commences. PeopLease also runs FMLA and Workers' Compensation leave concurrently

Employers are allowed to deny a "perfect attendance" award to an employee on FMLA leave.

The final ruling can be found on the DOL's website at: www.dol.gov/esa/whd/fmla/.

The Manager's Guide to Great Documentation

You've probably mentioned it to managers a hundred times: When there's a problem with an employee, make sure we have good documentation to back up any discipline. Employment law attorney Penelope Phillips explains a few hints that will make documentation better than "good."

Phillips says the clues lie in several court cases she's seen and how the right words have meant the difference between a win for the manager and a big cash settlement for an employee with a complaint. She says solid documentation relies on three pieces that every manager should understand. Here's how they're broken down:

I. Timing. Even good documentation can hurt your cause if too much time elapses between the incident and the date of the documentation. Two reasons:

- In the employee's mind, the connection between the incident and the documentation becomes fuzzy. When that happens, employees start to believe they're being treated unfairly.

greater the risk to the employer. All the better if the documentation is dated the same day as the incident.

2. Accuracy. Getting the story straight in writing is as much about what's *not said* as what's said.

Yes, managers should follow the reporter's creed of The Five W's - who, what, when, where, why - when putting together documentation. But most mistakes occur in the "why" stage.

Reason: too much "editorializing" about events. Examples:

- "Bob showed up late because he was drunk." That leaves the documentation open to questions such as, "How do you know? Did you take his alcohol-blood level?"

- "You have a bad attitude about deadlines." How do you define that? Better to describe a measurable behavior: "You failed to meet three important deadlines."

- "I may not approve of your lifestyle, but that has no bearing on this problem." Then why mention it? If circumstances are unrelated,

there's no need to bring them up.

- "You sexually harassed Carol three times." That's a legal conclusion made only by judges and juries. More accurate: "Carol complained three times that you spoke to her or touched



her in a way she thought was inappropriate."

3. Desired results. The point of any discipline and accompanying documentation is to change behavior. That desired change is another key to good documentation.

What's a common mistake in this area? Consider, as an example, the situation of the employee who's habitually late for work. Some supervisors in that instance will write "must be on time for 90 consecutive days" as an acceptable change in behavior.

So, what ends up happening? On the 91st day, the employee shows up late and says, "Hey, I followed the rules of your documentation." And a judge will most likely agree.

Best bet: Establish a standard for long-term behavior and set out the next disciplinary step for any violation of that standard: "If you're late again, we will consider suspending you without pay for a period to be determined."



- If an employee does decide to file a lawsuit over the incident, a judge might perceive that the supervisor was relying on a dim memory of old events.

There's no hard-and-fast rule about timing, but the longer it's put off, the

ADA Amendments

On September 25, 2008, President Bush signed into law the ADA Amendments Act (ADAAA/S. 3406). This law (Public law number 110-325), authored by Senators Tom Harkin (D-IA) and Orrin Hatch (R-UT), constitutes the first legislative change to our nation's landmark disability statute, the Americans with Disabilities Act of 1990 (ADA). The law becomes effective on January 1, 2009.

The purpose of the ADA Amendments Act is to overturn several Supreme Court and lower court decisions over the past decade that limited the ADA's coverage. However, the ADAAA also will leave intact the first prong of the disability definition language, so that a person will still need to show that he/she has a physical or mental impairment that "substantially limits" one or more of his/her major life activities in order to be protected under the ADA.

While the first prong of the disability definition will remain the same, the most significant changes to current law contained in the ADA Amendments Act are as follows:

- Excludes Consideration of Mitigating Measures – The ADAAA will prohibit consideration of mitigating measures in determining whether an individual has a disability, with the exception of ordinary eyeglasses and contact lenses. In other words, employees will be evaluated without regard to the hearing aids, medication, prosthetic devices and other measures they use to manage their impairments.
- Expands the Definition of "Regarded As" Prong – The ADAAA will provide that an individual is "regarded as" having a disability if the employee establishes that he/she has been discriminated against because of an actual or perceived physical or mental impairment. This new provision ensures that people who are fired or

suffer other adverse employment actions because they are regarded as disabled can prevail if they prove that they were discriminated against. However, the "regarded as" prong would not apply to transitory and minor impairments where the impairment is expected to last less than six months. The legislation also makes clear that employers will not be required to provide a reasonable accommodation to individuals that are regarded as disabled.



- Establishes New List of Major Life Activities – The ADAAA will introduce a new, non-exhaustive list of major life activities that will now include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. For the first time, major life activities will also include the operation of major bodily functions, including functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.
- Broadens construction – The ADAAA will establish a new rule of construction emphasizing the importance of the findings and purpose language in the bill by

directing courts to interpret the definition of disability consistent with those provisions.

- Authorizes regulations – The ADAAA explicitly authorizes the U.S. Equal Employment Opportunity Commission and the Departments of Justice and Transportation to issue new regulations.
- Here are some tips employers should put into place immediately to be compliant:

- Closely scrutinize and rewrite all employee job descriptions. A job description should accurately reflect the job functions of the position, including physical demands such as bending, lifting, standing, climbing, visual acuity, etc.
- Managers and supervisors should be able to recognize and handle potential disability issues. They need to recognize that employee requests for a job change such as a work schedule modification or the ability to telecommute may be considered requests for a disability accommodation under ADAAA.
- Properly document all decisions that are made when notified by employees of a disability and/or request for reasonable accommodation.
- Be sure managers and supervisors do not violate confidentiality requirements by notifying coworkers or other third parties that an applicant or employee has been granted accommodations due to a disability.
- Be sure systems are in place to keep medical information separate from other personnel file materials.

Although the ADAAA has changed the way courts will interpret the law, good common-sense practices such as promoting a respectful work environment and being open-minded and thoughtful when employees request reasonable accommodations will continue to help employers comply with the law and avoid liability.

Employee Free Choice Act

Some version of the Employee Free Choice Act (EFCA) has been floating around the Senate and the House of Representatives since 2005. President Bush vetoed the Act in 2007, but Obama is likely to sign a version of the Act into law within the first days of being in office. Essentially, the purpose of the EFCA is, "to amend the National Labor Relations Act to establish an efficient system to enable employees to form, join, or assist labor organizations to provide for mandatory injunctions for unfair labor practices during organizing efforts and for other purposes." Opponents of this Act say the unionization process will be oversimplified by potentially eliminating the secret ballot process that is currently required for union representation. Without the private ballot, employees' rights are being challenged, and employees would be required to publicly declare their choice for unionization while risking coercion and harassment.

The EFCA allows unionization through the card check process without secret ballots for workers. The card check process is a method of organizing employees into a labor union in which employers enter into an agreement to recognize the unionization of its employees if a majority of employees in a bargaining unit sign authorization forms or "cards". Currently private ballot elections determine whether employees want union representation. The employees must first sign cards as a promise to consider union representation. If at least thirty percent of employees sign the cards, the employees participate in a private ballot election supervised by the National Labor Relations Board, a federal committee. The proposed Act could allow unionization without the secret ballot election if fifty percent plus one employee sign the cards.

Not only will the EFCA expedite the process of unionization, this Act would also allow the Federal Government to impose the terms of the labor through mandatory binding arbitration between employers and unions after an employment agreement is not reached within 120 days of unionization. While it is not illegal for employers to voice their opposition regarding unionism, employers are not allowed to coerce or threaten workers with reprisal for exercising rights. Penalties would provide liquidated damages of three times the back pay if employers were found to have unlawfully terminated pro-union employees. EFCA would impose a \$20,000 penalty for each employee who has been wrongfully terminated.

If the EFCA is signed into law, employers will not have the time to coordinate damage control before union organizers start handing out cards to employees. Research shows that 60 million American workers would join unions if they could. Unions promise employees better wages and benefits, and with this economy, union promises sound really good to vulnerable employees. Employers need to take proactive steps within their organization to prepare and convince employees that they do not need an outside organization to take over their job rights.



These are some tips you are able to take to prepare your business:

- Contact Senators and Representatives and make a good faith effort to prevent your lawmakers from supporting this Act.
- Conduct employee satisfaction audits to see what issues in your workplace dissatisfy your employees. You can address these issues and may take some steam from union organizers trying to represent your employees.
- Make managers be more responsive to employee issues.
- Adopt a no solicitation policy to prevent unwanted visitors and union organizers.
- Educate employees about the effects of signing cards, unions, and their rights. Do not threaten your employees, instead spell out that although it may sound like a good idea for unions to represent their rights as employees, their voice is taken away and they will have to rely on the union to speak for them. Also, unions may sometimes negotiate higher wages, but the difference will be charged for union membership dues.

Reminders



Please review the list of reminders provided below by the department heads at PeopLease Corporation. If any of these reminders apply to you, please submit the appropriate response and/ or paperwork.

FEDERAL MINIMUM WAGE INCREASE: Effective January 1, 2009, the minimum wage will increase to in the following states: Arizona to \$7.25; Colorado to \$7.28; Connecticut to \$8.00; Florida to \$7.21; Missouri to \$7.05; Montana to \$6.90; New Mexico to \$7.50; Ohio to \$7.30; Oregon to \$8.40; Vermont to \$8.06; Washington to \$8.55. The next federal wage increase will raise to \$7.25 per hour by July 24, 2009.

CHECK PRINTING ON SITE - As a convenience to our clients, PeopLease offers on-site check printing. Printing checks on site allows you to print employee checks on demand without having to worry if weather will allow FedEx will make their delivery on time.

FIRST REPORT OF INJURY FORMS: It is imperative that when an employee is involved in an on-the-job injury that the supervisor promptly completes the First Report of Injury Form and then submits the form to the Workers' Compensation department. You are able to download the First Report of Injury form online at www.PeopLeaseCorp.com and fax to (843) 576-0074. Call (800) 948-4453 Monday to Friday 8:00-5:00 EST or (888) 219-0044 after EST normal business hours and weekends.

EMPLOYEE APPLICATION: Employers can download full applications that are available online at www.PeopLeaseCorp.com. Contact your Payroll Technician to obtain a Username and password.

CLIENT SERVICES: PeopLease offers services to benefit our client companies including comprehensive employee and driver background checks. PeopLease also offers health insurance, dental insurance, supplemental insurance, long-term disability insurance, prepaid legal services, including CDL Protection, and 401(k) retirement plans. Visit www.PeopLeaseCorp.com or contact your Payroll Technician for more information.



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