

FEDERAL LAW

Family and Medical Leave Act

The revised FMLA regulations become effective on January 16, 2009. Employers are required modify their existing policies in order to comply with the new FMLA regulations.

The requirements include posting the new FMLA poster, updating FMLA certification and

notification forms, and getting familiar with the new military leaves (especially for managers and supervisors).

Reed Group has made all the necessary changes to its clients' forms, letters and processes.

STATE / CITY LAW CHANGES

City of Philadelphia

The City of Philadelphia adopted a new ordinance called "Entitlement to Leave Due to Domestic or Sexual Violence." The ordinance requires employers in the city to provide unpaid leave to employees (or their qualifying family or household members) who need time off for reasons related to sexual assault, domestic violence, or stalking. The ordinance ("Entitlement To Leave Due To Domestic Or Sexual Violence,") is also located at: http://www.phila.gov/humanrelations/pdfs/Domestic_or_Sexual_V1.pdf

The ordinance requires employers with 50 or more employees to provide up to 8-weeks of leave in a 12-month period, while employers with fewer than 50 employees provide up to 4-weeks of leave in a 12-month period.

The leave due to "Domestic or Sexual Violence" can be used to:

1. seek medical attention for physical or psychological injuries caused by domestic or sexual violence;
2. obtain services from an organization that provides services to victims;
3. obtain counseling or therapy;

4. take actions to prevent future domestic or sexual violence or seek "economic security" related to domestic or sexual violence, such as safety planning or relocating to a safer location; or
5. seek legal assistance, related to the domestic or sexual violence.

Employees must provide employers with at least 48 hours of advance notice of the need for leave, unless such notice is not practicable under the circumstances. An employee's job protection under the ordinance is lost if the employee does not provide notice within a reasonable period.

The ordinance allows employers to require their employees to provide certification that the employee or the employee's family or household member is a victim of domestic or sexual violence and that the leave is for one of the permitted purposes. The certification requirement may be met with a sworn statement by the employee along with at least one of the following documents: documentation from an employee, agent or volunteer of a victim services organization; an attorney, a member of the clergy, a medical or other professional from whom the victim sought assistance; a police or court record; or other corroborating evidence.

continued on page 2

MDA Internet



See for yourself how the world's most trusted and comprehensive guidelines can help save time and money.

Click here to take a FREE 30-day trial, or visit www.mdainternet.com/FMLA



UMK Professional

Now includes ACOEM's Occupational Medicine & Practice Guidelines

Click here to take a FREE 30-day trial, or visit www.acoemumk.org

This leave may be taken in a continuous block of time or taken intermittently. The ordinance also provides job protection and maintenance of health coverage during the leave.

Employers are required to post information about the ordinance in a conspicuous location where notices to employees are customarily posted. The official notice can

be found at: http://www.phila.gov/humanrelations/pdfs/Domestic_Violence_Le.pdf

The ordinance takes effect as of January 5, 2009.

Recent FMLA cases

Failure to follow employer's call-in policy

Bacon v. Hennepin County Medical Center, 8th Cir., No. 08-1237, Dec. 22, 2008. The Eighth Circuit Court affirmed a summary judgment against an employee.

Melondy Bacon was employed as a janitor by Hennepin County Medical Center (HCMC). In the summer of 2003, Bacon began periodically to break out in hives while at work. This case arises from a hives outbreak on July 8, 2004. For this reason, Bacon obtained FMLA paperwork from HCMC, and the paperwork was properly completed by her physician. The physician's report indicates Bacon had a serious, chronic health condition (skin irritation caused by chemicals at work) and needed to take intermittent leave.

Bacon called HCMC on every day she was scheduled to work, reporting she would not be coming in, and her absences were recorded by HCMC as FMLA leave. This continued for about a month following the outbreak. Bacon was complying with HCMC's call-in policy that requires an employee on indefinite sick leave to call in her absences every day (this is because Bacon's medical documentation neither specified the length of her absence nor provided a tentative return-to-work date.)

On August 5, 2004, Bacon stopped calling in to report her absences. As a result, Bacon was terminated on August 11. The union contract that governs Bacon's employment provides that an absence for 3 consecutive days without notice is considered voluntary resignation. Bacon subsequently filed suit in federal district court, claiming that HCMC interfered with her rights under the FMLA by terminating her employment while she was on FMLA leave.

The district court granted summary judgment in favor of the employer, HCMC. On appeal, the Eighth Circuit upheld the summary judgment. The Eighth Circuit held

that an employer may take an employment action against employee on FMLA leave as long as the employer would have terminated the employee for doing so irrespective of whether these absences were related to FMLA leave.

Conclusion:

An employer may have a call-in policy similar to HCMC's that requires an employee on FMLA leave either to provide the employer with a tentative date for their return to work or to call in daily to report their absence. Such a policy is permissible under the FMLA regulations. 29 C.F.R. § 825.309(a) specifically provides that "an employer may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work." Therefore, an employer who enforces such policies by terminating an employee on FMLA leave for noncompliance does not violate the FMLA.

Please note: HCMC made explicit that its call-in policy was effective even when an employee was on FMLA leave.

- First, HCMC's *request for FMLA leave form* required the employee to acknowledge that "the Hennepin County Human Resources Rules (or applicable labor agreement) apply to my absences."
- Second, HCMC's FMLA employee handbook also specifically provided that the "Family and Medical Leave Act of 1993 does not change the County's leave of absence procedures" and the "County's standard leave policies as specified in the Hennepin County Human Resources Rules and/or union contracts continue to apply."

Reminder

Reed Group recommends that employers review their employee handbook, leave and FMLA policies in order to ensure they are in compliance with the revised and new regulations.

Disclaimer

This update is designed to provide accurate and authoritative information in regard to the subject matter covered, but it is distributed with the understanding that Reed Group is not engaged in rendering legal, accounting, or other professional services.