

# EMPLOYMENT UPDATE

## New Changes to ADA and FMLA Acts

**Patti J. Skoglund**  
pskoglund@jlolaw.com

JARDINE

ATTORNEYS AT LAW

LOGAN &

P.L.L.P.

O'BRIEN

**EMPLOYMENT UPDATE**  
**New ADA and FMLA Amendments and Regulations**  
**January 2009**

I. New FMLA Regulations: (Effective January 16, 2009)

A. Military Provisions

- 2008 FMLA Military Leave Provisions offer rights for employees:
  - Up to 26 weeks to care for a family member injured on active military duty
  - 12 weeks for “qualifying exigencies” caused by a family member being recalled to active duty

“Qualifying exigency” examples:

- Military events and related activities
- Childcare and school activities
- Financial and legal arrangements
- Counseling
- Rest and recuperation
- Post-deployment activities:
- Short notice deployment (less than 7 days)

What an employer may require for “qualifying exigency” leave

- Active duty orders or other military documentation
- Certification of the exigency

“Qualifying exigency” runs concurrently with regular FMLA leave

B. Non-military FMLA Regulation Changes

- Key changes to “serious health condition” definitions
- Employee must have either the following to meet “more than 3 days” definition:
  - 1 visit **within 7 days** of the start of the incapacity plus a regimen of continuing treatment; or
  - 2 healthcare provider visits, one visit within 7 days of the start of incapacity, and the second visit within 30 days
- For “chronic” definition, must have **at least 2** healthcare provider visits per year

C. Employer Notice Requirements: (You must now provide 2 types)

- Eligibility notice

- First, employees who request FLMA leave need to get notice that they are or are not eligible and that Leave has or has not been approved and designated as FMLA
- Designation notice (new required second notice)
  - Employer now has 5 days, (rather than 2 days), for notifying employees of eligibility
  - Electronic posting of FMLA notice is fine
  - Employer has 5, not 2 days, to ask for certification
  - If leave is longer than 1 year, employer can ask for new provider certifications of condition
  - Employer may contact the employee's healthcare provider **directly** (limited to certain individuals at employer)
  - Light duty does not count as FMLA leave
  - HIPAA requirements apply to medical information
  - Failure to comply may constitute "an interference with, restraint, or denial of an employee's FMLA rights" and employer may be liable for harm suffered by employee
    - This "harm" could include lost compensation and benefits, other monetary losses and appropriate equitable or other relief, including employment, reinstatement or promotion

D. Medical Certifications

- Contact with health care provider
  - Direct contact between employer and health care provider to authenticate a certification with employee's permission allowed if made only by provider, HR, leave administrator or management official (Contact cannot be made by direct supervisor!) 29 C.F.R 825.307(a)
  - Contact is limited to verifying that certification form was completed by the signing person and to understand the meaning of a response on certification (Use DOL revised forms WH-380E(for employee serious health condition)and WH 380-F(covered family members)
- **New Provision** for serious health condition:
  - may also be disability under ADA, employer may follow the ADA's procedures for requesting sufficient medical information to determine if a disability exists and/or what accommodation is necessary. See, 825.306(d)
- Timing of recertification:
  - Every 30 days only in connection with an absence for pregnancy, chronic or long term conditions unless significant change in circumstances or fraud is suspected

- If minimum time specified, may not request recertification until time periods has expired. In all circumstances, only every six months. 29 CFR 825.308(b)

E. Recommendation for Employers

- Evaluate and update FMLA and other policies, procedures and forms
- Proper designation notice must include:
  - Whether the leave is designated FMLA, and
  - The number of hours, days or weeks that will be FMLA (if unknown and expected to be extended period of time, you should provide every 30 days)
  - If you have a fitness for duty certification requirement, this info must be included with list of essential job functions (note: you must apply this equally to all employees are not entitled to request this for each absence on intermittent or reduced leave schedule)
  - Advise employee whether or not it finds the requested leave to be FMLA-qualifying. For example, if not why not, such as insufficient information or a non qualifying reason. (Use the DOL prototype notice)
- Designate one or more individual to be responsible for all FMLA requests, have packet with all FMLA forms organized, and appropriately calendar the multiple dates for issues
- **Educate and train supervisors and managers**
- **When in doubt seek advice. This is paramount to a strict liability statute and honest mistakes or reasonable judgments can result in liability!**

II. New ADA Regulations

- **(NOTE: There are no final regulations yet, so watch for interpreting regulations which will be forthcoming)**
- Broad coverage and changes have occurred in this area: when in doubt, assume disabled and use the interactive process

A. ADA Amendments Act

- Effective January 1, 2009
- Statutory definition of disability did not change, however, now **excludes** consideration of mitigating measures
- Employer has to evaluate employee without regard to medication, prosthetic devices, hearing aids, etc. (This exclusion does not apply to ordinary eye glasses and contact lenses)

B. New List of Major Life Activities

- |                          |                |
|--------------------------|----------------|
| *Caring for oneself      | *Bending       |
| *Performing manual tasks | *Speaking      |
| *Seeing                  | *Breathing     |
| *Hearing                 | *Learning      |
| *Eating                  | *Reading       |
| *Sleeping                | *Concentrating |
| *Walking                 | *Thinking      |
| *Standing                | *Communicating |
| *Lifting                 | *Working       |

C. Major Bodily Functions which include:

- |                     |                         |
|---------------------|-------------------------|
| *Immune System      | *Brain                  |
| *Normal Cell Growth | *Respiratory            |
| *Digestive          | *Circulatory            |
| *Bowel              | *Endocrine              |
| *Bladder            | *Reproductive functions |
| *Neurologic         |                         |

NOTE: New amendments pertaining to “regarded as” disability:

- Allows discrimination claims for actual or perceived physical or mental impairment
- Not applicable to transitory and minor impairments expected to last less than 6 months
- No accommodation obligation for individuals regarded as disabled

D. Recommendations

- Employer should go through the necessary steps of the interactive process rather than risk failing to do so under both state and federal law with these new amendments
- Train your managers and supervisory personnel in the areas of leave of absence needs, disability accommodation, and harassment
  - This includes recognizing “constructive notice” of leave, disability, complaints and retaliation.

III. Additional Updates

A. “Caregiver” Requirements

In 2007, the EEOC issued enforcement guidelines on unlawful disparate treatment of workers with care giving responsibilities. This is available on their website at [www.eeoc.gov](http://www.eeoc.gov). Also see JLO’s website at [www.jlolaw.com](http://www.jlolaw.com).

Employees with care giving responsibilities cover employees with children and older parents.

- Discrimination may occur in following scenarios:
  - Treating male and female caregivers differently
  - Reassigning a female employee based on assumption that “as a new mother” she will be less committed
  - Denying a male caregiver leave to care for an infant child where same leave is granted to female
  - Refusal to hire employees
- **Recommendations**
  - Review your application process
  - Review leave policy to ensure fairness to both male and female employees

B. The Lily Ledbetter Fair Pay law

January 29, 2009 President Obama signed this legislation

- This new law overturned a 2007 Supreme Court decision which ruled that workers must file a wage discrimination lawsuit within 6 months of the first instance of discrimination.
- The new law restores the old interpretation of the 1964 Civil Rights Act, which considers each paycheck a new act of discrimination
- This law allows lawsuits **within 6 months of when the discrimination is discovered**, no matter when the discrimination originally started. (Ledbetter alleged her pay discrimination existed for 20 years).