



## FMLA Update

# The Regulatory Issue

New Federal Family and Medical Leave Act (FMLA) regulations took effect on January 16, 2009, the first-ever amendments since the inception of FMLA 15 years ago. The final rule provides new military family leave entitlements and updates the regulations under the FMLA.

Under the first of two new military family leave entitlements, caregiver leave, eligible employees will be able to take up to 26 weeks in a single 12-month period to care for a family member who incurs a serious illness or injury in the line of duty in the military. This provision extends FMLA job-protected leave beyond the normal 12 weeks and also extends FMLA protection to

additional family members, such as next of kin.

The second new military leave entitlement, exigency leave, allows up to 12 workweeks of FMLA leave because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter or parent is a covered military member on active duty, or been notified of an impending call to active duty, in support of a contingency operation. Qualifying exigencies are broadly defined to include such categories as counseling, child care, and attendance at military events and to also include additional activities agreed to by the employer and employee.

The final rule also updated regulations under FMLA to improve communications between employees, employers, and health care providers and to provide needed clarity for both employees and employers about their responsibilities and rights under the FMLA leave.

Information about FMLA, including updated notices and forms, can be found on the Human Resources website, under Benefits, then Leaves of Absence, or by contacting a Leave Administrator in the Human Resources Benefits Unit at (860) 486-0400.

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## ADA Update

The Americans with Disabilities Act (ADA) is a federal law which protects people with disabilities from discrimination in areas such as employment, government services (including public higher education), public accommodations, and transportation. On January 1, 2009, a new law known as the ADA Amendments Act of 2008 ("ADA-AA") went into effect and significantly changed several important aspects of the ADA with which employers and public institutions must comply.

### ***Broader Definition of "Disability"***

Congress has now made its intent regarding the definition of a disability clear, stating that the term "disability" must be construed to provide "a broad scope of protection", which in effect means that people who

might not have been deemed protected as "disabled" before the ADA-AA's passage might now be so. The ADA-AA does state, however, that persons with "transitory or minor conditions" (that is, conditions with an actual or expected duration of six months or less) will still not be considered disabled under the law.

### ***Expansion of "Major Life Activities"***

The ADA-AA now provides a non-exhaustive list of activities that are to be considered major life activities and has expanded upon the commonly recognized activities (walking, seeing, speaking, breathing, learning, working, etc.) to include activities such as "eating, sleeping, standing, lifting, bending, reading, concentrating, thinking" as well as "the operation of a major bodily function." Thus, as

a result of more activities now recognized by the law as being "major life activities", the scope of people whose impairments might now be considered to constitute "disabilities" is greatly expanded.

### ***Rejection of the "Mitigating Measures" Rule***

Under the ADA-AA, consideration of whether a person is disabled must be made without reference to the effects of mitigating measures such as medications, equipment, prosthetics, hearing aids and cochlear implants, assistive technology, or "learned behavioral or adoptive neurological modifications".

### ***Coverage of Chronic Conditions in Remission***

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# FMLA Update cont.

## *A Few Highlights of Regulatory Changes in the Final Rule:*

**Light Duty:** Time spent performing light duty following FMLA leave does not count against an employee's FMLA leave entitlements.

**Serious Health Condition:** Clarifies when provider visits are required to qualify as a serious health condition. For example, "periodic visits" for chronic serious health conditions require at least two visits to a health care provider per year.

**Substitution of Paid Leave:** FMLA leave is unpaid; however, the statute provides for the substitution of paid leave. The final rule requires that all forms of paid leave substitutions are treated the same regardless of the type of leave substituted. For example, qualifying leaves related to worker's compensation are counted against an employee's FMLA leave entitlements.

**Employer Notice Obligations:** Employers are required to provide employees with a general notice about FMLA upon hire; and an eligibility notice, a rights and responsibilities notice, and a designation notice when leave is taken. The final rule extends the time for employers to provide the various notice provisions from two business days to five business days.

**Employee Notice:** Employees approved for FMLA must follow the employer's usual and customary call-in procedures for reporting an absence.

**Medical Certification:** To protect an employee's privacy, communications between the employer and the employee's health care provider are limited to 1) what is requested on the medical certification and 2) the employer designee who under no circumstances can be the employee's direct supervisor. Health care providers are allowed, but not required, to provide a medical diagnosis. If the employer deems the medical certification to be incomplete or insufficient, the employer must specify in writing what information is

lacking and give the employee seven calendar days to cure the deficiency. Employers may request a new medical certification each leave year for medical conditions that last longer than one year.

**Medical Recertification:** Employers will be able to request recertification every six months, even where the certification states a longer period. A certification that states a "lifetime" condition exists is information that indicates the condition will last in excess of six months.

**Fitness-For-Duty Certifications:** An employer may require that the fitness-for-duty certification specifically address the employee's ability to perform the essential functions of the employee's job. Where reasonable job safety concerns exist, an employer may require a fitness-for-duty certification before an employee may return to work when the employee takes intermittent leave.

*Article provided by Lori Vivian, Employee Benefits, Department of Human Resources*

# ADA Update cont.

Under the ADA-AA, an impairment that is in remission or episodic may now qualify as a "disability" if it would substantially limit a major life activity when it is active. This change in the law was prompted in reaction to a host of pre-ADA-AA federal court decisions in which persons who suffered from chronic conditions prone to flare-ups (such as seizure disorders, bipolar disorder, multiple sclerosis) were deemed not to be disabled because, other than an occasional flare-up, they had no significant limitations.

## *Claims of "No Disability" Discrimination*

The Act provides that the ADA does not cover claims by non-disabled individuals contending that they were subjected to discriminatory treatment because they do not have a disability.

As these and other important changes begin to establish their footing in the legal landscape, it is now more important than

ever for University community members to be mindful of the important legal duty that the University has to provide reasonable workplace or classroom accommodations/modifications to its employees and students with disabilities.

For more information concerning the ADA reasonable accommodation process in the employment context, or about the above-described changes to the ADA, please contact the Office of Diversity and Equity, at (860)486-2943, or visit its website, at: <http://www.ode.uconn.edu/>.

For more information concerning the ADA reasonable accommodation process in the academic context, please contact the Center for Students with Disabilities, at (860)486-2020, or visit its website, at: <http://www.csd.uconn.edu/>.

*Article provided by Joe Sassi, J.D., Office of Diversity and Equity*

**Compliance Training Deadline:  
May 15th**

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