



November 20, 2008

To: NACS Retail Members

From: Chris Tampio, Sr. Director, Government Relations

Re: New Family and Medical Leave Act (FMLA) Regulations Issued

As you may have heard, The U.S. Department of Labor (DOL) issued new updated regulations to the Family and Medical Leave Act (FMLA) on November 14, 2008.

So what does this mean for retailers?

First a short "Overview."

These are the first significant revisions to the FMLA regulations since the law was enacted 15 years ago and will affect all employers subject to the FMLA.

Who is covered by the FMLA?

The FMLA applies to any employer who has 50 or more employees each working day during at least 20 calendar weeks in the current or preceding calendar year. To be eligible, employees must have worked at least 12 months for their employer, and at least 1,250 hours during the 12 months preceding commencement of requested leave.

The new regulations allow employers more control over when employees can take leave. The regulations also cover the recently enacted leave benefits for family members of both seriously injured or ill service members and National Guard and Reserve members who have been called to service.

When will these changes take place?

Employers won't have much time to adapt. Those covered by the FMLA must come into compliance with the new regulations by January 16, 2009.

What has changed that retailers need to know?

- Employees may now be required to follow their employer's call-in policies when they are planning to miss work "absent unusual circumstances." Currently, employees have up to two days after a business absence to notify the company about their need for leave.
- To have a "chronic condition" that qualifies for FMLA leave, employees for the first time can be required to certify that they visited a doctor at least twice a year for the condition to continue being classified as chronic.

- In a departure from the proposed regulations, one new provision prohibits direct supervisors from getting an employee's medical information when an FMLA certification is needed, apparently to protect the employee's privacy. An employee's "direct supervisor" is prohibited from making these inquiries, limiting this right to a "health care provider, a human resources professional, a leave administrator (including third-party administrators), or a management official."
- Employers may require fitness-for-duty tests for employees returning from intermittent FMLA leave if doing the job raises a significant risk of harm to themselves or others.
- When employers place injured or ill workers on light duty, the time on light duty doesn't count against the employee's FMLA leave entitlement.
- The regulations provide additional clarification regarding the type and frequency of treatments that employers must receive under the "chronic" and "continuing treatment" definitions of a serious health condition.
- The regulations also contain (1) more detailed guidance on the substitution of paid leave for FMLA leave and (2) substantial new notice requirements for employers.

What has changed with Employer Notice Obligations?

One of the DOL's objectives in developing the new regulations was to encourage further notice of FMLA rights and obligations. The new rules' notice requirements set out no fewer than four mandatory notices employers must issue.

- The regulations retain the prior requirement for a "General Notice" to be posted in every workplace and incorporated into any employee handbook. If a company does not maintain a handbook, the notice must be distributed to each employee *upon hire*.
- The new regulations require employers to issue a personalized "Eligibility Notice" within five days of either a request for leave or after learning that a leave may be FMLA-qualifying.
- Retailers must also issue to an employee a written "Rights and Responsibilities Notice" at the same time as the Eligibility Notice.
- The new rules require you to issue a written "Designation Notice" within five days after receiving sufficient information to determine whether the need for leave is FMLA-qualifying.

The penalty for failing to provide a required notice has also been overhauled. The current rule states that an employer may not count any leave against an employee's annual 12-week allotment until after it provides all required notices. The DOL's new regulation clarifies that an employer is liable for failing to provide notice only to the extent an employee suffers actual harm, such as lost compensation and benefits, other monetary losses, or loss of employment or a promotion.

What actions should I take as a retailer?

NACS does not give legal advice, for this, please seek legal counsel with knowledge of the FMLA and its new rules. That being said, employers should look at updating their policies and procedures to reflect new or changed requirements, obligations and options under the new regulations. Please also look at any relevant state leave laws with rules that differ from the new FMLA regulations. Employers should also ensure that their leave designation and certification forms comply with the new regulations, which may well require the creation of new forms to both comply with and take advantage of employer-friendly options made available under the new rules.

What are the new leave rules for military families?

The new regulations clarify how to implement the expanded 26 weeks of unpaid FMLA caregiver leave for relatives of seriously injured or ill service members. "Next of kin," which can include grandparents, aunts, uncles, first cousins, and any relative so designated by the service member -- not just spouses, parents, and children -- are eligible to take this leave. The 26 weeks can be taken over a 12- month period, with the clock starting to run on the first day of the leave.

This military caregiver leave may be taken only once per injury, but more than one family member may qualify for it, and each relative may take leave again if there are other injuries. The leave, however, is available only while the service member remains in the military. The other new military family leave benefit allows relatives of those called to active duty in the National Guard and Reserves -- but not regular active-duty military members -- to take up to 12 weeks of leave for several qualifying "exigencies." A variety of deployment-related reasons would be covered, including:

- (1) short-notice deployment, (2) military events and related activities, (3) child-care and school activities, (4) financial and legal arrangements, (5) counseling, (6) rest and recuperation, (7) post-deployment activities, and (8) additional activities.

"Rest and recuperation" means that the employee may take up to five days of leave to spend time with a covered military member who is on short-term, temporary rest and recuperation leave during the period of deployment.

Please feel to contact Chris Tampio with NACS government Relations with any questions regarding these new regulations. ctampio@nacsonline.com