

# What's NEWS

A quarterly employment law update for State of Connecticut managers, HR personnel, and affirmative action professionals

Fall/Winter 2001

## Editor's Note

Issues of *What's News* are individually addressed and then mailed in bulk to each agency's main and divisional offices. If you have difficulty receiving your newsletter, please check with your internal mail distribution unit. You may also call Laura McNelly at (860) 713-5258 to confirm that your name is on the mailing list or to add or delete a listing.

A small overrun is printed of each issue of *What's News*. Additional copies, while available, may be ordered from Mrs. McNelly.

## OSHA Recordkeeping Rule in Effect January 1

The Occupational Safety and Health Administration's (OSHA) revised rules on recordkeeping went into effect on January 1, 2002. OSHA's recordkeeping requirements have been in place since 1971, the year the agency was formed. The revised rules (29 C.F.R. 1904 and 29 C.F.R. 1952) are the culmination of an effort, begun in the 1980s, to produce better information about occupational injuries and illnesses while simplifying the overall recordkeeping system for employers.

In revising the rule, OSHA had the following goals: improve the data, make record keeping simpler for employers, maximize the use of computers and technology, improve employee involvement and protect the privacy of the injured or ill worker.

Those states that operate their own OSHA-approved State plans (under Sec. 18 of the Occupational Safety and Health Act) — such as Connecticut — have to adopt the federal standards or develop their own standard that is at least as effective. The State of Connecticut Department of Labor's Division of Occupational Safety and Health (CONN-OSHA) is responsible for the program that covers the public sector workforce (both state and local government operations) in Connecticut. CONN-OSHA is in the process of incorporating by reference all revisions of the OSHA recordkeeping rule into the Regulations of Connecticut State Agencies (*Sections 31-374-1 et seq.*). These new Connecticut rules are also effective January 1, 2002.

In October of this year, CONN-OSHA sent all state agencies information on the revised rules, which included separate enclosures entitled "Highlights of OSHA's Recordkeeping Rule," "Major Changes to OSHA's Recordkeeping Rule" and "OSHA Forms for Recording Work-Related Injuries and Illnesses." These documents and other helpful items can be found on the Recordkeeping page of OSHA's web site: <http://www.osha.gov>. Additionally, CONN-OSHA has offered training sessions to assist employers in both the public and private sectors comply with this new OSHA recordkeeping regulation. Please check its web site at <http://www.ctdol.state.ct.us/osha/osha.htm> for details or call Lisa Costanzo at (860) 566-4550 to inquire about upcoming training opportunities.

## Provisions on Hearing Loss and MSDs Delayed

OSHA will delay for one year the effective date of three provisions of its recordkeeping rule. The provisions, postponed until January 1, 2003, are: (1) the criteria for recording work-related hearing loss; (2) the definition of "musculoskeletal disorder" (MSD); and (3) the requirement that employers check the MSD column on the OSHA log. All other provisions of the rule become effective on January 1, 2002. (MSDs include carpal tunnel syndrome and tendonitis, conditions caused by repetitive motion.)

During the delay, OSHA will establish interim criteria for recording cases of work-related hearing loss and reconsider what level of hearing loss should be recorded as a "significant" health condition. OSHA will also

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## Military Leaves of Absence

### Federal Law

In 1994, statutory reemployment rights for military members were revised with the signing of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) [38 U.S.C. Sections 4301-4333]. Like its predecessors, USERRA guarantees the rights of military service members to take a leave of absence from their civilian jobs for active military service and to return to their jobs with accrued seniority and other employment protections.

USERRA is administered and enforced by the U.S. Department of Labor's Veterans' Employment and Training Service (VETS) and applies to employees who perform "service in the uniformed services." This includes active duty, active duty for training, inactive duty training, full-time National Guard duty, and absence from work for funeral honors duty performed by National Guard or Reserve members.

VETS has information for veterans, national guard or reservists who may be activated for military service. VETS has developed a fact sheet and an interactive computer program, the USERRA Advisor, which address the rights and responsibilities of individuals and their employers, under the law. The fact sheet can be found at the U.S. Department of Labor's web site: <http://www.dol.gov/dol/vets/public/programs/fact/vet97-3.htm>, and the USERRA Advisor at: <http://www.dol.gov/elaws/userra0.htm>. Other resources are made available from ESGR (Employer Support of the Guard and Reserve)—specifically a Q & A Fact Sheet for Employers and "A Non-Technical Resource Guide to the USERRA." You may download this information from ESGR's web site: <http://www.esgr.org> or call its toll-free number: 1-800-336-4590.

### State Law

On November 20, 2001, Governor Rowland signed Senate Bill 2050, enacted during the legislative special session, which provides certain additional benefits to State employees who were activated for military service. Previously, under C.G.S. Sec. 27-33 and/or the applicable collective bargaining agreement, full-time employees called to duty were eligible to receive their regular pay for up to thirty (30) calendar days per calendar year while engaged in military service. Senate Bill 2050 provides employees with part-pay compensation for the duration of the eligible call-up to active service after the expiration of the 30-

day period of regular pay. "Part pay" is equal to the difference between the employee's base pay plus longevity pay in his/her primary position as a State employee minus the employee's total military service compensation.

Specifically, the bill applies to full-time State employees who are members of the National Guard or military Reserves and who have been "called to active service in the armed forces of any state or the United States for Operation Enduring Freedom, Operation Noble Eagle, a related emergency operation or a military operation whose mission was substantially changed as a result of the attacks of September 11, 2001, for the duration of such call-up to active service." The bill also includes any employees called up to active military duty prior to September 11 whose mission has substantially changed as a result (i.e., those serving in Bosnia).

The bill provides essentially the same health and part-pay benefits as was provided during the Desert Shield/Desert Storm Operations. The benefits are outlined in the Office of Labor Relations' (OLR) General Notices Nos. 2001-15 and 2001-14, which can be found on OLR's web site: <http://www.opm.state.ct.us/olr/Notices/notices.htm>. Questions from personnel officers regarding eligibility or issues relating to the collective bargaining agreements should be directed to Ellen Carter in OLR at (860) 418-6218. Those readers wishing to read the full text of the bill, can find it at: <http://www.cga.state.ct.us/2001/tob/s/2001SB-02050-R00-SB.htm>.

### OSC Memorandum

The Office of the State Comptroller has also issued a memorandum (No. 2001-65) to the heads of all state agencies outlining procedures to be followed to provide for continuation of health benefits. The memo instructs agencies to collect a notarized payroll information release form that gives the Comptroller the authority to request payroll information from the military from ALL employees who are in the military reserve, including the National Guard, whether or not they have been called to active duty. The memo and the release form can be found at the Comptroller's web site: <http://www.osc.state.ct.us/2001memos/>.

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*"OSHA Recordkeeping..." continued from page 1*

resolve the issue of what is the appropriate definition for "ergonomic injury" and "musculoskeletal disorder." (Readers of the spring issue of *What's News* will recall that last November OSHA released a new ergonomics standard that was to have become effective January 16, 2001. Employer groups hotly contested the new standard and in March, Congress repealed it. President Bush signed the resolution and the rules vanished almost as quickly as they appeared. At that time, the Labor Secretary said she would review the issue and consider new rulemaking to protect workers from cumulative trauma, repetitive stress and other ergonomics injuries.)

OSHA's new recordkeeping forms have been modified to remove the MSD and hearing loss columns from the OSHA 300 Log of Work-Related Injuries and Illnesses and the OSHA 300A Summary of Work-Related Injuries and Illnesses. The instructions accompanying the forms have also been modified to reflect the requirements that will take effect in calendar year 2002. Copies of the forms can be obtained on OSHA's web site, noted above, or from the OSHA publications office.

## Coming in the Spring Issue of What's News:

The latest Supreme Court decisions: *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*—a unanimous ruling that narrows the reach of the Americans with Disabilities Act (ADA) and impacts employees who suffer repetitive strain injuries, such as carpal tunnel syndrome, which leave them partly disabled. Also, *EEOC v. Waffle House*—another ADA related case that held that an employee's agreement to arbitrate employment-related disputes does not prevent the EEOC from suing for individual relief on the employee's behalf.

## Guidelines on How to Handle Anthrax Threats

On November 13, 2001, the Departments of Public Works (DPW) and Public Health (DPH) established guidelines to assist state agencies in responding to anthrax threats. These guidelines were developed jointly to reflect the current information issued by the Center for Disease Control and Prevention, the U.S. Postal Service and the FBI. They replaced those issued on October 17 by the DPH and the addendum issued October 23 by the DPW. Updates will be issued as new information becomes available.

Agency human resources administrators and managers in charge of mail handling processes received training on how to handle anthrax threats at two special sessions held on November 28 at the Capitol. Each attendee received a packet of material containing mail protocol, procedures for managers/supervisors, and laminated cards outlining basic steps for all employees to follow (to be posted in each office or mail handling area). The Occupational Safety and Health Administration (OSHA) developed a matrix, the "Workplace Risk Pyramid," to offer basic advice and suggest protective measures that OSHA believes reduce the risk of exposure in light of current concerns about the presence of anthrax spores in the workplace. Suggested protocols vary by risk zone. According to OSHA, State of Connecticut employees fall in the "Green Zone" – workplaces where contamination with anthrax spores is unlikely.

In the event of a possible anthrax threat, managers/supervisors should:

- Notify a building security official or the property manager and Human Resources.

- Turn off the fan or air conditioner.
- Be sure all persons physically exposed to the substance in question remain together in an area on the same floor of the building.
- Wait for further instructions.

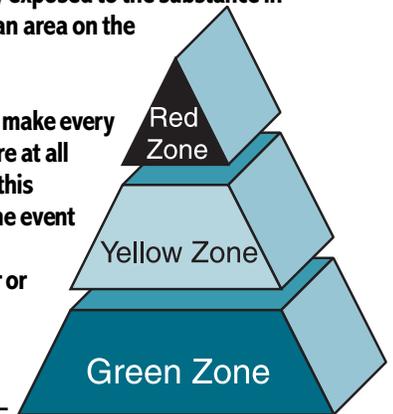
Additionally, supervisors should make every effort to know where employees are at all times and be prepared to provide this information, when requested, in the event of an emergency.

The on-site supervisor, manager or HR should call:

- State police – 1 (860) 842-0200 or (860) 685-8190
- Department of Public Works – (860) 713-5811 (after hours, use pager number (203) 835-4769)
- Agency head

Agency heads must establish a call chain for notification should evacuation be necessary, and make sure that the policy is disseminated to employees and included in their emergency response manuals and plans.

If you missed the training and would like a copy of the material or have any questions on guidelines, you may contact DPW Commissioner T.R. Anson (860-713-5800) or DPH Commissioner Joxel Garcia (860-509-7101).



## EEOC Releases Fact Sheet on Evacuation Assistance Questions

In a fact sheet, released on October 31, 2001, the U.S. Equal Employment Opportunity Commission (EEOC) stated that employers would not violate the Americans with Disabilities Act (ADA), if they asked employees whether – because of a disability or medical condition – they would need assistance in the event of an evacuation.

Following the September 11 attacks, employers increasingly are concerned about how to update their emergency evacuation plans to provide for people with disabilities. In its "Fact Sheet on Obtaining and Using Employee Medical Information as Part of Emergency Evacuation Procedures," the EEOC outlined three ways that employers may request information on needed evacuation assistance:

- (1) Employers may inquire about evacuation assistance after making job offers, but before employment begins, as long as everyone filling the position is asked to same question.
- (2) Employers may periodically survey all of its current employees to determine if emergency assistance is needed, as long as the employer makes it clear that self-identification is voluntary and explains the purpose for requesting the information.
- (3) Employers may ask employees with known disabilities if they will require assistance in emergencies and what type of assistance will be needed. (Employers should not assume, however, that everyone with an obvious disability will need assistance during an evacuation.)

Employers may ask individuals who indicate a need for assistance because of a medical condition to describe the type of assistance they think they will need. Follow-up conversations with individuals are allowed when necessary to get more detailed information. For example, it would be important for an employer to know whether

someone who uses a wheelchair because of mobility limitations is able to walk independently, with or without the use of crutches or a cane, in an emergency situation.

It also would be important for an employer to know if an individual will need any special medication, equipment, or device (e.g., an assisted wheelchair carrier strap or a mask because of a respiratory condition) in the event of an emergency. Of course, an employer is entitled only to the information necessary for it to be prepared to provide assistance. This means that, in most instances, it will be unnecessary for an employer to know the details of an individual's medical conditions.

The ADA's provisions that require employers to keep medical information about applicants and employees confidential include an exception. Specifically, employers are allowed to share information about the type of assistance an individual needs in the event of an evacuation with medical professionals, emergency coordinators, floor captains, building security officers who need to confirm that everyone has been evacuated, and other non-medical personnel who are responsible for ensuring safe evacuation.

Employers can also share information with an employee's colleague who has volunteered to act as a "buddy." Buddy systems can be used not only to help evacuate some employees with disabilities, such as with wheelchair users, but also to alert employees with hearing impairments that the building is being evacuated. Two or three people should be assigned as buddies to alert people with hearing impairments about when and how evacuations are occurring. Just assigning one person as a buddy won't work if that person is away when there is an emergency.

Copies of the Fact Sheet can be found at <http://www.eeoc.gov/facts/evacuation.html>.

## Front Pay Awards No Longer Limited by Title VII's Damages Cap

In June 2001, in an 8-0 ruling, the U.S. Supreme Court ruled that Congress' cap on compensatory damages in cases involving civil rights violations (a maximum of \$300,000 depending upon the employer's number of employees) does not apply to "front pay." Front pay is defined as the money awarded for lost compensation between the time a plaintiff wins a legal judgment and is reinstated to his or her job (or takes another job) or money that is awarded in lieu of reinstatement when reinstatement isn't possible.

### Case Facts

In *Pollard v. E.I. du Pont de Nemours & Co.* [532 U.S. 843], Sharon Pollard sued her former employer, DuPont, alleging that she had been subjected to a hostile work environment based on her sex, in violation of Title VII of the Civil Rights Act of 1964. The district court found that Pollard was indeed subjected to co-worker sexual harassment, that her supervisors were aware of the harassment and did not take adequate steps to stop it, and that it resulted in a medical leave of absence from her job for psychological assistance and her eventual dismissal for refusing to return to the same hostile work environment. The court awarded her backpay and benefits, attorneys' fees and \$300,000 in compensatory damages – the maximum permitted.

Pollard argued that she was entitled to \$800,000 in front pay; DuPont argued that front pay was part of the compensatory damages award, and therefore capped at \$300,000. Although both the district court and the 6<sup>th</sup> Circuit Court, to which Pollard appealed, agreed that the award granted was insufficient to compensate her, both felt bound by a prior 6<sup>th</sup> Circuit Court decision, which held that front pay was subject to the statutory cap on compensatory damages.

Because the 6<sup>th</sup> Circuit was the sole federal appeals court to limit front pay awards to the

statutory damages cap, the Supreme Court heard Pollard's case to resolve the conflict among the circuits.

### Background—Title VII Remedies and Statutory Limitations

As originally enacted, Title VII of the Civil Rights Act of 1964 prohibited employment discrimination based on race, color, religion, sex and national origin. The Act authorized courts to award plaintiffs subject to unlawful intentional discrimination equitable relief such as injunctions, reinstatement, backpay and lost benefits. In 1972 Congress expanded the remedies to include "any other equitable relief as the court deems appropriate," and in 1976 to include reasonable attorney fees. The Civil Rights Act of 1991 added compensatory and punitive damages (damages intended to "punish" the defendant for unlawful behavior). Compensatory damages include "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." Compensatory and punitive damages were capped based on an employer's size:

\$50,000	–	15-100 employees
\$100,000	–	101-200 employees
\$200,000	–	201-500 employees
\$300,000	–	more than 500 employees

[Note: Government agencies and political subdivisions were excluded from having to pay punitive damages. They are not, however, excluded from compensatory damages.]

### The Issue and Decision

The issue before the Court: *Is "front pay" an element of compensatory damages and, therefore, subject to the statutory cap or is it a previously authorized remedy that is outside the cap?*

The problem had to do with two conflicting provisions in the law. Although the Civil Rights Act of 1991 specifically listed "future pecuni-

ary losses" as covered by the cap on compensatory damages, it also stated that compensatory and punitive damages were "in addition to" any relief previously available.

The Court in *Pollard* acknowledged that while "future pecuniary losses" would appear to include wage losses suffered after the judgment, Congress' intent in passing the CRA of 1991 was to create additional remedies for workers subjected to illegal discrimination. Were front pay to be placed within the cap, the availability of those damages could be limited as they were in Pollard's case. In the Court's opinion, front pay is very similar to "back pay" (which is expressly excluded from the cap). Therefore, the Court held that front pay is excluded from the meaning of compensatory damages and not subject to the statutory cap.

The case was reversed and remanded to the lower court for a final accounting of Pollard's damage award. [Read the case at: <http://supct.law.cornell.edu/supct/html/00-763.ZO.html> (text version) or in pdf format at: <http://supct.law.cornell.edu/supct/pdf/00-763P.ZO> (requires Acrobat Reader).]

### Bottom Line

Although a majority of courts had found that front pay was a remedy that was not subject to the statutory cap on compensatory damages, the fact that the U.S. Supreme Court had not yet addressed the issue allowed employers to argue that there was a limit on the damages – a strategy that was helpful in settlement discussions. With the *Pollard* decision, making uncapped front pay available to plaintiffs who prove unlawful intentional discrimination, more plaintiffs will seek front pay. The price of cases is likely to increase as plaintiffs and their attorneys become less inclined to settle, and if they do negotiate for settlement, they'll have higher expectations for recovery. People who were previously unaware of front pay, or not as focused on it, will be more aware.

## You're the Judge

The employer hired a black South African national with an advanced degree in an entry-level position. Throughout his employment, the employee received "satisfactory" ratings while his colleagues, who were almost exclusively white, received the higher "commendable" rating. During his first year of work, the employee complained that a supervisor was making racially motivated attacks on his integrity and character. The employer conducted an investigation and determined that there was no basis for the complaints. For the next two years, the employee continued to complain about discrimination. However, he did so by by-passing his immediate supervisors and demanding to meet with upper management instead; rejecting other efforts by the company to resolve his complaints; engaging in loud, disruptive confrontations; and writing harshly-worded memos warning senior executives not to ignore his claims. The employee was ultimately terminated after a confrontation over his time card on which he wrote that the reason for his recent absences was "illegal retaliation." The company explained that he was being let go for insubordination and disrupting the workplace. The employee sued for race and national origin discrimination and retaliation under Title VII. *You're the judge. What do you decide?*

See "You Decide..." on page 6

## Note to Affirmative Action Officers

The following Public Acts were among those passed in 2001, to become effective October 1, 2001. These should be included in the Policy Statement section (46a-68-33) of your agency's affirmative action plan under the listing of federal and state constitutional provisions, laws, regulations, guidelines and executive orders:

- **Public Act 01-28**, An Act Concerning the Definition of Mental Disability and the Code of Fair Practices.
- **Public Act 01-53**, An Act Concerning State Agency Affirmative Action Plans and Diversity Training.
- **Public Act 01-182**, An Act Concerning Breastfeeding in the Workplace.

**Public Act 01-28** adds marital status, mental disability, and learning disability as prohibited bases for discrimination in those state employment, services, and program laws that did not already include them. It defines "mental disability" and applies it to those laws and to existing laws prohibiting such discrimination by private employers, labor unions, employment agencies and public accommodations providers. The act directs state agencies to comply with the federal Americans with Disabilities Act (ADA) in their provision of services, programs, and activities when the federal law affords people with disabilities greater rights and protections than state law does.

**Public Act 01-53** requires state agencies, boards or commissions with 20 or fewer full-time employees to file their affirmative action plans every two years with the Commission on Human Rights and Opportunities (CHRO), instead of annually. The act also: (1) extends the deadline for state agencies to complete diversity training and education for all their employees from January 1, 2001, to July 1, 2002; (2) specifies that any employee who works more than 20

hours a week must be trained; and (3) requires that state agencies include information in the affirmative action plans that they have complied with the diversity training requirements.

**Public Act 01-182** allows employees to express breast milk or breastfeed at their workplace during their meal or break period. It requires employers to make reasonable efforts to provide a room or other location close to the work area (other than a toilet stall) for the employee to express her milk in private. The act covers all employers, including the state and municipalities and prohibits them from discriminating against employees who choose to express milk or breastfeed at work. You can find copies of the public acts by accessing the general assembly's web site at: <http://www.cga.state.ct.us/default.asp>. Under "Quick search by" select "Public Act," type in the number of the act and hit "Go." On the next screen, under the heading "Enacted" you should see the public act number. Click on this.

### CHRO Can Reopen Previously Closed Proceeding

Affirmative Action officers should also be aware that Public Acts 00-199 and 01-95 authorized CHRO to reopen any case previously closed, provided the case had not been appealed to the Superior Court. Either the complainant or respondent may, for good cause shown, in the interest of justice, apply for the reopening of a previously closed proceeding. Such application must be filed with the commission within two years of the commission's final decision.

The standards for reopening a case include, but are not limited to: (1) material mistake of fact or law; (2) a finding that is arbitrary or capricious; (3) a finding that is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; and (4) the discovery of new evidence which materially affects the merits of the case and which, for good reasons, was not presented during the investigation. [C.G.S. Sec. 46a-94(c) & (d)]

## In Brief

**EEOC, DOJ and DOL Issue Joint Statement Against Workplace Bias in Wake of 9/11 Attacks** – The U.S. Equal Employment Opportunity Commission (EEOC) and the U.S. Departments of Justice (DOJ) and Labor (DOL) have issued a joint statement reaffirming the federal government's commitment to upholding the federal anti-discrimination laws in the aftermath of the events of September 11. The statement focuses on preventing and redressing incidents of harassment, discrimination and violence in the workplace, including such acts directed toward individuals who are, or are perceived to be Arab, Muslim, Middle Eastern, South Asian or Sikh. Read the press release at <http://www.eeoc.gov/press/11-19-01.html> and the joint statement at <http://www.eeoc.gov/press/11-19-01-js.html>. . . **Some Employers Don't Get It** – The Equal Employment Opportunity Commission (EEOC) has filed its 16<sup>th</sup> suit against Wal-Mart for violating the Americans with Disabilities Act (ADA). This latest lawsuit alleges that the world's largest retailer failed to reasonably accommodate an employee who was severely limited in her ability to stand for extended periods. According to the suit, Wal-Mart refused the employee's request for permission to occasionally sit down while performing her duties as a People Greeter, failed to engage in the interactive process required by the ADA, and constructively discharged her from her position. Currently the EEOC has 11 ADA suits pending nationwide against Wal-Mart. To read the full release: <http://www.eeoc.gov/press/6-21-01.html>.

## DAS Announces New Workers' Compensation Administrator

The Department of Administrative Services (DAS) has announced that a contract, effective December 21, 2001, has been signed with a new Third Party Administrator (TPA) for the State of Connecticut's Workers' Compensation Program. The new TPA is GAB Robins North America, Inc./MedInsights, a global organization with an extensive background in administering and managing workers' compensation claims.

GAB Robins has a state-of-the-art integrated Automated Claims Information System for its Claims/Medical case management staff and will provide a web-based claims management and reporting tool. Through its wholly owned subsidiary, MedInsights, headquartered in Franklin, Tennessee, GAB Robins will provide a First Report of Injury hotline, telephonic case management, utilization review, medical bill review and field case management.

The new TPA's Connecticut office is located in East Hartford. Staffing represents a significant increase in resources over that of the previous provider and includes: 26 claims adjusters, four medical-only claim adjusters, nine claim assistants, three hearing representatives, six clerical support and a quality & performance manager.

*New claims should continue to be reported to the 24-hour claims reporting center at 1-800-828-2717.*

**Q** If an employee is out on unpaid federal FMLA more than 5 days in a month, does he/she receive sick and vacation time accruals?

**A** No. Sec. 5-247-2(a)(3) and Sec. 5-250-3(b) of the Regulations of Connecticut State Agencies state that no sick leave (or vacation leave) will accrue for any calendar month in which an employee is on leave of absence without pay for an aggregate of more than three (3) working days. This limitation of three days has been changed to five (5) days by most collective bargaining agreements and by Management Personnel Policies #82-4 and #88-2. Federal FMLA regulations state, "An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave." [29 C.F.R. Sec. 825.215(d)(2)] Congress' intent in passing the FMLA was to alleviate employees' concerns over job security when they had to choose between caring for a seriously ill child/spouse/parent and work. Congress did not intend that FMLA would give employees on leave a greater benefit than those not on FMLA leave, which would be the case if employees on unpaid FMLA leave were able to accrue sick and vacation time, while those on unpaid leave for some other reason were not.

**Q** Must an employer grant FMLA leave for an eligible employee even if it will cause an undue hardship?

**A** Yes. The FMLA, unlike the Americans with Disabilities Act (ADA) does not have an "undue hardship" defense. If an eligible employee (i.e., one who has worked 1250 hours in the 12 months immediately preceding the leave) needs leave for an FMLA-qualifying reason and provides supporting medical documentation, the employee is

entitled to 12 weeks of FMLA leave in any 12 months, with the right to reinstatement to the same position or an equivalent position.

**Q** Is "on-call time" (hours when an employee must be available and respond if contacted by phone or beeper) counted as hours worked for the purposes of establishing FMLA eligibility?

**A** Yes. Under the Fair Labor Standards Act (FLSA) (which is incorporated by reference into the FMLA), an employee is "on duty" whenever the employer, not the employee, is controlling the use of the employee's time. If the employee is unable to use the time for his or her own purposes, the time is counted as hours worked. (29 C.F.R. Sec. 785.15)

**Q** When an employee takes FMLA leave to care for a family member who then dies, is the employee on FMLA leave after the death?

**A** No. When an employee is caring for a family member on FMLA leave and the family member dies, the leave is no longer FMLA-qualifying. If the employer provides for bereavement leave, that would become effective at the point of the family member's death. *Note:* State employees may use up to three days per occurrence in the event of the death of an immediate family member (husband, wife, child, father, mother, sister, brother or any relative living in their home.) These days are deducted from the employee's sick leave accruals. Employees may also use up to a total of three days per calendar year (from sick leave accruals) for funeral leave for someone who is not in their immediate family.

*You decide...*

... for the employer. At the district court level, the jury found: (1) that the employer's employment actions were not motivated by race or national origin; (2) that they were motivated by unlawful retaliation; but that (3) the employer would have taken the same employment actions in the absence of the retaliation. The employee appealed the judgment. The 2<sup>nd</sup> Circuit Court of Appeals found a wealth of testimony supporting the finding that the employee's behavior disrupted his own work and the duties of co-workers, supervisors and managers. Additionally, the court found that the employer provided the employee with ample avenues for internal complaint. When the employee was dissatisfied with the results of those complaints, he was not content to pursue administrative and legal remedies; instead, he repeatedly confronted and antagonized his supervisors in inappropriate contexts. The court found sufficient evidence to support the jury's finding that the employer would have fired the employee even in the absence of the employer's unlawful retaliation. According to the court, "disruptive or unreasonable protests against discrimination are not protected activity under Title VII and therefore cannot support a retaliation claim." [*Matima v. Celli*, 228 F.3d. 68] The appellate court also found that the district court properly awarded the employer costs in the amount of \$4,520.02.

*What's New(s)* is published quarterly by the Department of Administrative Services Business Advisory Group. Its purpose is to give basic information to state managers, HR personnel and affirmative action professionals on legal issues that affect employment. It is not intended to be a substitute for individual professional legal advice on a specific case. Individual problems should be reviewed by the agency's staff attorney or the Attorney General's office.

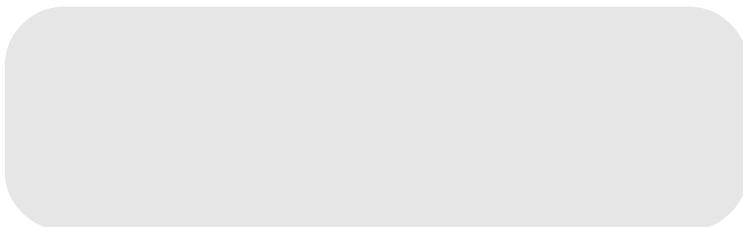
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Comments are welcome and should be addressed to the editor at:  
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ADDRESS TO:



# Special Supplement

## FMLA OVERVIEW (Part 2)

This article is the second part of a basic overview of the federal Family and Medical Leave Act (FMLA). Part 1, in the last issue of *What's News*, covered: the three overriding principles that all state agencies must keep in mind when administering FMLA leave; who qualifies for FMLA leave; the reasons for leave; the amount of leave to which employees are entitled; how leave is measured; and the definition of a "serious health condition" – a particularly problematic area for employers.

### Medical Certification

There are very stringent provisions regarding medical documentation, which will be handled in future issues of *What's News*. Briefly, employees are required to provide their employers with a completed medical form. State employees are to use *Form P-33A – Employee* if the leave is for the employee's own serious health condition and *Form P-33B – Caregiver* if the employee needs to care for a seriously ill child, spouse or parent. Agencies may not contact the doctor directly for any additional information. Federal law only allows an employer's health care provider to contact the doctor – with the employee's permission – and only to "clarify" and "authenticate" the documentation. Agencies without a health care provider on staff may use UCONN.

If agencies doubt the validity of an employee's initial medical certification, they may require the employee to get a second opinion with a health care provider of their choice at their own expense. In this case, however, agencies must not refer the employee to someone it normally utilizes on a regular basis. Agencies cannot use UCONN in this instance. (Remember, the state is one employer; each agency is not an individual employer. Going to UCONN would be the equivalent of the agency asking itself for a second opinion.) Agencies may use medical professionals listed in the Workers' Compensation network. (This is a third party provider and the physicians listed contract with the network, not with the State.) If the two opinions differ, the employer may require a third opinion from a provider approved by both the employee and agency. The agency will pay for this opinion as well. This last opinion is final and binding.

**NOTE:** The Medical Certificate forms (*P-33A – Employee* and *P-33B – Caregiver*) can be found on the DAS website: <http://www.das.state.ct.us/>. Go to "Human Resources Services," then to "Forms." Although the forms contain the DAS logo in the upper right hand corner, agencies should feel free to replace it with their own logo and agency mailing address. The form itself, however, should not otherwise be altered. It is important that all agencies use the same form. Remember: the State is one employer and all employees must be treated uniformly.

### Notice Is Required

**Federal** – Under the federal law, each agency has an obligation to post a notice explaining the provisions of the federal FMLA and providing information concerning the procedures for filing complaints of violations with the U.S. Department of Labor's (DOL) Wage and

Hour Division. The notice must be posted prominently where employees and applicants for employment can readily see it. Where an agency's workforce is comprised of a significant portion of workers who are not literate in English, the agency must provide such notice in a language in which the employees are literate. Agencies with multiple work sites must post notice at each site. The easiest way to fulfill this requirement is to use the U.S. DOL publication (WH 1420) entitled "Your Rights Under the Family and Medical Leave Act of 1993." It can be found at <http://www.dol.gov/dol/esa/public/regs/compliance/posters/fmla.htm>. (Follow the prompts for color or black/white versions.)

If the agency fails to post notice, the agency may be subject to a fine of up to \$100 for each separate offense. More importantly, the agency cannot take any adverse action against an employee who fails to provide advance notice of need for leave or to comply with any of the required provisions outlined in the posted notice.

Additionally, each agency having a written employee handbook that describes the agency's policies regarding leave, wages, attendance, etc. must incorporate in the handbook information concerning FMLA entitlements and employee obligations under FMLA.

Whether or not an agency has a written policy, manual or handbook, the agency must provide written guidance to an employee regarding federal FMLA rights and obligations whenever an employee requests FMLA leave. There are several very specific points that an agency must cover, including the fact that the leave will be counted against the employee's 12-week entitlement, medical certification requirement and the consequences for failure to comply, how to handle insurance premium payments and consequences of failure to make payments, the employee's right to restoration to the same or equivalent job, etc. As with the posting requirement, if an agency fails to comply with these notice requirements, it may not take action against an employee who fails to comply with provisions normally required of employees.

**State** – There are no notice requirements specified for agencies, however, employees are required by regulation to submit a request for unpaid family/medical leave to their appointing authority, as well as appropriate documentation to support their need for leave.

### Designation of Leave

**Federal** – It is the employer's responsibility at all times to designate leave as FMLA. Employees are not required to designate whether the leave they are taking is federal FMLA leave; they do not even need to specifically request "FMLA leave." This is an important point to remember. Frequently, employees do not wish to utilize their FMLA leave entitlement. If they are eligible (i.e., they have worked 1,250 hours in the preceding 12 months), their reason for leave qualifies and they have not previously exhausted their entitlement, they must be placed on federal FMLA leave. This is for their protection, as well as to ensure that your agency complies with federal law.

Any absence of more than three calendar days, or even sporadic absences of lesser duration, if for the same medical reason may allow an employee to qualify for leave under FMLA. Since retroactive designation of leave once an employee has returned to work is limited,

it is extremely important that supervisors report all potentially qualifying absences to their agencies' FMLA point person in the HR department. It is imperative that agencies have good internal communications systems in place, particularly larger agencies with multiple sites. Once an employee has returned to work, if the agency doesn't designate the time as FMLA within two business days and provide the appropriate notice to the employee, they may not later do so. In this case, the employee will retain his entitlement.

**State**— Once an employee has submitted a request for unpaid family/medical leave to the appointing authority, the appointing authority is required to review it promptly for conformance with the regulations. Retroactive designation of leave is not prohibited.

## Substitution of Paid Leave for Unpaid Leave

**Federal**— Generally, FMLA leave is unpaid. However, under certain circumstances, FMLA permits an eligible employee to substitute paid leave to cover some or all of the FMLA leave. If the employee does not choose to substitute accrued paid leave, federal law allows the employer to require the employee to do so. If the employer does so require, it must inform the employee of this requirement within two business days of learning of the need for leave. (Please note: Employers cannot require that employees substitute compensatory time if it is FLSA comp time; holiday comp days may be substituted.) If leave is for their own serious illness, state employees are required to exhaust their accrued sick leave prior to going on unpaid leave. Employees may not use accrued sick leave to care for a seriously ill child, parent or spouse in excess of time allowed by statute or contract.

**State**— Leave under C.G.S. 5-248a is unpaid; it is in addition to any other paid leave benefits and benefits provided under the separate pregnancy disability entitlement [C.G.S. 46-60(a)(7)]. Employees may request to use vacation/personal time, but this time cannot be used to extend the 24-week state entitlement.

## Health Insurance Continuation

Federal law requires that employers maintain employees' coverage under any group health plan on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period. However, the employer is not obligated to continue the employee's individually purchased health policies where employee participation is completely voluntary, the employer makes no contributions, and where the sole function of the employer is administrative, i.e., to collect premiums through payroll deduction and to remit them to the insurer.

Although an employee may choose not to retain group health plan coverage during FMLA leave (or if coverage lapses because an employee has not made required premium payments), upon the employee's return the employer must still restore the employee to the coverage/benefits on the same terms as prior to the leave without any qualifying period, physical examination, exclusion or preexisting conditions, etc.

The employee must continue to pay any share of group health plan premiums that he or she had paid prior to taking FMLA leave. If premiums are raised or lowered, the employee is required to pay the new premium rates.

State employees on unpaid leave are billed directly by Business Management for state-sponsored group life insurance premiums and the same portion of the cost of their health insurance that was previously withheld from their paychecks for these purposes. In the case of any other deductions being made from paychecks (e.g.

disability insurance, BSL life insurance, deferred compensation, credit union loans), employees must deal directly with the appropriate vendor to discuss payment options.

Employees not returning to work immediately following the leave for reasons other than a health condition or another good reason beyond their control may be charged retroactively for their portion of the cost of the insurance during the unpaid leave.

## Return to Work

Both federal and state law entitles an employee returning from leave to the same or equivalent position with equivalent benefits and equivalent pay. Federal law also stipulates that the position contain equivalent terms and conditions to the original position. This means that the employee must be reinstated to the same or a geographically proximate worksite; to the same shift; the same or an equivalent work schedule; and must have the same or an equivalent opportunity for bonuses, profit sharing and other discretionary and non-discretionary payments. An agency is not prohibited from accommodating an employee's request to be restored to a different shift, schedule or position that better suits the employee's personal needs, or to offer a promotion to a better position.

In cases involving the serious health condition of an employee, agencies may require the employee to produce a fitness-for-duty report on which the physician has certified the employee is able to return to work. This requirement protects the employee, co-workers and the public from the negative consequences that can result when an individual returns to work before being medically ready to do so. Employees who are notified of the need for a fitness-for-duty certification will not be allowed to return to work without it.

## Enforcement

The U.S. Department of Labor enforces federal FMLA. It will not, however, enforce the state family/medical leave law under C.G.S. 5-248a. States may not enforce the federal FMLA.

## Summary

Although the federal FMLA is an entitlement that must be granted (provided the employee is eligible, the reason for leave qualifies and is supported by medical documentation, etc.), the U.S. DOL tried to balance employee and employer needs by affording employers certain rights, specifically: Employees are required to provide 30 days advance notice of need for leave, when possible (i.e., expected birth, planned medical treatment, non-emergency situations), and attempt to schedule treatment to avoid disruption of the agency's operations. Agencies may ask employees for a second opinion if it doubts the validity of the original medical certification; and they can request periodic updates every 30 days. Agencies may also temporarily assign employees on intermittent leave or reduced schedules to alternative positions that may be less disruptive to their operations, as long as the pay and benefits are equivalent.

As mentioned in the last issue of the newsletter, the federal FMLA is a complex law and one that is evolving. Its standards are being defined by the courts and, in some instances, the courts are finding that the U.S. Department of Labor (DOL) exceeded its authority in promulgating certain of the regulations and granted entitlements not intended by Congress. Currently, there is a case before the U.S. Supreme Court regarding the U.S. DOL's rule prohibiting employers from counting time off as FMLA leave unless it is designated as such. Future issues of *What's News* will keep you informed of the outcome of this case, as well as deal with other problematic issues. For now, agencies should strictly follow the U.S. DOL's regulations.