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Long-Term Care Newsletter

New FMLA Rights and Rules

By Kevin McManaman

New Family and Medical Leave Act (FMLA) regulations became effective January 16, 2009. Employers must notify employees of their FMLA rights both by postings and in any written guidance to employees, such as an employee handbook or personnel manual.

The new "poster insert" for the military leave rights can be downloaded along with the traditional FMLA notice from the DOL website at: www.dol.gov/esa/whd/fmla/. Employers will have to change any notice of rights in guidance to employees, along with policies, to include the new military leave rights, the new definitions of "serious health condition," employee notification of absences, as well as health care provider and military leave certifi-

cation requirements. Consider updates on the following topics:

Qualifying Exigency Leave is a new military leave right which helps employees with a family member in the National Guard or Reserves manage their affairs while the member is on active duty or called to active duty in support of a contingency operation. It allows an employee with a spouse, son, daughter, or parent on active duty (or one who has been notified of an impending call or order to active duty) to take up to twelve weeks of FMLA leave when there has been a "qualifying exigency." The Department of Labor's final rule defines a qualifying exigency by referring to some broad categories for which such leave can be taken:

- Short-notice deployment;
- Military events and related activities;
- Childcare and school activities;
- Financial and legal arrangements;
- Counseling;
- Rest and recuperation;
- Post-deployment activities; and
- Additional activities not encompassed in the other categories, but agreed to by the employer and employee.

It is important to remember that these activities must be related to being on or being called to active duty and that ordinary regular routine matters do not qualify.

The new Military Caregiver Leave (also known as the "Covered Servicemember Leave") allows employees to take up to 26 weeks of leave (continued pg. 2)

Sweeping Changes to the Americans with Disabilities Act Affect Long Term Healthcare Facilities

By Rod Confer

Most long-term health care facility managers probably have a general familiarity with how the Americans with Disabilities Act (ADA) affects them as employers. Originally passed in 1990, the ADA prohibits private and governmental employers from discriminating against qualified individuals with disabilities in job applications, hiring and firing, promotions, compensation, training and other aspects of employment.

Health care facilities may not realize that recent changes greatly expand ADA coverage. These changes can be expected to have a significant impact on long-term health care facilities, as well as on employers in other sectors.

On January 1, 2009, the Ameri-

cans with Disabilities Amendments Act took effect. In that act, Congress reacted against restrictive past interpretations of the ADA in several Supreme Court opinions and in ADA regulations promulgated by the EEOC. Although the amendments do not change the basic definitions of "disability" in the ADA as an impairment that "substantially limits" one or more "major life activities," they change how these terms will be interpreted by courts and the EEOC.

The ADA Amendments Act states that Congress intends the term "disability" to be construed expansively "in favor of broad coverage...to the maximum extent permitted." It also requires the EEOC to revise its regulations

defining when an impairment "substantially limits" a major life activity in a manner consistent with the rest of the Act, i.e., more broadly. Those revised regulations have not been issued yet.

The amendments expand the definition of "major life activities," limitation of which may result in disability, by giving examples of some activities that formerly were not recognized by the EEOC, such as reading, bending and communicating. The amendments also provide that impairments of "major bodily functions" may substantially limit major life activities and qualify as disabilities.

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Preparing the
Way Forward



New FMLA Rights and Rules (continued from pg. 1)

to care for a family member who is a Covered Servicemember with a serious illness or injury incurred in the line of duty or on active duty. The definition of "Covered Servicemember" is quite broad, and includes a spouse, son, daughter, parent, or even 'next of kin' who is a member of the armed forces and who is undergoing medical treatment, recuperation, or therapy, is otherwise on outpatient status or is otherwise on the temporary disability retired list, due to a serious injury or illness sustained in the line of duty on active duty. Eligible employees utilizing the Military Caregiver Leave are entitled to a combined total of up to twenty-six (26) weeks for all types of FMLA leave. This new leave must be taken within a single 12-month period beginning with the first day of leave, a concept different than the traditional "leave year" for other types of FMLA leave. The regulations provide helpful examples on how these different calendars can be reconciled.

Serious health condition and continuing treatment redefined.

The final regulations of FMLA also revise the definition of a "serious health condition" in certain respects. For example, in order to qualify as "continuing treatment" for a serious health condition, any "incapacity and treatment" must now involve incapacity for more than three consecutive calendar days, and any subsequent treatment or incapacity relating to the same condition must involve: 1.) treatment by a health care provider two or more times within 30 days of the first day of incapacity (unless there are extenuating circumstances as defined in the regulations); or 2.) treatment by a health care provider at least once which results in a regimen of continuing treatment under supervision of a health care provider. The first day of such subsequent treatment under either 1.), or 2.), above, now has to take place within 7 days of the first day of incapacity. To qualify as continuing treatment of a serious health condition, incapacity due to chronic conditions must now involve the employee visiting a health care provider for the condi-

tion at least twice per year, the condition must continue for an extended period of time, and may involve episodic incapacity (e.g., asthma, diabetes, epilepsy, etc.). This is also a new requirement under the regulations.

Continuing treatment also includes conditions causing long-term or permanent incapacity and any period of absence to receive multiple medical treatments from a health care provider. Periods of incapacity due to Alzheimer's, a severe stroke, the terminal stages of a disease and the like, qualify. Absences due to conditions of multiple treatment for restorative surgery after an accident or other injury, or treatment for conditions that would likely result in incapacity of more than three consecutive calendar days in the absence of treatment such as cancer (chemotherapy, radiation, etc.) severe arthritis (PT), or kidney disease (dialysis) qualify. Common colds, flu, earaches, and non-migraine headaches are not serious health conditions, and routine physical, eye, or dental examinations are not within the scope of the continuing treatment concept.

Employee notice and certification requirements

Employees may be required to follow the employer's usual and customary call-in procedures for requesting foreseeable leave, absent unusual circumstances. For example, employers may require employees to set forth reasons for the requested leave, the expected duration of the leave, the anticipated start date of the leave, and may require employees to contact a specific individual. In any event, if an employee needs to give notice of leave that is foreseeable but less than 30 days in advance, notice must be given as soon as practicable. It generally should be considered practicable to give notice under the usual and customary method and timing for reporting an absence, such as a sick-call number.

With respect to the health-care-provider certification requirement, the U.S. Department of Labor has prepared a new form that may be given to employees to be used by their doctors in certifying a serious

health condition under the FMLA. Employers may choose to use their own form instead, or may simply identify in the policy the specific information to be provided by the doctors. If a medical certification is incomplete the employer must put in writing what information is needed, and give the employee seven days to cure the deficiency before denying leave or asking for other certification. Under no circumstances should a direct supervisor of the employee contact the health-care provider; rather, it should be done by HR, a management level employee, leave coordinator or health care provider.

Employers may also require "return to work" or "fitness for duty" certification stating whether the employee can perform the essential functions of the job. Employers can also require an employee provide a fitness for duty certification before returning from intermittent leave if the employer has reasonable concerns about the ability to perform the job safely. Employers must notify employees at the time their FMLA leave commences if they want to require such certifications before returning to work.

Substitution of paid leave

As before, employers have discretion regarding whether to require employees to take any accrued and unused paid vacation leave, personal leave, or, if applicable, family or sick leave, concurrently with taking the FMLA leave. If the employer requires the employee to take such paid leave, that leave may be counted towards the employee's FMLA leave. If an employer elects not to require employees to take this leave, employees must at least be allowed to use such paid leave at their option, which again may be counted towards the FMLA leave available to the employee. An employee electing to use any type of paid leave concurrently with FMLA leave must follow the same terms and conditions of the employer's policy that apply to other employees for the use of such leave. But overall the new regulations simplify these matters.

Additional rules also exist under the FMLA, which may be answered in Department of Labor publications or by your attorney.

Sweeping Changes (continued from pg. 1)

“Major bodily functions” include “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”

An impairment that is episodic or in remission is now considered to be a disability if it would substantially affect a major life activity when it was active. An individual discriminated against because of an actual or perceived disability will be regarded as disabled, unless the impairment is transitory and minor. Formerly such individuals were only regarded as disabled if their impairments are perceived by employers as substantial limitations on major life activities. Under the amendments an employer is not required to make reasonable accommodations to individuals only regarded as disabled, however.

The ADA Amendments Act overturns a decision of the Supreme Court that allowed an employer to consider mitigating measures such as prosthetic devices or medications in determining whether an individual had a

disability. Now the employer must determine disability without considering those measures, the sole exceptions being that the employer may consider the effect of ordinary glasses or contact lenses.

Health care is the largest industry in the U.S. economy, according to the Bureau of Labor Statistics, and is also expected to have the largest rate of employment growth over the next five years. In addition, in a recent year nursing care facilities' workers suffered occupational illnesses or injuries at more than twice the average rate: 10.1 cases per 100 full-time workers, compared to an average of 5.0 for private industry overall. Musculoskeletal injuries are the most common injury among nursing aides, the largest category of health support occupations. As one of the economy's largest employers, with significant exposures to occupational illness and injury, the long-term health care industry will undoubtedly see major effects from these amendments to the ADA.

The EEOC website, <http://www.eeoc.gov>, contains informa-

tion which is helpful for employers in complying with the ADA, including “Questions and Answers about Health Care Workers and the Americans with Disabilities Act.” Unfortunately these website materials have not yet been revised to reflect changes that were made in the ADA Amendments Act.

In the meantime, long-term health care facilities, like other employers, must insure that their policies and procedures are revised to comply with changes made by the ADA Amendments Act. It is important that operational personnel and human resources staff are aware of these changes in the law and prepared for the questions and situations that are likely to arise under the ADA as expanded following these amendments.

Under these new revisions it is more important than ever for employers to seek early legal advice from competent employment counsel concerning questions they may have concerning ADA, particularly whenever a claim of discrimination based on disability is alleged.



When Is a Health Care Facility Liable for Resident Assaults?

By Jeanelle Lust

When is a health care facility liable for resident on resident assaults? On September 26, 2008, the Nebraska Supreme Court made that determination in Marilyn Ehlert v. State of Nebraska, 276 Neb.605 (2008).

In that case, a woman, Ehlert, was assaulted by another patient at the Hastings Regional Center. Ehlert argued that the Regional Center had a duty to prevent the assault. The Supreme Court disagreed setting forth the test as follows:

There is no duty to control the conduct of a third person

as to prevent him from causing physical harm to another unless:

- (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or*
- (b) a special relation exists between the actor and the other which gives the other a right to protection.*

The Court clarified the test in a residential patient situation as:

One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third per-

sons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor:

- (a) knows or has reason to know that he has the ability to control the conduct of the third persons, and*
- (b) knows or should know the necessity and opportunity for exercising such control.*

The Court ruled against Ehlert because there was no evidence that the “HRC staff knew or should have known that L.S. was about to harm Ehlert and therefore should have immediately taken action to protect Ehlert from L.S.”



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Rod Confer

Rod joined the firm in 1976 and is engaged in general civil trial practice. He has tried many jury trials during his career, including wrongful death and commercial matters. He was recently selected as a Super Lawyer of the Great Plains (www.superlawyers.com/nebraska). The Nebraska Game and Parks Commission and the American Fisheries Society have honored Rod with conservation awards for his work in obtaining the first instream appropriation in Nebraska.

Rod has served as president of the state Order of the Coif Chapter, the Nebraska Literary Heritage Association and Friends of UNL Libraries, and as director of the Capital Humane Society and the Lincoln Metropolitan YMCA. He has spoken at several legal seminars and is the author of articles that have appeared in the Nebraska Law Review and Creighton Law Review. He has also written chapters in the "How to Practice" Manual published by the state bar and the Nebraska College of Law, and the Appellate Practice Manual for the U.S. Court of Appeals for the Eighth Circuit, published by the Minnesota State Bar Association. Rod and his wife Laurie have two grown children and two grandchildren.

Rod Confer is a native of McCook, Nebraska. He attended the University of Nebraska, earning a business administration degree in 1968, and received his J.D. degree with distinction in 1971 from the University of Nebraska College of Law. During law school, he served as Editor-in-Chief of the Nebraska Law Review, received the Adolph Wenke Scholarship, and was named to the Order of the Coif national legal honorary.

From 1971-1975, Rod was in the Navy Judge Advocate Corps, and after discharge he worked as law clerk to Honorable Donald R. Ross of the U.S. court of Appeals for the Eighth Circuit.

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