

Editors: Glenn R. Davis, Esq. & Steven M. Montresor, Esq.

LATSHA DAVIS & YOHE, P.C.

ATTORNEYS AT LAW

- Mechanicsburg, PA
(717) 761-1880
- Malvern, PA
(610) 251-6985
- Mt. Laurel, NJ
(856) 231-5351
- Maryland
(410) 727-2810



IN THIS EDITION:

Notice This: Department of Labor's FMLA Penalties Invalidated 1

HIPAA Implementation Timeline 2

Pennsylvania Adopts Electronic Filing for Non-profits 3

Single Task Worker Update: Feeding Assistants 3

Seminars 4



e-mail: info@ldylaw.com

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NOTICE THIS: DEPARTMENT OF LABOR'S FMLA PENALTIES INVALIDATED

By: Glenn R. Davis, Esq.

The basic guarantee of the Family and Medical Leave Act of 1993 ("FMLA" or "Act") is that qualifying employees are entitled to 12 weeks of unpaid leave each year with benefits. While this obligation is clear, the numerous notice requirements and penalties for violations of the notice provisions have been less than clear. One ongoing issue has been whether an employer is required to provide notice to an employee that a particular absence is being counted against his or her FMLA leave time. This confusion arises from disparities between the notice and penalty provisions of the Act and the Department of Labor's ("DOL") regulations which implement those provisions.

The Act provides for reasonable unpaid leave following events such as a disabling health problem, a family member's serious illness, or the birth of a child. The Act's intent is to balance the demands of the workplace with the needs of the family, to enhance the stability and economic security of families, and to preserve family integrity in a way that accommodates employees and employers. The time period of 12 weeks is a minimum figure representing a compromise between employers, who wanted less leave time, and employees, who wanted more leave time. The FMLA's language encourages businesses to adopt more generous policies. Nearly 23% of FMLA-covered establishments allow more than 12 weeks of leave per year, and nearly 63% provide some form of paid sick leave.

The confusion surrounding the notice requirements was recently addressed by the United States Supreme Court in *Ragsdale v. Wolverine World Wide, Inc.* Wolverine granted its employee, Tracy Ragsdale, 30 weeks of medical leave in 1996 in accordance with the provisions of its liberal leave policy. Wolverine did not indicate that any of this leave time would be counted against Ragsdale's FMLA leave. When Ragsdale requested leave time exceeding Wolverine's 30 week maximum, Wolverine refused her request. Ragsdale then requested additional leave or permission to work part-time, which was also denied. When Ragsdale did not return to work, Wolverine terminated her employment. Ragsdale filed suit, alleging that Wolverine was required to grant her 12 additional weeks of leave, since Wolverine failed to provide notice that her 30 weeks of leave would count against her FMLA entitlement.

Ragsdale's claim was based on the DOL regulation which requires employers to inform their workers about the relationship between the FMLA and leave granted under company plans. The regulation makes it the employer's responsibility to tell employees when an absence will be considered FMLA leave. According to the regulation, employers must give written notice of the designation, along with detailed information concerning the employee's rights and responsibilities under the Act within a reasonable period of time. DOL's penalty provisions provide that the leave taken does not count against the employee's FMLA entitlement if an employer fails to designate an employee's absence as FMLA leave, effectively resulting in an automatic 12 weeks of additional leave together with other remedies afforded by the Act.

(See *FMLA*, p.2)

(FMLA, continued from p.1)

In contrast to the regulation, in order to prevail under a cause of action under the statute's language, an employee must first prove that the employer violated the FMLA by interfering with, restraining or denying his or her exercise of rights under the Act. Assuming this requirement is met, the statute provides no relief unless the employee suffers actual prejudice as a result of the employer's violation. If the employer is found to have violated the FMLA, the employer becomes liable for compensation and benefits lost by reason of the violation, for other monetary losses sustained as a direct result of the violation, and for appropriate equitable relief, including reinstatement or promotion. Thus, the remedy imposed by the statute is related to the harm that the employee suffers.

Ultimately, the Supreme Court found that the DOL's regulation was contrary to the FMLA's comprehensive remedial mechanism and further, was beyond the Secretary of Labor's authority. The Supreme Court based its decision on some key points:

- The FMLA requires a case-by-case analysis of whether any prejudice and harm has actually occurred as a result of violation of the Act. The regulation, however, does not require that any prejudice or harm be suffered by an employee and applies across the board regardless of whether it is appropriate for the specific harm.
- The Act requires a general notice and sets forth a penalty for willful noncompliance, but does not impose a penalty for negligent or inadvertent failure to post the notice. By contrast, the regulation requires additional notices and penalizes employers regardless of intent.
- An employer could negate the risk of violating the regulation by simply adopting a leave policy that provided only the minimum 12 weeks of leave required by the Act. This is contrary to the stated policy objectives of the FMLA to encourage employers to adopt leave policies that are more generous than the Act's requirements.

The Supreme Court was troubled by the regulation's irrebuttable presumption that Wolverine's failure to provide notice impaired Ragsdale's ability to exercise her FMLA rights.

Consistent with the Supreme Court's concern, Ragsdale did not show that she would have taken less leave or intermittent leave if she had received the notice required by the regulation, and thus could articulate no prejudice resulting from Wolverine's actions. The challenged regulation was invalidated by the Court because it altered the FMLA's cause of action in a fundamental way: it relieved employees of the burden of proving any real abrogation of their rights and resulting prejudice. To hold otherwise would allow an employee to pursue a claim without any showing that an employer's actions restrained the employee's exercise of his or her FMLA rights.

Finally, the Supreme Court noted that the FMLA merely directs employers to post a general notice informing employees of their rights under the Act. Willful violation of this section carries a civil monetary penalty not to exceed \$100.00 for each separate offense. The DOL's regulation, in contrast, established a much more severe sanction both for willful and inadvertent violations of the supplemental notice requirement.

Since the Ragsdale decision, there has been some confusion regarding the obligations of employers to provide an FMLA-compliant notice. It is important for employers to note that the Court never invalidated the notice provisions of the regulations. Rather, the Court only invalidated the across-the-board penalty mandated by the regulation. The Court specifically refrained from deciding the validity of the regulation's notice requirements. Thus, it is possible that an employer may be required to provide notice that an employee's absence will be counted as FMLA leave time. However, the Court's ruling casts doubt on the validity of DOL's FMLA notice regulations to the extent they conflict with the Act's notice requirements.

Employers now face three major challenges after the Court's decision: continuing to comply with the statutory notice requirements of the FMLA; making a reasonable effort to comply with DOL's regulatory notice requirements; and voluntarily exploring ways of preventing prejudice or harm to their employees in FMLA matters. Employers may want to draft a comprehensive written FMLA policy and thoroughly document all communications relating to FMLA leave with its employees. ■

Additional research and contributions by: David E. Miller

HIPAA IMPLEMENTATION TIMELINE

OCTOBER 15, 2002:	Deadline for submission of Request for Extension of Compliance Date for Electronic Transactions Rule
APRIL 14, 2003:	Compliance deadline: Effective date of Privacy Rule
APRIL 16, 2003:	If granted extension for compliance with Electronic Transaction Rule, must begin testing of upgraded software no later than this date
OCTOBER 16, 2003:	Compliance deadline: Effective date of Electronic Transactions Rule

We are currently assisting our clients in their efforts towards achieving HIPAA compliance. If you require any assistance in establishing a HIPAA Compliance Plan or with the related policies, procedures and forms necessary to ensure your compliance with these deadlines, or if you have any questions regarding HIPAA, please do not hesitate to contact us. ■

PENNSYLVANIA ADOPTS ELECTRONIC FILING FOR NON-PROFITS

By: Jonathan M. Crist, Esq.

Pennsylvania has become the first state in the nation to approve electronic filing for non-profit entities. Non-profit corporations may now complete and electronically file their annual Form BCO-10 as well as their annual Form 990 or Form 990EZ with the Bureau of Charitable Organizations. The BCO-10 is required for non-profits which are subject to registration under the Solicitation of Funds for Charitable Purposes Act. Free software for use in electronic filing is available at www.form990.org or at efile.form990.org.

While the IRS does not currently accept any non-profit tax forms electronically, it has announced plans to accept Form 990 and Form 990EZ electronically beginning in 2003.

Posting of Form 990 on the World Wide Web

Regulations in effect since June 1999 have required non-profit corporations to make their annual information returns (Form 990 and Form 990EZ) available for public inspection upon request. An organization may avoid the necessity of responding to requests for copies of those documents by posting them on a World Wide Web page of the organization or of another entity which maintains a database of similar documents for tax-exempt organizations. Specific conditions must be met, including:

1. The web page must clearly inform readers that the document is available and provide instructions for downloading.
2. The document must be posted in a format that exactly reproduces the image of the annual return or application as it was originally filed with the IRS when the document is accessed, downloaded, viewed and printed in hard copy. Information permitted to be withheld from public disclosure is not required to be made available on the web page.
3. An individual must be able to access, download, view, and print the document without special computer hardware or software required for that format and without payment of a fee to an organization or to another entity maintaining the web page. Free, readily accessible and publicly available software is acceptable for formatting.

An organization which has made documents available on the web must notify anyone requesting a copy where the documents can be found, including the specific website address. If a request for this information is in writing, the information must be provided within seven days of receiving the request. ■

SINGLE TASK WORKER UPDATE: FEEDING ASSISTANTS

By: Steven M. Montresor, Esq.

In an attempt to ease the burden created by the current labor shortage in nursing homes, the Centers for Medicare & Medicaid Services ("CMS") issued a proposed rule on March 29, 2002 which would permit nursing facilities to employ trained feeding assistants. Nursing homes are encountering a growing resident population with increasingly complex medical conditions which can consume staff time. Consequently, there may be a strain between performing routine tasks, such as feeding, and attending to residents with acute clinical conditions. Some residents, however, only need encouragement or minimal assistance with feeding. The proposed regulation notes that properly trained non-medical staff could easily provide such assistance, while nursing staff with a higher level of training would continue to handle residents with more complex feeding problems. The types of feeding problems nurses or Certified Nurse Aides ("CNAs") would continue to manage include recurrent aspirating conditions, difficulty swallowing, use of feeding tubes or IV feedings. The proposed rule intends feeding assistants to be a supplement to CNAs, not a replacement.

Under the proposed rule, feeding assistants would have to meet certain training requirements. Those requirements include instruction in feeding techniques, assistance in feeding and hydration, communication skills, responsiveness to resident behavior, safety and emergency procedures, infection control, resident rights, the ability to detect changes in a resident's normal behavior and the importance of reporting these changes to the supervisory nurse. The proposed rule would also require facilities to keep records of all individuals who complete the feeding assistance training. Under the proposed rule, states must require facilities to report incidents of neglect, resident abuse, and misappropriation of resident property committed by a feeding assistant. Feeding assistants cannot be used to satisfy the minimum staffing requirements of the facility.

It is anticipated that allowing for feeding assistants will aid both providers and residents. Long-term care facilities should benefit from the greater choices in prospective personnel. Overall, the proposed rule should allow facilities to provide better quality care for its residents. ■

Additional research and contributions by: David E. Miller

LATSHA DAVIS & YOHE, P.C.

ATTORNEYS AT LAW

Executive Park West II
4720 Old Gettysburg Road, Suite 101
Mechanicsburg, PA 17055

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PA Adult Day Services Association	June 7, 2002	"HIPAA...What Impact on Adult Day Care"	Kimber L. Latsha, Esq.
PHCA	June 27, 2002	"HIPAA: A Framework for Compliance"	Kimber L. Latsha, Esq. David C. Marshall, Esq. Barbara G. Graybill, Esq.
PHCA	June 27, 2002	"Clock In or Pay Out" and "Employment Law Update"	Glenn R. Davis, Esq.
PHCA	June 27, 2002	"Aggressive Collection Practices"	Chadwick O. Bogar, Esq.
Council on Education Management	July 15 & 16, 2002	"Employment Law for Human Relations Professionals"	Glenn R. Davis, Esq. Chadwick O. Bogar, Esq.
LSS Foundation	September 12, 2002	"The Impact of HIPAA on Fund Development"	Barbara G. Graybill, Esq.
Jack Gaughen Realtors	September 12, 2002	"Like-Kind Exchanges"	Douglas C. Yohe, Esq.
LifeSpan (MANPHA)	September 23, 2002	"Coping with the Survey & Certification Process"	Kimber L. Latsha, Esq.
Council on Education Management	September 23, 2002	"Employment Law for Human Relations Professionals"	Glenn R. Davis, Esq. Chadwick O. Bogar, Esq.
PHCA	September 25, 2002	"Caution: OSHA Is Knocking at Your Door"	Glenn R. Davis, Esq.
PALA	September 26, 2002	"HIPAA Regulations: Does It Apply to Me? "	Kimber L. Latsha, Esq.
AHCA	October 7, 2002	"Fraud & Abuse Initiatives: An Offensive Strategy"	Kimber L. Latsha, Esq. David C. Marshall, Esq.
AAHSA	October 30, 2002	"Admission Preference Issues in CCRCs"	Kimber L. Latsha, Esq. David C. Marshall, Esq.
AAHSA	October 30, 2002	"Primer on Intermediate Sanctions: What You Should Know"	Douglas C. Yohe, Esq.
Allegheny & Mercer County Area Agency on Aging	November 12, 2002	"Hot Topics in Long Term Care"	Kimber L. Latsha, Esq. David C. Marshall, Esq. Barbara G. Graybill, Esq.