

**BOARD OF REGENTS  
BRIEFING PAPER**

**Agenda Item Title:**       **Addition of Web References for FMLA and FLSA Guidance, and removal of FMLA Appendix**

**Meeting Date:**           **September 4-5, 2014**

**2. BACKGROUND & POLICY CONTEXT OF ISSUE:**

The University of Nevada, Las Vegas was recently audited by the United States Department of Labor (DOL), Wage and Hour Division. At the exit conference for the audit, the DOL investigator noted that the Family Medical Leave Act (FMLA) Appendix which is currently in the NSHE Board of Regents Handbook is out of date and therefore does not include certain provision passed in more recent years. While other documentation available to employees at UNLV addresses each provision, the investigator recommended that the FMLA Appendix be addressed as well. The Vice Chancellor for Legal Affairs is bringing this recommendation forward on behalf of UNLV because the proposed amendments affect and will benefit all institutions.

**3. SPECIFIC ACTIONS BEING RECOMMENDED OR REQUESTED:**

Given the frequency that regulations change, in lieu of updating the FMLA Appendix the recommendation is that it be removed from the NSHE Board of Regents Handbook. NSHE institutions are required to comply with hundreds of federal, as well as State, regulations; far too many to reference or include within the Handbook. As such, the recommendation is that the FMLA Appendix be removed and that this important federal regulation be addressed in the manner described below.

Title 4, Chapter 3, Section 21 references NSHE's required adherence to the Family Medical Leave Act of 1993 and the Fair Labor Standards Act of 1938. This section also provides applicable references to the U.S. Code and the Code of Federal Regulation sections. In addition to these references, and in light of removing the FMLA Appendix, the recommendation is to modify Section 21 so as to provide relevant references to U.S. Department of Labor websites which maintain up to date information about the FMLA and FLSA.

**4. IMPETUS (WHY NOW?):**

This submission is based upon the recommendation for action from the U.S. Department of Labor, Wage and Hour Division.

**5. BULLET POINTS TO SUPPORT REQUEST/RECOMMENDATION:**

- Removal of FMLA Appendix ensures that resource information does not become outdated, which was the issue noted by the U.S. Department of Labor.
- Addition of web links to standard information from the Department of Labor website directs employees and others to currently maintained information from the source authority.
- NSHE Human Resources Advisory Council Supports this amendment.
- The amendment will prevent future adverse audit findings at other institutions.
- The deletion of the outdated Appendix will eliminate potential legal issues that could be based on providing inaccurate information regarding FLMA and FLSA rules.

**6. POTENTIAL ARGUMENTS AGAINST THE REQUEST/RECOMMENDATION:**

- None.

**7. ALTERNATIVE(S) TO WHAT IS BEING REQUESTED/RECOMMENDED:**

- Update and then maintain the FMLA Appendix within the Board of Regents Handbook.

**8. COMPLIANCE WITH BOARD POLICY:**

- Consistent With Current Board Policy: Title # \_\_\_\_\_ Chapter # \_\_\_\_\_ Section # \_\_\_\_\_
- Amends Current Board Policy: Title #4, Chapter #3, Section #21 and Appendix
- Amends Current Procedures & Guidelines Manual: Chapter # \_\_\_\_\_ Section # \_\_\_\_\_
- Other: \_\_\_\_\_
- Fiscal Impact: Yes \_\_\_\_\_ No X \_\_\_\_\_

**PROPOSED REVISIONS – Board of Regents HANDBOOK**  
**TITLE 4, Codification of Board Policy Statements**  
**Chapter 3, Section 21**  
**Family and/or Medical Leave/Fair Labor Standards Act**

Additions appear in *boldface italics*; deletions are [stricken and bracketed]

**Title 4 - Codification of Board Policy Statements**

**Chapter 3 PROFESSIONAL STAFF**

**Section 21. Family [~~and/or~~] Medical Leave/Fair Labor Standards Act**

1. Professional staff is entitled to take leave in accordance with the [~~Federal~~] Family and Medical Leave Act of 1993, *as amended*, its implementing regulations (Part 825 of Title 29 of the Code of Federal Regulations) and institutional policies promulgated in accordance therewith. See, for example, 29 C.F.R. 825.301 *and FMLA guidance at <http://www.dol.gov/whd/fmla/>*.
2. The provisions of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 201, et seq.), shall be adhered to by all NSHE institutions. *See FLSA guidance at <http://www.dol.gov/whd/flsa/>*.

[~~3. For additional information, see the Appendix at the end of this chapter.~~]

...

**[APPENDIX**

**~~The Family and Medical Leave Act of 1993~~**

~~The Family and Medical Leave Act of 1993 (FMLA) was enacted on February 5, 1993.~~

~~The new law is effective as of August 5, 1993 for NSHE employees.~~

~~The U. S. Department of Labor's Employment Standards Administration, Wage and Hour Division, administers and enforces FMLA for all NSHE employees.~~

~~FMLA entitles eligible employees to take up to 12 weeks of unpaid, job-protected leave each year for specified family and medical reasons. An eligible employee's right to FMLA leave begins on August 5, 1993; any leave taken before that date does not count as FMLA leave.~~

~~The law contains provisions on employer coverage; employee eligibility for the law's benefits; entitlement to leave, maintenance of health benefits during leave, and job restoration after leave; notice and certification of the need for FMLA leave; and, protections for employees who request or take FMLA leave. The law also requires employers to keep certain records.~~

**~~Employer Coverage~~**

~~FMLA applies to all NSHE institutions.~~

**~~Employee Eligibility~~**

~~To be eligible for FMLA benefits, an employee must:~~

- ~~(1) work for a covered employer;~~
- ~~(2) have worked for the employer for a total of at least 12 months;~~
- ~~(3) have worked at least 1,250 hours over the previous 12 months; and~~
- ~~(4) work at a location where at least 50 employees are employed by the employer within 75 miles.~~

**~~Leave Entitlement~~**

~~A covered employer must grant an eligible employee up to a total of 12 workweeks of unpaid leave during any 12-month period for one or more of the following reasons:~~

- ~~• for the birth or placement of a child for adoption or foster care;~~
- ~~• to care for an immediate family member (spouse, child, or parent) with a serious health condition; or~~
- ~~• to take medical leave when the employee is unable to work because of a serious health condition.~~

Spouses employed by the same employer are jointly entitled to a combined total of 12 workweeks of family leave for the birth or placement of a child for adoption or foster care, and to care for a parent (but not a parent in law) who has a serious health condition.

Leave for birth or placement for adoption or foster care must conclude within 12 months of the birth or placement.

Under some circumstances, employees may take FMLA leave intermittently—which means taking leave in blocks of time, or by reducing their normal weekly or daily work schedule:

- If FMLA leave is for birth or placement for adoption or foster care, use of intermittent leave is subject to the employer's approval;

- FMLA leave may be taken intermittently whenever medically necessary to care for a seriously ill family member, or because the employee is seriously ill and unable to work.

Also, subject to certain conditions, employees or employers may choose to use accrued paid leave (such as sick or vacation leave) to cover some or all of the FMLA leave. The employer is responsible for designating if an employee's use of paid leave counts as FMLA leave, based on information from the employee. In no case can use of paid leave be credited as FMLA leave after the leave has ended.

"Serious health condition" means an illness, injury, impairment, or physical or mental condition that involves:

- any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility;

- any period of incapacity requiring absence of more than three calendar days from work, school, or other regular daily activities that also involves continuing treatment by (or under the supervision of) a health care provider; or

- continuing treatment by (or under the supervision of) a health care provider for a chronic or long term health condition that is incurable or so serious that, if not treated, would likely result in a period of incapacity of more than three calendar days, and for prenatal care.

"Health care provider" means:

- doctors of medicine or osteopathy authorized to practice medicine or surgery by the state in which the doctor practices; or

- podiatrists, dentists, clinical psychologists, optometrists and chiropractors (limited to manual manipulation of the spine to correct a subluxation as demonstrated by X ray to exist) authorized to practice, and performing within the scope of their practice, under state law; or,

- nurse practitioners and nurse midwives authorized to practice, and performing within the scope of their practice, as defined under state law; or

- Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts.

### **Maintenance of Health Benefits**

A covered employer is required to maintain group health insurance coverage for an employee on FMLA leave whenever such insurance was provided before the leave was taken and on the same terms as if the employee had continued to work. If applicable, arrangements will need to be made for employees to pay their share of health insurance premiums while on leave.

In some instances, the employer may recover premiums it paid to maintain health coverage for an employee who fails to return to work from FMLA leave.

### **Job Restoration**

Upon return from FMLA leave, an employee must be restored to his or her original job, or to an equivalent job with equivalent pay, benefits, and other employment terms and conditions.

In addition, an employee's use of FMLA leave cannot result in the loss of any employment benefit that the employee earned or was entitled to before using FMLA leave.

Under specified and limited circumstances where restoration to employment will cause substantial and grievous economic injury to its operations, an employer may refuse to reinstate certain highly paid "key" employees after using FMLA leave during which health coverage was maintained. In order to do so, the employer must:

- notify the employee of his/her status as a "key" employee in response to the employee's notice of intent to take FMLA leave;
- notify the employee as soon as the employer decides it will deny job restoration and explain the reasons for this decision;
- offer the employee a reasonable opportunity to return to work from FMLA leave after giving this notice; and
- make a final determination as to whether reinstatement will be denied at the end of the leave period if the employee then requests restoration.

A "key" employee is a salaried "eligible" employee who is among the highest paid ten percent of employees within 75 miles of the work site.

#### **Notice and Certification**

Employees seeking to use FMLA leave may be required to provide:

- 30-day advance notice of the need to take FMLA leave when the need is foreseeable;
- medical certifications supporting the need for leave due to a serious health condition affecting the employee or an immediate family member;
- second or third medical opinions and periodic recertifications (at the employer's expense); and
- periodic reports during FMLA leave regarding the employee's status and intent to return to work.

When leave is needed to care for an immediate family member or the employee's own illness, and is for planned medical treatment, the employee must try to schedule treatment so as not to unduly disrupt the employer's operation.

Covered employers must post a notice approved by the Secretary of Labor explaining rights and responsibilities under FMLA. An employer that willfully violates this posting requirement may be subject to a fine of up to \$100 for each separate offense.

Also, covered employers must inform employees of their rights and responsibilities under FMLA, including giving specific information when an employee gives notice of FMLA leave on what is required of the employee and what might happen in certain circumstances, such as if the employee fails to return to work after FMLA leave.

#### **Unlawful Acts**

It is unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided by FMLA. It is also unlawful for an employer to discharge or discriminate against any individual for opposing any practice, or because of involvement in any proceeding, related to FMLA.

#### **Enforcement**

FMLA is enforced, including investigation of complaints, by the U. S. Labor Department's Employment Standards Administration, Wage and Hour Division. If violations cannot be satisfactorily resolved, the Department may bring action in court to compel compliance. An eligible employee may also bring a private civil action against an employer for violations.

#### **Other Provisions**

Special rules apply to employees of local education agencies. Generally, these rules provide for FMLA leave to be taken in blocks of time when intermittent leave is needed or the leave is required near the end of a school term.

Salaried executive, administrative, and professional employees of covered employers who meet the Fair Labor Standards Act (FLSA) criteria for exemption from minimum wage and overtime under Regulations, 29 CFR Part 541, do not lose their FLSA-exempt status by using any unpaid FMLA leave. This special exception to the "salary basis" requirements for FLSA's exemption extends only to "eligible" employees' use of leave required by FMLA.

The FMLA does not affect any other federal or state law, which prohibits discrimination, nor supersede any state or local law that provides greater family or medical leave protection. Nor does it affect an employer's obligation to provide greater leave rights under a collective bargaining agreement or employment benefit plan. The FMLA also encourages employers to provide more generous leave rights.

**Further Information**

For more information, please contact the nearest office of the Wage and Hour Division, listed in most telephone directories under U. S. Government, Department of Labor, Employment Standards Administration.]