

## Department of Labor Publishes New Guidelines Concerning FMLA Leave for Mental Health Conditions

*In keeping with the Biden administration's focus on mental health initiatives, the DOL has provided a roadmap for addressing FMLA requests based on mental health conditions*

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Last month, President Biden unveiled a multi-part initiative designed to address what has been termed a “mental health crisis” in the United States. The initiative involves billions of dollars in funding and the implementation of a wide variety of new programs across several executive departments, including the Department of Health and Human Services, the Department of Education, the Department of Defense, and the Department of Labor, to name a few. But while many of these measures are new, the administration’s focus on mental health issues has also manifested in old and familiar areas—as illustrated by the Department of Labor’s new guidance on “mental health conditions and the FMLA.” Of course, employers are only covered by the FMLA if, at the time of the employee’s leave request, they employ fifty (50) or more employees, and thus, some public employers may not be covered by this guidance. Those who are covered, however, should pay close attention to this new guidance in light of the administration’s apparent focus on mental health issues and its resultant enforcement priorities.

Published at the end of May 2022 to coincide with “Mental Health Awareness Month,” the new guidance reminds employers that “serious health conditions” for which eligible employees may use FMLA leave include mental health conditions. According to the new guidance, mental health conditions are considered “serious health conditions” under the FMLA (and therefore qualify employees to take FMLA leave) if they require either inpatient care *or* continuing treatment by a health care provider. What does this look like in practice? As the guidance explains, mental health conditions which “incapacitate” an individual for more than three consecutive days and require ongoing treatment from a health care provider (including a psychiatrist *or* a psychologist/social worker) would meet the criteria of a “serious health condition” under the FMLA. Likewise, “chronic conditions,” such as anxiety, depression, etc., that cause “occasional periods” of incapacitation and which require treatment by a health care provider (which, again, can be either a psychiatrist or a clinical psychologist/therapist) at least twice per year would also fit this bill, and would accordingly render individuals eligible to use FMLA leave in connection with the condition.

To illustrate, the new guidance provides an example of an employee with an anxiety condition that occasionally renders her unable to work. This employee, in the Department’s example, sees a doctor monthly to manage her anxiety. Because this hypothetical employee experiences a chronic mental health condition that occasionally prevents her from working and for which she receives treatment, the guidance explains that this employee would be eligible to use FMLA leave “to take time off when she is unable to work unexpectedly due to her condition” and/or when she has a scheduled appointment during her shift.

The new guidance also explains that, like any other FMLA-qualifying condition, employees may use FMLA leave to care for a spouse, child or parent with a “serious mental health condition.” Significantly, the guidance notes that “providing care” for these purposes includes the provision of “psychological comfort and reassurance”—a rather broad and vague term. Additionally, employees may use FMLA leave to provide care for a family member returning from military service and who experiences a “serious mental health condition” (such as PTSD). Finally, the new guidance permits employers to require “a certification from a health care provider to

support the employee’s need for FMLA leave,” but while “the information provided on the certification must be sufficient to support the need for leave,” an actual “diagnosis” is “not required.” The new guidance adopts existing rules surrounding FMLA certification forms, thus, as with any other FMLA leave request, employees requesting leave for a “serious mental health condition” may be required, under certain circumstances, to seek a second medical opinion (at the employer’s expense).

The impact of the COVID-19 pandemic on mental health issues has been well-documented, and legislative efforts to address these issues, including Pennsylvania’s recent police “post-traumatic stress disorder” law (“Act 59 of 2020”) have been a key feature of the last few years, and will likely continue to be so. Moreover, as part of the administration’s holistic focus on mental health issues, employers can likely expect increased attention on these issues from the Department of Labor and the EEOC. As with all FMLA leave requests, then, employee requests for FMLA leave based on mental health conditions should be taken seriously and should be evaluated with the same degree of attention granted to other requests. Liability can and will result if employers deny such requests or in any way “interfere” with an eligible employee’s access to FMLA leave.