

H.R. ALERT*

FEBRUARY 2005

Fifth Circuit Allows Termination for Unexcused Absences When an Employee Fails to Complete FMLA Medical Certification

An employee who fails to provide medical certification of a serious health condition, when properly requested by his or her employer, can lose the protection of the Family Medical Leave Act (“FMLA”) and can be terminated due to excessive absences. *Urban v. Dolgencorp of Texas*, 393 F.3d 572 (5th Cir. 2004). In *Urban*, the employer asked its employee to complete medical certification forms while she was out on leave. The employee failed to return the certification forms by the employer’s deadline despite receiving an additional 15 days to complete the forms. When the employee ran out of employer-provided sick leave and never returned to work, the employer terminated her due to her unexcused absences.

The employee sued under the FMLA relying on a regulation that states an employer must give the employee the chance to complete medical certification forms if they are not properly completed the first time. 825.305(d). The employer argued that the certification forms were not incomplete; rather, the certification forms were non-existent. The employer argued,

therefore, that the leave was not FMLA leave. FMLA regulations instruct that if an employee never produces medical certification, the leave is not FMLA leave. 825.311(b); 825.312(b). The Court of Appeals agreed with the defendant that non-existent medical certification forms were not “incomplete” under the regulations. The Court reasoned that such a broad reading of “incomplete” would have the effect of always negating the deadline for completing medical certification forms. Employees, therefore, can lose the protections of the FMLA, such as the right to job restoration, if they fail to return medical certification forms.

Employee Practice Tip: Employers should be pleased that the Fifth Circuit took a strong stance regarding an employee’s duty to complete medical certification forms. Employers must take care to follow the FMLA regulations concerning medical certification and the limitations on the deadlines employers can impose before they even consider taking advantage of this ruling.

Employees on Military Leave Are Entitled to No Greater Non-Seniority Benefits Upon Reemployment as Non-Military Employees Using Comparable Leave

The Uniformed Services Employment and Reemployment Rights Act (“USERRA”) does not entitle employees taking military leave to greater benefits upon reemployment than non-military employees using comparable non-military leave. *Rogers v. City of San Antonio*, 392 F.3d 758 (5th Cir. 2004). Plaintiffs were employees of the City of San Antonio and had been fulfilling training duties over several years in the National Guard. Plaintiffs sued the City of San Antonio claiming they were entitled to lost straight pay, overtime

opportunities and upgrade opportunities lost while fulfilling National Guard duties. The plaintiffs sued under the anti-discrimination provisions of USERRA. The Fifth Circuit Court of Appeals found that the district court should have applied the reemployment rights provisions of USERRA, since the plaintiffs sought benefits for the time they spent on leave. Applying that provision of USERRA, the Court of Appeals held that plaintiffs would only be entitled to

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**Employers Take Note:
Revised Child Labor Regulations Issued by the United States Department of Labor**

The Department of Labor issued new child labor regulations that will go into effect on February 14, 2005. Changes include DOL regulations instructing employers to hand over certificates of age to the minor upon separation of employment instead of returning it to the issuing agency. New DOL regulations will also be issued concerning the types of cooking duties minors may perform and cooking equipment that minors may use. New DOL regulations will also further prohibit minors from working on or about roofs. Additionally, the DOL has updated the definition and examples of explosives with respect to the prohibition of employment of minors in establishments that manufacture or store explosives.

The DOL is also introducing regulations which implement new federal laws such as the Compactor and Baler Act, which allows certain minors to work in compactor and baler operations. Moreover, new regulations are being issued to implement the Drive for Teen Employment Act. Under these regulations, minors under the age of 17 cannot drive on public roadways while on the job, and those minors who are seventeen are limited in doing so.

Employers who would like more information on child labor laws can obtain more information on the new developments at <http://www.dol.gov/esa/regs/fedreg/final/2004027182.pdf>. If you employ minors, we highly recommend you review this material.

**Fifth Circuit Holds That Unpaid Police Officers Are Volunteers,
Not Employees, Under the Fair Labor Standards Act**

The Fifth Circuit Court of Appeals recently held that “volunteer” police officers were volunteers, not employees, under the Fair Labor Standards Act, because anyone who performs public services without the expectation of compensation and with no tangible benefits for himself or herself, is volunteering for civic, charitable and/or humanitarian reasons. *Cleveland v. City of Elmendorf, Texas*, 388 F.3d 522 (5th Cir. 2004). In *Cleveland*, four former paid police officers of the Elmendorf, Texas Police Department sued the City for overtime wages they claimed were due under the FLSA. The City claimed it was exempt from the FLSA overtime laws, because a public agency that, in any workweek, employs fewer than five employees in law enforcement activities is exempt from paying those police overtime. 29 USC 213(b)(20). The plaintiffs claimed that the City was not exempt because its “non-paid regular” officers were employees under the FLSA.

Under the FLSA, an individual who works for a public agency and receives no compensation or is paid only expenses, reasonable benefits or a nominal fee for the services for which the individual volunteered, is not an employee. 29 USC 203(e)(4)(a). Specifically, under the Department of Labor’s regulations, an individual performing services for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered, is considered a volunteer. 29 C.F.R. 553.104. The regulation creates, and the Court adopted, a two-part test for ascertaining volunteer status: a) whether the individual is motivated by civic, charitable or humanitarian purposes; and, b) whether the individual receives compensation for the services.

The plaintiffs claimed that in order to be volunteers, the non-paid officers needed to be motivated solely by civic, charitable, or humanitarian reasons. The plaintiffs

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Interpreting the Family Medical Leave Act

For those employers trying to navigate through the regulations of the Family and Medical Leave Act, we suggest reference to the Department of Labor's website. The Internet tool is located at <http://www.dog.gov/elaws/fmla.html>. This site is one of many "e-law advisors" developed by the Wage and Hour Division of the Department of Labor to assist the public with federal employment laws and regulations. On the FMLA advisor's main page, <http://www.dol.gov/elaws/esa/fmla/fmlamenu.asp>, there are some questions listed that

both employees and employers may find useful.

Note for Employers: It may not be long before the Department of Labor revises some of its regulations interpreting the FMLA. Such discussions are ongoing. Difficulties interpreting the FMLA, as well as politically motivated concerns about its scope, may lead to significant changes in Congress and at the administrative level. Stay tuned.

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the benefits they claimed if non-military employees on comparable leave would have been entitled to those benefits. According to the Fifth Circuit, employees in

the military have no greater right to non-seniority benefits than comparable employees during times of USERRA protected leave.

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argued the non-paid officers volunteered in part for selfish reasons, namely, so that they could maintain their police commissions. The Court rejected that notion, finding instead that a common sense approach, derived from the statute and regulation, mandated that anyone willing to undertake the potentially dangerous jobs of police officers or firefighters without hope of compensation must possess some altruistic sense of civic responsibility. The Court concluded that this inferred motivation was enough to satisfy the motivation requirement of a volunteer, thereby rejecting the plaintiffs' argument that civic reasons had to be the "sole" motivation.

In its opinion, the Fifth Circuit also examined whether maintaining police commissions was a tangible benefit for the non-paid police officers, sufficient under the facts and circumstances, to indicate that the non-paid officers were actually employees under the FLSA. The Court found that maintaining commissions was simply a formality that allowed the non-paid officers to act as police officers in the first place. Simply put, the Court stated "in essence, the non-paid regulars receive no benefit from the City other than the ability to volunteer their services in compliance with Texas law." The Court found that this reasonable benefit of the job did not suffice as compensation.

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Inquiries concerning topics addressed in the *H.R. Alert* may be directed to Nan Alessandra, Jane Armstrong, Kim Boyle, or David Korn. Your comments, questions, and suggestions are encouraged.

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