

PROPOSED REGULATION OF THE PERSONNEL COMMISSION

LCB File No. R135-12

Section 1. NAC 284.52375 is hereby amended to read as follows:

Explanation of Proposed Change: This amendment, proposed by the Division of Human Resource Management, will clarify that that a physician’s assistant is a “provider of health care” and bring this regulation into alignment with the Family and Medical Leave Act federal regulations. This clarification will impact who an agency will accept medical documentation from in regards to an employee’s or an employee’s immediate family member’s medical condition. Additionally, the amendment will update the contact information for the First Church of Christ, Scientist.

NAC 284.52375 “Provider of health care” defined. (NRS 284.065, 284.155, 284.345) “Provider of health care” means:

1. A doctor of medicine or osteopathy who is authorized to practice medicine or surgery by the state or country in which the doctor practices.
2. A podiatric physician, a dentist, a clinical psychologist, an optometrist or a chiropractor who is authorized to practice as a podiatric physician, a dentist, a clinical psychologist, an optometrist or a chiropractor by the state or country in which he or she practices and who is performing within the scope of his or her practice as defined by the law of that state or country.
3. A nurse practitioner, nurse midwife, *physician assistant* or clinical social worker who is authorized to practice as a nurse practitioner, nurse midwife, *physician assistant* or clinical social worker by the state or country in which he or she practices and who is performing within the scope of his or her practice as defined by the law of that state or country.
4. A practitioner in Christian Science who is listed with The First Church of Christ, Scientist, in Boston, Massachusetts. The list of practitioners may be obtained from the Christian Science Committee on Publication for Nevada, ~~[P.O. Box 92752 Henderson]~~ [2994 Talbot St., Las Vegas, Nevada \[89009, 702.566.1097, at a cost of \\$3.50.\] 89169, 702.807.8026, nevada@compub.org](mailto:nevada@compub.org) [on the online directory located at www.spirituality.com](http://www.spirituality.com).
5. A provider of health care, as defined in NRS 629.031, acting within the scope of his or her license whose certification of the existence of a serious health condition is acceptable to substantiate a claim for benefits under the Public Employees’ Benefits Program.
(Added to NAC by Dep’t of Personnel, eff. 3-23-94; A 11-16-95; R082-00, 8-2-2000)

Sec. 2. NAC 284.566 is hereby amended to read as follows:

Explanation of Proposed Change: This amendment, proposed by the Division of Human Resource Management, removes the requirement that second medical opinions be obtained on a Family and Medical Leave Act (FMLA) certification form. The Americans with Disabilities Act (ADA) requires that medical information requested of an employee be consistent with business necessity. The information requested on a FMLA medical certification may not always be

relevant to an employee's need for sick leave and may lead to liability under the ADA. Additionally, a FMLA certification form does not always address the questions that need to be addressed in a sick leave second opinion. However, this would not eliminate the option of using a FMLA medical certification form, when appropriate.

Removing the requirement that a second opinion be provided by a health care provider that is not regularly used by the State will allow agencies to use providers with experience in occupational medicine for second opinions, not related to FMLA protected leave, even though they regularly provide services to the State. However, a provider of health care who provides a third opinion to settle the differences between a first and second opinion will still need to be approved jointly by the employee and the agency.

NAC 284.566 Sick leave: Approval by appointing authority; medical certification. (NRS 284.065, 284.155, 284.345, 284.355)

1. An appointing authority may approve sick leave only after having ascertained that the absence was for an authorized reason. For absences in excess of 3 consecutive working days, or for cases of suspected abuse, the appointing authority may require that the employee submit substantiating evidence, which may include, but is not limited to, a certificate from a provider of health care of the need for the absence.

2. For absences for which medical certification is required, the appointing authority may require the employee to provide a second medical opinion. The provider of health care who provides the second opinion of an employee's health condition shall certify as to the ability of the employee to perform his or her duties and responsibilities and when he or she believes the employee can return to work. The provider of health care who provides the second opinion of an immediate family member's health condition shall certify as to the health condition of the family member, the probable duration of the health condition and incapacity, and the need for the employee's assistance or presence. A copy of each opinion must be provided to the employee, the patient and the appointing authority, as appropriate. If the first and second opinions differ, the appointing authority may require the employee to provide a third medical opinion.

3. If a second medical opinion is required, an employee shall obtain the opinion ~~[, on the form which is used for certification under the Family and Medical Leave Act,]~~ from a provider of health care designated by the appointing authority. ~~[The designated provider of health care must not be regularly used by the State unless the employee or a member of his or her immediate family resides or works in an area where such a provider of health care is not available and must not be employed by the State.]~~ The agency shall pay for the consultation.

4. If a third medical opinion is required, an employee shall obtain the opinion ~~[, on the form which is used for certification under the Family and Medical Leave Act,]~~ from a provider of health care approved jointly by the employee and the appointing authority. If necessary, a list of three providers of health care from which the selection must be made may be requested from the medical society of the county in which the employee or, if applicable, the member of his or her immediate family, resides or works. If such a list is used, the selection of the third provider of health care must be made by the employee and appointing authority alternately striking one name off the list. The third opinion is final and binding. The agency shall pay for the consultation.

5. An employee shall request sick leave at least 30 days in advance if the need for leave is foreseeable and the sick leave is to be taken in conjunction with a planned leave of absence without pay.

6. An appointing authority may require a statement from a provider of health care that an employee is able to resume work if the requirement is related to the employee's ability to perform one or more of the essential functions of his or her position.

[Personnel Div., Rule VII § D subsec. 8, eff. 8-11-73; A and renumbered as subsec. 9, 2-5-82]—(NAC A by Dep't of Personnel, 10-26-84; 3-23-94; 11-16-95; R082-00, 8-2-2000)

Sec. 3. NAC 284.5811 is hereby amended to read as follows:

Explanation of Proposed Change: This amendment, proposed by the Division of Human Resource Management, will bring the regulation into alignment with the Family and Medical Leave Act (FMLA) federal regulations. The FMLA regulations prohibit requiring an employee who is receiving payment from a plan covering temporary disability (e.g., short term disability insurance) from being required to use paid leave concurrently with FMLA protected leave because the leave is not unpaid.

NAC 284.5811 Family and medical leave: Maximum amount in 12-month period; eligibility; use. (NRS 284.065, 284.155, 284.345, 284.350, 284.355, 284.3626)

1. Except as otherwise provided in subsection 2, an employee who is entitled to take leave pursuant to the Family and Medical Leave Act is limited to a total of 12 weeks of such leave during a rolling 12-month period. The rolling 12-month period is measured backward from the date an employee uses any leave pursuant to the Family and Medical Leave Act.

2. An employee who is entitled to take leave pursuant to the Family and Medical Leave Act to care for a covered servicemember is limited to a total of 26 weeks of such leave during a single 12-month period.

3. To calculate eligibility for leave pursuant to the Family and Medical Leave Act, each hour that an employee is in paid status in the 12-month period immediately preceding the leave must be considered as time worked.

4. Except as otherwise provided in ~~subsection~~ *subsections 5 and 6*, an employee who meets the requirements for eligibility for and who is taking leave pursuant to the Family and Medical Leave Act must exhaust all the accrued sick leave, accrued annual leave, accrued compensatory time and catastrophic leave that the employee is eligible to use based on the nature of the absence before he or she may use leave without pay. Any accrued sick leave, accrued annual leave, accrued compensatory time, catastrophic leave and holiday pay to which the employee is entitled pursuant to NAC 284.255 runs concurrently with the leave granted pursuant to the Family and Medical Leave Act if the employee is otherwise eligible for that sick leave, annual leave, compensatory time, catastrophic leave or holiday pay.

5. If an employee is absent from work as the result of a work-related injury or illness and he or she meets the requirements for eligibility for leave due to a serious health condition pursuant to the Family and Medical Leave Act:

(a) Any amount of time that the employee is absent from work during that period will be designated as leave pursuant to the Family and Medical Leave Act; and

(b) The employee may elect to use paid leave or leave without pay for the portion of time that he or she is not being compensated for the work-related injury or illness.

6. If an employee takes leave pursuant to the Family and Medical Leave Act, the employee may elect to use paid leave or leave without pay for the portion of time that his or her leave is covered by payment(s) from a plan covering temporary disabilities.

~~6~~7. An appointing authority may require an employee to provide medical or other appropriate documentation to support his or her need for leave pursuant to the Family and Medical Leave Act.

(Added to NAC by Dep't of Personnel, eff. 3-23-94; A 11-16-95; R082-00, 8-2-2000; A by Personnel Comm'n by R096-03, 10-30-2003; R145-05, 12-29-2005; R060-09, 11-25-2009)

Sec. 4. NAC 284.440 is hereby repealed:

Explanation of Proposed Change: This amendment, proposed by the Division of Human Resource Management, repeals NAC 284.440. As NAC 284.120 adopts the Americans with Disabilities Act definition for “essential functions of a position” by reference from 29 C.F.R. §1630.2, NAC 284.440 is redundant as this information is adopted by reference. Specifically, the federal regulation defines essential functions as “the fundamental job duties of the employment position the individual with a disability holds or desires” indicating that essential functions are specific to an employment position. Additionally, the federal regulation includes the criteria for determining what functions of a position are essential.

NAC 284.440 Determination by appointing authority. (NRS 284.065, 284.155)

~~[An appointing authority shall determine the essential functions of a position on a case by case basis. [An appointing authority shall consider the following factors, without limitation, in making its determination:~~

- ~~—1. Whether an employee is currently performing or has performed the function;~~
- ~~—2. Whether removing the function would fundamentally alter the position;~~
- ~~3. Whether the position exists to perform the function;~~
- ~~4. The number of other employees available to perform the function;~~
- ~~5. The degree of expertise or skill required to perform the function; and~~
- ~~6. The amount of time spent performing the function.]~~

(Added to NAC by Dep't of Personnel, eff. 7-6-92)—(Substituted in revision for NAC 284.356)