

**ADOPTED REGULATION OF THE
PERSONNEL COMMISSION**

LCB File No. R135-12

Effective October 4, 2013

EXPLANATION – Matter in *italics* is new; matter in brackets ~~omitted material~~ is material to be omitted.

AUTHORITY: §§1, 4 and 5, NRS 284.065 and 284.155; §2, NRS 284.065, 284.155 and 284.345; §3, NRS 284.065, 284.155, 284.345 and 284.355.

A REGULATION relating to state personnel; adding a physician assistant to the list of providers of health care from whom medical documentation will be accepted regarding the medical condition of an employee or an employee's immediate family member; revising certain provisions relating to the federal Family and Medical Leave Act; and providing other matters properly relating thereto.

Section 1. NAC 284.441 is hereby amended to read as follows:

284.441 1. The appointing authority shall provide a description of the essential functions of a position to each candidate who is being considered for a vacant position. The information must be provided in a timely manner to allow a candidate with a disability to determine his or her need for reasonable accommodation.

2. The appointing authority shall consider the essential functions of the position ~~that have been identified pursuant to NAC 284.440~~ when determining which candidate will be offered employment. If the disability of a candidate prevents or impedes the performance of one or more of the functions of the position that are not identified as essential, the appointing authority shall not consider those functions when determining which candidate will be offered employment.

3. The provisions of this section apply to all competitive and noncompetitive appointments to classified positions.

Sec. 2. NAC 284.52375 is hereby amended to read as follows:

284.52375 “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, Nevada 89009, (702) 566-1097, at a cost of \$3.50.~~ *2994 Talbot Street., Las Vegas, Nevada 89169, by telephone at (702) 807-8026, by electronic mail at nevada@compub.org or on the online directory located at www.christianscience.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.

Sec. 3. NAC 284.566 is hereby amended to read as follows:

284.566 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. *If a second medical opinion is required, an employee shall obtain the opinion from a provider of health care designated by the appointing authority. The employing agency shall pay for the consultation.* 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 *employing* agency shall pay for the consultation.

~~[5.]~~ 4. 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.]~~ 5. 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.

Sec. 4. NAC 284.568 is hereby amended to read as follows:

284.568 1. An appointing authority may place an employee on sick leave if:

(a) Due to a known or suspected illness or injury, the employee is not performing at the level required by his or her position or is not able to perform the essential functions of the position with or without reasonable accommodation, as determined by the appointing authority pursuant to NAC ~~[284.440 and]~~ 284.441; or

(b) The illness appears to be contagious.

2. If the appointing authority places the employee on sick leave pursuant to subsection 1, the appointing authority may require the employee, before the employee may return to work, to provide documentation from a provider of health care which verifies that the employee is medically able to perform the essential functions of the job with or without reasonable accommodation and does not have a contagious illness.

3. Except as otherwise provided in NRS 281.390, the appointing authority may require an eligible employee to use sick leave during the time family and medical leave is granted.

Sec. 5. NAC 284.440 is hereby repealed.

TEXT OF REPEALED SECTION

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.

LEGISLATIVE REVIEW OF ADOPTED REGULATIONS--NRS 233B.066
Informational Statement
LCB File #R135-12

1. A clear and concise explanation of the need for the adopted regulation.

The amendments to Sections 1, 4 and 5 delete references to NAC 284.440 which was repealed because it duplicated the federal law.

The amendment to Section 2 is required to bring the regulation into alignment with the federal Family and Medical Leave Act which includes physician assistants in its definition as a “provider of health care.”

The amendment to Section 3 is required to remove a possible conflict and violation of the American’s with Disabilities Act. 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.

2. Description of how public comment was solicited, a summary of public response, and an explanation of how other interested persons may obtain a copy of the summary.

Copies of the proposed regulations, notices of workshop, and notices of intent to act upon a regulation were sent by email to persons who were known to have an interest in the subject of proposed personnel regulation changes as well as any person who had specifically requested such notice. These documents were also made available on the Division of Human Resource Management website, emailed to all county libraries in Nevada, and posted at the following locations:

Blasdel Building	Grant Sawyer State Office Bldg.
209 E. Musser Street	555 E. Washington Blvd.
Carson City, NV 89701	Las Vegas, NV 89101
Nevada State Library and Archives	Capitol Building
100 Stewart Street	Main Floor
Carson City, NV 89701	Carson City, NV 89701
Legislative Building	Gaming Control Board
401 S. Carson Street	1919 College Parkway
Carson City, NV 89701	Carson City, NV 89701

Attached are pertinent minutes from the workshop and the Personnel Commission meeting.

A Regulation Workshop was conducted by the Division of Human Resource Management on June 18, 2012 and a public hearing was held by the Nevada Personnel Commission on December 7, 2012.

- 3. The number of persons who:**
 - (a) Attended each hearing:** December 7, 2012 – 45
 - (b) Testified at each hearing:** December 7, 2012 – 1
 - (c) Submitted written comments:** 0

- 4. For each person identified in paragraphs (b) and (c) of number 3 above, the following information if provided to the agency conducting the hearing:**

Carrie Hughes, Personnel Analyst
State of Nevada Human Resource Management Division
209 E. Musser St., Room 101
Carson City, NV 89701
(775) 684-0111
cphughes@admin.nv.gov

- 5. A description of how comment was solicited from affected businesses, a summary of their response and an explanation of how other interested persons may obtain a copy of the summary.**

Comments were not solicited from businesses, as the regulation does not affect businesses. Comments were solicited from effected parties including employees and employee associations. No written comments were received. Comments from the workshop can be obtained from the Division of Human Resource Management by contacting Shelley Blotter at sblotter@admin.nv.gov or calling (775) 684-0105.

- 6. If the regulation was adopted without changing any part of the proposed regulation, a summary of the reasons for adopting the regulation without change.**

The regulation changes in this file are a result of a comprehensive examination conducted by the Division in response to the Governor's request for State agencies to review regulations that are subject to its enforcement.

Initially, meetings were held with State agencies to solicit input regarding which regulations were problematic and/or hampered efficient business. Subsequently, a regulation workshop was held to gain additional input from all interested parties, including employee associations. Based upon the input received, changes were made to the proposed regulations.

During the workshop additional comments were received. As a result some proposed regulations were not taken to the Personnel Commission or were modified to address stakeholder concerns.

Testimony was heard and all sections of the regulation were unanimously adopted by the Personnel Commission.

7. **The estimated economic effect of the regulation on the business which it is to regulate and on the public.**
 - (a) **Estimated economic effect on the businesses which they are to regulate.**
 - (b) **Estimated economic effect on the public which they are to regulate.**

These regulations do not have a direct economic effect on either a regulated business or the public. They only impact the classified service of Executive Branch departments and the Nevada System of Higher Education.

8. **The estimated cost to the agency for enforcement of the proposed regulation:**

There is no additional cost to the agency for enforcement of these regulations.

9. **A description of any regulations of other State or governmental agencies which the regulation overlaps or duplicates and a statement explaining why the duplication or overlap is necessary. If the regulation overlaps or duplicates a federal regulation, the name of the regulating federal agency.**

There are no other state or government agency regulations that the proposed amendments duplicate.

10. **If the regulation includes provisions that are more stringent than a federal regulation that regulates the same activity, a summary of such provisions.**

These regulations do not include any provisions that are more stringent than any federal regulation.

11. **If the regulation provides a new fee or increases an existing fee, the total annual amount the agency expects to collect and the manner in which the money will be used.**

No fees are associated with these regulations.

Pertinent Testimony from Regulation Workshop Held June 18, 2012

Shelley Blotter: The meeting continued and proceeded to Section 16, 284.52375.

Priscilla Maloney: We are very happy that you're adding physician assistant.

Kimberley King: It's not a problem. My understanding is you tried to make that an informational note in the past regarding the address. Just thought it might make it easier for you.

Shelley Blotter: No, the Legislative Counsel Bureau actually requires us to put the address in even though it changes. There were no additional comments.

Priscilla Maloney: In reviewing what's being stricken, obviously, there's nothing being added but what's being stricken and then the explanation of proposed change. We were concerned about a couple of things on this. For instance, we're aware that Division of Industrial Relations maintains lists both of permanent impairment rating physicians and providers of Workers' Comp treatment. Those lists are maintained by DIR, and so in Subsection 3 from a provider of healthcare designated by the appointing authority, where that list would come from and what the possibilities of possible costs. It says the agency shall pay for the consultation, but we were concerned about where the list would come from and how they would be qualified to do this and whether you would be just dovetailing with, maybe, Division of Industrial Relations.

Carrie Hughes: This regulation, as you said, we're striking language, we're not adding specifically where that list would have to be attained from. Where this has come up in the past is where the office of Risk Management has participated in assisting agencies in getting second opinions done on medical documentation. Their list of employees, to some degree, with regards to Workers' Compensation and things like that are physicians that they have a relationship with and have a relationship with the State. So that's been the problem in the past. And really, that was the intent, was to allow Risk Management to potentially be able to assist an agency in finding a specialized doctor.

Priscilla Maloney: What's happened anecdotally, and I think you may have even been present during one grievance, we had a big discussion of, and AFSCME agrees that the problem where an agency was using the same kind of certification and/or release back-to-work form after that three days, they were just cobbling from the FMLA packet and forms that Division of Human Resources Management had online. And I think that that's a good thing that we're moving away so there's a clear delineation. You don't just use that as a template. You use a separate form. And I assume that you folks would be drafting a form that would subsequently be posted online for this?

Carrie Hughes: I don't know that there was any intent to draft a separate form. Part of the concern was that a second opinion could be requested for various reasons. If it was an FMLA second opinion, these forms would be entirely appropriate. But if it was a second opinion with regards to an Americans with Disabilities Act reasonable accommodation request for medical information, we have a form now for that online with sample questions that can be used, but also, there's a situation of potentially a second opinion on a catastrophic leave physician's documentation. Again, the questions are different. So I don't know that there's one size fits all type of form for this.

Priscilla Maloney: We're just trying to keep the simplicity for the State employee and if the problem with them going to their own physician, I mean, it's always preferable with their own physician because after three days, that physician is going to be, hopefully, intimately familiar with what's going on medically with that person and be able to assure the agency why they need to be out longer than three days. But the flip side of that is, of course, that the employee ends up paying for that consultation or that doctor's note. And that's the problem. But on the other hand,

it would be a concern of ours if they've been treating with their regular provider of healthcare and say, they've got the measles or some sort of viral thing and it's longer than the three days and the agency is concerned, for whatever reason, and wants a doctor's note, I think it would be easier for them to go back to their provider of healthcare that's already treating them for that than being shuffled off to a list of providers from the State after only three days. That would be our concern is that this may make it a little bit more burdensome than it needs to be.

Carrie Hughes: In the case of requiring documentation following an absence of more than three days, generally, they are going to be directed back to their healthcare provider. This would be a second opinion in a case where the facts don't seem to match up with what the physician has said.

Priscilla Maloney: Okay. So this is not for the Subsection 3. Subsection 3 is not contemplating that on day four of an absence you have to go use one of these providers of healthcare on Risk Management's list.

Carrie Hughes: That's not the intent. Also, if you notice, one of the sentences that was remaining at the end of Subsection 3 is that the agency would be responsible for paying for a second opinion.

Priscilla Maloney: Right. But we didn't know if it was three days and then, boom, on day four, you know, you're out of the situation where you're dealing with your own healthcare provider.

Carrie Hughes: That wasn't the intent, no.

Shelley Blotter: This is when the facts don't line up that we're getting a second opinion from a doctor from our provider list. She asked if there were any other comments. No other comments made.

Pertinent Testimony from Personnel Commission Meeting Held Dec. 7, 2012

Carrie Hughes, Personnel Analyst, Department of Administration, DHRM: Stated that she would be discussing Item X. C. LCB File No. R135-12.

A. LCB File No. R135-12

- Sec. 1 NAC 284.441 – Provision of description to candidates for vacant position; consideration for appointment
- Sec. 2 NAC 284.52375 – “Provider of health care” defined
- Sec. 3 NAC 284.566 – Sick leave; Approval by appointing authority; medical certification
- Sec. 4 NAC 284.568 – Sick leave; Placing employee on sick leave; conditions for return to work.
- Sec. 5 NAC 284.5811 – Family and medical leave; Maximum amount in 12-month period; eligibility; use
- Sec. 6 NAC 284.440 – Determination by appointing authority

Carrie Hughes, Personnel Analyst, Department of Administration, DHRM: Noted that the Legislative Counsel Bureau was proposing a permanent amendment to NAC 284.441 to remove the reference to NAC 284.440 which the DHRM had recommended be repealed. DHRM was proposing permanent amendments to NAC 284.52375 adding the proposed language “physician’s assistant” which would clarify that a physician’s assistant would be a provider of healthcare and bring the regulation into alignment with the Family of Medical Leave Act, Federal Regulations. She noted that in addition, the contact information for the First Church of Christ Scientist had been updated. She stated the DHRM was proposing a permanent amendment to NAC 284.566 to remove the requirement that a second opinion be provided by a healthcare provider that was not regularly used by the state and that a second medical opinion be obtained on a Family and Medical Leave Act (FMLA) certification form. She stated that removing the requirement that a second opinion not related to FMLA leave be obtained from a healthcare provider not regularly used by the state would allow agencies to use doctors with experience in occupational medicine even though they regularly provided services to the state. She noted that information requested on a FMLA certification form might not always be relevant to an employee’s need for sick leave and might lead to liability under the Americans with Disabilities Act’s requirement that medical information requested with business was necessary. She noted that the Legislative Counsel Bureau was proposing a permanent amendment to NAC 284.568 that references NAC 284.440 which the DHRM had proposed be repealed. DHRM was proposing the repeal of NAC 284.440 as NAC 284.120 would adopt the Americans with Disabilities Act’s definition for essential functions of the position by reference. She said the language of NAC 284.440 stating that essential functions were specific to a position and providing the definition of an essential function was redundant.

Chairperson Fox: Asked if workshops were done on the regulation changes. **Carrie Hughes:** Responded that was correct.

MOTION: Moved to approve changes identified in LCB No. R135-12
BY: Commissioner Brust
SECOND: Commissioner Sanchez
VOTE: The vote was unanimous in favor of the motion