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# **THE FAMILY AND MEDICAL LEAVE ACT OF 1993**

## **THE STATUTE AND FINAL REGULATIONS**

29 United States Code, Title 29, Section 2601 *et seq.*

Code of Federal Regulations, Title 29, Part 29 (2013)

*With annotations and an interpretive supplement*

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## Foreword

This is the complete text of the Family and Medical Leave Act of 1993 and the Department of Labor's final regulations implementing the statute, reproduced here as they appear on the Department's website, <<http://www.dol.gov>>.

Additional information which may be helpful to workers and union stewards, including footnotes and addenda dealing with FMLA questions, is also included. They are NOT part of the statute or the regulations.

This document, including all annotations, footnotes, and addenda, was prepared by Thomas B. Cochrane, Associate General Counsel of the Ohio Civil Service Employees Association (OCSEA), AFSCME Local 11, for reference use by its staff and officers only, and is not a substitute for sound legal advice. Anyone with an FMLA question should consult an attorney. OCSEA is not responsible for any errors or omissions which may appear herein, and disclaims any and all responsibility for any injury that may arise as a result of reliance hereon.

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## Introduction

The Family and Medical Leave Act is a federal law that is binding on most private and public sector employers in the United States. The regulations have the same force and effect as the law and are also binding, although a federal court may strike down any regulation it deems to be arbitrary, capricious, or manifestly contrary to the statute.

A number of cases are cited in the annotations and footnotes. The reader must always bear in mind that a court opinion is binding only in the jurisdiction of the court which decided it. The case *Millea v. Metro-North Railroad Co.*, 658 F.3d 154 (2nd Cir. 2011), for example, is binding only in the Second Circuit. Courts of other jurisdictions may choose to follow it, but they are not legally required to do so. All of OCSEA's bargaining units reside in the Sixth Circuit, which encompasses Michigan, Ohio, Kentucky, and Tennessee.

Opinions of the U.S. Supreme Court generally are binding throughout the United States.

The FMLA was amended on January 28, 2008, and the Department of Labor issued new regulations on January 19, 2009, and February 6, 2013. Cases decided before these dates may have little or no precedential value where the statutory or regulatory provision to which they pertain has changed.





# The Family and Medical Leave Act of 1993

*Public Law 103-3*

*Enacted February 5, 1993*

*As Amended by Section 585 of the  
National Defense Authorization Act for FY 2008  
Public Law [110-181] Enacted January 28, 2008*

*As Amended by Section 565 of the  
National Defense Authorization Act for Fiscal Year 2010  
Public Law [111-84] Enacted October 28, 2009*

*As Amended by the  
Airline Flight Crew Technical Corrections Act  
Public Law [111-119] Enacted December 21, 2009*

## *An Act*

To grant family and temporary medical leave under certain circumstances.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

### **Section 1. Short Title; Table of Contents**

(a) Short Title — This Act may be cited as the “Family and Medical Leave Act of 1993”.

(b) Table of Contents — The table of contents is as follows:

Sec. 1. Short title; table of contents.

Sec. 2. Findings and purposes.

#### **Title I — General Requirements for Leave**

Sec. 101. Definitions.

Sec. 102. Leave requirement.

Sec. 103. Certification.

Sec. 104. Employment and benefits protection.

Sec. 105. Prohibited acts.

Sec. 106. Investigative authority.

Sec. 107. Enforcement.

Sec. 108. Special rules concerning employees of local educational agencies.

Sec. 109. Notice.

#### **Title II — Leave for Civil Service Employees**

Sec. 201. Leave requirement.

#### **Title III — Commission on Leave**

Sec. 301. Establishment.

Sec. 302. Duties.

Sec. 303. Membership.

Sec. 304. Compensation.

Sec. 305. Powers.

Sec. 306. Termination.

#### **Title IV — Miscellaneous Provisions**

Sec. 401. Effect on other laws.

Sec. 402. Effect on existing employment benefits.

Sec. 403. Encouragement of more generous leave policies.

Sec. 404. Regulations.

Sec. 405. Effective dates.

#### **Title V — Coverage of Congressional Employees**

Sec. 501. Leave for certain Senate employees.

Sec. 502. Leave for certain House employees.

#### **Title VI — Sense of Congress**

Sec. 601. Sense of Congress.

## Sec. 2 [29 U.S.C. § 2601] Findings and Purposes

(a) Findings— Congress finds that—

(1) the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly;

(2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions;

(3) the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting;

(4) there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods;

(5) due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men; and

(6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.

(b) Purposes — It is the purpose of this Act —

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;

(3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;

(4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and

(5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

## Title I — General Requirements for Leave

### Sec. 101 [29 U.S.C. § 2611] Definitions

As used in this title:

(1) Commerce— The terms “commerce” and “industry or activity affecting commerce” mean any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include “commerce” and any “industry affecting commerce”, as defined in paragraphs (1) and (3) of section 501 of the Labor Management Relations Act, 1947 (29 U.S.C. 142 (1) and (3)).

(2) Eligible Employee—

(A) In General— The term “eligible employee” means an employee who has been employed—

(i) for at least 12 months by the employer with respect to whom leave is requested under section 102; and

(ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

(B) Exclusions— The term “eligible employee” does not include—

(i) any Federal officer or employee covered under subchapter V of chapter 63 of title 5, United States Code (as added by title II of this Act); or

(ii) any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50.

(C) Determination— For purposes of determining whether an employee meets the hours of service requirement specified in subparagraph (A)(ii), the legal standards established under section 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 207) shall apply.

(3) Employ; Employee; State— The terms “employ”, “employee”, and “State” have the same meanings given such terms in subsections (c), (e), and (g) of section 3 of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(c), (e), and (g)).

(4) Employer—

(A) In General— The term “employer”—

(i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

(ii) includes—

(I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and

(II) any successor in interest of an employer; and

(III) includes any “public agency”, as defined in section 3(x) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203 (x)).

(B) Public Agency— For purposes of subparagraph (A) (iii), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.

(5) Employment Benefits— The term “employment benefits” means all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer or through an “employee benefit plan”, as defined in section 3 (3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002 (3)).

(6) Health Care Provider— The term “health care provider” means—

(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(B) any other person determined by the Secretary to be capable of providing health care services.

(7) Parent— The term “parent” means the biological parent of an employee or an individual who stood in loco parentis to an employee when the employee was a son or daughter.

(8) Person— The term “person” has the same meaning given such term in section 3 (a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203 (a)).

(9) Reduced Leave Schedule— The term “reduced leave schedule” means a leave schedule that reduces the usual

number of hours per workweek, or hours per workday, of an employee.

(10) Secretary— The term “Secretary” means the Secretary of Labor.

(11) Serious Health Condition— The term “serious health condition” means an illness, injury, impairment, or physical or mental condition that involves—

(A) inpatient care in a hospital, hospice, or residential medical care facility; or

(B) continuing treatment by a health care provider.

(12) Son or Daughter— The term “son or daughter” means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is—

(A) under 18 years of age; or

(B) 18 years of age or older and incapable of self-care because of a mental or physical disability.

(13) Spouse— The term “spouse” means a husband or wife, as the case may be.<sup>1</sup>

(14) Active Duty— The term “active duty” means duty under a call or order to active duty under a provision of law referred to in section 101 (a) (13) (B) of title 10, United States Code.

(15) Contingency Operation— The term “contingency operation” has the same meaning given such term in section 101 (a) (13) of title 10, United States Code.

(16) Covered Servicemember— The term “covered servicemember” means a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury of illness.

(17) Outpatient Status— The term “outpatient status”, with respect to a covered servicemember, means the status of a member of the Armed Forces assigned to—

(A) a military medical treatment facility as an outpatient; or

(B) a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.

(18) Next of Kin— The term “next of kin”, used with respect to an individual, means the nearest blood relative of that individual.

(19) Serious Injury or Illness— The term “serious injury or illness”, in the case of a member of the Armed Forces, including a member of the National Guard or Reserves, means an injury or illness incurred by the member in line of duty on active duty in the Armed Forces that may render the member medically unfit to perform duties of the member’s office, grade, rank, or rating.

## Sec. 102. [29 U.S.C. § 2612] Leave Requirement

(a) In General—

(1) Entitlement to Leave— Subject to section 103, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(E) Because of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation.

(2) Expiration of Entitlement— The entitlement to leave under subparagraphs (A) and (B) of paragraph (1) for a birth or placement of a son or daughter shall expire at the end of the 12-month period beginning on the date of such birth or placement.

(3) Servicemember Family Leave— Subject to section 103, an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember shall be entitled to a total of 26 workweeks of leave during a 12-month period to care for the servicemember. The leave described in this paragraph shall only be available during a single 12-month period.

(4) Combined Leave Total— During the single 12-month period described in paragraph (3), an eligible employee shall be entitled to a combined total of 26 workweeks of leave under paragraphs (1) and (3). Nothing in this paragraph shall be construed to limit the availability of leave under paragraph (1) during any other 12-month period.

(b) Leave Taken Intermittently or on a Reduced Leave Schedule—

(1) In General— Leave under subparagraph (A) or (B) of subsection (a) (1) shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise. Subject to paragraph (2), subsection (e) (2), and subsection (b) (5) or (f) (as appropriate) of section 103, leave under subparagraph (C) or (D) of subsection (a) (1) or under subsection (a) (3) may be taken intermittently or on a reduced leave schedule when medically necessary. Subject to subsection (e) (3) and section 103 (f), leave under subsection (a) (1) (E) may be taken intermittently or on a reduced leave schedule. The taking of leave intermittently or on a reduced leave schedule pursuant to this paragraph shall not result in a reduction in the total amount of leave to which the employee is entitled under subsection (a) beyond the amount of leave actually taken.

(2) Alternative Position— If an employee requests intermittent leave, or leave on a reduced leave schedule, under subparagraph (C) or (D) of subsection (a) (1), or under subsection (a) (3), that is foreseeable based on planned medical treatment, the employer may require such employee to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified and that—

(A) has equivalent pay and benefits; and

(B) better accommodates recurring periods of leave than the regular employment position of the employee.

(c) Unpaid Leave Permitted— Except as provided in subsection (d), leave granted under subsection (a) may consist of unpaid leave. Where an employee is otherwise exempt under regulations issued by the Secretary pursuant to section 13(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)(1)), the compliance of an employer with this title by providing unpaid leave shall not affect the exempt status of the employee under such section.

(d) Relationship to Paid Leave—

<sup>1</sup> See § 825.103.

(1) Unpaid Leave— If an employer provides paid leave for fewer than 12 workweeks (or 26 workweeks in the case of leave provided under subsection (a) (3)), the additional weeks of leave necessary to attain the 12 workweeks (or 26 workweeks, as appropriate) of leave required under this title may be provided without compensation.

(2) Substitution of Paid Leave—

(A) In General— An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph (A), (B), or (C) of subsection (a) (1) for any part of the 12-week period of such leave under such subsection.

(B) Serious Health Condition— An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under subparagraph (C) or (D) of subsection (a) (1) for any part of the 12-week period of such leave under such subsection, except that nothing in this title shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave. An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, family leave, or medical or sick leave of the employee for leave provided under subsection (a) (3) for any part of the 26-week period of such leave under such subsection, except that nothing in this title requires an employer to provide paid sick leave or paid medical leave in any situation in which the employer would not normally provide any such paid leave.

(e) Foreseeable Leave—

(1) Requirement of Notice— In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a) (1) is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(2) Duties of Employee— In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a) (1) or under subsection (a) (3) is foreseeable based on planned medical treatment, the employee—

(A) shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate;<sup>2</sup> and

(B) shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the

employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(3) Notice for Leave Due to Active Duty of Family Member— In any case in which the necessity for leave under subsection (a) (1) (E) is foreseeable, whether because the spouse, or son, daughter, or parent, of the employee is on active duty, or because of notification of an impending call or order to active duty in support of a contingency operation, the employee shall provide such notice to the employer as is reasonable and practicable.

(f) Spouses Employed by the Same Employer—

(1) In General— In any case in which a husband and wife entitled to leave under subsection (a) are employed by the same employer, the aggregate number of workweeks of leave to which both may be entitled may be limited to 12 workweeks during any 12-month period, if such leave is taken—

(A) under subparagraph (A) or (B) of subsection (a)(1); or

(B) to care for a sick parent under subparagraph (C) of such subsection.

(2) Servicemember Family Leave—

(A) In General— The aggregate number of workweeks of leave to which both that husband and wife may be entitled under subsection (a) may be limited to 26 workweeks during the single 12-month period described in subsection (a) (3) if the leave is—

(i) leave under subsection (a) (3); or

(ii) a combination of leave under subsection (a) (3) and leave described in paragraph (1).

(B) Both Limitation Applicable— If the leave taken by the husband and wife includes leave described in paragraph (1), the limitation in paragraph (1) shall apply to the leave described in paragraph (1).

**Sec. 103 [29 U.S.C. § 2613] Certification**

(a) In General— An employer may require that a request for leave under subparagraph (C) or (D) of paragraph (1) or paragraph (3) of section 102 (a) section 102(a)(1) be supported by a certification issued by the health care provider of the eligible employee or of the son, daughter, spouse, or parent of the employee, or of the next of kin of an individual in the case of leave taken under such paragraph (3), as appropriate. The employee shall provide, in a timely manner, a copy of such certification to the employer.

(b) Sufficient Certification— Certification provided under subsection (a) shall be sufficient if it states—

(1) the date on which the serious health condition commenced;

(2) the probable duration of the condition;

(3) the appropriate medical facts within the knowledge of the health care provider regarding the condition;

(4)

(A) for purposes of leave under section 102(a)(1)(C), a statement that the eligible employee is needed to care for the son, daughter, spouse, or parent and an estimate of the amount of time that such employee is needed to care for the son, daughter, spouse, or parent; and

(B) for purposes of leave under section 102(a)(1)(D), a statement that the employee is unable to perform the functions of the position of the employee;

(5) in the case of certification for intermittent leave, or leave on a reduced leave schedule, for planned medical

<sup>2</sup> "The statute places a duty on an employee taking foreseeable leave to 'make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer.'... The provision requires that an eligible employee not inconvenience an employer by scheduling a foreseeable treatment in an avoidably disruptive way. It does not mean that the employee must have scheduled treatment prior to applying for FMLA leave." *Dobrowski v. Jay Dee Contractors, Inc.*, No. 08-1806 (6th Cir. July 8, 2009).

treatment, the dates on which such treatment is expected to be given and the duration of such treatment;

(6) in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 102(a)(1)(D), a statement of the medical necessity for the intermittent leave or leave on a reduced leave schedule, and the expected duration of the intermittent leave or reduced leave schedule; and

(7) in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 102(a)(1)(C), a statement that the employee's intermittent leave or leave on a reduced leave schedule is necessary for the care of the son, daughter, parent, or spouse who has a serious health condition, or will assist in their recovery, and the expected duration and schedule of the intermittent leave or reduced leave schedule.

(c) Second Opinion—

(1) In General— In any case in which the employer has reason to doubt the validity of the certification provided under subsection (a) for leave under subparagraph (C) or (D) of section 102(a)(1), the employer may require, at the expense of the employer, that the eligible employee obtain the opinion of a second health care provider designated or approved by the employer concerning any information certified under subsection (b) for such leave.

(2) Limitation— A health care provider designated or approved under paragraph (1) shall not be employed on a regular basis by the employer.

(d) Resolution of Conflicting Opinions—

(1) In General— In any case in which the second opinion described in subsection (c) differs from the opinion in the original certification provided under subsection (a), the employer may require, at the expense of the employer, that the employee obtain the opinion of a third health care provider designated or approved jointly by the employer and the employee concerning the information certified under subsection (b).

(2) Finality— The opinion of the third health care provider concerning the information certified under subsection (b) shall be considered to be final and shall be binding on the employer and the employee.

(e) Subsequent Recertification— The employer may require that the eligible employee obtain subsequent recertifications on a reasonable basis.

(f) Certification Related to Active Duty or Call to Active Duty— An employer may require that a request for leave under section 102 (a) (1) (E) be supported by a certification issued at such time and in such manner as the Secretary may by regulation prescribe. If the Secretary issues a regulation requiring such certification, the employee shall provide, in a timely manner, a copy of such certification to the employer.

#### **Sec. 104. [29 U.S.C. § 2614] Employment and Benefits Protection**

(a) Restoration to Position—

(1) In General— Except as provided in subsection (b), any eligible employee who takes leave under section 102 for the intended purpose of the leave shall be entitled, on return from such leave—

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

(2) Loss of Benefits— The taking of leave under section 102 shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

(3) Limitations— Nothing in this section shall be construed to entitle any restored employee to—

(A) the accrual of any seniority or employment benefits during any period of leave; or

(B) any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

(4) Certification— As a condition of restoration under paragraph (1) for an employee who has taken leave under section 102 (a) (1) (D), the employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.

(5) Construction— Nothing in this subsection shall be construed to prohibit an employer from requiring an employee on leave under section 102 to report periodically to the employer on the status and intention of the employee to return to work.

(b) Exemption Concerning Certain Highly Compensated Employees—

(1) Denial of Restoration— An employer may deny restoration under subsection (a) to any eligible employee described in paragraph (2) if—

(A) such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer;

(B) the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that such injury would occur; and

(C) in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice.

(2) Affected Employees— An eligible employee described in paragraph (1) is a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed.

(c) Maintenance of Health Benefits—

(1) Coverage— Except as provided in paragraph (2), during any period that an eligible employee takes leave under section 102, the employer shall maintain coverage under any "group health plan" (as defined in section 5000(b)(1) of the Internal Revenue Code of 1986) for the duration of such leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave.

(2) Failure to Return from Leave— The employer may recover the premium that the employer paid for maintaining coverage for the employee under such group health plan during any period of unpaid leave under section 102 if—

(A) the employee fails to return from leave under section 102 after the period of leave to which the employee is entitled has expired; and

(B) the employee fails to return to work for a reason other than—

(i) the continuation, recurrence, or onset of a serious health condition that entitles the employee to leave under subparagraph (C) or (D) of section 102(a)(1) or under section 102 (a) (3); or

(ii) other circumstances beyond the control of the employee.

(3) Certification—

(A) Issuance— An employer may require that a claim that an employee is unable to return to work because of the continuation, recurrence, or onset of the serious health condition described in paragraph (2)(B)(i) be supported by—

(i) a certification issued by the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate, in the case of an employee unable to return to work because of a condition specified in section 102(a)(1)(C); or

(ii) a certification issued by the health care provider of the eligible employee, in the case of an employee unable to return to work because of a condition specified in section 102(a)(1)(D); or

(iii) a certification issued by the health care provider of the servicemember being cared for by the employee, in the case of an employee unable to return to work because of a condition specified in section 102 (a) (3).

(B) Copy— The employee shall provide, in a timely manner, a copy of such certification to the employer.

(C) Sufficiency of Certification—

(i) Leave Due to Serious Health Condition of Employee— The certification described in subparagraph (A)(ii) shall be sufficient if the certification states that a serious health condition prevented the employee from being able to perform the functions of the position of the employee on the date that the leave of the employee expired.

(ii) Leave Due to Serious Health Condition of Family Member— The certification described in subparagraph (A) (i) shall be sufficient if the certification states that the employee is needed to care for the son, daughter, spouse, or parent who has a serious health condition on the date that the leave of the employee expired.

### Sec. 105. [29 U.S.C. § 2615] Prohibited Acts

(a) Interference with Rights—

(1) Exercise of Rights— It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this title.<sup>3</sup>

<sup>3</sup> In an interference claim, “[t]he question is not whether an employee can comply with the [employer’s] policy, but whether the employer’s enforcement of its policy discourages the employee from exercising his FMLA leave.” *Jackson v. Jernberg Indus., Inc.*, 2010 U.S. Dist. LEXIS 1581, \*29 (N.D. Ill. 2010).

“To prevail on an interference claim, a plaintiff must show that 1) she is an eligible employee, 2) the defendant is an employer under the act, 3) she was entitled to leave under the FMLA, 4) she gave the employer notice of her intention to take foreseeable leave, and 5) the employer denied her FMLA benefits to which she was entitled.” *Nawrocki v. United Methodist Retirement Communities*, 174 Fed. Appx. 334, 337 (6<sup>th</sup> Cir. 2006) (citations omitted).

(2) Discrimination— It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this title.<sup>4</sup>

(b) Interference with Proceedings or Inquiries— It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual—

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this title;

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this title; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this title.

### Sec. 106. [29 U.S.C. § 2616] Investigative Authority

(a) In General— To ensure compliance with the provisions of this title, or any regulation or order issued under this title, the Secretary shall have, subject to subsection (c), the investigative authority provided under section 11(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 211(a)).

(b) Obligation to Keep and Preserve Records— Any employer shall make, keep, and preserve records pertaining to compliance with this title in accordance with section 11 (c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 211(c)) and in accordance with regulations issued by the Secretary.

<sup>4</sup> 29 § 2615 (a)(2) prohibits both discrimination and interference. “The retaliation theory considers the employer’s intent, because retaliation claims impose liability on employers that act against employees specifically because those employees invoked their FMLA rights. Courts therefore apply the *McDonnell Douglas* burden-shifting test to FMLA retaliation claims. A prima facie case of FMLA retaliation requires a showing that (1) the plaintiff availed himself of a protected right under the FMLA by notifying the employer of his intent to take leave; (2) the plaintiff suffered an adverse employment action, and (3) there existed a causal connection between the plaintiff’s exercise of his FMLA rights and the adverse employment action.” *Gannon v. Cannon County, Tenn., Bd. Of Education*, 2011 WL 6888540, \*9-10 (M.D.Tenn. 2011) (internal quotes and citations omitted).

An employee cannot prevail on an interference claim where the employer honestly believed it had a legitimate, non-discriminatory reason for denying an employee’s FMLA. *Tillman v. Ohio Bell Tel. Co.*, 545 Fed.Appx. 340, 348-49 (6<sup>th</sup> Cir. 2013) (*unpublished*) (“Ohio Bell proffered a legitimate, non-discriminatory reason for Tillman’s termination: his abuse of FMLA leave and his corresponding violation of the company’s Code of Business Conduct. Tillman disputes that he abused his FMLA leave, and, thus, Ohio Bell did not actually have cause to discharge him. This is essentially a ‘no basis in fact’ pretext claim. However, as the district court properly recognized, the ‘honest belief rule defeats this type of pretext argument. As long as an employer has an honest belief in its proffered non-discriminatory reason, the employee cannot establish pretext simply because the reason is ultimately shown to be incorrect.... [T]he plaintiff must allege more than a dispute over facts upon which his discharge is based. He must put forth evidence which demonstrates that the employer did not honestly believe in the proffered non-discriminatory reason for its adverse employment action.” (internal quotes and citations omitted).

(c) Required Submissions General Limited to an Annual Basis— The Secretary shall not under the authority of this section require any employer or any plan, fund, or program to submit to the Secretary any books or records more than once during any 12-month period, unless the Secretary has reasonable cause to believe there may exist a violation of this title or any regulation or order issued pursuant to this title, or is investigating a charge pursuant to section 107(b).

(d) Subpoena Powers— For the purposes of any investigation provided for in this section, the Secretary shall have the subpoena authority provided for under section 9 of the Fair Labor Standards Act of 1938.

#### Sec. 107. [29 U.S.C. § 2617] Enforcement

(a) Civil Action by Employees—

(1) Liability— Any employer who violates section 105 shall be liable to any eligible employee affected—

(A) for damages equal to—

(i) the amount of—

(I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or

(II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks (or 26 weeks, in a case involving leave under section 102 (a) (3)) of wages or salary for the employee;

(ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and

(iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer who has violated section 105 proves to the satisfaction of the court that the act or omission which violated section 105 was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of section 105, such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively;<sup>5</sup> and

(B) for such equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(2) Right of Action.— An action to recover the damages or equitable relief prescribed in paragraph (1) may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of—

(A) the employees; or

(B) the employees and other employees similarly situated.

(3) Fees and Costs— The court in such an action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action to be paid by the defendant.

(4) Limitations— The right provided by paragraph (2) to bring an action by or on behalf of any employee shall terminate—

(A) on the filing of a complaint by the Secretary in an action under subsection (d) in which restraint is sought of any further delay in the payment of the amount described in paragraph (1)(A) to such employee by an employer responsible under paragraph (1) for the payment; or

(B) on the filing of a complaint by the Secretary in an action under subsection (b) in which a recovery is sought of the damages described in paragraph (1)(A) owing to an eligible employee by an employer liable under paragraph (1), unless the action described in subparagraph (A) or (B) is dismissed without prejudice on motion of the Secretary.

(b) Action by the Secretary—

(1) Administrative Action— The Secretary shall receive, investigate, and attempt to resolve complaints of violations of section 105 in the same manner that the Secretary receives, investigates, and attempts to resolve complaints of violations of sections 6 and 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 206 and 207).

(2) Civil Action— The Secretary may bring an action in any court of competent jurisdiction to recover the damages described in subsection (a) (1) (A).

(3) Sums Recovered— Any sums recovered by the Secretary pursuant to paragraph (2) shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to each employee affected. Any such sums not paid to an employee because of inability to do so within a period of 3 years shall be deposited into the Treasury of the United States as miscellaneous receipts.

(c) Limitation—

(1) In General— Except as provided in paragraph (2), an action may be brought under this section not later than 2 years after the date of the last event constituting the alleged violation for which the action is brought.

(2) Willful Violation— In the case of such action brought for a willful violation of section 105, such action may be brought within 3 years of the date of the last event constituting the alleged violation for which such action is brought.<sup>6</sup>

(3) Commencement— In determining when an action is commenced by the Secretary under this section for the purposes of this subsection, it shall be considered to be commenced on the date when the complaint is filed.

(d) Action for Injunction by Secretary— The district courts of the United States shall have jurisdiction, for cause shown, in an action brought by the Secretary—

<sup>5</sup> There is a strong presumption in favor of awarding liquidated damages. *Jackson v. City of Hot Springs*, 751 F.3d 855, 865-66 (8<sup>th</sup> Cir. 2014) (“To avoid a liquidated damages award, [the employer bears] the burden of establishing that it acted with subjective good faith and that it had an objectively reasonable belief that its conduct did not violate the law. Showing good faith when a jury has determined intentional retaliation is a very high bar to clear, if indeed it can be.” (internal quotes and citations omitted)).

<sup>6</sup>Whether an employer's actions are “willful” should be determined according to the Supreme Court's definition of willfulness laid down in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 28 Wage & Hour Cas. 1017 (1988). *Hillstrom v. Best Western TLC Hotel*, 354 F.3d 27, 9 Wage & Hour Cas. 2d 331 (1<sup>st</sup> Cir. 2003). *Accord, Bass v. Potter*, No. 06-5149, 522 F.3d 1098 (10<sup>th</sup> Cir. 2008).

(1) to restrain violations of section 105, including the restraint of any withholding of payment of wages, salary, employment benefits, or other compensation, plus interest, found by the court to be due to eligible employees; or

(2) to award such other equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(e) Solicitor of Labor— The Solicitor of Labor may appear for and represent the Secretary on any litigation brought under this section.

#### **Sec. 108. Special Rules Concerning Employees of Local Educational Agencies**

*[Text omitted.]*

#### **Sec. 109. [29 U.S.C. § 2619] Notice**

(a) In General— Each employer shall post and keep posted, in conspicuous places on the premises of the employer where notices to employees and applicants for employment are customarily posted, a notice, to be prepared or approved by the Secretary, setting forth excerpts from, or summaries of, the pertinent provisions of this title and information pertaining to the filing of a charge.

(b) Penalty— Any employer that willfully violates this section may be assessed a civil money penalty not to exceed \$100 for each separate offense.

#### **Title II — Leave for Civil Service Employees**

*[Text omitted.]*

#### **Title III — Commission on Leave**

*[Text omitted.]*

#### **Title IV — Miscellaneous Provisions**

#### **Sec. 401. [29 U.S.C. § 2651] Effect on Other Laws**

(a) Federal and State Antidiscrimination Laws— Nothing in this Act or any amendment made by this Act shall be construed to modify or affect any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability.

(b) State and Local Laws— Nothing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act.

#### **Sec. 402. [29 U.S.C. § 2652] Effect on Existing Employment Benefits**

(a) More Protective— Nothing in this Act or any amendment made by this Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act or any amendment made by this Act.

(b) Less Protective— The rights established for employees under this Act or any amendment made by this Act shall not be diminished by any collective bargaining agreement or any employment benefit program or plan.

#### **Sec. 403. [29 U.S.C. § 2653] Encouragement of More Generous Leave Policies**

Nothing in this Act or any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act.

#### **Sec. 404. [29 U.S.C. § 2654] Regulations**

The Secretary of Labor shall prescribe such regulations as are necessary to carry out title I and this title not later than 120 days after the date of the enactment of this Act.

#### **Sec. 405. Effective Dates**

*[Text omitted.]*

#### **Title V— Coverage of Congressional Employees**

*[Text omitted.]*

#### **Title VI— Sense of Congress**

*[Text omitted.]*







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Code of Federal Regulations, Title 29, Chapter V, Subchapter C, Part 825  
THE FAMILY AND MEDICAL LEAVE ACT OF 1993

**Subpart A—Coverage Under the Family and Medical Leave Act**

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## Subpart A—Coverage Under the Family and Medical Leave Act

### § 825.100 The Family and Medical Leave Act.

(a) The Family and Medical Leave Act of 1993, as amended, (FMLA or Act) allows eligible employees of a covered employer to take job-protected, unpaid leave, or to substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 12 workweeks in any 12 months (*see* § 825.200(b)) because of the birth of a child and to care for the newborn child, because of the placement of a child with the employee for adoption or foster care, because the employee is needed to care for a family member (child, spouse, or parent) with a serious health condition, because the employee's own serious health condition makes the employee unable to perform the functions of his or her job, or because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty). In addition, eligible employees of a covered employer may take job-protected, unpaid leave, or substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 26 workweeks in a single 12-month period to care for a covered servicemember with a serious injury or illness. In certain cases, FMLA leave may be taken on an intermittent basis rather than all at once, or the employee may work a part-time schedule.<sup>7</sup>

(b) An employee on FMLA leave is also entitled to have health benefits maintained while on leave as if the employee had continued to work instead of taking the leave. If an employee was paying all or part of the premium payments prior to leave, the employee would continue to pay his or her share during the leave period. The employer may recover its share only if the employee does not return to work for a reason other than the serious health condition of the employee or the employee's covered family member, the serious injury or illness of a covered servicemember, or another reason beyond the employee's control.

(c) An employee generally has a right to return to the same position or an equivalent position with equivalent pay, benefits, and working conditions at the conclusion of the leave. The taking of FMLA leave cannot result in the loss of any benefit that accrued prior to the start of the leave.

<sup>7</sup>The legislative history to the statutory language providing leave for sick employees states that 'it is unfair for an employee to be terminated when he or she is struck with a serious illness and is not capable of working.' S.Rep. No. 103-3 (1993), reprinted in 1993 U.S.C.A.N. 3, 13." *Strickland v. Water Works & Sewer Board of the City of Birmingham*, 239 F.3d 1199, 1205 n.7, 6 Wage & Hour Cas. (BNA) 2d 1185 (11th Cir. 2001)

(d) The employer generally has a right to advance notice from the employee. In addition, the employer may require an employee to submit certification to substantiate that the leave is due to the serious health condition of the employee or the employee's covered family member, due to the serious injury or illness of a covered servicemember, or because of a qualifying exigency. Failure to comply with these requirements may result in a delay in the start of FMLA leave. Pursuant to a uniformly applied policy, the employer may also require that an employee present a certification of fitness to return to work when the absence was caused by the employee's serious health condition (*see* §§ 825.312 and 825.313). The employer may delay restoring the employee to employment without such certificate relating to the health condition which caused the employee's absence.

### § 825.101 Purpose of the Act.

(a) FMLA is intended to allow employees to balance their work and family life by taking reasonable unpaid leave for medical reasons, for the birth or adoption of a child, for the care of a child, spouse, or parent who has a serious health condition, for the care of a covered servicemember with a serious injury or illness, or because of a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty or call to covered active duty status. The Act is intended to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. It was intended that the Act accomplish these purposes in a manner that accommodates the legitimate interests of employers, and in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment in minimizing the potential for employment discrimination on the basis of sex, while promoting equal employment opportunity for men and women.

(b) The FMLA was predicated on two fundamental concerns--the needs of the American workforce, and the development of high-performance organizations. Increasingly, America's children and elderly are dependent upon family members who must spend long hours at work. When a family emergency arises, requiring workers to attend to seriously-ill children or parents, or to newly-born or adopted infants, or even to their own serious illness, workers need reassurance that they will not be asked to choose between continuing their employment, and meeting their personal and family obligations or tending to vital needs at home.

(c) The FMLA is both intended and expected to benefit employers as well as their employees. A direct correlation exists between stability in the family and productivity in the workplace. FMLA will encourage the development of high-performance organizations. When

workers can count on durable links to their workplace they are able to make their own full commitments to their jobs. The record of hearings on family and medical leave indicate the powerful productive advantages of stable workplace relationships, and the comparatively small costs of guaranteeing that those relationships will not be dissolved while workers attend to pressing family health obligations or their own serious illness.

### § 825.102 Definitions.

For purposes of this part:

*Act* or *FMLA* means the Family and Medical Leave Act of 1993, Public Law 103-3 (February 5, 1993), 107 Stat. 6 (29 U.S.C. 2601 *et seq.*, as amended).

*ADA* means the Americans With Disabilities Act (42 U.S.C. 12101 *et seq.*, as amended).

*Administrator* means the Administrator of the Wage and Hour Division, U.S. Department of Labor, and includes any official of the Wage and Hour Division authorized to perform any of the functions of the Administrator under this part.

*Airline flight crew employee* means an airline flight crewmember or flight attendant as those terms are defined in regulations of the Federal Aviation Administration. See also § 825.800(a).

*Applicable monthly guarantee* means:

(1) For an airline flight crew employee who is not on reserve status (line holder), the minimum number of hours for which an employer has agreed to schedule such employee for any given month; and

(2) For an airline flight crew employee who is on reserve status, the number of hours for which an employer has agreed to pay the employee for any given month. See also § 825.801(b)(1).

*COBRA* means the continuation coverage requirements of Title X of the Consolidated Omnibus Budget Reconciliation Act of 1986, as amended (Pub. L. 99-272, title X, section 10002; 100 Stat 227; 29 U.S.C. 1161- 1168).

*Commerce and industry or activity affecting commerce* mean any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include "commerce" and any "industry affecting commerce" as defined in sections 501(1) and 501(3) of the Labor Management Relations Act of 1947, 29 U.S.C. 142(1) and (3).

*Contingency operation* means a military operation that:

(1) Is designated by the Secretary of Defense as an operation in which members of the Armed Forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(2) Results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of Title 10 of the United States Code, chapter 15 of Title

10 of the United States Code, or any other provision of law during a war or during a national emergency declared by the President or Congress. See also § 825.126(a)(2).

*Continuing treatment by a health care provider* means any one of the following:

(1) *Incapacity and treatment*. A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(i) Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral by, a health care provider; or

(ii) Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.

(iii) The requirement in paragraphs (i) and (ii) of this definition for treatment by a health care provider means an in-person visit to a health care provider. The first in-person treatment visit must take place within seven days of the first day of incapacity.

(iv) Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period shall be determined by the health care provider.

(v) The term "extenuating circumstances" in paragraph (i) means circumstances beyond the employee's control that prevent the follow-up visit from occurring as planned by the health care provider. Whether a given set of circumstances are extenuating depends on the facts. See also § 825.115(a)(5).

(2) *Pregnancy or prenatal care*. Any period of incapacity due to pregnancy, or for prenatal care. See also § 825.120.

(3) *Chronic conditions*. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(i) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;

(ii) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(iii) May cause episodic rather than a continuing period of incapacity (*e.g.*, asthma, diabetes, epilepsy, etc.).

(4) *Permanent or long-term conditions*. A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples



include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(5) *Conditions requiring multiple treatments.* Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for:

(i) Restorative surgery after an accident or other injury; or

(ii) A condition that would likely result in a period of incapacity of more than three consecutive full calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis).

(6) Absences attributable to incapacity under paragraphs (2) or (3) of this definition qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive full calendar days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

*Covered active duty or call to covered active duty status* means:

(1) In the case of a member of the Regular Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country; and,

(2) In the case of a member of the Reserve components of the Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country under a Federal call or order to active duty in support of a contingency operation pursuant to: Section 688 of Title 10 of the United States Code, which authorizes ordering to active duty retired members of the Regular Armed Forces and members of the retired Reserve who retired after completing at least 20 years of active service; Section 12301(a) of Title 10 of the United States Code, which authorizes ordering all reserve component members to active duty in the case of war or national emergency; Section 12302 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Ready Reserve to active duty; Section 12304 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Selected Reserve and certain members of the Individual Ready Reserve to active duty; Section 12305 of Title 10 of the United States Code, which authorizes the suspension of promotion, retirement or separation rules for certain Reserve components; Section 12406 of Title 10 of the United States Code, which authorizes calling the National Guard into Federal service in certain circumstances;

chapter 15 of Title 10 of the United States Code, which authorizes calling the National Guard and state military into Federal service in the case of insurrections and national emergencies; or any other provision of law during a war or during a national emergency declared by the President or Congress so long as it is in support of a contingency operation. See 10 U.S.C. 101(a)(13)(B). See also § 825.126(a).

*Covered servicemember* means:

(1) A current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness, or

(2) A covered veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness.

*Covered veteran* means an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves), and was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran. See § 825.127(b)(2).

*Eligible employee* means:

(1) An employee who has been employed for a total of at least 12 months by the employer on the date on which any FMLA leave is to commence, except that an employer need not consider any period of previous employment that occurred more than seven years before the date of the most recent hiring of the employee, unless:

(i) The break in service is occasioned by the fulfillment of the employee's Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301, *et seq.*, covered service obligation (the period of absence from work due to or necessitated by USERRA-covered service must be also counted in determining whether the employee has been employed for at least 12 months by the employer, but this section does not provide any greater entitlement to the employee than would be available under the USERRA; or

(ii) A written agreement, including a collective bargaining agreement, exists concerning the employer's intention to rehire the employee after the break in service (*e.g.*, for purposes of the employee furthering his or her education or for childrearing purposes); and

(2) Who, on the date on which any FMLA leave is to commence, has met the hours of service requirement by having been employed for at least 1,250 hours of service with such employer during the previous 12-month period, or for an airline flight crew employee, in the previous 12 months, having worked or been paid for not less than 60 percent of the applicable total monthly guarantee and having worked or been paid for not less than 504 hours, not counting personal commute time, or

vacation, medical or sick leave (*see* § 825.801(b)), except that:

(i) An employee returning from fulfilling his or her USERRA-covered service obligation shall be credited with the hours of service that would have been performed but for the period of absence from work due to or necessitated by USERRA-covered service in determining whether the employee met the hours of service requirement (accordingly, a person reemployed following absence from work due to or necessitated by USERRA-covered service has the hours that would have been worked for the employer (or, for an airline flight crew employee, would have been worked for or paid by the employer) added to any hours actually worked (or, for an airline flight crew employee, actually worked or paid) during the previous 12-month period to meet the hours of service requirement); and

(ii) To determine the hours that would have been worked (or, for an airline flight crew employee, would have been worked or paid) during the period of absence from work due to or necessitated by USERRA-covered service, the employee's pre-service work schedule can generally be used for calculations; and

(3) Who is employed in any State of the United States, the District of Columbia or any Territories or possession of the United States.

(4) Excludes any Federal officer or employee covered under subchapter V of chapter 63 of title 5, United States Code.

(5) Excludes any employee of the United States House of Representatives or the United States Senate covered by the Congressional Accountability Act of 1995, 2 U.S.C. 1301.

(6) Excludes any employee who is employed at a worksite at which the employer employs fewer than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is also fewer than 50.

(7) Excludes any employee employed in any country other than the United States or any Territory or possession of the United States.

*Employ* means to suffer or permit to work.

*Employee* has the meaning given the same term as defined in section 3(e) of the Fair Labor Standards Act, 29 U.S.C. 203(e), as follows:

(1) The term employee means any individual employed by an employer;

(2) In the case of an individual employed by a public agency, employee means--

(i) Any individual employed by the Government of the United States--

(A) As a civilian in the military departments (as defined in section 102 of Title 5, United States Code),

(B) In any executive agency (as defined in section 105 of Title 5, United States Code), excluding any Federal officer or employee covered under subchapter V of chapter 63 of Title 5, United States Code,

(C) In any unit of the legislative or judicial branch of the Government which has positions in the

competitive service, excluding any employee of the United States House of Representatives or the United States Senate who is covered by the Congressional Accountability Act of 1995,

(D) In a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or

(ii) Any individual employed by the United States Postal Service or the Postal Regulatory Commission; and

(iii) Any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual--

(A) Who is not subject to the civil service laws of the State, political subdivision, or agency which employs the employee; and

(B) Who--

(1) Holds a public elective office of that State, political subdivision, or agency,

(2) Is selected by the holder of such an office to be a member of his personal staff,

(3) Is appointed by such an officeholder to serve on a policymaking level,

(4) Is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of the office of such officeholder, or

(5) Is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

*Employee employed in an instructional capacity.* See the definition of Teacher in this section.

*Employer* means any person engaged in commerce or in an industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year, and includes--

(1) Any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer;

(2) Any successor in interest of an employer; and

(3) Any public agency.

*Employment benefits* means all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer or through an employee benefit plan as defined in section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(3). The term does not include non-employment related obligations paid by employees through voluntary deductions such as supplemental insurance coverage. See also § 825.209(a).

*FLSA* means the Fair Labor Standards Act (29 U.S.C. 201 *et seq.*).

*Group health plan* means any plan of, or contributed to by, an employer (including a self-insured plan) to provide health care (directly or otherwise) to

the employer's employees, former employees, or the families of such employees or former employees. For purposes of FMLA the term group health plan shall not include an insurance program providing health coverage under which employees purchase individual policies from insurers provided that:

(1) No contributions are made by the employer;

(2) Participation in the program is completely voluntary for employees;

(3) The sole functions of the employer with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions and to remit them to the insurer;

(4) The employer receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deduction; and,

(5) The premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

*Health care provider* means:

(1) The Act defines health care provider as:

(i) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(ii) Any other person determined by the Secretary to be capable of providing health care services.

(2) Others "capable of providing health care services" include only:

(i) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;

(ii) Nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;

(iii) Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employer that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable State or local law or collective bargaining agreement.

(iv) Any health care provider from whom an employer or the employer's group health plan's benefits

manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and

(v) A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

(3) The phrase "authorized to practice in the State" as used in this section means that the provider must be authorized to diagnose and treat physical or mental health conditions.

*Incapable of self-care* means that the individual requires active assistance or supervision to provide daily self-care in several of the "activities of daily living" (ADLs) or "instrumental activities of daily living" (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

*Instructional employee*: See the definition of *Teacher* in this section.

*Intermittent leave* means leave taken in separate periods of time due to a single illness or injury, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy.

*Invitational travel authorization (ITA)* or *Invitational travel order (ITO)* are orders issued by the Armed Forces to a family member to join an injured or ill servicemember at his or her bedside. See also § 825.310(e).

*Key employee* means a salaried FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed by the employer within 75 miles of the employee's worksite. See also § 825.217.

*Mental disability*: See the definition of *Physical or mental disability* in this section.

*Military caregiver* leave means leave taken to care for a covered servicemember with a serious injury or illness under the Family and Medical Leave Act of 1993. See also § 825.127.

*Next of kin of a covered servicemember* means the nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no

such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered servicemember's only next of kin. *See also* § 825.127(d)(3).

*Outpatient status* means, with respect to a covered servicemember who is a current member of the Armed Forces, the status of a member of the Armed Forces assigned to either a military medical treatment facility as an outpatient; or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients. *See also* § 825.127(b)(1).

*Parent* means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee when the employee was a son or daughter as defined below. This term does not include parents "in law."

*Parent of a covered servicemember* means a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered servicemember. This term does not include parents "in law." *See also* § 825.127(d)(2).

*Person* means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons, and includes a public agency for purposes of this part.

*Physical or mental disability* means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 CFR part 1630, issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, as amended, define these terms.

*Public agency* means the government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Regulatory Commission), a State, or a political subdivision of a State, or any interstate governmental agency. Under section 101(5)(B) of the Act, a public agency is considered to be a "person" engaged in commerce or in an industry or activity affecting commerce within the meaning of the Act.

*Reduced leave schedule* means a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee.

*Reserve components of the Armed Forces*, for purposes of qualifying exigency leave, include the Army National Guard of the United States, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard of the United States, Air Force Reserve, and Coast Guard Reserve, and retired members of the

Regular Armed Forces or Reserves who are called up in support of a contingency operation. *See also* § 825.126(a)(2)(i).

*Secretary* means the Secretary of Labor or authorized representative.

*Serious health condition* means an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in § 825.114 or continuing treatment by a health care provider as defined in § 825.115. Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not serious health conditions unless inpatient hospital care is required or unless complications develop. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness or allergies may be serious health conditions, but only if all the conditions of § 825.113 are met.

*Serious injury or illness* means:

(1) In the case of a current member of the Armed Forces, including a member of the National Guard or Reserves, an injury or illness that was incurred by the covered servicemember in the line of duty on active duty in the Armed Forces or that existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces and that may render the servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating; and

(2) In the case of a covered veteran, an injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) and manifested itself before or after the member became a veteran, and is:

(i) A continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; or

(ii) A physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or

(iii) A physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or

(iv) An injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers. *See also* § 825.127(c).

*Son or daughter* means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and “incapable of self-care because of a mental or physical disability” at the time that FMLA leave is to commence.

*Son or daughter of a covered servicemember* means a covered servicemember’s biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age. *See also* § 825.127(d)(1).

*Son or daughter on covered active duty or call to covered active duty status* means the employee’s biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on covered active duty or call to covered active duty status, and who is of any age. *See also* § 825.126(a)(5).

*Spouse* means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.

*State* means any State of the United States or the District of Columbia or any Territory or possession of the United States.

*Teacher* (or employee employed in an instructional capacity, or instructional employee) means an employee employed principally in an instructional capacity by an educational agency or school whose principal function is to teach and instruct students in a class, a small group, or an individual setting, and includes athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. The term does not include teacher assistants or aides who do not have as their principal function actual teaching or instructing, nor auxiliary personnel such as counselors, psychologists, curriculum specialists, cafeteria workers, maintenance workers, bus drivers, or other primarily noninstructional employees.

*TRICARE* is the health care program serving active duty servicemembers, National Guard and Reserve members, retirees, their families, survivors, and certain former spouses worldwide.

## § 825.103 [Reserved]

## § 825.104 Covered employer.

(a) An employer covered by FMLA is any person engaged in commerce or in any industry or activity affecting commerce, who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. Employers covered by FMLA also include any person acting, directly or indirectly, in the interest of a covered employer to any of the employees of the employer, any successor in interest of a covered employer, and any public agency. Public agencies are covered employers without regard to the number of

employees employed.<sup>8</sup> Public as well as private elementary and secondary schools are also covered employers without regard to the number of employees employed. (*See* § 825.600.)

(b) The terms commerce and industry affecting commerce are defined in accordance with section 501(1) and (3) of the Labor Management Relations Act of 1947 (LMRA) (29 U.S.C. 142 (1) and (3)), as set forth in the definitions at § 825.800 of this part. For purposes of the FMLA, employers who meet the 50-employee coverage test are deemed to be engaged in commerce or in an industry or activity affecting commerce.

(c) Normally the legal entity which employs the employee is the employer under FMLA.<sup>9</sup> Applying this principle, a corporation is a single employer rather than its separate establishments or divisions.

(1) Where one corporation has an ownership interest in another corporation, it is a separate employer unless it meets the joint employment test discussed in § 825.106, or the integrated employer test contained in paragraph (c)(2) of this section.

(2) Separate entities will be deemed to be parts of a single employer for purposes of FMLA if they meet the integrated employer test. Where this test is met, the employees of all entities making up the integrated employer will be counted in determining employer coverage and employee eligibility. A determination of whether or not separate entities are an integrated employer is not determined by the application of any single criterion, but rather the entire relationship is to be reviewed in its totality. Factors considered in determining whether two or more entities are an integrated employer include:

(i) Common management;

<sup>8</sup> The U.S. Supreme Court held in *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003), that public employees may sue their employers under § 2612 (a)(1)(C) for interfering with employees’ attempts to take FMLA leave to care for a parent, spouse, or child.

In *Coleman v. Court of App. of Md.*, \_\_\_U.S.\_\_\_, 132 S.Ct. 1327 (2012), the Supreme Court held that public employees may not sue their employers under § 2612 (A)(1)(D) for money damages for interfering with their attempt to take FMLA leave for their own serious health condition unless the state defendant has waived sovereign immunity. Public employees can still sue the responsible public official for injunctive relief. *Coleman*, 132 S.Ct. at 1350 (Ginsburg, J., dissenting).

The ability of public sector unions to enforce the FMLA through collectively bargained grievance and arbitration procedures is not affected by *Hibbs* or *Coleman*.

*See also* § 825.108.

<sup>9</sup> Unions and union officers generally cannot be held liable for an employer’s FMLA violations. *See Cole v. Beros*, 2008 U.S. Dist. LEXIS 57669, \*3 (W.D.Pa. 2008) (“While Defendants recognize that individuals ‘acting in the interest of an employer’ may be held individually liable under the FMLA, ... Beverly Health Care—not the union—was Ms. Cole’s employer. There is no basis to conclude that [union representative] Beros or [union attorney] Jordan were acting in the interest of Beverly Health Care.”).

- (ii) Interrelation between operations;
- (iii) Centralized control of labor relations; and
- (iv) Degree of common ownership/financial control.

-(d) An employer includes any person who acts directly or indirectly in the interest of an employer to any of the employer's employees. The definition of employer in section 3(d) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 203(d), similarly includes any person acting directly or indirectly in the interest of an employer in relation to an employee. As under the FLSA, individuals such as corporate officers "acting in the interest of an employer" are individually liable for any violations of the requirements of FMLA.

#### § 825.105 Counting employees for determining coverage.

-(a) The definition of employ for purposes of FMLA is taken from the Fair Labor Standards Act, § 3(g), 29 U.S.C. 203(g). The courts have made it clear that the employment relationship under the FLSA is broader than the traditional common law concept of master and servant. The difference between the employment relationship under the FLSA and that under the common law arises from the fact that the term "employ" as defined in the Act includes "to suffer or permit to work." The courts have indicated that, while "to permit" requires a more positive action than "to suffer," both terms imply much less positive action than required by the common law. Mere knowledge by an employer of work done for the employer by another is sufficient to create the employment relationship under the Act. The courts have said that there is no definition that solves all problems as to the limitations of the employer-employee relationship under the Act; and that determination of the relation cannot be based on isolated factors or upon a single characteristic or technical concepts, but depends "upon the circumstances of the whole activity" including the underlying economic reality." In general an employee, as distinguished from an independent contractor who is engaged in a business of his/her own, is one who "follows the usual path of an employee" and is dependent on the business which he/she serves.

-(b) Any employee whose name appears on the employer's payroll will be considered employed each working day of the calendar week, and must be counted whether or not any compensation is received for the week. However, the FMLA applies only to employees who are employed within any State of the United States, the District of Columbia or any Territory or possession of the United States. Employees who are employed outside these areas are not counted for purposes of determining employer coverage or employee eligibility.

-(c) Employees on paid or unpaid leave, including FMLA leave, leaves of absence, disciplinary suspension, etc., are counted as long as the employer has a reasonable expectation that the employee will later

return to active employment. If there is no employer/employee relationship (as when an employee is laid off, whether temporarily or permanently) such individual is not counted. Part-time employees, like full-time employees, are considered to be employed each working day of the calendar week, as long as they are maintained on the payroll.

-(d) An employee who does not begin to work for an employer until after the first working day of a calendar week, or who terminates employment before the last working day of a calendar week, is not considered employed on each working day of that calendar week.

-(e) A private employer is covered if it maintained 50 or more employees on the payroll during 20 or more calendar workweeks (not necessarily consecutive workweeks) in either the current or the preceding calendar year.

-(f) Once a private employer meets the 50 employees/20 workweeks threshold, the employer remains covered until it reaches a future point where it no longer has employed 50 employees for 20 (nonconsecutive) workweeks in the current and preceding calendar year. For example, if an employer who met the 50 employees/20 workweeks test in the calendar year as of September 1, 2008, subsequently dropped below 50 employees before the end of 2008 and continued to employ fewer than 50 employees in all workweeks throughout calendar year 2009, the employer would continue to be covered throughout calendar year 2009 because it met the coverage criteria for 20 workweeks of the preceding (*i.e.*, 2008) calendar year.

#### § 825.106 Joint employer coverage.

-(a) Where two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under FMLA. Joint employers may be separate and distinct entities with separate owners, managers, and facilities. Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

-(1) Where there is an arrangement between employers to share an employee's services or to interchange employees;

-(2) Where one employer acts directly or indirectly in the interest of the other employer in relation to the employee; or,

-(3) Where the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

-(b)(1) A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality. For example, joint employment will ordinarily be found to exist when a temporary placement agency supplies employees to a second employer.

-(2) A type of company that is often called a Professional Employer Organization (PEO) contracts with client employers to perform administrative functions such as payroll, benefits, regulatory paperwork, and updating employment policies. The determination of whether a PEO is a joint employer also turns on the economic realities of the situation and must be based upon all the facts and circumstances. A PEO does not enter into a joint employment relationship with the employees of its client companies when it merely performs such administrative functions. On the other hand, if in a particular fact situation, a PEO has the right to hire, fire, assign, or direct and control the client's employees, or benefits from the work that the employees perform, such rights may lead to a determination that the PEO would be a joint employer with the client employer, depending upon all the facts and circumstances.

-(c) In joint employment relationships, only the primary employer is responsible for giving required notices to its employees, providing FMLA leave, and maintenance of health benefits. Factors considered in determining which is the primary employer include authority/ responsibility to hire and fire, assign/place the employee, make payroll, and provide employment benefits. For employees of temporary placement agencies, for example, the placement agency most commonly would be the primary employer. Where a PEO is a joint employer, the client employer most commonly would be the primary employer.

-(d) Employees jointly employed by two employers must be counted by both employers, whether or not maintained on one of the employer's payroll, in determining employer coverage and employee eligibility. For example, an employer who jointly employs 15 workers from a temporary placement agency and 40 permanent workers is covered by FMLA. (A special rule applies to employees jointly employed who physically work at a facility of the secondary employer for a period of at least one year. See § 825.111(a)(3).) An employee on leave who is working for a secondary employer is considered employed by the secondary employer, and must be counted for coverage and eligibility purposes, as long as the employer has a reasonable expectation that that employee will return to employment with that employer. In those cases in which a PEO is determined to be a joint employer of a client employer's employees, the client employer would only be required to count employees of the PEO (or employees of other clients of the PEO) if the client employer jointly employed those employees.

-(e) Job restoration is the primary responsibility of the primary employer. The secondary employer is responsible for accepting the employee returning from FMLA leave in place of the replacement employee if the secondary employer continues to utilize an employee from the temporary placement agency, and the agency chooses to place the employee with the secondary employer. A secondary employer is also responsible for compliance with the prohibited acts provisions with respect to its jointly employed employees, whether or not the secondary employer is covered by FMLA. See § 825.220(a). The prohibited acts include prohibitions against interfering with an employee's attempt to exercise rights under the Act, or discharging or discriminating against an employee for opposing a practice which is unlawful under FMLA. A covered secondary employer will be responsible for compliance with all the provisions of the FMLA with respect to its regular, permanent workforce.

#### § 825.107 Successor in interest coverage.

-(a) For purposes of FMLA, in determining whether an employer is covered because it is a "successor in interest" to a covered employer, the factors used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Adjustment Act will be considered. However, unlike Title VII, whether the successor has notice of the employee's claim is not a consideration. Notice may be relevant, however, in determining successor liability for violations of the predecessor. The factors to be considered include:

- (1) Substantial continuity of the same business operations;
- (2) Use of the same plant;
- (3) Continuity of the work force;
- (4) Similarity of jobs and working conditions;
- (5) Similarity of supervisory personnel;
- (6) Similarity in machinery, equipment, and production methods;
- (7) Similarity of products or services; and
- (8) The ability of the predecessor to provide relief.

-(b) A determination of whether or not a successor in interest exists is not determined by the application of any single criterion, but rather the entire circumstances are to be viewed in their totality.

-(c) When an employer is a successor in interest, employees' entitlements are the same as if the employment by the predecessor and successor were continuous employment by a single employer. For example, the successor, whether or not it meets FMLA coverage criteria, must grant leave for eligible employees who had provided appropriate notice to the predecessor, or continue leave begun while employed by the predecessor, including maintenance of group health benefits during the leave and job restoration at the conclusion of the leave. A successor which meets FMLA's coverage criteria must count periods of employment and hours of service with the predecessor

for purposes of determining employee eligibility for FMLA leave.

#### § 825.108 Public agency coverage.

(a) An employer under FMLA includes any public agency, as defined in section 3(x) of the Fair Labor Standards Act, 29 U.S.C. 203(x). Section 3(x) of the FLSA defines public agency as the government of the United States; the government of a State or political subdivision of a State; or an agency of the United States, a State, or a political subdivision of a State, or any interstate governmental agency. State is further defined in Section 3(c) of the FLSA to include any State of the United States, the District of Columbia, or any Territory or possession of the United States.

(b) The determination of whether an entity is a public agency, as distinguished from a private employer, is determined by whether the agency has taxing authority, or whether the chief administrative officer or board, *etc.*, is elected by the voters-at-large or their appointment is subject to approval by an elected official.

(c) (1) A State or a political subdivision of a State constitutes a single public agency and, therefore, a single employer for purposes of determining employee eligibility. For example, a State is a single employer; a county is a single employer; a city or town is a single employer. Whether two agencies of the same State or local government constitute the same public agency can only be determined on a case-by-case basis. One factor that would support a conclusion that two agencies are separate is whether they are treated separately for statistical purposes in the Census of Governments issued by the Bureau of the Census, U.S. Department of Commerce.

(2) The Census Bureau takes a census of governments at five-year intervals. Volume I, Government Organization, contains the official counts of the number of State and local governments. It includes tabulations of governments by State, type of government, size, and county location. Also produced is a universe list of governmental units, classified according to type of government. Copies of Volume I, Government Organization, and subsequent volumes are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, U.S. Department of Commerce District Offices, or can be found in Regional and selective depository libraries, or online at <http://www.census.gov/govs/www/index.html>. For a list of all depository libraries, write to the Government Printing Office, 710 N. Capitol St. NW., Washington, DC 20402.

(d) All public agencies are covered by the FMLA regardless of the number of employees; they are not subject to the coverage threshold of 50 employees carried on the payroll each day for 20 or more weeks in

a year.<sup>10</sup> However, employees of public agencies must meet all of the requirements of eligibility, including the requirement that the employer (*e.g.*, State) employ 50 employees at the worksite or within 75 miles.

#### § 825.109 Federal agency coverage.

(a) Most employees of the government of the United States, if they are covered by the FMLA, are covered under Title II of the FMLA (incorporated in Title V, Chapter 63, Subchapter 5 of the United States Code) which is administered by the U.S. Office of Personnel Management (OPM). OPM has separate regulations at 5 CFR Part 630, Subpart L. Employees of the Government Printing Office are covered by Title II. While employees of the Government Accountability Office and the Library of Congress are covered by Title I of the FMLA, the Comptroller General of the United States and the Librarian of Congress, respectively, have responsibility for the administration of the FMLA with respect to these employees. Other legislative branch employees, such as employees of the Senate and House of Representatives, are covered by the Congressional Accountability Act of 1995, 2 U.S.C. 1301.

(b) The Federal Executive Branch employees within the jurisdiction of these regulations include:

(1) Employees of the Postal Service;

(2) Employees of the Postal Regulatory Commission;

(3) A part-time employee who does not have an established regular tour of duty during the administrative workweek; and,

(4) An employee serving under an intermittent appointment or temporary appointment with a time limitation of one year or less.

(c) Employees of other Federal executive agencies are also covered by these regulations if they are not covered by Title II of FMLA.

(d) Employees of the judicial branch of the United States are covered by these regulations only if they are employed in a unit which has employees in the competitive service. For example, employees of the U.S. Tax Court are covered by these regulations.

(e) For employees covered by these regulations, the U.S. Government constitutes a single employer for purposes of determining employee eligibility. These employees must meet all of the requirements for eligibility, including the requirement that the Federal Government employ 50 employees at the worksite or within 75 miles.

#### § 825.110 Eligible employee.

(a) An eligible employee is an employee of a covered employer who:

(1) Has been employed by the employer for at least 12 months, and

<sup>10</sup> See also § 825.104 (a) and accompanying notes.



(2) Has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave (see § 825.801 for special hours of service requirements for airline flight crew employees), and

(3) Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. See § 825.105(b) regarding employees who work outside the U.S.

(b) The 12 months an employee must have been employed by the employer need not be consecutive months, provided

(1) Subject to the exceptions provided in paragraph (b)(2) of this section, employment periods prior to a break in service of seven years or more need not be counted in determining whether the employee has been employed by the employer for at least 12 months.

(2) Employment periods preceding a break in service of more than seven years must be counted in determining whether the employee has been employed by the employer for at least 12 months where:

(i) The employee's break in service is occasioned by the fulfillment of his or her Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301, *et seq.*, covered service obligation. The period of absence from work due to or necessitated by USERRA-covered service must be also counted in determining whether the employee has been employed for at least 12 months by the employer. However, this section does not provide any greater entitlement to the employee than would be available under the USERRA; or

(ii) A written agreement, including a collective bargaining agreement, exists concerning the employer's intention to rehire the employee after the break in service (*e.g.*, for purposes of the employee furthering his or her education or for childrearing purposes).

(3) If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (*e.g.*, workers' compensation, group health plan benefits, *etc.*), the week counts as a week of employment. For purposes of determining whether intermittent/occasional/casual employment qualifies as at least 12 months, 52 weeks is deemed to be equal to 12 months.

(4) Nothing in this section prevents employers from considering employment prior to a continuous break in service of more than seven years when determining whether an employee has met the 12-month employment requirement. However, if an employer chooses to recognize such prior employment, the employer must do so uniformly, with respect to all employees with similar breaks in service.

(c) (1) Except as provided in paragraph (c)(2) of this section and in § 825.801 containing the special hours of service requirement for airline flight crew employees, whether an employee has worked the

minimum 1,250 hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA) for determining compensable hours of work. See 29 CFR part 785. The determining factor is the number of hours an employee has worked for the employer within the meaning of the FLSA. The determination is not limited by methods of recordkeeping, or by compensation agreements that do not accurately reflect all of the hours an employee has worked for or been in service to the employer. Any accurate accounting of actual hours worked under FLSA's principles may be used.<sup>11</sup>

(2) An employee returning from USERRA-covered service shall be credited with the hours of service that would have been performed but for the period of absence from work due to or necessitated by USERRA-covered service in determining the employee's eligibility for FMLA-qualifying leave. Accordingly, a person reemployed following USERRA-covered service has the hours that would have been worked for the employer added to any hours actually worked during the previous 12-month period to meet the hours of service requirement. In order to determine the hours that would have been worked during the period of absence from work due to or necessitated by USERRA-covered service, the employee's pre-service work schedule can generally be used for calculations. See § 825.801(c) for special rules applicable to airline flight crew employees.

(3) In the event an employer does not maintain an accurate record of hours worked by an employee,

<sup>11</sup>See *Ricco v. Potter*, 9 Wage & Hour Cas. 2d 1455, 1459-60, 377 F.3d 599 (6<sup>th</sup> Cir. 2004)(hours for which unlawfully discharged postal employee was compensated as part of grievance arbitration award should be counted towards employee's total "hours of service" required for her eligibility under FMLA, where legislative history of FMLA indicates that minimum hours-of-service requirement is meant to be construed in manner consistent with legal principles established for determining hours of work for payment of overtime compensation under the Fair Labor Standards Act, and employee would have worked but for her unlawful discharge). See also *Magruda v. Belle Vernon Area School Dist.*, 2009 WL 440386 (W.D. Pa. 2009); *Savage v. Chicago Transit Auth.*, 2007 WL 809600 (N.D. Ill. 2007); *Densmore v. Pilgrim's Pride Corp.*, 2006 WL 3258259 (E.D. Ark. 2006). But see *Plumley v. Southern Container, Inc.*, 303 F.3d 364, 170 LRRM (BNA) 3049 (1<sup>st</sup> Cir. 2002)(backpay for work-hours lost awarded by arbitrator in collective bargaining grievance arbitration does not count as "hours of service" where arbitrator did not explicitly state that it should be counted); *Miller v. OPW Fueling Components*, 2013 WL 1190018, \*4 (S.D. Ohio 2013) (plaintiff's reliance on *Ricco* in unavailing where settlement agreement precludes a finding that the employer acted unlawfully when it discharged him).

At least one arbitrator has opted to follow *Ricco* and disregard *Plumley*. Sinclair Kossoff ruled in *Sysco Food Services*, 130 Lab. Arb. 39, 52 (2011) that *Ricco* is "well-reasoned and persuasive", and is "consistent with how arbitrators handle a parallel situation where, because of an unjustified discharge, an employee has failed to work the requisite number of hours to qualify for a contractual benefit."

including for employees who are exempt from FLSA's requirement that a record be kept of their hours worked (e.g., bona fide executive, administrative, and professional employees as defined in FLSA Regulations, 29 CFR part 541), the employer has the burden of showing that the employee has not worked the requisite hours. An employer must be able to clearly demonstrate, for example, that full-time teachers (see § 825.102 for definition) of an elementary or secondary school system, or institution of higher education, or other educational establishment or institution (who often work outside the classroom or at their homes) did not work 1,250 hours during the previous 12 months in order to claim that the teachers are not eligible for FMLA leave. See § 825.801(d) for special rules applicable to airline flight crew employees.

(d) The determination of whether an employee meets the hours of service requirement and has been employed by the employer for a total of at least 12 months must be made as of the date the FMLA leave is to start.<sup>12</sup> An employee may be on non-FMLA leave at the time he or she meets the 12-month eligibility requirement, and in that event, any portion of the leave taken for an FMLA-qualifying reason after the employee meets the eligibility requirement would be FMLA leave. See § 825.300(b) for rules governing the content of the eligibility notice given to employees.)

(e) Whether 50 employees are employed within 75 miles to ascertain an employee's eligibility for FMLA benefits is determined when the employee gives notice of the need for leave. Whether the leave is to be taken at one time or on an intermittent or reduced leave schedule basis, once an employee is determined eligible in response to that notice of the need for leave, the employee's eligibility is not affected by any subsequent change in the number of employees employed at or within 75 miles of the employee's worksite, for that specific notice of the need for leave. Similarly, an employer may not terminate employee leave that has already started if the employee count drops below 50. For example, if an employer employs 60 employees in August, but expects that the number of employees will

drop to 40 in December, the employer must grant FMLA benefits to an otherwise eligible employee who gives notice of the need for leave in August for a period of leave to begin in December.

#### § 825.111 Determining whether 50 employees are employed within 75 miles.

(a) Generally, a worksite can refer to either a single location or a group of contiguous locations. Structures which form a campus or industrial park, or separate facilities in proximity with one another, may be considered a single site of employment. On the other hand, there may be several single sites of employment within a single building, such as an office building, if separate employers conduct activities within the building. For example, an office building with 50 different businesses as tenants will contain 50 sites of employment. The offices of each employer will be considered separate sites of employment for purposes of FMLA. An employee's worksite under FMLA will ordinarily be the site the employee reports to or, if none, from which the employee's work is assigned.

(1) Separate buildings or areas which are not directly connected or in immediate proximity are a single worksite if they are in reasonable geographic proximity, are used for the same purpose, and share the same staff and equipment. For example, if an employer manages a number of warehouses in a metropolitan area but regularly shifts or rotates the same employees from one building to another, the multiple warehouses would be a single worksite.

(2) For employees with no fixed worksite, e.g., construction workers, transportation workers (e.g., truck drivers, seamen, pilots), salespersons, etc., the worksite is the site to which they are assigned as their home base, from which their work is assigned, or to which they report. For example, if a construction company headquartered in New Jersey opened a construction site in Ohio, and set up a mobile trailer on the construction site as the company's on-site office, the construction site in Ohio would be the worksite for any employees hired locally who report to the mobile trailer/company office daily for work assignments, etc. If that construction company also sent personnel such as job superintendents, foremen, engineers, an office manager, etc., from New Jersey to the job site in Ohio, those workers sent from New Jersey continue to have the headquarters in New Jersey as their worksite. The workers who have New Jersey as their worksite would not be counted in determining eligibility of employees whose home base is the Ohio worksite, but would be counted in determining eligibility of employees whose home base is New Jersey. For transportation employees, their worksite is the terminal to which they are assigned, report for work, depart, and return after completion of a work assignment. For example, an airline pilot may work for an airline with headquarters in New York, but the pilot regularly reports for duty

<sup>12</sup>The required 1250 hours of service must be computed from the date of the commencement of the leave rather than the date of the employer's adverse action against the employee. *Butler v. Owens-Brockway*, 5 Wage & Hour Cas. 2d 1281, 1283, 1999 FED App. 0414P 3 (6th Cir. 1999).

The Eleventh Circuit Court of Appeals reversed a district court's dismissal of an employee's FMLA interference claim where the employee was not eligible for FMLA leave at the time she requested maternity leave, but would have been eligible by the time she gave birth when she wanted to begin her requested leave. *Pereda v. Brookdale Senior Living Communities*, 666 F.3d 1269, 1272-73 (11th Cir. 2012). The District Court for the Eastern District of Tennessee questioned the validity of *Pereda* in *Dunn v. Chattanooga Publishing Co.*, no. 1:12-cv-252, \_\_\_ F.Supp.2d \_\_\_ (E.D.Tenn., Jan. 14, 2013), but the court's position has not been accepted outside the Eastern District of Tennessee.

and originates or begins flights from the company's facilities located in an airport in Chicago and returns to Chicago at the completion of one or more flights to go off duty. The pilot's worksite is the facility in Chicago. An employee's personal residence is not a worksite in the case of employees, such as salespersons, who travel a sales territory and who generally leave to work and return from work to their personal residence, or employees who work at home, as under the concept of flexiplace or telecommuting. Rather, their worksite is the office to which they report and from which assignments are made.

-(3) For purposes of determining that employee's eligibility, when an employee is jointly employed by two or more employers (*see* § 825.106), the employee's worksite is the primary employer's office from which the employee is assigned or reports, unless the employee has physically worked for at least one year at a facility of a secondary employer, in which case the employee's worksite is that location. The employee is also counted by the secondary employer to determine eligibility for the secondary employer's full-time or permanent employees.

-(b) The 75-mile distance is measured by surface miles, using surface transportation over public streets, roads, highways and waterways, by the shortest route from the facility where the employee needing leave is employed. Absent available surface transportation between worksites, the distance is measured by using the most frequently utilized mode of transportation (*e.g.*, airline miles).

-(c) The determination of how many employees are employed within 75 miles of the worksite of an employee is based on the number of employees maintained on the payroll. Employees of educational institutions who are employed permanently or who are under contract are "maintained on the payroll" during any portion of the year when school is not in session. *See* § 825.105(c).

### § 825.112 Qualifying reasons for leave, general rule.

-(a) *Circumstances qualifying for leave.* Employers covered by FMLA are required to grant leave to eligible employees:

-(1) For birth of a son or daughter, and to care for the newborn child (*see* § 825.120);

-(2) For placement with the employee of a son or daughter for adoption or foster care (*see* § 825.121);

-(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition (*see* §§ 825.113 and 825.122);

-(4) Because of a serious health condition that makes the employee unable to perform the functions of the employee's job (*see* §§ 825.113 and 825.123);

-(5) Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty (or

has been notified of an impending call or order to covered active duty status (*see* §§ 825.122 and 825.126); and

-(6) To care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the covered servicemember (*see* §§ 825.122 and 825.127).

-(b) *Equal application.* The right to take leave under FMLA applies equally to male and female employees. A father, as well as a mother, can take family leave for the birth, placement for adoption, or foster care of a child.

-(c) *Active employee.* In situations where the employer/employee relationship has been interrupted, such as an employee who has been on layoff, the employee must be recalled or otherwise be re-employed before being eligible for FMLA leave. Under such circumstances, an eligible employee is immediately entitled to further FMLA leave for a qualifying reason.

### § 825.113 Serious health condition.

-(a) For purposes of FMLA, *serious health condition* entitling an employee to FMLA leave means an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in § 825.114 or continuing treatment by a health care provider as defined in § 825.115.<sup>13</sup>

<sup>13</sup> The Sixth Circuit Court of Appeals provided the following discussion of "serious health condition" in *Morris v. Family Dollar Stores of Ohio*, 320 Fed.Appx. 330, 337 (6th Cir. (unreported), cert. denied, 130 S.Ct. 418 (2009):

An outpatient procedure with a follow-up appointment is not a "regimen of continuing treatment." 29 CFR § 825.114(a)(2)(i)(B) (2003). Neither does it constitute "[t]reatment two or more times by a health care provider." 29 CFR § 825.114 (a)(2)(i)(A) (2003); *see Doughtie v. Ashland, Inc.*, No. 03-2073, 2005 WL 1239286, at \*4 (W.D. Tenn. May 24, 2005) (follow-up visit with doctor eleven days after plaintiff had returned to work did not count as a second treatment by a health care provider); *see also Jones v. Denver Pub. Sch.*, 427 F.3d 1315, 1321 (10th Cir. 2005) ("[T]o qualify for FMLA protection, the health condition must be sufficiently serious that it entails an absence of more than three consecutive calendar days during which the employee obtained treatment by a health care provider at least two times (or one time followed by a regimen of continuing treatment)."); *Perry v. Jaguar of Troy*, 353 F.3d 510, 515 (6th Cir. 2003) (periodic examinations every six months did not render the condition a "serious health condition"); *Marchisheck v. San Mateo County*, 199 F.3d 1068, 1075 (9th Cir. 1999) (pre-arranged drug counseling session did not qualify as continuing treatment).

As the district court commented, "the Court has serious doubts as to whether an outpatient needle biopsy with one follow-up visit two weeks later would constitute a 'serious medical condition' for purposes of the FMLA." *Morris v. Family Dollar Stores of Ohio, Inc.*, No. 1:05 CV 2211, 2007 U.S. Dist. LEXIS 24383, 2007 WL 893051, at \*7 n.4 (N.D.

(b) The term *incapacity* means inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom.

(c) The term treatment includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition.<sup>14</sup> Treatment does not include routine physical examinations, eye examinations, or dental examinations. A regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(d) Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not serious health conditions unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave.<sup>15</sup> Restorative dental or

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Ohio Mar. 21, 2007). We agree. The outpatient needle biopsy involved neither inpatient treatment nor continuing treatment by a healthcare provider and simply does not satisfy the plain meaning of a "serious health condition" in the relevant statutory and regulatory language.

<sup>14</sup> FMLA leave may be taken for "visits to a doctor when the employee has symptoms that are eventually diagnosed as constituting a serious health condition, even if, at the time of the initial medical appointments, the illness has not yet been diagnosed nor its degree of seriousness determined." *Phillips v. Matthews*, 547 F.3d 905, 910 (8th Cir. 2008) (citation and internal quotation omitted). See also *Darst v. Interstate Brands Corp.*, 512 F.3d 903, 911 (7th Cir. 2008) (treatment includes examinations to determine if a serious health condition exists and evaluation of the condition). "[I]t is immaterial that [the employee] was terminated before she submitted her FMLA paperwork or before [the employer] learned she needed additional time off from work. That is because an employer does not avoid liability by discharging an employee who takes leave in order to seek treatment for a condition that is later held to be covered by the FMLA." *Id.* (citation and internal quotation omitted). "[T]reatment does not include actions such as calling to make an appointment or scheduling a substance-abuse rehabilitation." *Darst*, 512 F.3d at 911.

<sup>15</sup> In *Nawrocki v. United Methodist Retirement Communities*, 174 Fed. Appx. 334, 335 (6th Cir. 2006) (*unpublished*), the plaintiff had an ear ache which became a serious health condition because of complications. "[T]he

plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness or allergies may be serious health conditions, but only if all the conditions of this section are met.<sup>16</sup>

#### § 825.114 Inpatient care.

-Inpatient care means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity as defined in §

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plaintiff experienced pain in her left ear during her shift. Later that evening, she was diagnosed as having an ear infection and prescribed an antibiotic, ear drops, and Vicodin. That same night, Plaintiff awoke from extreme pain in her left ear. She noted that her ear was swollen and red and that the redness continued down to her jaw line. The pain, redness, and swelling worsened over the next several hours and by the evening... the left side of Plaintiff's face, neck, and ears was swollen and purple.

"[The] Physician's Assistant... in the office of Dr. Raymond Cole... diagnosed Plaintiff as having edematous with significant debris, otitis exyterna, otitis media, and an allergic reaction to her ear drop prescription. He inserted an ear wick into her ear canal to increase drainage and the intake of the medication to the infection. She was told keep the wick in place for four days. He also prescribed her another antibiotic, a new ear drop prescription, and a stronger narcotic, Zydone."

<sup>16</sup> This regulatory language reflects the Congressional intent that FMLA is not needed for minor, short-term illnesses for which treatment and recovery are very brief because they would be covered by employers' sick leave programs. See H. Rep. No. 103-8, at 40 (1993); S. Rep. No. 103-3, at 28-29 (1993). The Department's position is that such minor illnesses would not be expected to last more than three days. If, however, they met the regulatory criteria for a serious health condition under § 825.114 (a), they would nevertheless qualify as a serious health condition.

Whether conditions qualify as serious health conditions for FMLA purposes must be determined on a case-by-case basis. The Eighth Circuit Court of Appeals says "minor illnesses 'normally' [will] not come within the definition of 'serious health condition,' [but] that does not mean such ailments can never be FMLA 'serious health conditions'". *Thorson v. Gemini*, 205 F.3d 370, 5 Wage & Hour Cas. 2d 1646, 1653 (8th Cir. 2000). The Third Circuit explains that a "laundry list" of applicable 'serious' conditions... was not included in the [regulations] because the Department of Labor determined that... such a list might cause employers to... recognize only conditions on the list or to second guess whether a condition is equally 'serious' rather than apply the regulatory standard." *Victorelli v. Shadyside Hospital*, 128 F.3d 184, 4 Wage & Hour Cas. 2d 321, 326 (3rd Cir. 1997) (citations omitted). See also *Miller v. AT&T Corp.*, 250 F.3d 820, 6 Wage & Hour Cas. 2d 1754 (4th Cir. 2001) (§ 825.113 (c) "does not automatically exclude the flu from coverage under the FMLA."); *Wheeler v. Pioneer Developmental Servs., Inc.*, 349 F. Supp. 2d 158, 168 (D. Mass. 2004) ("[Op. Dep't of Labor FMLA-86 (December 12, 1996) explains] that the regulation did not intend to exclude employees with flu-like symptoms from FMLA coverage in all circumstances... [I]f an employee's illness satisfies the substantive regulatory definition of a 'serious health condition,' infections like the flu will qualify the employee for FMLA leave." (emphasis in original)).

825.113(b), or any subsequent treatment in connection with such inpatient care.

#### § 825.115 Continuing treatment.

-A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

-(a) *Incapacity and treatment.*<sup>17</sup> A period of incapacity<sup>18</sup> of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

-(1) Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider;<sup>19</sup> or

<sup>17</sup> “[A] demonstration that an employee is unable to work in his or her current job due to a serious health condition is enough to show that the employee is incapacitated, even if that job is the only one the employee is unable to perform.” *Stekloff v. St. John’s Mercy Health Sys.*, 218 F.3d 858, 861 (8th Cir. 2000). See also *Electrolux Home Products v. Auto Workers*, 416 F.3d 848, 855, 10 Wage & Hour Cas. 2d 1350, 1355 (8th Cir. 2005) (an employee can be considered incapacitated even if he or she could force herself to stay on the job despite their serious health condition). See also *Branham v. Gannett Satellite Info. Network*, 619 F.3d 563, 569 (6th Cir. 2010) (a person can be incapacitated despite being able to do some of her regular work if she was not able to perform her essential job functions during the period of her absences). See also § 825.123.

<sup>18</sup> Overturning summary judgment for the employer on the question of whether an employee’s three-year-old child was “incapacitated,” the Eighth Circuit Court of Appeals stated that “[t]he fact finder must determine whether the child’s illness demonstrably affected his normal activity. In making this determination, the fact finder may consider a variety of factors, including but not limited to: whether the child participated in his daily routines or was particularly difficult to care for during that period, and whether a daycare facility would have allowed [the child] to attend its sessions.” *Caldwell v. Holland of Texas, Inc.*, 208 F.3d 671, 674-75 (8th Cir. 2000).

See also *Scamihorn v. General Truck Drivers*, 282 F.3d 1078, 7 Wage & Hour Cas. 1172 (9th Cir. 2002) (employee not barred during FMLA leave to care for his father from performing “chores such as cutting wood to heat the house, shoveling snow and driving his father to counseling sessions... because his father was incapable of doing these things for himself”).

<sup>19</sup> Treatment by a physician and the physician’s subsequent referral to a radiologist for x-rays constitutes two treatments. *Densmore v. Pilgrim’s Pride Corp.*, 2006 U.S. Dist. LEXIS 82285, 12 Wage & Hour Cas. 2d 381, 387 (E.D. Ark. 2006) (“Plaintiff injured her hand and was treated by Dr. Starnes, who referred her to a radiologist for x-rays. Under the FMLA, Plaintiff must show that she had a serious medical condition - meaning that she was incapable of working for [sic]

- (2) Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.

- (3) The requirement in paragraphs (a)(1) and (2) of this section for treatment by a health care provider means an in-person visit to a health care provider. The first (or only) in-person treatment visit must take place within seven days of the first day of incapacity.

- (4) Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period shall be determined by the health care provider.

- (5) The term *extenuating circumstances* in paragraph (a)(1) of this section means circumstances beyond the employee’s control that prevent the follow-up visit from occurring as planned by the health care provider. Whether a given set of circumstances are extenuating depends on the facts. For example, extenuating circumstances exist if a health care provider determines that a second in-person visit is needed within the 30-day period, but the health care provider does not have any available appointments during that time period.

- (b) *Pregnancy or prenatal care.* Any period of incapacity due to pregnancy, or for prenatal care. See also § 825.120.

- (c) *Chronic conditions.* Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(1) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;

(2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(3) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

- (d) *Permanent or long-term conditions.* A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving

than three days, and required continuous medical treatment. Defendant maintains Plaintiff did not need continuous medical care because she saw her doctor once. If she was seen as least twice by a doctor - she would qualify. Treatment for diagnostic purposes is sufficient to meet the FMLA’s continuing treatment requirement. Therefore, Plaintiff’s visit to the radiologist can be considered part of her treatment. Further, the evidence shows she met the other requirements for a serious health condition because Dr. Starnes certified that she was unable to work for four days. Because Plaintiff’s... injury required treatment on more than one occasion, she has created a reasonable inference that she was qualified for protection under the FMLA.” (paragraph break and footnote omitted)).

active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(e) Conditions requiring multiple treatments. Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for:

(1) Restorative surgery after an accident or other injury; or

(2) A condition that would likely result in a period of incapacity of more than three consecutive, full calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis).<sup>20</sup>

(f) Absences attributable to incapacity under paragraph (b) or (c) of this section qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive, full calendar days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

#### § 825.116 [Reserved]

#### § 825.117 [Reserved]

#### § 825.118 [Reserved]

#### § 825.119 Leave for treatment of substance abuse.

(a) Substance abuse may be a serious health condition if the conditions of §§ 825.113 through 825.115 are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

(b) Treatment for substance abuse does not prevent an employer from taking employment action

<sup>20</sup> "A condition requiring multiple treatments need not actually cause incapacity for three days. Instead, the FMLA requires only that a condition *would* cause incapacity for three days in the absence of medical intervention or treatment. If satisfied, then any period of absence to receive multiple treatments for the condition, including recovery, would qualify for FMLA leave." *Byron v. St. Mary's Med. Ctr.*, 2012 WL 3966090, \*5 (E.D. Mich. 2012) (internal citations and quotes omitted).

against an employee. The employer may not take action against the employee because the employee has exercised his or her right to take FMLA leave for treatment. However, if the employer has an established policy, applied in a non-discriminatory manner that has been communicated to all employees, that provides under certain circumstances an employee may be terminated for substance abuse, pursuant to that policy the employee may be terminated whether or not the employee is presently taking FMLA leave. An employee may also take FMLA leave to care for a covered family member who is receiving treatment for substance abuse. The employer may not take action against an employee who is providing care for a covered family member receiving treatment for substance abuse.

#### § 825.120 Leave for pregnancy or birth.

(a) *General rules.* Eligible employees are entitled to FMLA leave for pregnancy or birth of a child as follows:

(1) Both the mother and father are entitled to FMLA leave for the birth of their child.

(2) Both the mother and father are entitled to FMLA leave to be with the healthy newborn child (*i.e.*, bonding time) during the 12-month period beginning on the date of birth. An employee's entitlement to FMLA leave for a birth expires at the end of the 12-month period beginning on the date of the birth. If state law allows, or the employer permits, bonding leave to be taken beyond this period, such leave will not qualify as FMLA leave. *See* § 825.701 regarding non-FMLA leave which may be available under applicable State laws. Under this section, both the mother and father are entitled to FMLA leave even if the newborn does not have a serious health condition.

(3) A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care or to care for the child after placement, or to care for the employee's parent with a serious health condition. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as a husband and wife are employed by the same employer. It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where the husband and wife both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the husband and wife would each be entitled to the difference between the amount he or she has taken

individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took six weeks of leave to care for a healthy, newborn child, each could use an additional six weeks due to his or her own serious health condition or to care for a child with a serious health condition. Note, too, that many State pregnancy disability laws specify a period of disability either before or after the birth of a child; such periods would also be considered FMLA leave for a serious health condition of the mother, and would not be subject to the combined limit.

(4) The mother is entitled to FMLA leave for incapacity due to pregnancy, for prenatal care, or for her own serious health condition following the birth of the child. Circumstances may require that FMLA leave begin before the actual date of birth of a child. An expectant mother may take FMLA leave before the birth of the child for prenatal care or if her condition makes her unable to work. The mother is entitled to leave for incapacity due to pregnancy even though she does not receive treatment from a health care provider during the absence, and even if the absence does not last for more than three consecutive calendar days. For example, a pregnant employee may be unable to report to work because of severe morning sickness.

(5) The husband is entitled to FMLA leave if needed to care for his pregnant spouse who is incapacitated or if needed to care for her during her prenatal care, or if needed to care for the spouse following the birth of a child if the spouse has a serious health condition. See § 825.124.

(6) Both the mother and father are entitled to FMLA leave if needed to care for a child with a serious health condition if the requirements of §§ 825.113 through 825.115 and 825.122(d) are met. Thus, a husband and wife may each take 12 weeks of FMLA leave if needed to care for their newborn child with a serious health condition, even if both are employed by the same employer, provided they have not exhausted their entitlements during the applicable 12-month FMLA leave period.

(b) *Intermittent and reduced schedule leave.* An eligible employee may use intermittent or reduced schedule leave after the birth to be with a healthy newborn child only if the employer agrees. For example, an employer and employee may agree to a part-time work schedule after the birth. If the employer agrees to permit intermittent or reduced schedule leave for the birth of a child, the employer may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, Federal law (such as the Americans with Disabilities Act), and State law. Transfer to an alternative position may include altering

an existing job to better accommodate the employee's need for intermittent or reduced leave. The employer's agreement is not required for intermittent leave required by the serious health condition of the mother or newborn child. See §§ 825.202--825.205 for general rules governing the use of intermittent and reduced schedule leave. See § 825.121 for rules governing leave for adoption or foster care. See § 825.601 for special rules applicable to instructional employees of schools. See § 825.802 for special rules applicable to airline flight crew employees.

#### § 825.121 Leave for adoption or foster care.

(a) *General rules.* Eligible employees are entitled to FMLA leave for placement with the employee of a son or daughter for adoption or foster care as follows:

(1) Employees may take FMLA leave before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed. For example, the employee may be required to attend counseling sessions, appear in court, consult with his or her attorney or the doctor(s) representing the birth parent, submit to a physical examination, or travel to another country to complete an adoption. The source of an adopted child (e.g., whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for leave for this purpose.

(2) An employee's entitlement to leave for adoption or foster care expires at the end of the 12-month period beginning on the date of the placement. If state law allows, or the employer permits, leave for adoption or foster care to be taken beyond this period, such leave will not qualify as FMLA leave. See § 825.701 regarding non-FMLA leave which may be available under applicable State laws. Under this section, the employee is entitled to FMLA leave even if the adopted or foster child does not have a serious health condition.

(3) A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for the placement of the employee's son or daughter or to care for the child after placement, for the birth of the employee's son or daughter or to care for the child after birth, or to care for the employee's parent with a serious health condition. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as a husband and wife are employed by the "same employer." It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where the husband and wife both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement

for adoption or foster care, or to care for a parent, the husband and wife would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took six weeks of leave to care for a healthy, newly placed child, each could use an additional six weeks due to his or her own serious health condition or to care for a child with a serious health condition.

(4) An eligible employee is entitled to FMLA leave in order to care for an adopted or foster child with a serious health condition if the requirements of §§ 825.113 through 825.115 and 825.122(d) are met. Thus, a husband and wife may each take 12 weeks of FMLA leave if needed to care for an adopted or foster child with a serious health condition, even if both are employed by the same employer, provided they have not exhausted their entitlements during the applicable 12-month FMLA leave period.

(b) *Use of intermittent and reduced schedule leave.* An eligible employee may use intermittent or reduced schedule leave after the placement of a healthy child for adoption or foster care only if the employer agrees. Thus, for example, the employer and employee may agree to a part-time work schedule after the placement for bonding purposes. If the employer agrees to permit intermittent or reduced schedule leave for the placement for adoption or foster care, the employer may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, federal law (such as the Americans with Disabilities Act), and State law. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave. The employer's agreement is not required for intermittent leave required by the serious health condition of the adopted or foster child. See §§ 825.202-825.205 for general rules governing the use of intermittent and reduced schedule leave. See § 825.120 for general rules governing leave for pregnancy and birth of a child. See § 825.601 for special rules applicable to instructional employees of schools. See § 825.802 for special rules applicable to airline flight crew employees.

**§ 825.122 Definitions of covered servicemember, spouse, parent, son or daughter, next of kin of a covered servicemember, adoption, foster care, son or daughter on covered active duty or call to covered active duty status, son or daughter of a covered servicemember, and parent of a covered servicemember.**

(a) Covered servicemember means: (1) A current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness; or

(2) A covered veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness. *Covered veteran* means an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves), and was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran. See § 825.127(b)(2).

(b) *Spouse.* Spouse means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.

(c) *Parent.* Parent means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis<sup>21</sup> to the employee when the

<sup>21</sup> The Department of Labor explains in loco parentis "is commonly understood to refer to 'a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption. It embodies the two ideas of assuming the parental status and discharging the parental duties.' *Niewiadomski v. U.S.*, 159 F.2d 683, 686 (6<sup>th</sup> Cir. 1947) (quotations omitted).... 'The key to determining whether the relationship of *in loco parentis* is established is found in the *intention* of the person allegedly *in loco parentis* to assume the status of a parent toward the child. The intent to assume such parental status can be inferred from the acts of the parties.' *Dillon v. Maryland-National Capital Park and Planning Comm'n.* 382 F.Supp. 2d 777, 787 (D.Md. 2005), *aff'd* 258 Fed. Appx. 577 (4<sup>th</sup> Cir. 2007) (citations omitted; emphasis in original)." Op. Dept. of Labor No. 2010-3 (June 22, 2010).

"Employees who have no biological or legal relationship with a child may nonetheless stand in loco parentis to the child and be entitled to FMLA leave.... [T]he regulations do not require an employee who intends to assume the responsibilities of a parent to establish that he or she provides both day-to-day care and financial support in order to be found to stand in loco parentis to a child. For example, where an employee provides day-to-day care for his or her unmarried partner's child (with whom there is no legal or biological relationship) but does not financially support the child, the employee could be considered to stand *in loco parentis* to the child and therefore be entitled to FMLA leave to care for the child if the child had a serious health condition. The same principles apply to leave for the birth of a child and to bond with a child within the first 12 months following birth or placement. For instance, an employee who will share equally in the raising of a child with the child's biological parent would be entitled to leave for the child's birth because he or she will stand in loco parentis to the child. Similarly, an employee who will share equally in the raising of an adopted child with a same sex partner, but who does not have a legal relationship



employee was a son or daughter as defined in paragraph (d) of this section.<sup>22</sup> This term does not include parents “in law.”

(d) *Son or daughter.* For purposes of FMLA leave taken for birth or adoption, or to care for a family member with a serious health condition, son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and “incapable of self-care because of a mental or physical disability” at the time that FMLA leave is to commence.<sup>23</sup>

-(1) *Incapable of self-care* means that the individual requires active assistance or supervision to provide daily self-care in three or more of the activities of daily living (ADLs) or instrumental activities of daily living (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one’s grooming and hygiene, bathing, dressing and eating.

with the child, would be entitled to leave to bond with the child following placement, or to care for the child if the child had a serious health condition, because the employee stands in loco parentis to the child.” *Id.*

The department notes that “[n]either the statute nor the regulations restrict the number of parents a child may have under the FMLA.” *Id.*

<sup>22</sup> The employer is entitled to documentation supporting an employee’s claim of an in loco parentis relationship. “[T]he employee must provide the employer with sufficient facts indicating that such a relationship may exist. See *Sherrod v. Philadelphia Gas Works*, 57 Fed. Appx. 68, 72-73 (3d Cir. 2003) (‘Since [the employee] did not initially tell her employer that her grandmother had raised her, she failed to sufficiently explain her reasons for the needed leave so as to allow the employer to determine that her request was covered by the FMLA’).” *Ruble v. American River Transportation*, 2011 U.S. Dist. LEXIS 69898 (E.D. Mo. 2011).

<sup>23</sup> The Department of Labor opines that a “parent will be entitled to take FMLA leave to care for a son or daughter 18 years of age or older, if the adult son or daughter:

- (1) has a disability as defined by the ADA;
- (2) is incapable of self-care due to that disability;
- (3) has a serious health condition; and
- (4) is in need of care due to the serious health condition.

It is only when all four requirements are met that an eligible employee is entitled to FMLA-protected leave to care for his or her adult son or daughter.” Wage & Hour Adm’r Interpretation No. 2013-1 (Jan. 14, 2013).

The department’s opinion comports with the 2009 amendments to the Americans with Disabilities Act (ADAAA), which require courts “to construe the term disability broadly and to provide coverage to the maximum extent possible under the [ADAAA].... The ADAAA’s expanded definition of ‘disability’ gives greater weight to the First Circuit’s decision in *Navarro*.... The First Circuit held... that Congress did not intend that the impairment always be shown to be long-lasting.” The broader definition of “disability” includes “impairments that either are not of long duration or are episodic or in remission.” *Patton v. eCardio Diagnostics*, 793 F.Supp.2d 964, 966-67 (S.D.Tex. 2011) (internal quotes and citations omitted).

Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

(2) *Physical or mental disability* means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 CFR 1630.2(h), (i), and (j), issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, define these terms.

-(3) Persons who are “in loco parentis” include those with day-to-day responsibilities to care for and financially support a child, or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

(e) *Next of kin of a covered servicemember* means the nearest blood relative other than the covered servicemember’s spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember’s next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered servicemember’s only next of kin. See § 825.127(d)(3).

(f) *Adoption* means legally and permanently assuming the responsibility of raising a child as one’s own. The source of an adopted child (e.g., whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for FMLA leave. See § 825.121 for rules governing leave for adoption.

(g) *Foster care* means 24-hour care for children in substitution for, and away from, their parents or guardian. Such placement is made by or with the agreement of the State as a result of a voluntary agreement between the parent or guardian that the child be removed from the home, or pursuant to a judicial determination of the necessity for foster care, and involves agreement between the State and foster family that the foster family will take care of the child. Although foster care may be with relatives of the child, State action is involved in the removal of the child from parental custody. See § 825.121 for rules governing leave for foster care.

(h) *Son or daughter on covered active duty or call to covered active duty status* means the employee’s

biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on covered active duty or call to covered active duty status, and who is of any age. See § 825.126(a)(5).

(i) *Son or daughter of a covered servicemember* means the covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age. See § 825.127(b)(1).

(j) *Parent of a covered servicemember*. "Parent of a covered servicemember" means a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered servicemember. This term does not include parents "in law." See § 825.127(d)(2).

(k) *Documenting relationships*. For purposes of confirmation of family relationship, the employer may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, etc. The employer is entitled to examine documentation such as a birth certificate, etc., but the employee is entitled to the return of the official document submitted for this purpose.

### § 825.123 Unable to perform the functions of the position.

-(a) *Definition*. An employee is unable to perform the functions of the position where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act (ADA), as amended, 42 U.S.C. 12101 *et seq.*, and the regulations at 29 CFR 1630.2(n).<sup>24</sup> An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment.

-(b) *Statement of functions*. An employer has the option, in requiring certification from a health care provider, to provide a statement of the essential functions of the employee's position for the health care provider to review. A sufficient medical certification must specify what functions of the employee's position the employee is unable to perform so that the employer can then determine whether the employee is unable to perform one or more essential functions of the

employee's position. For purposes of FMLA, the essential functions of the employee's position are to be determined with reference to the position the employee held at the time notice is given or leave commenced, whichever is earlier. See § 825.306.

### § 825.124 Needed to care for a family member or covered servicemember.<sup>25</sup>

-(a) The medical certification provision that an employee is needed to care for a family member or covered servicemember encompasses both physical and psychological care.<sup>26</sup> It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.<sup>27</sup>

<sup>25</sup> Employees applying for leave to provide "psychological comfort and reassurance" to a family member may be required to establish that they are providing needed care. Under § 825.124 (a), to provide "care for" a family member with a serious health condition the employee must participate in the ongoing treatment of the condition and must be in close physical proximity to the ill family member. *Baham v. McLane Foodservice*, 431 Fed.Appx. 345, 348-49, 2011 WL 2623575 (5th Cir. 2011), citing *Tellis v. Alaska Airlines*, 414 F.3d 1045 (9th Cir. 2005).

In *Morgan Foods, Inc.*, 106 Lab. Arb. 833 (Goldstein 1996), the arbitrator found that the FMLA does not require the employer to grant a leave of absence to an employee just because the employee wished to be with the family member, since the statute mandates that the employee be "needed to care for" the family member. *Id.* at 836. *But see* § 825.124 (b) and accompanying notes.

<sup>26</sup> "An employee may 'care' for a sick family member in a number of ways, including by: providing physical care; providing 'psychological comfort and reassurance'; discussing the family member's medical condition and treatment with doctors; and authorizing medical procedures. Additionally, employees can provide care even if they are only 'filling in' for the primary caregiver." *Bell v. Prefix, Inc.*, 321 Fed. Appx. 423, 326 (6th Cir. 2009) (*unpublished*) (citations and quotations omitted).

<sup>27</sup> The Ninth Circuit Court of Appeals emphasized in a 2002 opinion that an employee can take leave solely to provide psychological care to an ailing family member regardless of whether the family member is hospitalized:

The final regulations clarify that the concept of "care" includes providing psychological comfort to those "receiving inpatient or home care." The legislative history of the FMLA underscores the significance of this type of care:

The phrase "to care for"... is intended to be read broadly to include both physical and psychological care.

The regulations clearly contemplate not only physical but, just as important, also the psychological care that seriously

<sup>24</sup> It is the responsibility of the health care provider, not the employer, "to certify whether the employee is unable to perform any essential function of her job." However, the employer's duty to reinstate is only triggered if the certification "provides that the employee can return without restriction." *Budhun v. Reading Hosp. & Med'l Ctr.*, 765 F.3d 245, 254 (3rd Cir. 2014).

-(b) The term also includes situations where the employee may be needed to substitute for others who normally care for the family member or covered servicemember, or to make arrangements for changes in care, such as transfer to a nursing home.<sup>28</sup> The employee need not be the only individual or family member available to care for the family member or covered servicemember.<sup>29</sup>

ill parents often require from their care-giving children. There is evidence in the record that [the plaintiff's father] at times was unable to complete daily tasks and it was necessary for his son to assist and comfort him.

*Scamihorn v. General Truck Drivers Local 952*, 282 F.3d 1078, 1087, 7 Wage & Hour Cas. 2d 1172, 1180 (9th Cir. 2002)(citations omitted, emphasis in original).

The family member need not necessarily be conscious. *Bell v. Prefix, Inc.*, 2007 US Dist LEXIS 52837 (E.D. Mich., 2007), *aff'd*, 321 Fed. Appx. 423 (6th Cir. 2009) (plaintiff's hospital visits to his father were protected by the FMLA, even though the plaintiff's father remained in a drug-induced coma for all but the plaintiff's initial visit).

"Caring for" does not include accompanying family members on non-medically related trips. See *Gradilla v. Ruskin Mfg.*, 320 F.3d 951 (9th Cir. 2003) *opinion withdrawn, on stipulation of the parties, by Gradilla v. Ruskin Mfg.*, 328 F.3d 1107 (9th Cir. 2003), (worker could not take leave under the California Family Rights Act to accompany his sick wife to a funeral in Mexico). See also *Alsoofi v. Thyssenkrupp Materials NA*, 2010 WL 973456, \*6 (E.D. Mich. 2010) (accompanying betrothed sister to Yemen for six-week family celebration does not constitute "caring for" family member, where employee was not "substituting for" caregiver when he replaced ill brother to fulfill religious requirement that sister travel with male family member). *But see Ballard v. Chicago Park District*, 2012 WL 4578059 (N.D. Ill. 2012) (employee could take FMLA leave to accompany her mother on a trip provided by a charitable organization that grants "wishes" to terminally ill persons, where employee was needed to care for mother during trip; that the trip had no medical-treatment purpose has no bearing on an employee's eligibility for FMLA leave).

<sup>28</sup> An employee may take FMLA leave to go to the hospital in order to make a decision with his sister regarding whether his mother should continue on life support. *Romans v. Mich. Dep't of Human Svcs.*, 668 F.3d 826, 840 (6th Cir. 2012).

<sup>29</sup> Leave taken by a father to babysit his three healthy children while his wife stayed with their fourth, sick child in the hospital was covered by FMLA. "A literal reading of the FMLA makes it clear that Congress passed it to aid families when faced with a crisis such as the one faced by the Briones family when Calixto became gravely ill. The Court therefore concludes that the scope of the protections afforded by the Act is broad enough to encompass Briones' claim." *Briones v. Genuine Parts Co.*, 225 F.Supp. 2d 711, 716 (E.D.La. 2002).

The employee seeking leave need not demonstrate that they are the only person who can provide care. "The plain language of the statute states that an employee is entitled to leave '[i]n order to care for the ... parent, of the employee, if such ... parent has a serious health condition.'" 29 U.S.C. § 2612(a)(1)(C). The statute does not impose the additional requirement that the employee prove necessity to care for ill parent. To conclude otherwise is to read something that is simply not contained in the statute. Under the plain language

-(c) An employee's intermittent leave or a reduced leave schedule necessary to care for a family member or covered servicemember includes not only a situation where the condition of the family member or covered servicemember itself is intermittent, but also where the employee is only needed intermittently--such as where other care is normally available, or care responsibilities are shared with another member of the family or a third party. See §§ 825.202-825.205 for rules governing the use of intermittent or reduced schedule leave.

#### § 825.125 Definition of health care provider.

-(a) The Act defines *health care provider* as:

(1) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

-(2) Any other person determined by the Secretary to be capable of providing health care services.

-(b) Others capable of providing health care services include only:

-(1) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;

-(2) Nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;

-(3) Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employer that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from

of the statute, to be entitled to FMLA leave, Barrilleaux must only prove that she is an 'eligible employee' requesting leave in order to care for her father who had a 'serious health condition', as noted above." *Barrilleaux v. Thayer Lodging Group*, 1999 WL 144110, 5 Wage & Hour Cas.2d (BNA) 601 (E.D.La. 1999). See also *Patton v. eCardio Diagnostics*, 793 F.Supp.2d 964, 966-67 (S.D.Tex. 2011) ("[T]he FMLA permits an employee to take leave even when sharing responsibility for the injured person's care."); *Romans v. Mich. Dep't of Human Svcs.*, 668 F.3d 826, 840 (6th Cir. 2012) (court below improperly granted employer summary judgment where court erroneously found employee was not protected because his sister was present to provide care, given that regulation was clarified in 2009 to add that employee need not be only person available to care for family member and same section provides that family members are entitled to leave to "make arrangements" for changes in care).

a health care provider other than a Christian Science practitioner except as otherwise provided under applicable State or local law or collective bargaining agreement;

(4) Any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and

(5) A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

(c) The phrase authorized to practice in the State as used in this section means that the provider must be authorized to diagnose and treat physical or mental health conditions.

#### § 825.126 Leave because of a qualifying exigency.

(a) Eligible employees may take FMLA leave for a qualifying exigency while the employee's spouse, son, daughter, or parent (the military member or member) is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty).

(1) *Covered active duty or call to covered active duty status* in the case of a member of the Regular Armed Forces means duty during the deployment of the member with the Armed Forces to a foreign country. The active duty orders of a member of the Regular components of the Armed Forces will generally specify if the member is deployed to a foreign country.

(2) *Covered active duty or call to covered active duty status* in the case of a member of the Reserve components of the Armed Forces means duty during the deployment of the member with the Armed Forces to a foreign country under a Federal call or order to active duty in support of a contingency operation pursuant to: Section 688 of Title 10 of the United States Code, which authorizes ordering to active duty retired members of the Regular Armed Forces and members of the retired Reserve who retired after completing at least 20 years of active service; Section 12301(a) of Title 10 of the United States Code, which authorizes ordering all reserve component members to active duty in the case of war or national emergency; Section 12302 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Ready Reserve to active duty; Section 12304 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Selected Reserve and certain members of the Individual Ready Reserve to active duty; Section 12305 of Title 10 of the United States Code, which authorizes the suspension of promotion, retirement or separation rules for certain Reserve components; Section 12406 of Title 10 of the United States Code, which authorizes calling the National

Guard into Federal service in certain circumstances; chapter 15 of Title 10 of the United States Code, which authorizes calling the National Guard and state military into Federal service in the case of insurrections and national emergencies; or any other provision of law during a war or during a national emergency declared by the President or Congress so long as it is in support of a contingency operation. See 10 U.S.C. 101(a)(13)(B).

(i) For purposes of covered active duty or call to covered active duty status, the Reserve components of the Armed Forces include the Army National Guard of the United States, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard of the United States, Air Force Reserve and Coast Guard Reserve, and retired members of the Regular Armed Forces or Reserves who are called up in support of a contingency operation pursuant to one of the provisions of law identified in paragraph (a)(2).

(ii) The active duty orders of a member of the Reserve components will generally specify if the military member is serving in support of a contingency operation by citation to the relevant section of Title 10 of the United States Code and/or by reference to the specific name of the contingency operation and will specify that the deployment is to a foreign country.

(3) *Deployment of the member with the Armed Forces to a foreign country* means deployment to areas outside of the United States, the District of Columbia, or any Territory or possession of the United States, including international waters.

(4) A call to covered active duty for purposes of leave taken because of a qualifying exigency refers to a Federal call to active duty. State calls to active duty are not covered unless under order of the President of the United States pursuant to one of the provisions of law identified in paragraph (a)(2) of this section.

(5) *Son or daughter on covered active duty or call to covered active duty status* means the employee's biological, adopted, or foster child, legal ward, or a child for whom the employee stood in loco parentis, who is on covered active duty or call to covered active duty status, and who is of any age.

(b) An eligible employee may take FMLA leave for one or more of the following qualifying exigencies:

(1) *Short-notice deployment.* (i) To address any issue that arises from the fact that the military member is notified of an impending call or order to covered active duty seven or less calendar days prior to the date of deployment;

(ii) Leave taken for this purpose can be used for a period of seven calendar days beginning on the date the military member is notified of an impending call or order to covered active duty;

(2) *Military events and related activities.* (i) To attend any official ceremony, program, or event sponsored by the military that is related to the covered active duty or call to covered active duty status of the military member; and

-(ii) To attend family support or assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross that are related to the covered active duty or call to covered active duty status of the military member;

-(3) *Childcare and school activities.* For the purposes of leave for childcare and school activities listed in (i) through (iv) of this paragraph, a child of the military member must be the military member's biological, adopted, or foster child, stepchild, legal ward, or child for whom the military member stands in loco parentis, who is either under 18 years of age or 18 years of age or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence. As with all instances of qualifying exigency leave, the military member must be the spouse, son, daughter, or parent of the employee requesting qualifying exigency leave.

(i) To arrange for alternative childcare for a child of the military member when the covered active duty or call to covered active duty status of the military member necessitates a change in the existing childcare arrangement;

(ii) To provide childcare for a child of the military member on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the need to provide such care arises from the covered active duty or call to covered active duty status of the military member;

-(iii) To enroll in or transfer to a new school or day care facility a child of the military member when enrollment or transfer is necessitated by the covered active duty or call to covered active duty status of the military member; and

-(iv) To attend meetings with staff at a school or a daycare facility, such as meetings with school officials regarding disciplinary measures, parent-teacher conferences, or meetings with school counselors, for a child of the military member, when such meetings are necessary due to circumstances arising from the covered active duty or call to covered active duty status of the military member;

—(4) *Financial and legal arrangements.*

(i) To make or update financial or legal arrangements to address the military member's absence while on covered active duty or call to covered active duty status, such as preparing and executing financial and healthcare powers of attorney, transferring bank account signature authority, enrolling in the Defense Enrollment Eligibility Reporting System (DEERS), obtaining military identification cards, or preparing or updating a will or living trust; and

-(ii) To act as the military member's representative before a federal, state, or local agency for purposes of obtaining, arranging, or appealing military service benefits while the military member is on covered active duty or call to covered active duty status, and for a

period of 90 days following the termination of the military member's covered active duty status;

-(5) *Counseling.* To attend counseling provided by someone other than a health care provider, for oneself, for the military member, or for the biological, adopted, or foster child, a stepchild, or a legal ward of the military member, or a child for whom the military member stands in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence, provided that the need for counseling arises from the covered active duty or call to covered active duty status of the military member;

-(6) *Rest and Recuperation.* (i) To spend time with the military member who is on short-term, temporary, Rest and Recuperation leave during the period of deployment;

-(ii) Leave taken for this purpose can be used for a period of 15 calendar days beginning on the date the military member commences each instance of Rest and Recuperation leave;

-(7) *Post-deployment activities.* (i) To attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following the termination of the military member's covered active duty status; and

-(ii) To address issues that arise from the death of the military member while on covered active duty status, such as meeting and recovering the body of the military member, making funeral arrangements, and attending funeral services;

(8) *Parental care.* For purposes of leave for parental care listed in (i) through (iv) of this paragraph, the parent of the military member must be incapable of self-care and must be the military member's biological, adoptive, step, or foster father or mother, or any other individual who stood in loco parentis to the military member when the member was under 18 years of age. A parent who is incapable of self-care means that the parent requires active assistance or supervision to provide daily self-care in three or more of the activities of daily living or instrumental activities of daily living. Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing, and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc. As with all instances of qualifying exigency leave, the military member must be the spouse, son, daughter, or parent of the employee requesting qualifying exigency leave.

(i) To arrange for alternative care for a parent of the military member when the parent is incapable of self-care and the covered active duty or call to covered active duty status of the military member necessitates a change in the existing care arrangement for the parent;

(ii) To provide care for a parent of the military member on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the parent is incapable of self-care and the need to provide such care arises from the covered active duty or call to covered active duty status of the military member;

(iii) To admit to or transfer to a care facility a parent of the military member when admittance or transfer is necessitated by the covered active duty or call to covered active duty status of the military member; and

(iv) To attend meetings with staff at a care facility, such as meetings with hospice or social service providers for a parent of the military member, when such meetings are necessary due to circumstances arising from the covered active duty or call to covered active duty status of the military member but not for routine or regular meetings;

(9) *Additional activities.* To address other events which arise out of the military member's covered active duty or call to covered active duty status provided that the employer and employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave.

**§ 825.127 Leave to care for a covered servicemember with a serious injury or illness (military caregiver leave).**

(a) Eligible employees are entitled to FMLA leave to care for a covered servicemember with a serious illness or injury.

(b) *Covered servicemember* means:

(1) A current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status; or is otherwise on the temporary disability retired list, for a serious injury or illness. Outpatient status means the status of a member of the Armed Forces assigned to either a military medical treatment facility as an outpatient or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.

(2) A covered veteran who is undergoing medical treatment, recuperation or therapy for a serious injury or illness. Covered veteran means an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves), and was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran. An eligible employee must commence leave to care for a covered veteran within five years of the veteran's active duty service, but the single 12-month period described in paragraph (e)(1) of this section may extend beyond the five-year period.

(i) For an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves) and who was discharged or released under conditions other than dishonorable prior to the effective date of this Final Rule, the period between October 28, 2009 and the effective date of this Final Rule shall not count towards the determination of the five-year period for covered veteran status.

(c) *A serious injury or illness* means:

(1) In the case of a current member of the Armed Forces, including a member of the National Guard or Reserves, means an injury or illness that was incurred by the covered servicemember in the line of duty on active duty in the Armed Forces or that existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces, and that may render the member medically unfit to perform the duties of the member's office, grade, rank or rating; and,

(2) In the case of a covered veteran, means an injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) and manifested itself before or after the member became a veteran, and is:

(i) a continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; or

(ii) a physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or

(iii) a physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or

(iv) an injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

(d) In order to care for a covered servicemember, an eligible employee must be the spouse, son, daughter, or parent, or next of kin of a covered servicemember.

(1) *Son or daughter of a covered servicemember* means the covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age.

(2) *Parent of a covered servicemember* means a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who

stood in loco parentis to the covered servicemember. This term does not include parents "in law."

(3) *Next of kin of a covered servicemember* means the nearest blood relative, other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered servicemember's only next of kin. For example, if a covered servicemember has three siblings and has not designated a blood relative to provide care, all three siblings would be considered the covered servicemember's next of kin. Alternatively, where a covered servicemember has a sibling(s) and designates a cousin as his or her next of kin for FMLA purposes, then only the designated cousin is eligible as the covered servicemember's next of kin. An employer is permitted to require an employee to provide confirmation of covered family relationship to the covered servicemember pursuant to § 825.122(k).

(e) An eligible employee is entitled to 26 workweeks of leave to care for a covered servicemember with a serious injury or illness during a single 12-month period.

(1) The single 12-month period described in paragraph (e) of this section begins on the first day the eligible employee takes FMLA leave to care for a covered servicemember and ends 12 months after that date, regardless of the method used by the employer to determine the employee's 12 workweeks of leave entitlement for other FMLA-qualifying reasons. If an eligible employee does not take all of his or her 26 workweeks of leave entitlement to care for a covered servicemember during this single 12-month period, the remaining part of his or her 26 workweeks of leave entitlement to care for the covered servicemember is forfeited.

(2) The leave entitlement described in paragraph (e) of this section is to be applied on a per-covered-servicemember, per-injury basis such that an eligible employee may be entitled to take more than one period of 26 workweeks of leave if the leave is to care for different covered servicemembers or to care for the same servicemember with a subsequent serious injury or illness, except that no more than 26 workweeks of leave may be taken within any single 12-month period.

An eligible employee may take more than one period of 26 workweeks of leave to care for a covered servicemember with more than one serious injury or illness only when the serious injury or illness is a subsequent serious injury or illness. When an eligible employee takes leave to care for more than one covered servicemember or for a subsequent serious injury or illness of the same covered servicemember, and the single 12-month periods corresponding to the different military caregiver leave entitlements overlap, the employee is limited to taking no more than 26 workweeks of leave in each single 12-month period.

(3) An eligible employee is entitled to a combined total of 26 workweeks of leave for any FMLA-qualifying reason during the single 12-month period described in paragraph (e) of this section, provided that the employee is entitled to no more than 12 workweeks of leave for one or more of the following: because of the birth of a son or daughter of the employee and in order to care for such son or daughter; because of the placement of a son or daughter with the employee for adoption or foster care; in order to care for the spouse, son, daughter, or parent with a serious health condition; because of the employee's own serious health condition; or because of a qualifying exigency. Thus, for example, an eligible employee may, during the single 12-month period, take 16 workweeks of FMLA leave to care for a covered servicemember and 10 workweeks of FMLA leave to care for a newborn child. However, the employee may not take more than 12 weeks of FMLA leave to care for the newborn child during the single 12-month period, even if the employee takes fewer than 14 workweeks of FMLA leave to care for a covered servicemember.

(4) In all circumstances, including for leave taken to care for a covered servicemember, the employer is responsible for designating leave, paid or unpaid, as FMLA-qualifying, and for giving notice of the designation to the employee as provided in § 825.300. In the case of leave that qualifies as both leave to care for a covered servicemember and leave to care for a family member with a serious health condition during the single 12-month period described in paragraph (e) of this section, the employer must designate such leave as leave to care for a covered servicemember in the first instance. Leave that qualifies as both leave to care for a covered servicemember and leave taken to care for a family member with a serious health condition during the single 12-month period described in paragraph (e) of this section must not be designated and counted as both leave to care for a covered servicemember and leave to care for a family member with a serious health condition. As is the case with leave taken for other qualifying reasons, employers may retroactively designate leave as leave to care for a covered servicemember pursuant to § 825.301(d).

(f) A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 26 workweeks of

leave during the single 12-month period described in paragraph (e) of this section if the leave is taken for birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care, or to care for the child after placement, to care for the employee's parent with a serious health condition, or to care for a covered servicemember with a serious injury or illness. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as a husband and wife are employed by the "same employer." It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 26 workweeks of FMLA leave.

### Subpart B—Employee Leave Entitlements Under the Family and Medical Leave Act

#### § 825.200 Amount of leave.

(a) Except in the case of leave to care for a covered servicemember with a serious injury or illness, an eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks of leave during any 12-month period for any one, or more, of the following reasons:

(1) The birth of the employee's son or daughter, and to care for the newborn child;

(2) The placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child;

(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition;

(4) Because of a serious health condition that makes the employee unable to perform one or more of the essential functions of his or her job; and,

(5) Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty status (or has been notified of an impending call or order to covered active duty).

(b) An employer is permitted to choose any one of the following methods for determining the 12-month period in which the 12 weeks of leave entitlement described in paragraph (a) of this section occurs:

(1) The calendar year;

(2) Any fixed 12-month leave year, such as a fiscal year, a year required by State law, or a year starting on an employee's anniversary date;

(3) The 12-month period measured forward from the date any employee's first FMLA leave under paragraph (a) begins; or,

(4) A "rolling" 12-month period measured backward from the date an employee uses any FMLA leave as described in paragraph (a).

(c) Under methods in paragraphs (b)(1) and (b)(2) of this section an employee would be entitled to up to 12 weeks of FMLA leave at any time in the fixed 12-month period selected. An employee could, therefore, take 12 weeks of leave at the end of the year and 12 weeks at the beginning of the following year. Under the method in paragraph (b)(3) of this section, an employee would be entitled to 12 weeks of leave during the year beginning on the first date FMLA leave is taken; the next 12-month period would begin the first time FMLA leave is taken after completion of any previous 12-month period. Under the method in paragraph (b)(4) of this section, the "rolling" 12-month period, each time an employee takes FMLA leave the remaining leave entitlement would be any balance of the 12 weeks which has not been used during the immediately preceding 12 months.<sup>30</sup> For example, if an employee has taken eight weeks of leave during the past 12 months, an additional four weeks of leave could be taken. If an employee used four weeks beginning February 1, 2008, four weeks beginning June 1, 2008, and four weeks beginning December 1, 2008, the employee would not be entitled to any additional leave until February 1, 2009. However, beginning on February 1, 2009, the employee would again be eligible to take FMLA leave, recouping the right to take the leave in the same manner and amounts in which it was used in the previous year. Thus, the employee would recoup (and be entitled to use) one additional day of FMLA leave each day for four weeks, commencing February 1, 2009. The employee would also begin to recoup additional days beginning on June 1, 2009, and additional days beginning on December 1, 2009. Accordingly, employers using the rolling 12-month period may need to calculate whether the employee is entitled to take FMLA leave each time that leave is requested, and employees taking FMLA leave on such a basis may fall in and out of FMLA protection based on their FMLA usage in the prior 12 months. For example, in the example above, if the employee needs six weeks of leave for a serious health condition commencing February 1, 2009, only the first four weeks of the leave would be FMLA protected.

(d)(1) Employers will be allowed to choose any one of the alternatives in paragraph (b) of this section for the leave entitlements described in paragraph (a) of this section provided the alternative chosen is applied

<sup>30</sup>When an employee takes intermittent leave, he or she need only meet the eligibility requirements when the leave commences. "[A] series of absences, separated by days during which the employee is at work, but all of which are taken for the same medical reason, subject to the same notice, and taken during the same twelve-month period, comprises one period of intermittent leave. [The employee] must establish his eligibility only on the occasion of the first absence and not on the occasion of every absence thereafter." *Barron v. Runyon*, 11 F.Supp. 2d 676, 680, 4 Wage & Hour Cas. 2d 1321, 1325-6 (E.D.Va. 1998), *aff'd*, 205 F.3d 1332 (4th Cir. 2000).

See also §§ 825.110(d) and 825.300 (b) and accompanying notes.



consistently and uniformly to all employees. An employer wishing to change to another alternative is required to give at least 60 days notice to all employees, and the transition must take place in such a way that the employees retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the employee. Under no circumstances may a new method be implemented in order to avoid the Act's leave requirements.

-(2) An exception to this required uniformity would apply in the case of a multi-State employer who has eligible employees in a State which has a family and medical leave statute. The State may require a single method of determining the period during which use of the leave entitlement is measured. This method may conflict with the method chosen by the employer to determine any 12 months for purposes of the Federal statute. The employer may comply with the State provision for all employees employed within that State, and uniformly use another method provided by this regulation for the leave entitlements described in paragraph (a) for all other employees.

(e) If an employer fails to select one of the options in paragraph (b) of this section for measuring the 12-month period for the leave entitlements described in paragraph (a), the option that provides the most beneficial outcome for the employee will be used. The employer may subsequently select an option only by providing the 60-day notice to all employees of the option the employer intends to implement. During the running of the 60-day period any other employee who needs FMLA leave may use the option providing the most beneficial outcome to that employee. At the conclusion of the 60-day period the employer may implement the selected option.<sup>31</sup>

-(f) An eligible employee's FMLA leave entitlement is limited to a total of 26 workweeks of leave during a single 12-month period to care for a covered servicemember with a serious injury or illness. An employer shall determine the single 12-month period in which the 26-weeks-of-leave-entitlement described in this paragraph occurs using the 12-month period measured forward from the date an employee's first

FMLA leave to care for the covered servicemember begins. See § 825.127(e)(1).

-(g) During the single 12-month period described in paragraph (f), an eligible employee's FMLA leave entitlement is limited to a combined total of 26 workweeks of FMLA leave for any qualifying reason. See § 825.127(e)(3).

-(h) For purposes of determining the amount of leave used by an employee, the fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave. However, if an employee is using FMLA leave in increments of less than one week, the holiday will not count against the employee's FMLA entitlement unless the employee was otherwise scheduled and expected to work during the holiday. Similarly, if for some reason the employer's business activity has temporarily ceased and employees generally are not expected to report for work for one or more weeks (e.g., a school closing two weeks for the Christmas/New Year holiday or the summer vacation or an employer closing the plant for retooling or repairs), the days the employer's activities have ceased do not count against the employee's FMLA leave entitlement. Methods for determining an employee's 12-week leave entitlement are also described in § 825.205. See § 825.802 for special calculation of leave rules applicable to airline flight crew employees.

#### § 825.201 Leave to care for a parent.

-(a) *General rule.* An eligible employee is entitled to FMLA leave if needed to care for the employee's parent with a serious health condition. Care for parents-in-law is not covered by the FMLA. See § 825.122(c) for definition of parent.

-(b) *Same employer limitation.* A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken to care for the employee's parent with a serious health condition, for the birth of the employee's son or daughter or to care for the child after the birth, or for placement of a son or daughter with the employee for adoption or foster care or to care for the child after placement. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as a husband and wife are employed by the same employer. It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where the husband and wife both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the husband and wife would each be entitled to the difference between the

<sup>31</sup>"The regulations... plainly contemplate that the employer's selection of one of the four calculation methods will be an open one, not a secret kept from the employees.... [A]n initial selection of a method of calculating the leave year must be an open—not a secret—one before it can be applied to an employee's disadvantage." *Bachelor v. American West Airlines Inc.*, 259 F.3d 1112, 1128 (9th Cir. 2001); accord *Thom v. Am. Standard, Inc.*, 666 F.3d 968, 974 (6th Cir. 2012). See also *Casas v. Sch. Dist. of Hillsborough Cnty.*, 2014 WL 2988059, \*4-5 (M.D. Fla 2014) (employer's ambiguous policy as to which method it used to calculate 12-month period entitles teacher to use most beneficial leave period regardless of the teacher's subjective belief as to which method the employer used).

See also § 825.300 (c)(5).

amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took six weeks of leave to care for a parent, each could use an additional six weeks due to his or her own serious health condition or to care for a child with a serious health condition. *See also* § 825.127(d).

#### § 825.202 Intermittent leave or reduced leave schedule.

-(a) *Definition.* FMLA leave may be taken intermittently or on a reduced leave schedule under certain circumstances. Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason. A reduced leave schedule is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday.<sup>32</sup> A reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time.

-(b) *Medical necessity.* For intermittent leave or leave on a reduced leave schedule taken because of one's own serious health condition, to care for a spouse, parent, son, or daughter with a serious health condition, or to care for a covered servicemember with a serious injury or illness, there must be a medical need for leave and it must be that such medical need can be best accommodated through an intermittent or reduced leave schedule. The treatment regimen and other information described in the certification of a serious health condition and in the certification of a serious injury or illness, if required by the employer, addresses the medical necessity of intermittent leave or leave on a reduced leave schedule. *See* §§ 825.306, 825.310. Leave may be taken intermittently or on a reduced leave schedule when medically necessary for planned and/or unanticipated medical treatment of a serious health condition or of a covered servicemember's serious injury or illness, or for recovery from treatment or recovery

<sup>32</sup> In *Santiago v. Dep't of Transportation*, \_\_\_ F.Supp.3d \_\_\_, 2014 WL 4823869, \*6, \*9 (2014) (footnote omitted), the court held that the employee was entitled to FMLA leave to avoid working overtime, where his doctor determined that working extensive overtime triggered his migraines. The employer claimed the ability to work overtime was an "essential function" of his position and if could not perform it he was disability separated. Granting the employee requested leave would effectively relieve him "of ever having to work overtime for his lifetime while employed". The court ruled that "[t]o the extent that Mr. Santiago is able to use his FMLA leave to essentially obtain an accommodation that might not be available under the ADA, this is a result that is permitted by the statute and been considered by the DOL since the statute's inception.... [N]othing in the FMLA restricts Mr. Santiago from using the statutory entitlement to leave [to] eliminate overtime." *Accord Verhoff v. Time Warner Cable, Inc.*, 299 Fed. App'x. 488, 490 (6th Cir. 2008) (*unpublished*) (employer's refusal to grant leave to employee unable to work more than forty hours per week constituted interference with his right to intermittent FMLA leave).

from a serious health condition or a covered servicemember's serious injury or illness. It may also be taken to provide care or psychological comfort to a covered family member with a serious health condition or a covered servicemember with a serious injury or illness.

(1) Intermittent leave may be taken for a serious health condition of a spouse, parent, son, or daughter, for the employee's own serious health condition, or a serious injury or illness of a covered servicemember which requires treatment by a health care provider periodically, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy. A pregnant employee may take leave intermittently for prenatal examinations or for her own condition, such as for periods of severe morning sickness. An example of an employee taking leave on a reduced leave schedule is an employee who is recovering from a serious health condition and is not strong enough to work a full-time schedule.

-(2) Intermittent or reduced schedule leave may be taken for absences where the employee or family member is incapacitated or unable to perform the essential functions of the position because of a chronic serious health condition or a serious injury or illness of a covered servicemember, even if he or she does not receive treatment by a health care provider.<sup>33</sup> *See* §§ 825.113 and 825.127.

-(c) *Birth or placement.* When leave is taken after the birth of a healthy child or placement of a healthy child for adoption or foster care, an employee may take leave intermittently or on a reduced leave schedule only if the employer agrees. Such a schedule reduction might occur, for example, where an employee, with the employer's agreement, works part-time after the birth of a child, or takes leave in several segments. The employer's agreement is not required, however, for leave during which the mother has a serious health condition in connection with the birth of her child or if the newborn child has a serious health condition. *See* § 825.204 for rules governing transfer to an alternative position that better accommodates intermittent leave.

<sup>33</sup> Speaking in an American Law Institute-American Bar Association teleconference held on January 13, 2009, plaintiff's attorney Sharon M. Dietrich of Community Legal Services in Philadelphia said "employees assigned to mandatory overtime who cannot work that overtime because of an FMLA situation may take FMLA leave that amounts just to the overtime not worked during the week.... [Management-side attorney Ellen E.] McLaughlin [with Seyfarth Shaw in Chicago] said that, following exhaustion of FMLA leave, employees still unable to work mandatory overtime may be considered not qualified for their jobs." Laura D. Francis, *New FMLA Regulations Clarify and Change*, 47 Gov't Emp. Rel. Rep. (BNA) 113 (Jan. 27, 2009).

See also § 825.120 (pregnancy) and § 825.121 (adoption and foster care).

-(d) *Qualifying exigency.* Leave due to a qualifying exigency may be taken on an intermittent or reduced leave schedule basis.

#### § 825.203 Scheduling of intermittent or reduced schedule leave.

-Eligible employees may take FMLA leave on an intermittent or reduced schedule basis when medically necessary due to the serious health condition of a covered family member or the employee or the serious injury or illness of a covered servicemember. See § 825.202. Eligible employees may also take FMLA leave on an intermittent or reduced schedule basis when necessary because of a qualifying exigency. If an employee needs leave intermittently or on a reduced leave schedule for planned medical treatment, then the employee must make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations.

#### § 825.204 Transfer of an employee to an alternative position during intermittent leave or reduced schedule leave.

-(a) *Transfer or reassignment.* If an employee needs intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment for the employee, a family member, or a covered servicemember, including during a period of recovery from one's own serious health condition, a serious health condition of a spouse, parent, son, or daughter, or a serious injury or illness of a covered servicemember, or if the employer agrees to permit intermittent or reduced schedule leave for the birth of a child or for placement of a child for adoption or foster care, the employer may require the employee to transfer temporarily, during the period that the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. See § 825.601 for special rules applicable to instructional employees of schools.

-(b) *Compliance.* Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, Federal law (such as the Americans with Disabilities Act), and State law. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced schedule leave.

-(c) *Equivalent pay and benefits.* The alternative position must have equivalent pay and benefits. An alternative position for these purposes does not have to have equivalent duties. The employer may increase the pay and benefits of an existing alternative position, so as to make them equivalent to the pay and benefits of

the employee's regular job. The employer may also transfer the employee to a part-time job with the same hourly rate of pay and benefits, provided the employee is not required to take more leave than is medically necessary. For example, an employee desiring to take leave in increments of four hours per day could be transferred to a half-time job, or could remain in the employee's same job on a part-time schedule, paying the same hourly rate as the employee's previous job and enjoying the same benefits. The employer may not eliminate benefits which otherwise would not be provided to part-time employees; however, an employer may proportionately reduce benefits such as vacation leave where an employer's normal practice is to base such benefits on the number of hours worked.

-(d) *Employer limitations.* An employer may not transfer the employee to an alternative position in order to discourage the employee from taking leave or otherwise work a hardship on the employee. For example, a white collar employee may not be assigned to perform laborer's work; an employee working the day shift may not be reassigned to the graveyard shift; an employee working in the headquarters facility may not be reassigned to a branch a significant distance away from the employee's normal job location. Any such attempt on the part of the employer to make such a transfer will be held to be contrary to the prohibited acts of the FMLA.

-(e) *Reinstatement of employee.* When an employee who is taking leave intermittently or on a reduced leave schedule and has been transferred to an alternative position no longer needs to continue on leave and is able to return to full-time work, the employee must be placed in the same or equivalent job as the job he or she left when the leave commenced. An employee may not be required to take more leave than necessary to address the circumstance that precipitated the need for leave.

#### § 825.205 Increments of FMLA leave for intermittent or reduced schedule leave.

—(a) *Minimum increment.*

(1) When an employee takes FMLA leave on an intermittent or reduced leave schedule basis, the employer must account for the leave using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave provided that it is not greater than one hour and provided further that an employee's FMLA leave entitlement may not be reduced by more than the amount of leave actually taken. An employer may not require an employee to take more leave than is necessary to address the circumstances that precipitated the need for the leave, provided that the leave is counted using the shortest increment of leave used to account for any other type of leave. See also § 825.205(a)(2) for the physical impossibility exception, §§ 825.600 and 825.601 for special rules applicable to

employees of schools, and § 825.802 for special rules applicable to airline flight crew employees. If an employer uses different increments to account for different types of leave, the employer must account for FMLA leave in the smallest increment used to account for any other type of leave. For example, if an employer accounts for the use of annual leave in increments of one hour and the use of sick leave in increments of one-half hour, then FMLA leave use must be accounted for using increments no larger than one-half hour. If an employer accounts for use of leave in varying increments at different times of the day or shift, the employer may also account for FMLA leave in varying increments, provided that the increment used for FMLA leave is no greater than the smallest increment used for any other type of leave during the period in which the FMLA leave is taken. If an employer accounts for other forms of leave use in increments greater than one hour, the employer must account for FMLA leave use in increments no greater than one hour. An employer may account for FMLA leave in shorter increments than used for other forms of leave. For example, an employer that accounts for other forms of leave in one hour increments may account for FMLA leave in a shorter increment when the employee arrives at work several minutes late, and the employer wants the employee to begin work immediately. Such accounting for FMLA leave will not alter the increment considered to be the shortest period used to account for other forms of leave or the use of FMLA leave in other circumstances. In all cases, employees may not be charged FMLA leave for periods during which they are working.

(2) Where it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to commence or end work mid-way through a shift, such as where a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, or a laboratory employee is unable to enter or leave a sealed "clean room" during a certain period of time and no equivalent position is available, the entire period that the employee is forced to be absent is designated as FMLA leave and counts against the employee's FMLA entitlement. The period of the physical impossibility is limited to the period during which the employer is unable to permit the employee to work prior to a period of FMLA leave or return the employee to the same or equivalent position due to the physical impossibility after a period of FMLA leave. See § 825.214.

—(b) *Calculation of leave.* (1) When an employee takes leave on an intermittent or reduced leave schedule, only the amount of leave actually taken may be counted toward the employee's leave entitlement. The actual workweek is the basis of leave entitlement. Therefore, if an employee who would otherwise work 40 hours a week takes off eight hours, the employee would use one-fifth ( $\frac{1}{5}$ ) of a week of FMLA leave. Similarly, if a full-time employee who would otherwise work eight hour days works four-hour days under a

reduced leave schedule, the employee would use one-half ( $\frac{1}{2}$ ) week of FMLA leave. Where an employee works a part-time schedule or variable hours, the amount of FMLA leave that an employee uses is determined on a pro rata or proportional basis. If an employee who would otherwise work 30 hours per week, but works only 20 hours a week under a reduced leave schedule, the employee's 10 hours of leave would constitute one-third ( $\frac{1}{3}$ ) of a week of FMLA leave for each week the employee works the reduced leave schedule. An employer may convert these fractions to their hourly equivalent so long as the conversion equitably reflects the employee's total normally scheduled hours. An employee does not accrue FMLA-protected leave at any particular hourly rate. An eligible employee is entitled to up to a total of 12 workweeks of leave, or 26 workweeks in the case of military caregiver leave, and the total number of hours contained in those workweeks is necessarily dependent on the specific hours the employee would have worked but for the use of leave. See also, §§ 825.601 and 825.602, special rules for schools and § 825.802, special rules for airline flight crew employees.

(2) If an employer has made a permanent or long-term change in the employee's schedule (for reasons other than FMLA, and prior to the notice of need for FMLA leave), the hours worked under the new schedule are to be used for making this calculation.

(3) If an employee's schedule varies from week to week to such an extent that an employer is unable to determine with any certainty how many hours the employee would otherwise have worked (but for the taking of FMLA leave), a weekly average of the hours scheduled over the 12 months prior to the beginning of the leave period (including any hours for which the employee took leave of any type) would be used for calculating the employee's leave entitlement.

(c) *Overtime.* If an employee would normally be required to work overtime, but is unable to do so because of a FMLA-qualifying reason that limits the employee's ability to work overtime, the hours which the employee would have been required to work may be counted against the employee's FMLA entitlement. In such a case, the employee is using intermittent or reduced schedule leave. For example, if an employee would normally be required to work for 48 hours in a particular week, but due to a serious health condition the employee is unable to work more than 40 hours that week, the employee would utilize eight hours of FMLA-protected leave out of the 48-hour workweek, or one-sixth ( $\frac{1}{6}$ ) of a week of FMLA leave. Voluntary overtime hours that an employee does not work due to an FMLA-qualifying reason may not be counted against the employee's FMLA leave entitlement.

#### § 825.206 Interaction with the FLSA.

(a) Leave taken under FMLA may be unpaid. If an employee is otherwise exempt from minimum wage and

overtime requirements of the Fair Labor Standards Act (FLSA) as a salaried executive, administrative, professional, or computer employee (under regulations issued by the Secretary, 29 CFR part 541), providing unpaid FMLA-qualifying leave to such an employee will not cause the employee to lose the FLSA exemption. See 29 CFR 541.602—(b)(7). This means that under regulations currently in effect, where an employee meets the specified duties test, is paid on a salary basis, and is paid a salary of at least the amount specified in the regulations, the employer may make deductions from the employee's salary for any hours taken as intermittent or reduced FMLA leave within a workweek, without affecting the exempt status of the employee. The fact that an employer provides FMLA leave, whether paid or unpaid, and maintains records required by this part regarding FMLA leave, will not be relevant to the determination whether an employee is exempt within the meaning of 29 CFR part 541.

-(b) For an employee paid in accordance with the fluctuating workweek method of payment for overtime (see 29 CFR 778.114), the employer, during the period in which intermittent or reduced schedule FMLA leave is scheduled to be taken, may compensate an employee on an hourly basis and pay only for the hours the employee works, including time and one-half the employee's regular rate for overtime hours. The change to payment on an hourly basis would include the entire period during which the employee is taking intermittent leave, including weeks in which no leave is taken. The hourly rate shall be determined by dividing the employee's weekly salary by the employee's normal or average schedule of hours worked during weeks in which FMLA leave is not being taken. If an employer chooses to follow this exception from the fluctuating workweek method of payment, the employer must do so uniformly, with respect to all employees paid on a fluctuating workweek basis for whom FMLA leave is taken on an intermittent or reduced leave schedule basis. If an employer does not elect to convert the employee's compensation to hourly pay, no deduction may be taken for FMLA leave absences. Once the need for intermittent or reduced scheduled leave is over, the employee may be restored to payment on a fluctuating workweek basis.

-(c) This special exception to the salary basis requirements of the FLSA exemption or fluctuating workweek payment requirements applies only to employees of covered employers who are eligible for FMLA leave, and to leave which qualifies as FMLA leave. Hourly or other deductions which are not in accordance with 29 CFR part 541 or 29 CFR 778.114 may not be taken, for example, from the salary of an employee who works for an employer with fewer than 50 employees, or where the employee has not worked long enough to be eligible for FMLA leave without potentially affecting the employee's eligibility for exemption. Nor may deductions which are not permitted by 29 CFR part 541 or 29 CFR 778.114 be

taken from such an employee's salary for any leave which does not qualify as FMLA leave, for example, deductions from an employee's pay for leave required under State law or under an employer's policy or practice for a reason which does not qualify as FMLA leave, e.g., leave to care for a grandparent or for a medical condition which does not qualify as a serious health condition or serious injury or illness; or for leave which is more generous than provided by FMLA. Employers may comply with State law or the employer's own policy/practice under these circumstances and maintain the employee's eligibility for exemption or for the fluctuating workweek method of pay by not taking hourly deductions from the employee's pay, in accordance with FLSA requirements, or may take such deductions, treating the employee as an hourly employee and pay overtime premium pay for hours worked over 40 in a workweek.

#### § 825.207 Substitution of paid leave.

-(a) Generally, FMLA leave is unpaid leave. However, under the circumstances described in this section, FMLA permits an eligible employee to choose to substitute accrued paid leave for FMLA leave. If an employee does not choose to substitute accrued paid leave, the employer may require the employee to substitute accrued paid leave for unpaid FMLA leave.<sup>34</sup>

<sup>34</sup> An employer may not require an employee to substitute vacation leave for FMLA leave where the employee's vacation is governed by a collective bargaining agreement, unless the agreement specifically gives the employer the right to substitute. An employer violates the vacation provision of the agreement if it requires an employee to take vacation when he or she otherwise would not. Doing so unilaterally changes the terms and conditions of employment by placing a non-negotiated restriction on the employee's use of vacation. See *City & County of San Francisco*, 119 Lab. Arb. (BNA) 596 (F. Silver 2004)(city violated CBA when it required employee to use all paid accrued vacation leave and personal or floating holidays during her FMLA leave, since Act shall not be construed to diminish the obligation of an employer to comply with terms of any collective bargaining agreement). See also *Grand Haven Stamped Products*, 107 Lab. Arb. 131 (W. Daniel 1996); *Union Hospital*, 108 Lab. Arb. 966 (G. Chattman 1997). But cf. *Vie de France Yamazaki Inc.*, 116 Lab. Arb. 1518 (Alan J. Cook, 2001) (work rule requiring use of accrued paid vacation while on FMLA leave did not violate CBA, where vacation provision required employees to schedule vacation by March 1, "but in such a way as not to impair the ability of the Company to produce its product," and employer implemented work rule "to improve [its] effective operation"); *Interstate Brands Corp.*, 117 Lab. Arb. 714 (C.W. Sharpe, 2002) (employer did not violate contract when it substituted vacation for FMLA leave, where contract's vacation provision does not refer to FMLA and requires that scheduling of vacation be consistent with business requirements; leave substitution policy serves business purposes of reducing unavailability of employees). Cf. *OCSEA & Ohio Dep't of Rehabilitation and Correction*, cas. no. 27-33-20090323-0032-01-03, OCB award no. 2088 (2010) (C. George, grievant) (Susan Grody Ruben,

The term substitute means that the paid leave provided by the employer, and accrued pursuant to established policies of the employer, will run concurrently with the unpaid FMLA leave. Accordingly, the employee receives pay pursuant to the employer's applicable paid leave policy during the period of otherwise unpaid FMLA leave. An employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employer's normal leave policy. When an employee chooses, or an employer requires, substitution of accrued paid leave, the employer must inform the employee that the employee must satisfy any procedural requirements of the paid leave policy only in connection with the receipt of such payment. *See* § 825.300(c). If an employee does not comply with the additional requirements in an employer's paid leave policy, the employee is not entitled to substitute accrued paid leave, but the employee remains entitled to take unpaid FMLA leave.<sup>35</sup> Employers may not

arb.) (*unpublished*) (*available at* <<http://ocbarbs.das.ohio.gov/Default.aspx>>) (public employer cannot compel employee to use compensatory time concurrently with unpaid FMLA leave where CBA does not specifically give the employer that right).

An employer can also commit an unfair labor practice by requiring substitution in violation of a CBA's vacation provision. In *Verizon North, Inc., and IBEW, Local 1637*, 2007 NLRB LEXIS 261 (2007), the administrative law judge relied upon *Bhd. of Maintenance of Way Employees v. CSX Transp.*, 478 F.3d 614, 820 (7th Cir. 2007), *cert. denied*, 2008 U.S. LEXIS 1018 (2008), a case decided under the Railway Labor Act (RLA), finding the employer violated the NLRA by unilaterally changing the policy regarding the use of vacation days in lieu of unpaid FMLA. Specifically citing the court's holding that the FMLA may not be used to abrogate rights secured under a collective bargaining agreement, the Board determined that an employer must bargain to make a material change in its leave policies. *See Verizon North* at \*15-16.

*See also* § 825.700 (a).

<sup>35</sup> The courts generally hold that an employee who does not comply with the additional requirements of a paid sick leave policy is not entitled to paid leave, but remains entitled to unpaid FMLA leave. Some courts, however, permit employers to require employees to call in when taking paid sick leave concurrently with FMLA leave, especially if the employee has a history of abusing leave. For example, in *Callison v. City of Philadelphia*, 430 F.3d 117 (3d Cir. 2005), the Third Circuit Court of Appeals held that where an employee had previously abused sick leave, the employer does not interfere with his right to FMLA leave by requiring that during regular business hours he notify the employer when leaving home and upon return. This requirement "neither prevents employees from taking FMLA leave nor discourages employees from taking such leave. It simply ensures that employees do not abuse their FMLA leave." *Id.* at 120 (internal quotation omitted). Since call-in is not a prerequisite to entitlement to FMLA leave, it does not amount to an additional burden to taking leave. It only "sets forth obligations of employees who are on leave, regardless of whether the leave is pursuant to the FMLA. The purpose of the procedure is to provide an additional safeguard against sick leave abuse by employees...."

"Nothing in the FMLA prevents employers from ensuring that employees who are on leave from work do not abuse their

discriminate against employees on FMLA leave in the administration of their paid leave policies.<sup>36</sup>

(b) If neither the employee nor the employer elects to substitute paid leave for unpaid FMLA leave under the above conditions and circumstances, the employee will remain entitled to all the paid leave which is earned or accrued under the terms of the employer's plan.

(c) If an employee uses paid leave under circumstances which do not qualify as FMLA leave, the leave will not count against the employee's FMLA leave entitlement. For example, paid sick leave used for a medical condition which is not a serious health

leave, particularly those who enter leave while on the employer's Sick Abuse List." *Id.* at 120-21.

Following *Callison*, the Sixth Circuit holds that where an employee on a last chance agreement because of poor attendance fails to provide an FMLA medical certification or written doctor's note specifying his anticipated return date, and fails to call in daily as required by the CBA, the employer may properly discharge that employee for failing to call in. *Allen v. Butler County Commissioners*, 2009 U.S. App. LEXIS 18773, \*6, 19-20 (6th Cir. 2009).

The Seventh Circuit observes that "[n]othing in the FMLA or the implementing regulations prevents an employer from enforcing a rule requiring employees on FMLA leave to keep the employer informed about the employee's plans." *Gilliam v. United Parcel Serv., Inc.*, 233 F.2d 969, 972 (7th Cir. 2000). An employer may validly require employees to call in to verify that an absence is FMLA-related, or "may call the employee at home as a means of verification". *Jackson v. Jernberg Indus., Inc.*, 677 F.Supp.2d 1042, 1051 (N.D. Ill. 2010) *citing Callison*, 430 F.3d 117, 121 (3d Cir. 2005). However, the employer's right to be kept informed is not so broad as to permit it to require employees on intermittent leave to present a doctor's slip for each absence claimed as FMLA-qualifying where it otherwise had no suspicion that the employee was abusing leave. Certification and recertification are the only means by which an employer can require documentation from a health care provider. Anything additional constitutes interference with the employee's FMLA rights. *Jackson*, 677 F.Supp.2d at 1051-52.

In *Smith v. CallTech*, 2009 U.S. Dist. LEXIS 48518 (S.D. Ohio 2009), "CallTech's attendance policy,... requires a note from a physician verifying that every instance of absence, tardiness or early departure is directly related to the employee's medical condition that is on file. Under this policy, an employee approved for intermittent leave is not actually required to see a doctor each time leave is taken; the doctor can go back and verify several absences in a single note." *Id.* at \*12. The court held that CallTech's physician verification requirement was the functional equivalent of an FMLA medical certification. As CallTech had only given Smith 3 days to get the verification from her doctor, instead of the 15 days required by § 825.305 for medical certifications, the court held that CallTech had illegally interfered with Smith's FMLA rights. *Id.* at \*20-21.

<sup>36</sup> The employee is entitled to the protections of the Act regardless of whether the employer requires substitution of paid leave. *Strickland v. Water Works & Sewer Board of the City of Birmingham*, 239 F.3d 1199, 1205, 6 Wage & Hour Cas. 2d 1185 (11th Cir. 2001).

condition or serious injury or illness does not count against the employee's FMLA leave entitlement.

(d) Leave taken pursuant to a disability leave plan would be considered FMLA leave for a serious health condition and counted in the leave entitlement permitted under FMLA if it meets the criteria set forth above in §§ 825.112 through 825.115. In such cases, the employer may designate the leave as FMLA leave and count the leave against the employee's FMLA leave entitlement. Because leave pursuant to a disability benefit plan is not unpaid, the provision for substitution of the employee's accrued paid leave is inapplicable, and neither the employee nor the employer may require the substitution of paid leave.<sup>37</sup> However, employers and employees may agree, where state law permits, to have paid leave supplement the disability plan benefits, such as in the case where a plan only provides replacement income for two-thirds of an employee's salary.

(e) The Act provides that a serious health condition may result from injury to the employee on or off the job. If the employer designates the leave as FMLA leave in accordance with § 825.300(d), the leave counts against the employee's FMLA leave entitlement. Because the workers' compensation absence is not unpaid, the provision for substitution of the employee's accrued paid leave is not applicable, and neither the employee nor the employer may require the substitution of paid leave. However, employers and employees may agree, where state law permits, to have paid leave supplement workers' compensation benefits, such as in the case where workers' compensation only provides replacement income for two-thirds of an employee's salary. If the health care provider treating the employee for the workers' compensation injury certifies the employee is able to return to a light duty job but is unable to return to the same or equivalent job, the employee may decline the employer's offer of a light duty job. As a result the employee may lose workers' compensation payments, but is entitled to remain on unpaid FMLA leave until the employee's FMLA leave entitlement is exhausted. As of the date workers' compensation benefits cease, the substitution provision becomes applicable and either the employee may elect or the employer may require the use of accrued paid leave. See also §§ 825.210(f), 825.216(d), 825.220(d), 825.307(a) and 825.702(d)(1) and (2) regarding the relationship between workers' compensation absences and FMLA leave.

(f) Section 7(o) of the Fair Labor Standards Act (FLSA) permits public employers under prescribed circumstances to substitute compensatory time off

accrued at one and one-half hours for each overtime hour worked in lieu of paying cash to an employee when the employee works overtime hours as prescribed by the Act. This section of the FLSA limits the number of hours of compensatory time an employee may accumulate depending upon whether the employee works in fire protection or law enforcement (480 hours) or elsewhere for a public agency (240 hours). In addition, under the FLSA, an employer always has the right to cash out an employee's compensatory time or to require the employee to use the time. Therefore, if an employee requests and is permitted to use accrued compensatory time to receive pay for time taken off for an FMLA reason, or if the employer requires such use pursuant to the FLSA, the time taken may be counted against the employee's FMLA leave entitlement.

#### § 825.208 [Reserved]

#### § 825.209 Maintenance of employee benefits.

(a) During any FMLA leave, an employer must maintain the employee's coverage under any group health plan (as defined in the Internal Revenue Code of 1986 at 26 U.S.C. 5000(b)(1)) on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period. All employers covered by FMLA, including public agencies, are subject to the Act's requirements to maintain health coverage. The definition of group health plan is set forth in § 825.800. For purposes of FMLA, the term group health plan shall not include an insurance program providing health coverage under which employees purchase individual policies from insurers provided that:

- (1) No contributions are made by the employer;
- (2) Participation in the program is completely voluntary for employees;
- (3) The sole functions of the employer with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions and to remit them to the insurer;
- (4) The employer receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deduction; and,
- (5) The premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

(b) The same group health plan benefits provided to an employee prior to taking FMLA leave must be maintained during the FMLA leave. For example, if family member coverage is provided to an employee, family member coverage must be maintained during the FMLA leave. Similarly, benefit coverage during FMLA leave for medical care, surgical care, hospital

<sup>37</sup> If an employee receives short term disability payments during FMLA leave, the employer may not also require the employee to use sick and/or vacation days during the leave period. *Repa v. Roadway Express, Inc.*, 477 F.3d 938 (7<sup>th</sup> Cir. 2007) (for purposes of an employee's concurrent use of leaves, the regulations make no distinction between employer-provided benefits and third-party administered benefits).

care, dental care, eye care, mental health counseling, substance abuse treatment, *etc.*, must be maintained during leave if provided in an employer's group health plan, including a supplement to a group health plan, whether or not provided through a flexible spending account or other component of a cafeteria plan.

-(c) If an employer provides a new health plan or benefits or changes health benefits or plans while an employee is on FMLA leave, the employee is entitled to the new or changed plan/benefits to the same extent as if the employee were not on leave. For example, if an employer changes a group health plan so that dental care becomes covered under the plan, an employee on FMLA leave must be given the same opportunity as other employees to receive (or obtain) the dental care coverage. Any other plan changes (*e.g.*, in coverage, premiums, deductibles, *etc.*) which apply to all employees of the workforce would also apply to an employee on FMLA leave.

-(d) Notice of any opportunity to change plans or benefits must also be given to an employee on FMLA leave. If the group health plan permits an employee to change from single to family coverage upon the birth of a child or otherwise add new family members, such a change in benefits must be made available while an employee is on FMLA leave. If the employee requests the changed coverage it must be provided by the employer.

-(e) An employee may choose not to retain group health plan coverage during FMLA leave. However, when an employee returns from leave, the employee is entitled to be reinstated on the same terms as prior to taking the leave, including family or dependent coverages, without any qualifying period, physical examination, exclusion of pre-existing conditions, *etc.* See § 825.212(c).

-(f) Except as required by the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) and for "key" employees (as discussed below), an employer's obligation to maintain health benefits during leave (and to restore the employee to the same or equivalent employment) under FMLA ceases if and when the employment relationship would have terminated if the employee had not taken FMLA leave (*e.g.*, if the employee's position is eliminated as part of a nondiscriminatory reduction in force and the employee would not have been transferred to another position); an employee informs the employer of his or her intent not to return from leave (including before starting the leave if the employer is so informed before the leave starts); or the employee fails to return from leave or continues on leave after exhausting his or her FMLA leave entitlement in the 12-month period.

-(g) If a key employee (*see* § 825.218) does not return from leave when notified by the employer that substantial or grievous economic injury will result from his or her reinstatement, the employee's entitlement to group health plan benefits continues unless and until the employee advises the employer that the employee

does not desire restoration to employment at the end of the leave period, or the FMLA leave entitlement is exhausted, or reinstatement is actually denied.

-(h) An employee's entitlement to benefits other than group health benefits during a period of FMLA leave (*e.g.*, holiday pay) is to be determined by the employer's established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as appropriate).

#### **§ 825.210 Employee payment of group health benefit premiums.**

-(a) Group health plan benefits must be maintained on the same basis as coverage would have been provided if the employee had been continuously employed during the FMLA leave period. Therefore, any share of group health plan premiums which had been paid by the employee prior to FMLA leave must continue to be paid by the employee during the FMLA leave period. If premiums are raised or lowered, the employee would be required to pay the new premium rates. Maintenance of health insurance policies which are not a part of the employer's group health plan, as described in § 825.209(a), are the sole responsibility of the employee. The employee and the insurer should make necessary arrangements for payment of premiums during periods of unpaid FMLA leave.

-(b) If the FMLA leave is substituted paid leave, the employee's share of premiums must be paid by the method normally used during any paid leave, presumably as a payroll deduction.

-(c) If FMLA leave is unpaid, the employer has a number of options for obtaining payment from the employee. The employer may require that payment be made to the employer or to the insurance carrier, but no additional charge may be added to the employee's premium payment for administrative expenses. The employer may require employees to pay their share of premium payments in any of the following ways:

-(1) Payment would be due at the same time as it would be made if by payroll deduction;

-(2) Payment would be due on the same schedule as payments are made under COBRA;

-(3) Payment would be prepaid pursuant to a cafeteria plan at the employee's option;

-(4) The employer's existing rules for payment by employees on leave without pay would be followed, provided that such rules do not require prepayment (*i.e.*, prior to the commencement of the leave) of the premiums that will become due during a period of unpaid FMLA leave or payment of higher premiums than if the employee had continued to work instead of taking leave; or,

-(5) Another system voluntarily agreed to between the employer and the employee, which may include prepayment of premiums (*e.g.*, through increased payroll deductions when the need for the FMLA leave is foreseeable).



(d) The employer must provide the employee with advance written notice of the terms and conditions under which these payments must be made. *See* § 825.300(c).

(e) An employer may not require more of an employee using unpaid FMLA leave than the employer requires of other employees on leave without pay.

(f) An employee who is receiving payments as a result of a workers' compensation injury must make arrangements with the employer for payment of group health plan benefits when simultaneously taking FMLA leave. *See* § 825.207(e).

### § 825.211 Maintenance of benefits under multi-employer health plans.

(a) A multi-employer health plan is a plan to which more than one employer is required to contribute, and which is maintained pursuant to one or more collective bargaining agreements between employee organization(s) and the employers.

(b) An employer under a multi-employer plan must continue to make contributions on behalf of an employee using FMLA leave as though the employee had been continuously employed, unless the plan contains an explicit FMLA provision for maintaining coverage such as through pooled contributions by all employers party to the plan.

(c) During the duration of an employee's FMLA leave, coverage by the group health plan, and benefits provided pursuant to the plan, must be maintained at the level of coverage and benefits which were applicable to the employee at the time FMLA leave commenced.

(d) An employee using FMLA leave cannot be required to use banked hours or pay a greater premium than the employee would have been required to pay if the employee had been continuously employed.

(e) As provided in § 825.209(f) of this part, group health plan coverage must be maintained for an employee on FMLA leave until:

(1) The employee's FMLA leave entitlement is exhausted;

(2) The employer can show that the employee would have been laid off and the employment relationship terminated; or,

(3) The employee provides unequivocal notice of intent not to return to work.

### § 825.212 Employee failure to pay health plan premium payments.

(a)(1) In the absence of an established employer policy providing a longer grace period, an employer's obligations to maintain health insurance coverage cease under FMLA if an employee's premium payment is more than 30 days late. In order to drop the coverage for an employee whose premium payment is late, the employer must provide written notice to the employee that the payment has not been received. Such notice

must be mailed to the employee at least 15 days before coverage is to cease, advising that coverage will be dropped on a specified date at least 15 days after the date of the letter unless the payment has been received by that date. If the employer has established policies regarding other forms of unpaid leave that provide for the employer to cease coverage retroactively to the date the unpaid premium payment was due, the employer may drop the employee from coverage retroactively in accordance with that policy, provided the 15-day notice was given. In the absence of such a policy, coverage for the employee may be terminated at the end of the 30-day grace period, where the required 15-day notice has been provided.

(2) An employer has no obligation regarding the maintenance of a health insurance policy which is not a group health plan. *See* § 825.209(a).

(3) All other obligations of an employer under FMLA would continue; for example, the employer continues to have an obligation to reinstate an employee upon return from leave.

(b) The employer may recover the employee's share of any premium payments missed by the employee for any FMLA leave period during which the employer maintains health coverage by paying the employee's share after the premium payment is missed.

(c) If coverage lapses because an employee has not made required premium payments, upon the employee's return from FMLA leave the employer must still restore the employee to coverage/benefits equivalent to those the employee would have had if leave had not been taken and the premium payment(s) had not been missed, including family or dependent coverage. *See* § 825.215(d)(1)-(5). In such case, an employee may not be required to meet any qualification requirements imposed by the plan, including any new preexisting condition waiting period, to wait for an open season, or to pass a medical examination to obtain reinstatement of coverage. If an employer terminates an employee's insurance in accordance with this section and fails to restore the employee's health insurance as required by this section upon the employee's return, the employer may be liable for benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable relief tailored to the harm suffered.

### § 825.213 Employer recovery of benefit costs.

(a) In addition to the circumstances discussed in § 825.212(b), an employer may recover its share of health plan premiums during a period of unpaid FMLA leave from an employee if the employee fails to return to work after the employee's FMLA leave entitlement has been exhausted or expires, unless the reason the employee does not return is due to:

(1) The continuation, recurrence, or onset of either a serious health condition of the employee or the employee's family member, or a serious injury or illness

of a covered servicemember, which would otherwise entitle the employee to leave under FMLA; or

(2) Other circumstances beyond the employee's control. Examples of "other circumstances beyond the employee's control" are necessarily broad. They include such situations as where a parent chooses to stay home with a newborn child who has a serious health condition; an employee's spouse is unexpectedly transferred to a job location more than 75 miles from the employee's worksite; a relative or individual other than a covered family member has a serious health condition and the employee is needed to provide care; the employee is laid off while on leave; or, the employee is a key employee who decides not to return to work upon being notified of the employer's intention to deny restoration because of substantial and grievous economic injury to the employer's operations and is not reinstated by the employer. Other circumstances beyond the employee's control would not include a situation where an employee desires to remain with a parent in a distant city even though the parent no longer requires the employee's care, or a parent chooses not to return to work to stay home with a well, newborn child.

(3) When an employee fails to return to work because of the continuation, recurrence, or onset of either a serious health condition of the employee or employee's family member, or a serious injury or illness of a covered servicemember, thereby precluding the employer from recovering its (share of) health benefit premium payments made on the employee's behalf during a period of unpaid FMLA leave, the employer may require medical certification of the employee's or the family member's serious health condition or the covered servicemember's serious injury or illness. Such certification is not required unless requested by the employer. The cost of the certification shall be borne by the employee, and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification. The employee is required to provide medical certification in a timely manner which, for purposes of this section, is within 30 days from the date of the employer's request. For purposes of medical certification, the employee may use the optional DOL forms developed for these purposes. See §§ 825.306(b), 825.310(c)-(d). If the employer requests medical certification and the employee does not provide such certification in a timely manner (within 30 days), or the reason for not returning to work does not meet the test of other circumstances beyond the employee's control, the employer may recover 100% of the health benefit premiums it paid during the period of unpaid FMLA leave.

(b) Under some circumstances an employer may elect to maintain other benefits, *e.g.*, life insurance, disability insurance, *etc.*, by paying the employee's (share of) premiums during periods of unpaid FMLA leave. For example, to ensure the employer can meet its responsibilities to provide equivalent benefits to the

employee upon return from unpaid FMLA leave, it may be necessary that premiums be paid continuously to avoid a lapse of coverage. If the employer elects to maintain such benefits during the leave, at the conclusion of leave, the employer is entitled to recover only the costs incurred for paying the employee's share of any premiums whether or not the employee returns to work.

(c) An employee who returns to work for at least 30 calendar days is considered to have returned to work. An employee who transfers directly from taking FMLA leave to retirement, or who retires during the first 30 days after the employee returns to work, is deemed to have returned to work.

(d) When an employee elects or an employer requires paid leave to be substituted for FMLA leave, the employer may not recover its (share of) health insurance or other non-health benefit premiums for any period of FMLA leave covered by paid leave. Because paid leave provided under a plan covering temporary disabilities (including workers' compensation) is not unpaid, recovery of health insurance premiums does not apply to such paid leave.

(e) The amount that self-insured employers may recover is limited to only the employer's share of allowable premiums as would be calculated under COBRA, excluding the 2 percent fee for administrative costs.

(f) When an employee fails to return to work, any health and non-health benefit premiums which this section of the regulations permits an employer to recover are a debt owed by the non-returning employee to the employer. The existence of this debt caused by the employee's failure to return to work does not alter the employer's responsibilities for health benefit coverage and, under a self-insurance plan, payment of claims incurred during the period of FMLA leave. To the extent recovery is allowed, the employer may recover the costs through deduction from any sums due to the employee (*e.g.*, unpaid wages, vacation pay, profit sharing, *etc.*), provided such deductions do not otherwise violate applicable Federal or State wage payment or other laws. Alternatively, the employer may initiate legal action against the employee to recover such costs.

#### § 825.214 Employee right to reinstatement.

-General rule. On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence. *See also* § 825.106(e) for the obligations of joint employers.

### § 825.215 Equivalent position.

-(a) *Equivalent position.* An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

-(b) *Conditions to qualify.* If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, fly a minimum number of hours, etc., as a result of the leave, the employee shall be given a reasonable opportunity to fulfill those conditions upon return to work.

—(c) *Equivalent pay.*

(1) An employee is entitled to any unconditional pay increases which may have occurred during the FMLA leave period, such as cost of living increases. Pay increases conditioned upon seniority, length of service, or work performed must be granted in accordance with the employer's policy or practice with respect to other employees on an equivalent leave status for a reason that does not qualify as FMLA leave. An employee is entitled to be restored to a position with the same or equivalent pay premiums, such as a shift differential. If an employee departed from a position averaging ten hours of overtime (and corresponding overtime pay) each week, an employee is ordinarily entitled to such a position on return from FMLA leave.

-(2) Equivalent pay includes any bonus or payment, whether it is discretionary or non-discretionary, made to employees consistent with the provisions of paragraph (c)(1) of this section. However, if a bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied, unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave. For example, if an employee who used paid vacation leave for a non-FMLA purpose would receive the payment, then the employee who used paid vacation leave for an FMLA-protected purpose also must receive the payment.

-(d) *Equivalent benefits.* Benefits include all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer through an employee benefit plan as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(3).

(1) At the end of an employee's FMLA leave, benefits must be resumed in the same manner and at the same levels as provided when the leave began, and

subject to any changes in benefit levels that may have taken place during the period of FMLA leave affecting the entire workforce, unless otherwise elected by the employee. Upon return from FMLA leave, an employee cannot be required to requalify for any benefits the employee enjoyed before FMLA leave began (including family or dependent coverages). For example, if an employee was covered by a life insurance policy before taking leave but is not covered or coverage lapses during the period of unpaid FMLA leave, the employee cannot be required to meet any qualifications, such as taking a physical examination, in order to requalify for life insurance upon return from leave. Accordingly, some employers may find it necessary to modify life insurance and other benefits programs in order to restore employees to equivalent benefits upon return from FMLA leave, make arrangements for continued payment of costs to maintain such benefits during unpaid FMLA leave, or pay these costs subject to recovery from the employee on return from leave. See § 825.213(b).

-(2) An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. Benefits accrued at the time leave began, however, (e.g., paid vacation, sick or personal leave to the extent not substituted for FMLA leave) must be available to an employee upon return from leave.

-(3) If, while on unpaid FMLA leave, an employee desires to continue life insurance, disability insurance, or other types of benefits for which he or she typically pays, the employer is required to follow established policies or practices for continuing such benefits for other instances of leave without pay. If the employer has no established policy, the employee and the employer are encouraged to agree upon arrangements before FMLA leave begins.

-(4) With respect to pension and other retirement plans, any period of unpaid FMLA leave shall not be treated as or counted toward a break in service for purposes of vesting and eligibility to participate. Also, if the plan requires an employee to be employed on a specific date in order to be credited with a year of service for vesting, contributions or participation purposes, an employee on unpaid FMLA leave on that date shall be deemed to have been employed on that date. However, unpaid FMLA leave periods need not be treated as credited service for purposes of benefit accrual, vesting and eligibility to participate.

-(5) Employees on unpaid FMLA leave are to be treated as if they continued to work for purposes of changes to benefit plans. They are entitled to changes in benefits plans, except those which may be dependent upon seniority or accrual during the leave period, immediately upon return from leave or to the same extent they would have qualified if no leave had been taken. For example, if the benefit plan is predicated on a pre-established number of hours worked each year and the employee does not have sufficient hours as a

result of taking unpaid FMLA leave, the benefit is lost. (In this regard, § 825.209 addresses health benefits.)

*(e) Equivalent terms and conditions of employment.*

An equivalent position must have substantially similar duties, conditions, responsibilities, privileges and status as the employee's original position.

(1) The employee must be reinstated to the same or a geographically proximate worksite (*i.e.*, one that does not involve a significant increase in commuting time or distance) from where the employee had previously been employed. If the employee's original worksite has been closed, the employee is entitled to the same rights as if the employee had not been on leave when the worksite closed. For example, if an employer transfers all employees from a closed worksite to a new worksite in a different city, the employee on leave is also entitled to transfer under the same conditions as if he or she had continued to be employed.

(2) The employee is ordinarily entitled to return to the same shift or the same or an equivalent work schedule.

(3) The employee must have the same or an equivalent opportunity for bonuses, profit-sharing, and other similar discretionary and non-discretionary payments.

(4) FMLA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, or position which better suits the employee's personal needs on return from leave, or to offer a promotion to a better position. However, an employee cannot be induced by the employer to accept a different position against the employee's wishes.

*(f) De minimis exception.* The requirement that an employee be restored to the same or equivalent job with the same or equivalent pay, benefits, and terms and conditions of employment does not extend to de minimis, intangible, or unmeasurable aspects of the job.

**§ 825.216 Limitations on an employee's right to reinstatement.**

(a) An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment.<sup>38</sup> For example:

(1) If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employer's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee cease at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise. An employer would have the burden of proving that an

employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration. Restoration to a job slated for lay-off when the employee's original position is not would not meet the requirements of an equivalent position.

(2) If a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon restoration. However, if a position on, for example, a night shift has been filled by another employee, the employee is entitled to return to the same shift on which employed before taking FMLA leave.

(3) If an employee was hired for a specific term or only to perform work on a discrete project, the employer has no obligation to restore the employee if the employment term or project is over and the employer would not otherwise have continued to employ the employee. On the other hand, if an employee was hired to perform work on a contract, and after that contract period the contract was awarded to another contractor, the successor contractor may be required to restore the employee if it is a successor employer. *See* § 825.107.

(b) In addition to the circumstances explained above, an employer may deny job restoration to salaried eligible employees (key employees, as defined in § 825.217(c)), if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer; or may delay restoration to an employee who fails to provide a fitness-for-duty certificate to return to work under the conditions described in § 825.312.

(c) If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition or an injury or illness also covered by workers' compensation, the employee has no right to restoration to another position under the FMLA. The employer's obligations may, however, be governed by the Americans with Disabilities Act (ADA), as amended. *See* § 825.702, state leave laws, or workers' compensation laws.

(d) An employee who fraudulently obtains FMLA leave from an employer is not protected by FMLA's job restoration or maintenance of health benefits provisions.

(e) If the employer has a uniformly-applied policy governing outside or supplemental employment, such a policy may continue to apply to an employee while on FMLA leave. An employer which does not have such a policy may not deny benefits to which an employee is entitled under FMLA on this basis unless the FMLA leave was fraudulently obtained as in paragraph (d) of this section.

**§ 825.217 Key employee, general rule.**

(a) A *key employee* is a salaried FMLA-eligible employee who is among the highest paid 10 percent of

<sup>38</sup> *See also* § 825.202 (a) and accompanying notes.

all the employees employed by the employer within 75 miles of the employee's worksite.

-(b) The term *salaried* means paid on a salary basis, as defined in 29 CFR 541.602. This is the Department of Labor regulation defining employees who may qualify as exempt from the minimum wage and overtime requirements of the FLSA as executive, administrative, professional, and computer employees.

-(c) A key employee must be among the highest paid 10 percent of all the employees--both salaried and non-salaried, eligible and ineligible--who are employed by the employer within 75 miles of the worksite.

-(1) In determining which employees are among the highest paid 10 percent, year-to-date earnings are divided by weeks worked by the employee (including weeks in which paid leave was taken). Earnings include wages, premium pay, incentive pay, and non-discretionary and discretionary bonuses. Earnings do not include incentives whose value is determined at some future date, *e.g.*, stock options, or benefits or perquisites.

-(2) The determination of whether a salaried employee is among the highest paid 10 percent shall be made at the time the employee gives notice of the need for leave. No more than 10 percent of the employer's employees within 75 miles of the worksite may be key employees.

#### § 825.218 Substantial and grievous economic injury.

-(a) In order to deny restoration to a key employee, an employer must determine that the restoration of the employee to employment will cause substantial and grievous economic injury to the operations of the employer, not whether the absence of the employee will cause such substantial and grievous injury.

-(b) An employer may take into account its ability to replace on a temporary basis (or temporarily do without) the employee on FMLA leave. If permanent replacement is unavoidable, the cost of then reinstating the employee can be considered in evaluating whether substantial and grievous economic injury will occur from restoration; in other words, the effect on the operations of the company of reinstating the employee in an equivalent position.

-(c) A precise test cannot be set for the level of hardship or injury to the employer which must be sustained. If the reinstatement of a key employee threatens the economic viability of the firm, that would constitute substantial and grievous economic injury. A lesser injury which causes substantial, long-term economic injury would also be sufficient. Minor inconveniences and costs that the employer would experience in the normal course of doing business would certainly not constitute substantial and grievous economic injury.

-(d) FMLA's substantial and grievous economic injury standard is different from and more stringent

than the undue hardship test under the ADA. *See also* § 825.702.

#### § 825.219 Rights of a key employee.

-(a) An employer who believes that reinstatement may be denied to a key employee, must give written notice to the employee at the time the employee gives notice of the need for FMLA leave (or when FMLA leave commences, if earlier) that he or she qualifies as a key employee. At the same time, the employer must also fully inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employer should determine that substantial and grievous economic injury to the employer's operations will result if the employee is reinstated from FMLA leave. If such notice cannot be given immediately because of the need to determine whether the employee is a key employee, it shall be given as soon as practicable after being notified of a need for leave (or the commencement of leave, if earlier). It is expected that in most circumstances there will be no desire that an employee be denied restoration after FMLA leave and, therefore, there would be no need to provide such notice. However, an employer who fails to provide such timely notice will lose its right to deny restoration even if substantial and grievous economic injury will result from reinstatement.

-(b) As soon as an employer makes a good faith determination, based on the facts available, that substantial and grievous economic injury to its operations will result if a key employee who has given notice of the need for FMLA leave or is using FMLA leave is reinstated, the employer shall notify the employee in writing of its determination, that it cannot deny FMLA leave, and that it intends to deny restoration to employment on completion of the FMLA leave. It is anticipated that an employer will ordinarily be able to give such notice prior to the employee starting leave. The employer must serve this notice either in person or by certified mail. This notice must explain the basis for the employer's finding that substantial and grievous economic injury will result, and, if leave has commenced, must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the length of the leave and the urgency of the need for the employee to return.<sup>39</sup>

<sup>39</sup> Notification to an employee pursuant to § 825.219(a) that she is a key employee and may be denied restoration to her position is not sufficient to comply with the requirements of § 825.219(b) that an employer notify an employee of "the basis for the employer's finding that substantial and grievous injury will result, and, if leave has commenced, must provide the employee a reasonable time in which to return to work,..." Subsection (b) places additional notification requirements upon the employer beyond those required by subsection (a). *Neel v. Mid-Atlantic of Fairfield*, 2011 U.S. Dist. LEXIS 42807, \*24-27, 17 Wage & Hour Cas. 2d 1367, 1373 (D. Md. 2011).

(c) If an employee on leave does not return to work in response to the employer's notification of intent to deny restoration, the employee continues to be entitled to maintenance of health benefits and the employer may not recover its cost of health benefit premiums. A key employee's rights under FMLA continue unless and until the employee either gives notice that he or she no longer wishes to return to work, or the employer actually denies reinstatement at the conclusion of the leave period.

(d) After notice to an employee has been given that substantial and grievous economic injury will result if the employee is reinstated to employment, an employee is still entitled to request reinstatement at the end of the leave period even if the employee did not return to work in response to the employer's notice. The employer must then again determine whether there will be substantial and grievous economic injury from reinstatement, based on the facts at that time. If it is determined that substantial and grievous economic injury will result, the employer shall notify the employee in writing (in person or by certified mail) of the denial of restoration.

#### § 825.220 Protection for employees who request leave or otherwise assert FMLA rights.

(a) The FMLA prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights.<sup>40</sup> More specifically, the law contains the following employee protections:

(1) An employer is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act.

(2) An employer is prohibited from discharging or in any other way discriminating against any person (whether or not an employee) for opposing or complaining about any unlawful practice under the Act.

(3) All persons (whether or not employers) are prohibited from discharging or in any other way discriminating against any person (whether or not an employee) because that person has--

(i) Filed any charge, or has instituted (or caused to be instituted) any proceeding under or related to this Act;

(ii) Given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under this Act;

(iii) Testified, or is about to testify, in any inquiry or proceeding relating to a right under this Act.

(b) Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act.<sup>41</sup> An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. See § 825.400(c). Interfering with the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave.<sup>42</sup> It would also include manipulation by a covered employer to avoid responsibilities under FMLA, for example:

(1) Transferring employees from one worksite to another for the purpose of reducing worksites, or to keep worksites, below the 50-employee threshold for employee eligibility under the Act;

(2) Changing the essential functions of the job in order to preclude the taking of leave;

(3) Reducing hours available to work in order to avoid employee eligibility.

(c) The Act's prohibition against interference prohibits an employer from discriminating or retaliating against an employee or prospective

<sup>40</sup> "[T]he FMLA creates two types of claims: interference claims, in which an employee asserts that his employer denied or otherwise interfered with his substantive rights under the Act,... and retaliation claims, in which an employee asserts that his employer discriminated against him because he engaged in activity protected by the Act.... To state a claim of interference... an employee need only demonstrate by a preponderance of the evidence that he was entitled to the benefit denied.... In contrast, to succeed on a retaliation claim, an employee must demonstrate that his employer intentionally discriminated against him in the form of an adverse employment action for having exercised an FMLA right.... When a plaintiff asserts a claim of retaliation... in the absence of direct evidence of the employer's intent, we apply the same burden-shifting framework established by... *McDonnell Douglas Corp. v. Green*, 411 U.S. 792,... (1973), for evaluating Title VII discrimination claims." *Strickland v. Water Works & Sewer Board of the City of Birmingham*, 239 F.3d 1199, 1205, 6 Wage & Hour Cas. 2d 1185 (11th Cir. 2001).

<sup>41</sup> "[A]n FMLA interference claim may be established... as long as the plaintiff is able to demonstrate prejudice; there is no additional requirement that the plaintiff demonstrate she was denied actual FMLA leave." *Brock-Chapman v. Nat'l Care Network, LLC*, 2013 WL 169177, \*7 (N.D. Tex. 2013). "[A]n employee may bring an interference claim for actions that could 'chill' the desire to take FMLA leave, even though the leave is subsequently granted." *Gibson v. Lafayette Manor*, 2007 WL 951473, \*16 (W.D. Pa. 2007).

Employer actions which may constitute interference include failing to provide notice of approval or disapproval of leave request within five days, *Lyons v. Core Systems*, 2011 WL 4402777, \*6 (S.D. Ohio 2011), and requesting a new medical certification from the employee before expiration of the approved certification. *Mills v. Temple University*, 2012 WL 1122888, \*15-16 (E.D. Pa. 2012).

<sup>42</sup> Failing to inform employees that they may be eligible for leave can constitute "interfering with" employees' FMLA rights. *Mora v. Chem-Tronics Inc.*, 16 F.Supp.2d 1192, 5 Wage & Hour Cas. 2d 475, 505 (D.C. S.Ca. 1998).("[A] plaintiff can be discouraged from taking absences whether or not s/he knows that such absences could be covered by FMLA...").

employee for having exercised or attempted to exercise FMLA rights.<sup>43</sup> For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under no fault attendance policies.<sup>44</sup> See § 825.215.

-(d) Employees cannot waive, nor may employers induce employees to waive, their prospective rights under FMLA. For example, employees (or their collective bargaining representatives) cannot trade off the right to take FMLA leave against some other benefit offered by the employer. This does not prevent the settlement or release of FMLA claims by employees based on past employer conduct without the approval of the Department of Labor or a court. Nor does it prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a light duty assignment while recovering from a serious health condition. See § 825.702(d). An employee's acceptance of such light duty assignment does not constitute a waiver of the employee's prospective rights, including the right to be restored to the same position the employee held at the time the employee's FMLA leave commenced or to an equivalent position. The employee's right to restoration, however, ceases at the end of the applicable 12-month FMLA leave year.

<sup>43</sup> "The Sixth Circuit has confirmed that this 'negative-factor analysis' [in § 825.220 (c)] is applicable in evaluating an interference claim. Thus, if an employer takes an employment action based, in whole or in part, on the fact that the employee took FMLA-protected leave, the employer has denied the employee a benefit to which he is entitled." *Gannon v. Cannon County, Tenn., Bd. Of Education*, 2011 WL 6888540, \*9 (M.D.Tenn. 2011) (internal quotes and citations omitted).

<sup>44</sup> The Ninth Circuit Court of Appeals ruled in *Bachelor v. American West Airlines, Inc.*, 259 F.3d 1112, 7 Wage Hour Cas. 2d 286, 291 (9th Cir. 2001), that this sentence of the regulations "is a reasonable interpretation of the statute's prohibition on 'interference with' and 'restraint of employee's rights under the FMLA."

The Court noted that the prohibition on "interference with" and "restraint of" employees' FMLA rights "largely mimics that of § 8 (a) (1) of the National Labor Relations Act... and that courts have long recognized that employers violate [this] section... by engaging in activity that tends to chill an employee's freedom to exercise his rights. For, a protected activity acquires a precarious status if innocent employees can be discharged for engaging in it." *Id.* at 291-92 (internal quotations and citations omitted). "As a general matter, then,... employers' actions that deter employees' participation in protected activities constitute 'interference' or 'restraint' with the employees' exercise of their rights. Under the FMLA as under the NLRA, attaching negative consequences to the exercise of protected rights surely 'tends to chill' an employee's willingness to exercise those rights..." *Id.* at 292.

See also 29 U.S.C. § 2615.

-(e) Individuals, and not merely employees, are protected from retaliation for opposing (e.g., filing a complaint about) any practice which is unlawful under the Act. They are similarly protected if they oppose any practice which they reasonably believe to be a violation of the Act or regulations.

## Subpart C—Employee and Employer Rights and Obligations Under the Act

### § 825.300 Employer notice requirements.

—(a) *General notice.* (1) Every employer covered by the FMLA is required to post and keep posted on its premises, in conspicuous places where employees are employed, a notice explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act with the Wage and Hour Division. The notice must be posted prominently where it can be readily seen by employees and applicants for employment. The poster and the text must be large enough to be easily read and contain fully legible text. Electronic posting is sufficient to meet this posting requirement as long as it otherwise meets the requirements of this section. An employer that willfully violates the posting requirement may be assessed a civil money penalty by the Wage and Hour Division not to exceed \$110 for each separate offense.

-(2) Covered employers must post this general notice even if no employees are eligible for FMLA leave.

-(3) If an FMLA-covered employer has any eligible employees, it shall also provide this general notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring. In either case, distribution may be accomplished electronically.

-(4) To meet the requirements of paragraph (a)(3) of this section, employers may duplicate the text of the Department's prototype notice (WHD Publication 1420) or may use another format so long as the information provided includes, at a minimum, all of the information contained in that notice.<sup>45</sup> Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer shall provide the general notice in a language in which the employees are literate. Prototypes are available from the nearest office of the Wage and Hour Division or on the Internet at [www.dol.gov/whd](http://www.dol.gov/whd). Employers furnishing FMLA notices to sensory-impaired individuals must also comply with all applicable requirements under Federal or State law.

—(b) *Eligibility notice.* (1) When an employee requests FMLA leave, or when the employer acquires

<sup>45</sup> A copy of WHD Publication 1420 is included in Appendix A.

knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances.<sup>46</sup> See § 825.110 for definition of an eligible employee and § 825.801 for special hours of service eligibility requirements for airline flight crews. Employee eligibility is determined (and notice must be provided) at the commencement of the first instance of leave for each FMLA-qualifying reason in the applicable 12-month period. See §§ 825.127(c) and 825.200(b). All FMLA absences for the same qualifying reason are considered a single leave and employee eligibility as to that reason for leave does not change during the applicable 12-month period.

(2) The eligibility notice must state whether the employee is eligible for FMLA leave as defined in § 825.110.<sup>47</sup> If the employee is not eligible for FMLA

<sup>46</sup> See Department of Labor, *Need Time? The Employee's Guide to The Family and Medical Leave Act*. WH-1506 at 8 (August 2012) ("Your employer must notify you if you are eligible for FMLA leave within 5 business days of your first leave request. If the employer says that you are not eligible, it has to state at least one reason why you are not eligible (for example, you have not worked for the employer for a total of 12 months).").

<sup>47</sup> If a private sector employer notifies an employee he is eligible and qualified for FMLA and subsequently determines the employee is not qualified (see §§ 825.110 and 825.112), the employee may still be entitled to the protections of the FMLA if he can show that he relied on the employer's notice to his detriment because the employer would be equitably estopped from claiming the employee was not entitled to FMLA leave. See *Sorrell v. Rinker Materials Corp.*, 395 F.3d 332, 336 (6th Cir. 2005). In *Dobrowski v. Jay Dee Contractors, Inc.*, No. 08-1806 (6th Cir. 2009), the Sixth Circuit Court of Appeals held that "to prevail on his equitable estoppel argument, [the plaintiff] need only meet the requirements for equitable estoppel adopted by the Supreme Court in *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1986) and discussed in the *Restatement (Second) of Torts* § 894. He need not show that his employer either was aware of the true facts or intended for the statement to be relied on. Instead, [he] need only show (1) a definite misrepresentation as to a material fact, (2) a reasonable reliance on the misrepresentation, and (3) a resulting detriment to the party reasonably relying on the misrepresentation." *Dobrowski*, slip op. at 8-9.

Equitable estoppel may not be applicable in cases involving public sector employers. "Governments in the past have not been subject to estoppel or, more recently, have been held not subject to estoppel, save in exceptional situations that we have called 'hen's-teeth rare'.... The Supreme Court has been very cautious in language, and even more cautious in practice, about extending estoppel to the government. It has said, but only in *dictum*, that 'affirmative misconduct' by the government can lead to estoppel..." *Nagle v. Acton-Boxborough Reg'l School Dist.*, 576 F.3d 1, 7-8 (1st Cir. 2009) (citations omitted). "[A]ffirmative misconduct... has usually been taken to mean something more than careless misstatements." *Id.* at 12. "We have said that '[a]ffirmative misconduct... require[s] an affirmative misrepresentation or affirmative concealment of a material fact by the government,

leave, the notice must state at least one reason why the employee is not eligible, including as applicable the number of months the employee has been employed by the employer, the hours of service with the employer during the 12-month period, and whether the employee is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. Notification of eligibility may be oral or in writing; employers may use optional Form WH-381 (Notice of Eligibility and Rights and Responsibility) to provide such notification to employees. Prototypes are available from the nearest office of the Wage and Hour Division or on the Internet at [www.dol.gov/whd](http://www.dol.gov/whd).<sup>48</sup> The employer is obligated to translate this notice in any situation in which it is obligated to do so in § 825.300(a)(4).

(3) If, at the time an employee provides notice of a subsequent need for FMLA leave during the applicable 12-month period due to a different FMLA-qualifying reason, and the employee's eligibility status has not changed, no additional eligibility notice is required. If, however, the employee's eligibility status has changed (e.g., if the employee has not met the hours of service requirement in the 12 months preceding the commencement of leave for the subsequent qualifying reason or the size of the workforce at the worksite has dropped below 50 employees), the employer must notify the employee of the change in eligibility status within five business days, absent extenuating circumstances.

—(c) *Rights and responsibilities notice.* (1) Employers shall provide written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. The employer is obligated to translate this notice in any situation in which it is obligated to do so in § 825.300(a)(4). This notice shall be provided to the employee each time the eligibility notice is provided pursuant to paragraph (b) of this section. If leave has already begun, the notice should be mailed to the employee's address of record. Such specific notice must include, as appropriate:

—(i) That the leave may be designated and counted against the employee's annual FMLA leave entitlement if qualifying (see §§ 825.300(c) and 825.301) and the applicable 12-month period for FMLA entitlement (see §§ 825.127(c), 825.200(b), (f), and (g));

—(ii) Any requirements for the employee to furnish certification of a serious health condition, serious injury or illness, or qualifying exigency arising out of covered active duty or call to covered active duty status, and the

although it does not require that the government intend to mislead a party." *Id.* at 23 n.10 (Lipez, C.J., dissenting) (citations omitted).

Equitable estoppel does not apply to either private or public sector cases where the employee is not eligible for leave under § 825.110. See, e.g., *Prigge v. Sears Holding Corp.*, 2010 WL 2731589, \*5 (E.D.Pa. 2010).

<sup>48</sup> A copy of form WH-381 is included in Appendix A.



consequences of failing to do so (see §§ 825.305, 825.309, 825.310, 825.313);

-(iii) The employee's right to substitute paid leave, whether the employer will require the substitution of paid leave, the conditions related to any substitution, and the employee's entitlement to take unpaid FMLA leave if the employee does not meet the conditions for paid leave (see § 825.207);

-(iv) Any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments (see § 825.210), and the possible consequences of failure to make such payments on a timely basis (i.e., the circumstances under which coverage may lapse);

-(v) The employee's status as a key employee and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial (see § 825.218);

-(vi) The employee's rights to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave (see §§ 825.214 and 825.604); and

-(vii) The employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave (see § 825.213).

-(2) The notice of rights and responsibilities may include other information--e.g., whether the employer will require periodic reports of the employee's status and intent to return to work--but is not required to do so.<sup>49</sup>

-(3) The notice of rights and responsibilities may be accompanied by any required certification form.

-(4) If the specific information provided by the notice of rights and responsibilities changes, the employer shall, within five business days of receipt of the employee's first notice of need for leave subsequent to any change, provide written notice referencing the prior notice and setting forth any of the information in the notice of rights and responsibilities that has changed. For example, if the initial leave period was paid leave and the subsequent leave period would be unpaid leave, the employer may need to give notice of the arrangements for making premium payments.

-(5) Employers are also expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA.

-(6) A prototype notice of rights and responsibilities may be obtained from local offices of the Wage and Hour Division or from the Internet at [www.dol.gov/whd](http://www.dol.gov/whd). Employers may adapt the prototype

notice as appropriate to meet these notice requirements. The notice of rights and responsibilities may be distributed electronically so long as it otherwise meets the requirements of this section.

—(d) *Designation notice.* (1) The employer is responsible in all circumstances for designating leave as FMLA-qualifying, and for giving notice of the designation to the employee as provided in this section. When the employer has enough information to determine whether the leave is being taken for a FMLA-qualifying reason (e.g., after receiving a certification), the employer must notify the employee whether the leave will be designated and will be counted as FMLA leave within five business days absent extenuating circumstances.<sup>50</sup> Only one notice of designation is required for each FMLA-qualifying reason per applicable 12-month period, regardless of whether the leave taken due to the qualifying reason will be a continuous block of leave or intermittent or reduced schedule leave. If the employer determines that the leave will not be designated as FMLA-qualifying (e.g., if the leave is not for a reason covered by FMLA or the FMLA leave entitlement has been exhausted), the employer must notify the employee of that determination. If the employer requires paid leave to be substituted for unpaid FMLA leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, the employer must inform the employee of this designation at the time of designating the FMLA leave.

(2) If the employer has sufficient information to designate the leave as FMLA leave immediately after receiving notice of the employee's need for leave, the employer may provide the employee with the designation notice at that time.<sup>51</sup>

(3) If the employer will require the employee to present a fitness-for-duty certification to be restored to employment, the employer must provide notice of such requirement with the designation notice. If the employer will require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the employee's position, the

<sup>50</sup> An employer's failure to provide notice of approval or disapproval of leave request within five days can constitute interference, in violation of 29 U.S.C. § 2615 (a)(1). *Lyons v. Core Systems*, 2011 WL 4402777, \*6 (S.D. Ohio 2011).

<sup>51</sup> It is possible for the employer to have sufficient information to determine if the employee is requesting leave for a FMLA-qualifying reason *before* it receives the employee's completed certification. See §§ 825.300 (d)(1) and (2). In such case, the employer *may* provide the employee with the designation notice at that time, but it *must* provide the notice no more than five business days later, even if it has not yet received the certification. See § 825.301 (a) and accompanying notes. See also Department of Labor, *Need Time? The Employee's Guide to The Family and Medical Leave Act*. WH-1506 at 9 (August 2012) ("When your employer has the information necessary to determine if your leave is FMLA protected, it must notify you whether the leave will be designated as FMLA leave and, if possible, how much leave will be counted against your FMLA entitlement.").

<sup>49</sup> Assuming an employer has previously provided an employee with a written copy of its call-in policy, the employer is not required to provide the employee with specific written notice of a call-in requirement when the employee asks for FMLA leave. *Thompson v. CenturyTel*, 403 Fed.Appx. 114, 118 (8th Cir. 2010).

employer must so indicate in the designation notice, and must include a list of the essential functions of the employee's position. See § 825.312. If the employer handbook or other written documents (if any) describing the employer's leave policies clearly provide that a fitness-for-duty certification will be required in specific circumstances (e.g., by stating that fitness-for-duty certification will be required in all cases of back injuries for employees in a certain occupation), the employer is not required to provide written notice of the requirement with the designation notice, but must provide oral notice no later than with the designation notice.

(4) The designation notice must be in writing. A prototype designation notice may be obtained from local offices of the Wage and Hour Division or from the Internet at [www.dol.gov/whd](http://www.dol.gov/whd). If the leave is not designated as FMLA leave because it does not meet the requirements of the Act, the notice to the employee that the leave is not designated as FMLA leave may be in the form of a simple written statement.

(5) If the information provided by the employer to the employee in the designation notice changes (e.g., the employee exhausts the FMLA leave entitlement), the employer shall provide, within five business days of receipt of the employee's first notice of need for leave subsequent to any change, written notice of the change.

(6) The employer must notify the employee of the amount of leave counted against the employee's FMLA leave entitlement. If the amount of leave needed is known at the time the employer designates the leave as FMLA-qualifying, the employer must notify the employee of the number of hours, days, or weeks that will be counted against the employee's FMLA leave entitlement in the designation notice. If it is not possible to provide the hours, days, or weeks that will be counted against the employee's FMLA leave entitlement (such as in the case of unforeseeable intermittent leave), then the employer must provide notice of the amount of leave counted against the employee's FMLA leave entitlement upon the request by the employee, but no more often than once in a 30-day period and only if leave was taken in that period. The notice of the amount of leave counted against the employee's FMLA entitlement may be oral or in writing. If such notice is oral, it shall be confirmed in writing, no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday). Such written notice may be in any form, including a notation on the employee's pay stub.

(e) *Consequences of failing to provide notice.* Failure to follow the notice requirements set forth in this section may constitute an interference with, restraint, or denial of the exercise of an employee's FMLA rights.<sup>52</sup> An employer may be liable for

<sup>52</sup> An employer may not delay or deny leave because of deficiencies in the employee's medical certification where the

compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered See § 825.400(c).<sup>53</sup>

### § 825.301 Designation of FMLA leave.

(a) *Employer responsibilities.* The employer's decision to designate leave as FMLA-qualifying must be based only on information received from the employee or the employee's spokesperson (e.g., if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc., may provide notice to the employer of the need to take FMLA leave). In any circumstance where the employer does not have sufficient information about the reason for an employee's use of leave, the employer should inquire further of the employee or the spokesperson to ascertain whether leave is potentially FMLA-qualifying. Once the employer has acquired knowledge that the leave is being taken for a FMLA-qualifying reason, the employer must notify the employee as provided in § 825.300(d).<sup>54</sup>

(b) *Employee responsibilities.* An employee giving notice of the need for FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave and otherwise satisfy the notice requirements set forth in § 825.302 or § 825.303 depending on whether the need for leave is foreseeable or unforeseeable. An employee giving notice of the need for FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine whether the leave qualifies under the Act. If the employee fails to explain the reasons, leave may be denied. In many cases, in explaining the reasons for a request to use leave, especially when the need for the leave was unexpected or unforeseen, an employee will provide sufficient information for the employer to

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employer did not inform the employee a certification was required, that it was due in 15 days, or the consequences of failing to provide an adequate certification. *Branham v. Gannett Satellite Information Network*, 619 F.3d 568, 573 (6th Cir. 2010).

<sup>53</sup> A technical violation of the FMLA regulations does not entitle a claimant to relief unless the violation caused an actual injury. *Murray v. AT&T Mobility*, 2010 U.S. App. LEXIS 7734, \*\*9 (7th Cir. 2010).

<sup>54</sup> Since the employer must designate the employee's leave as FMLA-qualifying within five days of receiving the employee's leave request, and the employee has at least 15 calendar days to return a medical certification, the employer may not wait to receive the medical certification to make the designation if the employee's request conveyed enough information for the employer to know the leave is being taken for a FMLA-qualifying reason. See § 825.300 (d) and accompanying notes.

designate the leave as FMLA leave. An employee using accrued paid leave may in some cases not spontaneously explain the reasons or their plans for using their accrued leave. However, if an employee requesting to use paid leave for a FMLA-qualifying reason does not explain the reason for the leave and the employer denies the employee's request, the employee will need to provide sufficient information to establish a FMLA-qualifying reason for the needed leave so that the employer is aware that the leave may not be denied and may designate that the paid leave be appropriately counted against (substituted for) the employee's FMLA leave entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for a FMLA-qualifying reason will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employer may count the leave used after the FMLA-qualifying reason against the employee's FMLA leave entitlement.

-(c) *Disputes*. If there is a dispute between an employer and an employee as to whether leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employer. Such discussions and the decision must be documented.

-(d) *Retroactive designation*. If an employer does not designate leave as required by § 825.300, the employer may retroactively designate leave as FMLA leave with appropriate notice to the employee as required by § 825.300 provided that the employer's failure to timely designate leave does not cause harm or injury to the employee. In all cases where leave would qualify for FMLA protections, an employer and an employee can mutually agree that leave be retroactively designated as FMLA leave.

-(e) *Remedies*. If an employer's failure to timely designate leave in accordance with § 825.300 causes the employee to suffer harm, it may constitute an interference with, restraint of, or denial of the exercise of an employee's FMLA rights. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. See § 825.400(c). For example, if an employer that was put on notice that an employee needed FMLA leave failed to designate the leave properly, but the employee's own serious health condition prevented him or her from returning to work during that time period regardless of the designation, an employee may not be able to show that the employee suffered harm as a result of the employer's actions.<sup>55</sup>

However, if an employee took leave to provide care for a son or daughter with a serious health condition believing it would not count toward his or her FMLA entitlement, and the employee planned to later use that FMLA leave to provide care for a spouse who would need assistance when recovering from surgery planned for a later date, the employee may be able to show that harm has occurred as a result of the employer's failure to designate properly. The employee might establish this by showing that he or she would have arranged for an alternative caregiver for the seriously ill son or daughter if the leave had been designated timely.

#### § 825.302 Employee notice requirements for foreseeable FMLA leave.

-(a) *Timing of notice*. An employee must provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or of a family member, or the planned medical treatment for a serious injury or illness of a covered servicemember. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable. For example, an employee's health condition may require leave to commence earlier than anticipated before the birth of a child. Similarly, little opportunity for notice may be given before placement for adoption. For foreseeable leave due to a qualifying exigency notice must be provided as soon as practicable, regardless of how far in advance such leave is foreseeable. Whether FMLA leave is to be continuous or is to be taken intermittently or on a reduced schedule basis, notice need only be given one time, but the employee shall advise the employer as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown. In those cases where the employee is required to provide at least 30 days notice of foreseeable leave and does not do so, the employee shall explain the reasons why such notice was not practicable upon a request from the employer for such information.

-(b) *As soon as practicable* means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. When an employee becomes aware of a need for FMLA leave less than 30 days in advance, it should be practicable for the

had actively resisted providing the employee with written notice of her FMLA rights despite repeated requests.

However, in *Hart v. Comcast of Houston*, 347 Fed. Appx. 978 (5th Cir. 2009) (unpublished), the Fifth Circuit, cautioning against elevating "form over substance," declined to impose liability on an employer where its employee was allowed 17 weeks of unpaid leave, was returned to the same position with the same pay, and was not harmed by any lack of notice. 347 Fed. Appx. at 980.

<sup>55</sup>In *Lafata v. Church of Christ Home for the Aged*, 325 Fed. Appx. 416, 421 (6th Cir. 2009), the employer was required to restore its employee to an equivalent position upon conclusion of her leave, even though this resulted in the employee effectively receiving more than 12 weeks of leave, because it

employee to provide notice of the need for leave either the same day or the next business day. In all cases, however, the determination of when an employee could practicably provide notice must take into account the individual facts and circumstances.

(c) *Content of notice.* An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a health care provider; if the leave is due to a qualifying exigency, that a military member is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty), and that the requested leave is for one of the reasons listed in § 825.126(b); if the leave is for a family member, that the condition renders the family member unable to perform daily activities, or that the family member is a covered servicemember with a serious injury or illness; and the anticipated duration of the absence, if known. When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA. When an employee seeks leave due to a FMLA-qualifying reason, for which the employer has previously provided FMLA-protected leave, the employee must specifically reference the qualifying reason for leave or the need for FMLA leave. In all cases, the employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken.<sup>56</sup> In the case of medical conditions, the

employer may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave. See § 825.305. An employer may also request certification to support the need for leave for a qualifying exigency or for military caregiver leave. See §§ 825.309, 825.310). When an employee has been previously certified for leave due to more than one FMLA-qualifying reason, the employer may need to inquire further to determine for which qualifying reason the leave is needed. An employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employer inquiries regarding the leave request may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying.

(d) *Complying with employer policy.* An employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. For example, an employer may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave. An employee also may be required by an employer's policy to contact a specific individual. Unusual circumstances would include situations such as when an employee is unable to comply with the employer's policy that requests for leave should be made by contacting a specific number because on the day the employee needs to provide notice of his or her need for FMLA leave there is no one to answer the call-in number and the voice mail box is full. Where an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied.<sup>57</sup> However, FMLA-protected leave may not be

<sup>56</sup> Under certain circumstances an employee can affirmatively refuse to use FMLA leave concurrently with other paid leave—such as vacation—even if the underlying reason for seeking leave would have qualified as FMLA leave. Where an employer has an established requirement that an employee taking vacation for a reason that also qualifies for FMLA must take both leaves concurrently, the employee must comply. If, however, a CBA limits the employer's ability to force an employee to use vacation, the employer may not be able to compel the employee to take vacation and FMLA concurrently. "An employer's obligation to ascertain 'whether FMLA leave is being sought' strongly suggests that there are circumstances in which an employee might seek time off but intend not to exercise his or her rights under the FMLA. And a compelling practical reason supports this conclusion. Holding that simply referencing an FMLA-qualifying reason triggers FMLA protections would place employers... in an untenable situation if the employee's stated desire is not to take FMLA leave. The employer could find itself open to liability for forcing FMLA leave on the unwilling employee. See, e.g., *Wysong v. Dow Chem. Co.*, 503 F.3d 441, 449 (6th Cir.2007) (noting that '[a]n involuntary-leave claim,' alleging that an 'employer forces

an employee to take FMLA leave,' is 'really a type of interference claim')." *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1243-44 (9th Cir. 2014). *Accord, Big Ridge, Inc.*, 128 Lab. Arb. 107 (2010) (Joseph Daly, arb.) (Under the FMLA the employer has the right "to compel use of paid time off, including vacation, in a situation where there is no collective bargaining agreement... in this case, there is a collective bargaining agreement... that says exactly when the vacation periods will be.... [I]f the employee decides that he/she cannot afford to take a week off without pay and the employee has accrued earned vacation that has not yet been used, then under the collective bargaining agreement and the FMLA that employee may elect to take all or some of the earned vacation as part of qualified FMLA leave. *Under the collective bargaining agreement and the FMLA it is the employee's option not the employer's option.*" (emphasis added)).

<sup>57</sup> In *Srouder v. Dana Light Axle Mfg.*, 725 F.3d 608 (6th Cir. 2013), the Sixth Circuit noted that its prior ruling in *Cavin v. Honda of Am. Mfg.*, 346 F.3d 713 (6th Cir. 2003), held that the an employer could not limit an employee's FMLA

delayed or denied where the employer's policy requires notice to be given sooner than set forth in paragraph (a) of this section and the employee provides timely notice as set forth in paragraph (a) of this section.

(e) *Scheduling planned medical treatment.* When planning medical treatment, the employee must consult with the employer and make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations, subject to the approval of the health care provider. Employees are ordinarily expected to consult with their employers prior to the scheduling of treatment in order to work out a treatment schedule which best suits the needs of both the employer and the employee. For example, if an employee who provides notice of the need to take FMLA leave on an intermittent basis for planned medical treatment neglects to consult with the employer to make a reasonable effort to arrange the schedule of treatments so as not to unduly disrupt the employer's operations, the employer may initiate discussions with the employee and require the employee to attempt to make such arrangements, subject to the approval of the health care provider. *See* §§ 825.203 and 825.205.

(f) Intermittent leave or leave on a reduced leave schedule must be medically necessary due to a serious health condition or a serious injury or illness. An employee shall advise the employer, upon request, of the reasons why the intermittent/reduced leave schedule is necessary and of the schedule for treatment, if applicable. The employee and employer shall attempt to work out a schedule for such leave that meets the employee's needs without unduly disrupting the

rights by denying them whenever an employee failed to comply with internal procedural requirements that are more strict than those contemplated by the Act. However, the *Srouder* court pointed out that *Cavin* was predicated upon FMLA regulations that are no longer in effect. *Srouder*, 725 F.3d at 614. Therefore, the court held that to continue to adhere to *Cavin* "would be to ignore the revision's plain language designed to address the giving of notice..." *Id.* at 615. "Thus, in light of the [2009] revisions to § 825.302(d), we hold that an employer may enforce its usual and customary notice and procedural requirements against an employee claiming FMLA-protected leave, unless unusual circumstances justify the employee's failure to comply with the employer's requirements." *Id.* *See also* *Bacon v. Hennepin Cnty. Med. Ctr.*, 550 F.3d 711, 715 (8th Cir. 2008) (discussing an employer's call-in policy and noting that "[e]mployers who enforce such policies by firing employees on FMLA leave for noncompliance do not violate the FMLA" (citing *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 878 (10th Cir.2004), and *Lewis v. Holsum of Fort Wayne, Inc.*, 278 F.3d 706, 710 (7th Cir.2002)).

*But cf. Bourne v. Exempla, Inc.*, 2013 WL 1232139 (D. Colo. 2013), in which the court rejected the employer's argument that the employee's failure to follow the employer's notice procedure prevented it from acquiring knowledge of the employee's need for leave in light of the fact that the employer granted the employee FMLA leave thirteen times in six months.

*See also* § 825.303 (c) and accompanying notes.

employer's operations, subject to the approval of the health care provider.

(g) An employer may waive employees' FMLA notice requirements. *See* § 825.304.

### § 825.303 Employee notice requirements for unforeseeable FMLA leave.

(a) *Timing of notice.* When the approximate timing of the need for leave is not foreseeable, an employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case. It generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements applicable to such leave.<sup>58</sup> *See* § 825.303(c). Notice may be given by the employee's spokesperson (*e.g.*, spouse, adult family member, or other responsible party) if the employee is unable to do so personally. For example, if an employee's child has a severe asthma attack and the employee takes the child to the emergency room, the employee would not be required to leave his or her child in order to report the absence while the child is receiving emergency treatment. However, if the child's asthma attack required only the use of an inhaler at home followed by a period of rest, the employee would be expected to call the employer promptly after ensuring the child has used the inhaler.

(b) *Content of notice.* An employee shall provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request. Depending on the situation,<sup>59</sup> such information

<sup>58</sup>A person who is unable to give notice is generally excused from doing so. *Byrne v. Avon Products*, 328 F.3d 379, 8 Wage & Hour Cas. 2d 1249, 1251-52 (7<sup>th</sup> Cir.), *cert. denied*, 540 U.S. 42, 8 Wage & Hour Cas. 2d 1920 (2003) ("If a person with 'major depression'... could not have told his employer about the problem and requested leave, then notice was not 'feasible' and was unnecessary even if the change in behavior was not enough to alert Avon to a need for medical leave. If a trier of fact believes... that Byrne was mentally unable either to work or give notice early in November 1998, then he would be entitled to FMLA leave covering the period Avon treats as misconduct.").

<sup>59</sup> According to the Fifth Circuit Court of Appeals, when assessing the adequacy of the employee's notice, it is inappropriate to apply "categorical rules for the content of the notice; instead we focus on what is 'practicable' based on the facts and circumstances of each individual." *Lanier v. Univ. of Texas Med. Ctr.*, 527 Fed. Appx. 312 (5th Cir. 2013) (unreported).

A drastic change in an employee's behavior may be sufficient notice that the employee needs leave. "It is not beyond the bounds of reasonableness to treat a dramatic change in behavior as notice of a medical problem. That's clear enough if a worker collapses: an employer might suspect a stroke, or a heart attack, or insulin deficiency, or some other serious condition. It would be silly to require the unconscious worker to inform the employer verbally or in writing. Unusual behavior gives all the notice required, and no employer would

may include that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a health care provider; if the leave is due to a qualifying exigency, that a military member is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty), that the requested leave is for one of the reasons listed in § 825.126(b), and the anticipated duration of the absence; or if the leave is for a family member that the condition renders the family member unable to perform daily activities or that the family member is a covered servicemember with a serious injury or illness; and the anticipated duration of the absence, if known.<sup>60</sup> When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA. When an employee seeks leave due to a qualifying reason, for which the employer has previously provided the employee FMLA-protected leave, the employee must specifically reference either the qualifying reason for leave or the need for FMLA leave. Calling in "sick" without providing more information will not be considered sufficient notice to trigger an employer's obligations under the Act.<sup>61</sup> The

be allowed to say 'I fired this stricken person for shirking on company time, and by the time a physician arrived and told me why the worker was unconscious it was too late to claim FMLA leave.' A sudden change may supply notice even if the employee is lucid: someone who breaks an arm obviously requires leave. It is enough under the FMLA if the employer knows of the employee's need for leave; the employee need not mention the statute or demand its benefits." *Byrne v. Avon Products*, 328 F.3d 379, 381-82 (7th Cir.), cert. denied, 540 U.S. 42, 8 Wage & Hour Cas. 2d 1920, (2003) (emphasis added). See also *Murphy v. Fed. Ex. Nat'l*, 618 F.3d 893, 903 (8th Cir. 2010) (the adequacy of an employee's notice "requires consideration of the totality of the circumstances").

<sup>60</sup> "[Section] 825.303, unlike § 825.302, does not require employees to tell employers how much leave they need, if they do not know yet themselves." *Gienapp v. Harbor Crest*, 756 F.3d 527, 529 (7th Cir. 2014) (emphasis in original).

<sup>61</sup> "The employer's [notice] duties arise when the employee provides enough information to put the employer on notice that the employee may be in need of FMLA leave. The adequacy of an employee's notice requires consideration of the totality of the circumstances..." *Ruble v. American River Transportation Co.*, 2011 U.S. Dist. LEXIS 69896, \*16 (E.D. Mo. 2011) (internal citations and quotes omitted). See also *Stimpson v. UPS*, 351 Fed. Appx. 42, 47 (6th Cir. 2009) (an employer should inquire further to determine if FMLA leave was necessary upon learning that employee had been struck by a car and would not come to work until he recovered from his injuries); *Burnett v. LFW Inc.*, 472 F.3d 471, 480 (7th Cir. 2006) (employee provided sufficient notice to employer of his need for leave when he said he was "sick" and "wanted to go home" where over previous four months he had communicated that he was suffering from "weak bladder" that precluded his transfer to another position, he had numerous medical visits and testing that showed prostate cancer indicators, his

employer will be expected to obtain any additional required information through informal means.<sup>62</sup> An employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employer inquiries regarding the leave request may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying.

-(c) *Complying with employer policy.* When the need for leave is not foreseeable, an employee must comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. For example, an employer may require employees to call a designated number or a specific individual to request leave. However, if an employee requires emergency medical treatment, he or she would not be required to follow the call-in procedure until his or her condition is stabilized and he or she has access to, and is able to use, a phone.<sup>63</sup> Similarly, in the

supervisor knew employee's recent prostate biopsy was used to diagnose cancer, biopsy resulted in employee having to request help in his work duties, and he repeatedly stated that he "felt sick" and intimated that his condition may be similar to his brother-in-law's latent prostate cancer); *Kinney v. Holiday Companies*, 398 Fed. Appx. 282, 284-85 (9th Cir. 2010) (employee's request insufficient where she told manager she "wasn't feeling good" and "needed to go home" and asked manager if she could "possibly find somebody to come in" but manager only said "she would try" and neither spoke of the matter again); *Lichtenstein v. Univ. of Pittsburgh Medical Ctr.*, 691 F.3d 294, 304 (3rd Cir. 2012) (Lichtenstein's notice to her supervisor that "(1) she was currently in the emergency room, (2) her mother had been brought into the hospital via ambulance, and (3) she would be unable to work that day" was sufficient because it "allow[ed] the employer to reasonably determine whether the FMLA may apply." (emphasis in original, internal quotes omitted); *Nicholson v. Pulte Homes Corp.*, 690 F.3d 819, 826 (7th Cir. 2012) ("Nicholson was not required to specifically refer to the FMLA so long as she alerted her employer to the seriousness of [her family member's] health condition.... If Nicholson provided sufficient notice that she needed time off to care for her seriously ill parents, then Pulte had a duty to inquire further... Here, the evidence falls short of establishing... notice. Nicholson had one 'casual conversation' with [her supervisor] about the challenges of dealing with aging parents and may have mentioned her father's condition. This is clearly insufficient as a matter of law to notify [her employer] that FMLA-qualifying leave was needed." (internal quotes and citations omitted)).

<sup>62</sup> In *Haley v. Community Health Partners*, 2013 WL 322493, \*14 (S.D. Ohio 2013), the court held a nurse provided sufficient notice of her need for leave when she was in the hospital's own emergency room with her husband who was being treated for chest pain, where the nurse notified the hospital of her need for leave as soon as practicable, and her supervisor knew on the same day that the nurse was in the hospital's emergency room with her husband and that the husband had chest pain.

<sup>63</sup> The FMLA generally requires employees to comply with the employer's usual and customary notice and procedural requirements for requesting leave. However, this requirement

case of an emergency requiring leave because of a FMLA-qualifying reason, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved. If an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied.

#### § 825.304 Employee failure to provide notice.

-(a) *Proper notice required.* In all cases, in order for the onset of an employee's FMLA leave to be delayed due to lack of required notice, it must be clear that the employee had actual notice of the FMLA notice requirements. This condition would be satisfied by the employer's proper posting of the required notice at the worksite where the employee is employed and the employer's provision of the required notice in either an employee handbook or employee distribution, as required by § 825.300.

-(b) *Foreseeable leave—30 days.* When the need for FMLA leave is foreseeable at least 30 days in advance and an employee fails to give timely advance notice with no reasonable excuse, the employer may delay FMLA coverage until 30 days after the date the employee provides notice. The need for leave and the approximate date leave would be taken must have been clearly foreseeable to the employee 30 days in advance of the leave. For example, knowledge that an employee would receive a telephone call about the availability of a child for adoption at some unknown point in the future would not be sufficient to establish the leave was clearly foreseeable 30 days in advance.

-(c) *Foreseeable leave—less than 30 days.* When the need for FMLA leave is foreseeable fewer than 30 days in advance and an employee fails to give notice as soon as practicable under the particular facts and circumstances, the extent to which an employer may delay FMLA coverage for leave depends on the facts of the particular case. For example, if an employee

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is relaxed in unusual circumstances or where the company policy conflicts with the law.... Because [§ 825.303 (a)]... expressly condones indirect notification when the employer is unable to notify directly, Metro-North's policy conflicts with the FMLA and is therefore invalid to the extent it requires direct notification even when the FMLA leave is unforeseen and direct notification is not an option." *Millea v. Metro-North Railroad Co.*, 658 F.3d 154, 161-62 (2nd Cir. 2011) (internal quotes and citations omitted).

An "[e]mployee's failure to follow his employer's internal procedures is irrelevant and insufficient to bar his FMLA claim, where he informed his employer about his medical condition by contacting his supervisors by email, personally speaking with the district manager, and taking other affirmative steps to keep his employer informed." *Harvey v. Waste Management of Illinois*, 2010 U.S. Dist. LEXIS 42028, \*11-12 (N.D.Ill. 2010).

See also § 825.302 (d) and accompanying notes.

reasonably should have given the employer two weeks notice but instead only provided one week notice, then the employer may delay FMLA-protected leave for one week (thus, if the employer elects to delay FMLA coverage and the employee nonetheless takes leave one week after providing the notice (*i.e.*, a week before the two week notice period has been met) the leave will not be FMLA-protected).

-(d) *Unforeseeable leave.* When the need for FMLA leave is unforeseeable and an employee fails to give notice in accordance with § 825.303, the extent to which an employer may delay FMLA coverage for leave depends on the facts of the particular case. For example, if it would have been practicable for an employee to have given the employer notice of the need for leave very soon after the need arises consistent with the employer's policy, but instead the employee provided notice two days after the leave began, then the employer may delay FMLA coverage of the leave by two days.

-(e) *Waiver of notice.* An employer may waive employees' FMLA notice obligations or the employer's own internal rules on leave notice requirements. If an employer does not waive the employee's obligations under its internal leave rules, the employer may take appropriate action under its internal rules and procedures for failure to follow its usual and customary notification rules, absent unusual circumstances, as long as the actions are taken in a manner that does not discriminate against employees taking FMLA leave and the rules are not inconsistent with § 825.303(a).

#### § 825.305 Certification, general rule.

-(a) *General.* An employer may require that an employee's leave to care for the employee's covered family member with a serious health condition, or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's family member. An employer may also require that an employee's leave because of a qualifying exigency or to care for a covered servicemember with a serious injury or illness be supported by a certification, as described in §§ 825.309 and 825.310, respectively. An employer must give notice of a requirement for certification each time a certification is required; such notice must be written notice whenever required by § 825.300(c). An employer's oral request to an employee to furnish any subsequent certification is sufficient.

-(b) *Timing.* In most cases, the employer should request that an employee furnish certification at the time the employee gives notice of the need for leave or within five business days thereafter, or, in the case of unforeseen leave, within five business days after the leave commences. The employer may request certification at some later date if the employer later has

reason to question the appropriateness of the leave or its duration.<sup>64</sup> The employee must provide the requested certification to the employer within 15 calendar days after the employer's request, unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts<sup>65</sup> or the employer provides more than 15 calendar days to return the requested certification.<sup>66</sup>

(c) *Complete and sufficient certification.* The employee must provide a complete and sufficient certification to the employer if required by the employer in accordance with §§ 825.306, 825.309, and 825.310. The employer shall advise an employee whenever the employer finds a certification incomplete or insufficient, and shall state in writing what additional information is necessary to make the certification complete and sufficient. A certification is considered incomplete if the employer receives a certification, but one or more of the applicable entries have not been completed. A certification is considered insufficient if the employer receives a complete certification, but the information provided is vague, ambiguous, or non-responsive.<sup>67</sup> The

<sup>64</sup> This provision applies when the employer has opted not to request a medical certification when the employee first requests leave. If the employee has already submitted an original certification, the employer may request another certification at a later time if (1) the employee asks for an extension of leave, (2) circumstances described by the previous certification have changed significantly, or (3) the employer receives information that casts doubt upon the continuing validity of the certification. See § 825.308 (c).

<sup>65</sup> The 15 day response time may not be shortened by a collective bargaining agreement. *Stimpson v. UPS*, 351 Fed. Appx. 42, 48 (6th Cir. 2009) (*unpublished*), citing 29 U.S.C. § 2652 (b).

<sup>66</sup> An employee's delay in providing certification is not necessarily the same as failing to provide the certification at all, and the "employer's option in the case of a tardy medical certification is not termination, but to delay the continuation of the employee's FMLA leave." *Stroud v. Connor Concepts*, 2009 U.S. Dist. LEXIS 112072, \*15 (M.D. Tenn. 2009), citing *Killian v. Yorozu Automotive Tennessee, Inc.*, 454 F.3d 549, 555 (6th Cir. 2006). *Stroud* characterized the 15 day period as a "guide" which is flexible depending on the particular facts and circumstances. The passage of 81 days between the date the leave began and the date the required paperwork was returned did not relieve the employer of its FMLA obligations to the employee.

<sup>67</sup> "A doctor's certification of a serious health condition is sufficient if it states (1) the date on which the serious health condition began, (2) the probable duration of the condition, (3) the appropriate medical facts within the health care provider's knowledge, and (4) a statement that the employee is unable to perform her job duties. While the medical certification provided by the employee is presumptively valid if it contains the required information and is signed by the health care provider, the employer may overcome this presumption by showing that the certification is invalid or inauthentic." *Fischbach v. City of Toledo*, 2011 U.S. Dist. LEXIS 68480, \*10-11 (N.D. Ohio 2011) (internal quotes and citations omitted).

"[The definitions of incomplete and insufficient certifications in § 825.305(c)] provide useful guidance for

employer must provide the employee with seven calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any such deficiency. If the deficiencies specified by the employer are not cured in the resubmitted certification, the employer may deny the taking of FMLA leave, in accordance with § 825.313. A certification that is not returned to the employer is not considered incomplete or insufficient, but constitutes a failure to provide certification.<sup>68</sup>

(d) *Consequences.* At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. If the employee fails to provide the employer with a complete and sufficient certification, despite the opportunity to cure the certification as provided in paragraph (c) of this section, or fails to provide any certification, the employer may deny the taking of FMLA leave, in accordance with § 825.313. It is the employee's responsibility either to furnish a complete and sufficient certification or to furnish the health care provider providing the certification with any necessary authorization from the employee or the employee's family member in order for the health care provider to release a complete and sufficient certification to the employer to support the employee's FMLA request. This provision will apply in any case where an employer requests a certification permitted by these regulations, whether it is the initial certification, a recertification, a

employers in assessing whether a certification is sufficient to support a request for FMLA leave. While a medical certification should include the clearest information that is practicable for the health care provider to provide regarding the employee's need for leave, the Department is aware that precise responses are not always possible, particularly regarding the frequency and duration of incapacity due to chronic conditions. The Department does expect, however, that over time health care providers should be able to provide more detailed responses to these questions based on their knowledge of the employee's (or family member's) condition. For example, while an initial certification for a newly diagnosed chronic serious health condition may provide a relatively large range of expected incapacity, subsequent certifications in new leave years should be able to provide more specific information regarding the anticipated frequency and duration of incapacity based on the employee's actual experience during the intervening period." *The Family and Medical Leave Act of 1993, Final Rule, Summary of Comments on Changes to the FMLA Regulations*, 73 Fed. Reg. 67934, 68012 (2008).

<sup>68</sup> The Sixth Circuit Court of Appeals suggested in *dicta* that an employee who submits a negative medical certification within the 15 days period may use the remainder of the 15 days to secure a second certification from the same health care provider support her claim for leave. The court did not reach the question because it held that the employer did not trigger the employee's obligation to provide certification because it failed to provide her with the written notification required by § 825.300. *Branham v. Gannett Satellite Information Network*, 619 F.3d 568, 572-73 (6th Cir. 2010).



second or third opinion, or a fitness for duty certificate, including any clarifications necessary to determine if such certifications are authentic and sufficient. See §§ 825.306, 825.307, 825.308, and 825.312.

(e) *Annual medical certification.* Where the employee's need for leave due to the employee's own serious health condition, or the serious health condition of the employee's covered family member, lasts beyond a single leave year (as defined in § 825.200), the employer may require the employee to provide a new medical certification in each subsequent leave year. Such new medical certifications are subject to the provisions for authentication and clarification set forth in § 825.307, including second and third opinions.<sup>69</sup>

**§ 825.306 Content of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member.**

(a) *Required information.* When leave is taken because of an employee's own serious health condition, or the serious health condition of a family member, an employer may require an employee to obtain a medical certification from a health care provider that sets forth the following information:

(1) The name, address, telephone number, and fax number of the health care provider and type of medical practice/specialization;

(2) The approximate date on which the serious health condition commenced, and its probable duration;

(3) A statement or description of appropriate medical facts regarding the patient's health condition for which FMLA leave is requested. The medical facts must be sufficient to support the need for leave. Such medical facts may include information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation or treatment (physical therapy, for example), or any other regimen of continuing treatment;<sup>70</sup>

<sup>69</sup> Section 825.305 (e) permits an employer to require an employee with a chronic (*i.e.* life-long) serious health condition to submit a new medical certification annually. Such new certifications are subject to the provisions of § 825.307, including second and third opinions. Section 825.308 (b) permits an employer to require the employee to submit a recertification every six months, and no second or third opinion may be required. 29 CFR § 308 (f). In practice, this means an employer may require an employee to submit a medical certification of a chronic serious health condition every six months, but may only require second or third opinions on that certification every twelve months, *i.e.* every other certification.

<sup>70</sup>According to the Department of Labor, a diagnosis may be included in the medical certification, but is not required. "[T]he Department continues to believe that it would not be appropriate to require a diagnosis as part of a complete and sufficient FMLA medical certification. Whether a diagnosis is included in the certification form is left to the discretion of the health care provider and an employer may not reject a

(4) If the employee is the patient, information sufficient to establish that the employee cannot perform the essential functions of the employee's job as well as the nature of any other work restrictions, and the likely duration of such inability (*see* § 825.123(b) and (c));

(5) If the patient is a covered family member with a serious health condition, information sufficient to establish that the family member is in need of care, as described in § 825.124, and an estimate of the frequency and duration of the leave required to care for the family member;

(6) If an employee requests leave on an intermittent or reduced schedule basis for planned medical treatment of the employee's or a covered family member's serious health condition, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the dates and duration of such treatments and any periods of recovery;

(7) If an employee requests leave on an intermittent or reduced schedule basis for the employee's serious health condition, including pregnancy, that may result in unforeseeable episodes of incapacity, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the frequency and duration of the episodes of incapacity; and

(8) If an employee requests leave on an intermittent or reduced schedule basis to care for a covered family member with a serious health condition, a statement that such leave is medically necessary to care for the family member, as described in §§ 825.124 and 825.203(b), which can include assisting in the

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complete and sufficient certification because it lacks a diagnosis." *The Family and Medical Leave Act of 1993, Final Rule, Summary of Comments on Changes to the FMLA Regulations*, 73 Fed. Reg. 67934, 68014 (2008).

At least one court has declined to adopt the department's position. Where an employee claimed the Americans with Disabilities Act prohibited his employer from requiring a diagnosis in his certification, the Second Circuit Court of Appeals held that "we do not believe that the ADA categorically prohibits an employer from implementing a general policy requiring medical certification with general diagnoses. Nonetheless, we emphasize that the examination of whether a policy actually contributes to the business necessity is vital. [The employer] argues that it had met its burden because... it has a generally applicable policy designed to achieve business necessity justifications that have been approved in other cases (here, ensuring workplace security and eradicating egregious absenteeism). However, [the employer]... must actually show that the general diagnosis requirement contributes to the achievement of those business necessities. The adoption of a generally applicable policy does not allow the employer to escape scrutiny as to whether the policy is consistent with business necessity.... [A] court must carefully analyze whether an employer's requested inquiry of an individual employee falls within the business necessity exception." *Conroy v. New York Dep't. of Correctional Services*, 333 F.3d 88, 100-01 (2nd Cir. 2003).

family member's recovery, and an estimate of the frequency and duration of the required leave.-

(b) DOL has developed two optional forms (Form WH-380E and Form WH-380F, as revised) for use in obtaining medical certification, including second and third opinions, from health care providers that meets FMLA's certification requirements. Optional form WH-380E is for use when the employee's need for leave is due to the employee's own serious health condition. Optional form WH-380F is for use when the employee needs leave to care for a family member with a serious health condition. These optional forms reflect certification requirements so as to permit the health care provider to furnish appropriate medical information. Form WH-380-E and WH-380-F, as revised, or another form containing the same basic information, may be used by the employer; however, no information may be required beyond that specified in §§ 825.306, 825.307, and 825.308. In all instances the information on the form must relate only to the serious health condition for which the current need for leave exists. Prototype forms WH-380-E and WH-380-F may be obtained from local offices of the Wage and Hour Division or from the Internet at [www.dol.gov/whd](http://www.dol.gov/whd).<sup>71</sup>

(c) If an employee is on FMLA leave running concurrently with a workers' compensation absence, and the provisions of the workers' compensation statute permit the employer or the employer's representative to request additional information from the employee's workers' compensation health care provider, the FMLA does not prevent the employer from following the workers' compensation provisions and information received under those provisions may be considered in determining the employee's entitlement to FMLA-protected leave. Similarly, an employer may request additional information in accordance with a paid leave policy or disability plan that requires greater information to qualify for payments or benefits, provided that the employer informs the employee that the additional information only needs to be provided in connection with receipt of such payments or benefits. Any information received pursuant to such policy or plan may be considered in determining the employee's entitlement to FMLA-protected leave. If the employee fails to provide the information required for receipt of such payments or benefits, such failure will not affect the employee's entitlement to take unpaid FMLA leave. See § 825.207(a).

(d) If an employee's serious health condition may also be a disability within the meaning of the Americans with Disabilities Act (ADA), as amended, the FMLA does not prevent the employer from following the procedures for requesting medical information under the ADA. Any information received pursuant to these procedures may be considered in determining the employee's entitlement to FMLA-protected leave.

<sup>71</sup> A copy of forms WH-380-E and WH-380-F are included in this booklet as Appendix A.

(e) While an employee may choose to comply with the certification requirement by providing the employer with an authorization, release, or waiver allowing the employer to communicate directly with the health care provider of the employee or his or her covered family member, the employee may not be required to provide such an authorization, release, or waiver. In all instances in which certification is requested, it is the employee's responsibility to provide the employer with complete and sufficient certification and failure to do so may result in the denial of FMLA leave.<sup>72</sup> See § 825.305(d).

**§ 825.307 Authentication and clarification of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member; second and third opinions.**

(a) *Clarification and authentication.* If an employee submits a complete and sufficient certification signed by the health care provider,<sup>73</sup> the employer may not request additional information from the health care

<sup>72</sup> The statute states that the *employee* shall provide certification to the employer, 29 U.S.C. § 2613 (a), suggesting that the health care provider may not submit the certification directly to the employer but may only provide it to the employee for conveyance to the employer; the second or third certifications, if requested, also may not be submitted directly to the employer. 29 U.S.C. § 2613 (c)(1), (d)(1).

By contrast, the regulations suggest, and the department's comments on the regulations explicitly state, that the health care provider may submit the certification directly to the employer. See e.g. *The Family and Medical Leave Act of 1993, Final Rule, Summary of Comments on Changes to the FMLA Regulations*, 73 Fed. Reg. 67934, 68011 (2008) ("Employees who request that their health care providers submit the certification directly to their employer can check with their employer to ensure that the certification has been received.")

Bearing in mind that statutes always control over contrary regulations and that whenever possible regulations should be read in harmony with the statutes they are intended to interpret, it appears a health care provider may only submit certifications directly to employers if so directed by the employee. The Department's comments provide some support for this interpretation where they state: "when it is the employee's obligation to either provide a complete and sufficient certification or provide any necessary authorization for the health care provider to release a complete and sufficient certification directly to the employer; this obligation applies regardless of whether the certification requested is an initial certification, a recertification, a second or third certification, or a fitness for duty certification." *Id.* at 68010.

*But see Townsend-Taylor v. Ameritech*, 523 F.3d 815, 817 (7th Cir. 2008) (employer may require that certification be faxed or mailed by the health care provider where the requirement is a reasonable and nonburdensome measure to prevent fraud).

<sup>73</sup> If not returned, the certification is considered not provided rather than insufficient or incomplete. *Miedema v. Facility Concession Svcs*, 487 Fed. Appx. 214 (5th Cir. 2012).

provider.<sup>74</sup> However, the employer may contact the health care provider for purposes of clarification and authentication of the medical certification (whether initial certification or recertification) after the employer has given the employee an opportunity to cure any deficiencies as set forth in § 825.305(c). To make such contact, the employer must use a health care provider, a human resources professional, a leave administrator, or a management official. Under no circumstances, however, may the employee's direct supervisor contact the employee's health care provider. For purposes of these regulations, *authentication* means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document; no additional medical information may be requested. *Clarification* means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response. Employers may not ask health care providers for additional information beyond that required by the certification form. The requirements of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule (see 45 CFR parts 160 and 164), which governs the privacy of individually-identifiable health information created or held by HIPAA-covered entities, must be satisfied when individually-identifiable health information of an employee is shared with an employer by a HIPAA-covered health care provider. If an

employee chooses not to provide the employer with authorization allowing the employer to clarify the certification with the health care provider, and does not otherwise clarify the certification, the employer may deny the taking of FMLA leave if the certification is unclear. See § 825.305(d). It is the employee's responsibility to provide the employer with a complete and sufficient certification and to clarify the certification if necessary.

-(b) *Second opinion.*<sup>75</sup>

(1) An employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employer's expense. Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits of the Act, including maintenance of group health benefits. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave and may be treated as paid or unpaid leave under the employer's established leave policies. In addition, the consequences set forth in § 825.305(d) will apply if the employee or the employee's family member fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a second opinion in order to render a sufficient and complete second opinion.

<sup>74</sup> On the employer's assessment of the information provided in the medical certification, the District Court of Massachusetts writes: "At times, the Service writes as if it needs sufficient information to independently assess Albert's condition or to evaluate Dr. Smith's diagnosis. However, an employer is not entitled to require information beyond that allowed by 29 U.S.C. § 2613, in order to make its own assessment. [Cite to pre-2009 regulations omitted]. Moreover, the limited information that the FMLA permits an employer to demand shows that the statute does not authorize an employer to make an independent assessment of the employee's medical condition. Instead, the employer should determine whether the provided information demonstrates that the diagnosed condition is a serious health condition within the meaning of the FMLA." *Albert v. Runyon*, 6 F.Supp. 2d 57, 64, 1998 U.S. Dist. LEXIS 7505 (D.Mass 1998). See also *Miller v. AT&T*, 5 Wage & Hour Cas. 2d 936, 941 (S.W.Va. 1999) ("[T]he 'statutory scheme is designed to have medical determinations made by health care providers, rather than the courts.'... [W]hether or not a particular case... qualifies as a serious health condition is and should be left to the informed discretion of medical doctors..." (citations omitted)), *aff'd*, 250 F.3d 820, 6 Wage & Hour Cas 2d 1754 (4th Cir., 2001).

*Cf. Sims v. Alameda-Contra Costa Transit*, 2 F.Supp.2d 1253, 5 Wage & Hour Cas. 2d 1486, 1494-95 (N.D.Calif. 1998) ("Congress did not intend to allow employers who did not seek second opinions to later challenge in court the validity of the certification presented by the employee at the time he requested leave.... The statutory scheme is designed to have medical determinations made by health care providers, rather than courts.").

<sup>75</sup> The Fourth, Sixth, and Eighth Circuit Courts of Appeal have ruled that 29 U.S.C. § 2613 (c)(1) and § 825.307(a)(2) are merely permissive because both say an employer *may* require a second or third certification. An employer that fails to require a second or third certification is, therefore, not barred from contesting the validity of the first certification in the future. *Rhoads v. Federal Deposit Ins. Corp.*, 257 F.3d 373, 386 (4th Cir. 2001); *Novak v. Metrohealth Medical Center*, 503 F.3d 572, 579-80 (6th Cir. 2007) ("We continue to view the language of 29 U.S.C. § 2613(c)(1) as merely permissive; therefore an employer's failure to require a second certification does not preclude the employer from contesting the employee's certification." (case citations omitted); *Stekloff v. St. John's Mercy Health Sys.*, 218 F.3d 858, 860 (8th Cir. 2000). This does not mean, however, "that there are not potential pitfalls for an employer who chooses not to pursue a second opinion." *Rhoads*, 257 F.3d at 386. An employer who rejects an employee's initial certification must be able to produce some evidence calling the certification into question, which could be difficult to do if the only medical information contemporaneous to the employee's leave is contained in the employee's certification. The employer in *Rhoads* prevailed, even though it rejected Rhoads' certification without seeking a second certification, but "Rhoads' employer had immediate reason to believe that she was not really sick." *Rhoads*, 257 F.3d at 386. *But cf. Sims v. Alameda-Contra Costa Transit Dist.*, 2 F.Supp.2d 1253, 1255 (N.D.Cal. 1998) ("where the employer did not seek a subsequent medical opinion within a reasonable time period after the employee submitted his initial certification of a serious health condition, the employer may not now challenge... the validity of the initial medication certification submitted by the employee").

(2) The employer is permitted to designate the health care provider to furnish the second opinion, but the selected health care provider may not be employed on a regular basis by the employer. The employer may not regularly contract with or otherwise regularly utilize the services of the health care provider furnishing the second opinion unless the employer is located in an area where access to health care is extremely limited (e.g., a rural area where no more than one or two doctors practice in the relevant specialty in the vicinity).

(c) *Third opinion.* If the opinions of the employee's and the employer's designated health care providers differ, the employer may require the employee to obtain certification from a third health care provider, again at the employer's expense. This third opinion shall be final and binding. The third health care provider must be designated or approved jointly by the employer and the employee. The employer and the employee must each act in good faith to attempt to reach agreement on whom to select for the third opinion provider. If the employer does not attempt in good faith to reach agreement, the employer will be bound by the first certification. If the employee does not attempt in good faith to reach agreement, the employee will be bound by the second certification. For example, an employee who refuses to agree to see a doctor in the specialty in question may be failing to act in good faith. On the other hand, an employer that refuses to agree to any doctor on a list of specialists in the appropriate field provided by the employee and whom the employee has not previously consulted may be failing to act in good faith. In addition, the consequences set forth in § 825.305(d) will apply if the employee or the employee's family member fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a third opinion in order to render a sufficient and complete third opinion.

(d) *Copies of opinions.* The employer is required to provide the employee with a copy of the second and third medical opinions, where applicable, upon request by the employee. Requested copies are to be provided within five business days unless extenuating circumstances prevent such action.

(e) *Travel expenses.* If the employer requires the employee to obtain either a second or third opinion the employer must reimburse an employee or family member for any reasonable "out of pocket" travel expenses incurred to obtain the second and third medical opinions. The employer may not require the employee or family member to travel outside normal commuting distance for purposes of obtaining the second or third medical opinions except in very unusual circumstances.

(f) *Medical certification abroad.* In circumstances in which the employee or a family member is visiting in another country, or a family member resides in another

country, and a serious health condition develops, the employer shall accept a medical certification as well as second and third opinions from a health care provider who practices in that country. Where a certification by a foreign health care provider is in a language other than English, the employee must provide the employer with a written translation of the certification upon request.

**§ 825.308 Recertifications for leave taken because of an employee's own serious health condition or the serious health condition of a family member.**

(a) *30-day rule.* An employer may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless paragraphs (b) or (c) of this section apply.

(b) *More than 30 days.* If the medical certification indicates that the minimum duration of the condition is more than 30 days, an employer must wait until that minimum duration expires before requesting a recertification, unless paragraph (c) of this section applies. For example, if the medical certification states that an employee will be unable to work, whether continuously or on an intermittent basis, for 40 days, the employer must wait 40 days before requesting a recertification. In all cases, an employer may request a recertification of a medical condition every six months in connection with an absence by the employee. Accordingly, even if the medical certification indicates that the employee will need intermittent or reduced schedule leave for a period in excess of six months (e.g., for a lifetime condition), the employer would be permitted to request recertification every six months in connection with an absence.

(c) *Less than 30 days.* An employer may request recertification in less than 30 days if:

- (1) The employee requests an extension of leave;
- (2) Circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of the absence, the nature or severity of the illness, complications). For example, if a medical certification stated that an employee would need leave for one to two days when the employee suffered a migraine headache and the employee's absences for his or her last two migraines lasted four days each, then the increased duration of absence might constitute a significant change in circumstances allowing the employer to request a recertification in less than 30 days. Likewise, if an employee had a pattern of using unscheduled FMLA leave for migraines in conjunction with his or her scheduled days off, then the timing of the absences also might constitute a significant change in circumstances sufficient for an employer to request a recertification more frequently than every 30 days; or

(3) The employer receives information that casts doubt upon the employee's stated reason for the absence

or the continuing validity of the certification.<sup>76</sup> For example, if an employee is on FMLA leave for four weeks due to the employee's knee surgery, including recuperation, and the employee plays in company softball league games during the employee's third week of FMLA leave, such information might be sufficient to cast doubt upon the continuing validity of the certification allowing the employer to request a recertification in less than 30 days.

(d) *Timing.* The employee must provide the requested recertification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(e) *Content.* The employer may ask for the same information when obtaining recertification as that permitted for the original certification as set forth in § 825.306. The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or adequate authorization to the health care provider) in the recertification process as in the initial certification process. See § 825.305(d). As part of the information allowed to be obtained on recertification for leave taken because of a serious health condition, the employer may provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern.

(f) Any recertification requested by the employer shall be at the employee's expense unless the employer provides otherwise. No second or third opinion on recertification may be required.

### § 825.309 Certification for leave taken because of a qualifying exigency.

(a) *Active Duty Orders.* The first time an employee requests leave because of a qualifying exigency arising out of the covered active duty or call to covered active duty status (or notification of an impending call or order to covered active duty) of a military member (see § 825.126(a)), an employer may require the employee to provide a copy of the military member's active duty orders or other documentation issued by the military which indicates that the military member is on covered

active duty or call to covered active duty status, and the dates of the military member's covered active duty service. This information need only be provided to the employer once. A copy of new active duty orders or other documentation issued by the military may be required by the employer if the need for leave because of a qualifying exigency arises out of a different covered active duty or call to covered active duty status (or notification of an impending call or order to covered active duty) of the same or a different military member;

(b) *Required information.*<sup>77</sup> An employer may require that leave for any qualifying exigency specified in § 825.126 be supported by a certification from the employee that sets forth the following information:

(1) A statement or description, signed by the employee, of appropriate facts regarding the qualifying exigency for which FMLA leave is requested. The facts must be sufficient to support the need for leave. Such facts should include information on the type of qualifying exigency for which leave is requested and any available written documentation which supports the request for leave; such documentation, for example, may include a copy of a meeting announcement for informational briefings sponsored by the military, a document confirming an appointment with a counselor or school official, or a copy of a bill for services for the handling of legal or financial affairs;

(2) The approximate date on which the qualifying exigency commenced or will commence;

(3) If an employee requests leave because of a qualifying exigency for a single, continuous period of time, the beginning and end dates for such absence;

(4) If an employee requests leave because of a qualifying exigency on an intermittent or reduced schedule basis, an estimate of the frequency and duration of the qualifying exigency;

(5) If the qualifying exigency involves meeting with a third party, appropriate contact information for the individual or entity with whom the employee is meeting (such as the name, title, organization, address, telephone number, fax number, and email address) and a brief description of the purpose of the meeting; and

(6) If the qualifying exigency involves *Rest and Recuperation* leave, a copy of the military member's Rest and Recuperation orders, or other documentation issued by the military which indicates that the military member has been granted Rest and Recuperation leave, and the dates of the military member's Rest and Recuperation leave.

(c) DOL has developed an optional form (Form WH-384) for employees' use in obtaining a certification that meets FMLA's certification requirements. Form WH-384 may be obtained from local offices of the Wage and Hour Division or from the Internet at [www.dol.gov/whd](http://www.dol.gov/whd).<sup>78</sup> This optional form reflects

<sup>76</sup> Where the employer investigates an employee's continuing need for leave based on a reasonable suspicion that the employee deliberately misrepresented his medical condition, it is under no obligation to seek further information from the employee's health care provider. Although the employer's investigation need not "leave no stone unturned" its investigation must only be sufficient to show it had an honest belief the employee was fraudulently taking leave. *Seeger v. Cincinnati Bell Tel. Co.*, 681 F.3d 274, 285-86 (6th Cir. 2012).

<sup>77</sup> See 29 U.S.C. § 2613 (b).

<sup>78</sup> A copy of form WH-384 is included in this booklet as Appendix A.

certification requirements so as to permit the employee to furnish appropriate information to support his or her request for leave because of a qualifying exigency. Form WH-384, or another form containing the same basic information, may be used by the employer; however, no information may be required beyond that specified in this section.

(d) *Verification.* If an employee submits a complete and sufficient certification to support his or her request for leave because of a qualifying exigency, the employer may not request additional information from the employee. However, if the qualifying exigency involves meeting with a third party, the employer may contact the individual or entity with whom the employee is meeting for purposes of verifying a meeting or appointment schedule and the nature of the meeting between the employee and the specified individual or entity. The employee's permission is not required in order to verify meetings or appointments with third parties, but no additional information may be requested by the employer. An employer also may contact an appropriate unit of the Department of Defense to request verification that a military member is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty); no additional information may be requested and the employee's permission is not required.

**§ 825.310 Certification for leave taken to care for a covered servicemember (military caregiver leave).**

(a) *Required information from health care provider.* When leave is taken to care for a covered servicemember with a serious injury or illness, an employer may require an employee to obtain a certification completed by an authorized health care provider of the covered servicemember. For purposes of leave taken to care for a covered servicemember, any one of the following health care providers may complete such a certification:

- (1) A United States Department of Defense ("DOD") health care provider;
- (2) A United States Department of Veterans Affairs ("VA") health care provider;
- (3) A DOD TRICARE network authorized private health care provider;
- (4) A DOD non-network TRICARE authorized private health care provider; or
- (5) Any health care provider as defined in § 825.125.

(b) If the authorized health care provider is unable to make certain military-related determinations outlined below, the authorized health care provider may rely on determinations from an authorized DOD representative (such as a DOD Recovery Care Coordinator) or an authorized VA representative. An

employer may request that the health care provider provide the following information:

(1) The name, address, and appropriate contact information (telephone number, fax number, and/or email address) of the health care provider, the type of medical practice, the medical specialty, and whether the health care provider is one of the following:

- (i) A DOD health care provider;
- (ii) A VA health care provider;
- (iii) A DOD TRICARE network authorized private health care provider;
- (iv) A DOD non-network TRICARE authorized private health care provider; or
- (v) A health care provider as defined in § 825.125.

(2) Whether the covered servicemember's injury or illness was incurred in the line of duty on active duty or, if not, whether the covered servicemember's injury or illness existed before the beginning of the servicemember's active duty and was aggravated by service in the line of duty on active duty;

(3) The approximate date on which the serious injury or illness commenced, or was aggravated, and its probable duration;

(4) A statement or description of appropriate medical facts regarding the covered servicemember's health condition for which FMLA leave is requested. The medical facts must be sufficient to support the need for leave.

(i) In the case of a current member of the Armed Forces, such medical facts must include information on whether the injury or illness may render the covered servicemember medically unfit to perform the duties of the servicemember's office, grade, rank, or rating and whether the member is receiving medical treatment, recuperation, or therapy.

(ii) In the case of a covered veteran, such medical facts must include:

(A) Information on whether the veteran is receiving medical treatment, recuperation, or therapy for an injury or illness that is the continuation of an injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember medically unfit to perform the duties of the servicemember's office, grade, rank, or rating; or

(B) Information on whether the veteran is receiving medical treatment, recuperation, or therapy for an injury or illness that is a physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and that such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or

(C) Information on whether the veteran is receiving medical treatment, recuperation, or therapy for an injury or illness that is a physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by

reason of a disability or disabilities related to military service, or would do so absent treatment; or

(D) Documentation of enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

(5) Information sufficient to establish that the covered servicemember is in need of care, as described in § 825.124, and whether the covered servicemember will need care for a single continuous period of time, including any time for treatment and recovery, and an estimate as to the beginning and ending dates for this period of time;

(6) If an employee requests leave on an intermittent or reduced schedule basis for planned medical treatment appointments for the covered servicemember, whether there is a medical necessity for the covered servicemember to have such periodic care and an estimate of the treatment schedule of such appointments;

(7) If an employee requests leave on an intermittent or reduced schedule basis to care for a covered servicemember other than for planned medical treatment (e.g., episodic flare-ups of a medical condition), whether there is a medical necessity for the covered servicemember to have such periodic care, which can include assisting in the covered servicemember's recovery, and an estimate of the frequency and duration of the periodic care.

(c) *Required information from employee and/or covered servicemember.* In addition to the information that may be requested under § 825.310(b), an employer may also request that such certification set forth the following information provided by an employee and/or covered servicemember:

(1) The name and address of the employer of the employee requesting leave to care for a covered servicemember, the name of the employee requesting such leave, and the name of the covered servicemember for whom the employee is requesting leave to care;

(2) The relationship of the employee to the covered servicemember for whom the employee is requesting leave to care;

(3) Whether the covered servicemember is a current member of the Armed Forces, the National Guard or Reserves, and the covered servicemember's military branch, rank, and current unit assignment;

(4) Whether the covered servicemember is assigned to a military medical facility as an outpatient or to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients (such as a medical hold or warrior transition unit), and the name of the medical treatment facility or unit;

(5) Whether the covered servicemember is on the temporary disability retired list;

(6) Whether the covered servicemember is a veteran, the date of separation from military service, and whether the separation was other than dishonorable. The employer may require the employee

to provide documentation issued by the military which indicates that the covered servicemember is a veteran, the date of separation, and that the separation is other than dishonorable. Where an employer requires such documentation, an employee may provide a copy of the veteran's Certificate of Release or Discharge from Active Duty issued by the U.S. Department of Defense (DD Form 214) or other proof of veteran status. See § 825.127(c)(2).

(7) A description of the care to be provided to the covered servicemember and an estimate of the leave needed to provide the care.

(d) DOL has developed optional forms (WH-385, WH-385-V) for employees' use in obtaining certification that meets FMLA's certification requirements, which may be obtained from local offices of the Wage and Hour Division or on the Internet at [www.dol.gov/whd](http://www.dol.gov/whd).<sup>79</sup> These optional forms reflect certification requirements so as to permit the employee to furnish appropriate information to support his or her request for leave to care for a covered servicemember with a serious injury or illness. WH-385, WH-385-V, or another form containing the same basic information, may be used by the employer; however, no information may be required beyond that specified in this section. In all instances the information on the certification must relate only to the serious injury or illness for which the current need for leave exists. An employer may seek authentication and/or clarification of the certification under § 825.307. Second and third opinions under § 825.307 are not permitted for leave to care for a covered servicemember when the certification has been completed by one of the types of health care providers identified in § 825.310(a)(1)-(4). However, second and third opinions under § 825.307 are permitted when the certification has been completed by a health care provider as defined in § 825.125 that is not one of the types identified in § 825.310(a)(1)-(4). Additionally, recertifications under § 825.308 are not permitted for leave to care for a covered servicemember. An employer may require an employee to provide confirmation of covered family relationship to the seriously injured or ill servicemember pursuant to § 825.122(k) of the FMLA.

(e) An employer requiring an employee to submit a certification for leave to care for a covered servicemember must accept as sufficient certification, in lieu of the Department's optional certification forms (WH-385) or an employer's own certification form, invitational travel orders (ITOs) or invitational travel authorizations (ITAs) issued to any family member to join an injured or ill servicemember at his or her bedside. An ITO or ITA is sufficient certification for the duration of time specified in the ITO or ITA. During that time period, an eligible employee may take leave to care for the covered servicemember in a continuous

<sup>79</sup> A copy of forms WH-385 and WH-385V are included in this booklet as Appendix A.

block of time or on an intermittent basis. An eligible employee who provides an ITO or ITA to support his or her request for leave may not be required to provide any additional or separate certification that leave taken on an intermittent basis during the period of time specified in the ITO or ITA is medically necessary. An ITO or ITA is sufficient certification for an employee entitled to take FMLA leave to care for a covered servicemember regardless of whether the employee is named in the order or authorization.

(1) If an employee will need leave to care for a covered servicemember beyond the expiration date specified in an ITO or ITA, an employer may request that the employee have one of the authorized health care providers listed under § 825.310(a) complete the DOL optional certification form (WH-385) or an employer's own form, as requisite certification for the remainder of the employee's necessary leave period.

(2) An employer may seek authentication and clarification of the ITO or ITA under § 825.307. An employer may not utilize the second or third opinion process outlined in § 825.307 or the recertification process under § 825.308 during the period of time in which leave is supported by an ITO or ITA.

(3) An employer may require an employee to provide confirmation of covered family relationship to the seriously injured or ill servicemember pursuant to § 825.122(k) when an employee supports his or her request for FMLA leave with a copy of an ITO or ITA.

(f) An employer requiring an employee to submit a certification for leave to care for a covered servicemember must accept as sufficient certification of the servicemember's serious injury or illness documentation indicating the servicemember's enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers. Such documentation is sufficient certification of the servicemember's serious injury or illness to support the employee's request for military caregiver leave regardless of whether the employee is the named caregiver in the enrollment documentation.

(1) An employer may seek authentication and clarification of the documentation indicating the servicemember's enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers under § 825.307. An employer may not utilize the second or third opinion process outlined in § 825.307 or the recertification process under § 825.308 when the servicemember's serious injury or illness is shown by documentation of enrollment in this program.

(2) An employer may require an employee to provide confirmation of covered family relationship to the seriously injured or ill servicemember pursuant to § 825.122(k) when an employee supports his or her request for FMLA leave with a copy of such enrollment documentation. An employer may also require an employee to provide documentation, such as a veteran's Form DD-214, showing that the discharge was other

than dishonorable and the date of the veteran's discharge.

(g) Where medical certification is requested by an employer, an employee may not be held liable for administrative delays in the issuance of military documents, despite the employee's diligent, good-faith efforts to obtain such documents. *See* § 825.305(b). In all instances in which certification is requested, it is the employee's responsibility to provide the employer with complete and sufficient certification and failure to do so may result in the denial of FMLA leave. *See* § 825.305(d).

### § 825.311 Intent to return to work.

(a) An employer may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work.<sup>80</sup> The employer's policy regarding such reports may not be discriminatory and must take into account all of the relevant facts and circumstances related to the individual employee's leave situation.

(b) If an employee gives unequivocal notice of intent not to return to work, the employer's obligations under FMLA to maintain health benefits (subject to COBRA requirements) and to restore the employee cease. However, these obligations continue if an employee indicates he or she may be unable to return to work but expresses a continuing desire to do so.

(c) It may be necessary for an employee to take more leave than originally anticipated. Conversely, an employee may discover after beginning leave that the circumstances have changed and the amount of leave originally anticipated is no longer necessary. An employee may not be required to take more FMLA leave than necessary to resolve the circumstance that precipitated the need for leave. In both of these situations, the employer may require that the employee provide the employer reasonable notice (*i.e.*, within two business days) of the changed circumstances where foreseeable. The employer may also obtain information on such changed circumstances through requested status reports.

### § 825.312 Fitness-for-duty certification.<sup>81</sup>

<sup>80</sup> An employer may terminate an employee on FMLA leave for failing to comply with the employer's call-in requirement that the employee report periodically on her status and intent to return to work. *Thompson v. CenturyTel*, 403 Fed.Appx. 114, 118 (8th Cir. 2010).

<sup>81</sup> "The FMLA does not authorize an employer to make its own determination of whether an employee is fit to return from FMLA leave following recovery from a serious health condition. Rather, an employer must rely on the evaluation done by the employee's own clinician and return the employee to work without delay upon receipt of medical certification." *Albert v. Runyon*, 6 F.Supp.2d 57, 62 (D.C.Mass 1998)



-(a) As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employer may have a uniformly-applied policy or practice that requires all similarly-situated employees (*i.e.*, same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work. The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or providing sufficient authorization to the health care provider to provide the information directly to the employer) in the fitness-for-duty certification process as in the initial certification process. See § 825.305(d).

-(b) An employer may seek a fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification from the employee's health care provider must certify that the employee is able to resume work. Additionally, an employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. In order to require such a certification, an employer must provide an employee with a list of the essential functions of the employee's job no later than with the designation notice required by § 825.300(d), and must indicate in the designation notice that the certification must address the employee's ability to perform those essential functions. If the employer satisfies these requirements, the employee's health care provider must certify that the employee can perform the identified essential functions of his or her job. Following the procedures set forth in § 825.307(a), the employer may contact the employee's health care provider for purposes of clarifying and authenticating the fitness-for-duty certification. Clarification may be requested only for the serious health condition for which FMLA leave was taken. The employer may not delay the employee's return to work while contact with the health care provider is being made. No second or third opinions on a fitness-for-duty certification may be required.

-(c) The cost of the certification shall be borne by the employee, and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification.

-(d) The designation notice required in § 825.300(d) shall advise the employee if the employer will require a fitness-for-duty certification to return to work and whether that fitness-for-duty certification must address the employee's ability to perform the essential functions of the employee's job.

-(e) An employer may delay restoration to employment until an employee submits a required fitness-for-duty certification unless the employer has failed to provide the notice required in paragraph (d) of this section. If an employer provides the notice required, an employee who does not provide a fitness-

for-duty certification or request additional FMLA leave is no longer entitled to reinstatement under the FMLA. See § 825.313(d).

-(f) An employer is not entitled to a certification of fitness to return to duty for each absence taken on an intermittent or reduced leave schedule. However, an employer is entitled to a certification of fitness to return to duty for such absences up to once every 30 days if reasonable safety concerns exist regarding the employee's ability to perform his or her duties, based on the serious health condition for which the employee took such leave.<sup>82</sup> If an employer chooses to require a fitness-for-duty certification under such circumstances, the employer shall inform the employee at the same time it issues the designation notice that for each subsequent instance of intermittent or reduced schedule leave, the employee will be required to submit a fitness-for-duty certification unless one has already been submitted within the past 30 days. Alternatively, an employer can set a different interval for requiring a fitness-for-duty certification as long as it does not exceed once every 30 days and as long as the employer advises the employee of the requirement in advance of the employee taking the intermittent or reduced schedule leave. The employer may not terminate the employment of the employee while awaiting such a certification of fitness to return to duty for an intermittent or reduced schedule leave absence. Reasonable safety concerns means a reasonable belief of significant risk of harm to the individual employee or others. In determining whether reasonable safety concerns exist, an employer should consider the nature and severity of the potential harm and the likelihood that potential harm will occur.

-(g) If State or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied.

-(h) Requirements under the Americans with Disabilities Act (ADA), as amended, apply. After an employee returns from FMLA leave, the ADA requires any medical examination at an employer's expense by the employer's health care provider be job-related and consistent with business necessity. For example, an attorney could not be required to submit to a medical examination or inquiry just because her leg had been amputated. The essential functions of an attorney's job do not require use of both legs; therefore such an inquiry would not be job related. An employer may require a warehouse laborer, whose back impairment affects the ability to lift, to be examined by an orthopedist, but may not require this employee to submit to an HIV test where the test is not related to either the essential functions of his or her job or to

<sup>82</sup> An employer may require certification of fitness to return to duty upon return from FMLA leave every 30 days only if it also requires certification from employees returning from non-FMLA leave under the same circumstances. 29 U.S.C. § 2614 (a)(4).

his/her impairment. If an employee's serious health condition may also be a disability within the meaning of the ADA, the FMLA does not prevent the employer from following the procedures for requesting medical information under the ADA.

### § 825.313 Failure to provide certification.

-(a) *Foreseeable leave.* In the case of foreseeable leave, if an employee fails to provide certification in a timely manner as required by § 825.305, then an employer may deny FMLA coverage until the required certification is provided. For example, if an employee has 15 days to provide a certification and does not provide the certification for 45 days without sufficient reason for the delay, the employer can deny FMLA protections for the 30-day period following the expiration of the 15-day time period, if the employee takes leave during such period.

-(b) *Unforeseeable leave.* In the case of unforeseeable leave, an employer may deny FMLA coverage for the requested leave if the employee fails to provide a certification within 15 calendar days from receipt of the request for certification unless not practicable due to extenuating circumstances.<sup>83</sup> For example, in the case of a medical emergency, it may not be practicable for an employee to provide the required certification within 15 calendar days. Absent such extenuating circumstances, if the employee fails to timely return the certification, the employer can deny FMLA protections for the leave following the expiration of the 15-day time period until a sufficient certification is provided. If the employee never produces the certification, the leave is not FMLA leave.

-(c) *Recertification.* An employee must provide recertification within the time requested by the employer (which must allow at least 15 calendar days after the request) or as soon as practicable under the particular facts and circumstances. If an employee fails to provide a recertification within a reasonable time under the particular facts and circumstances, then the employer may deny continuation of the FMLA leave protections until the employee produces a sufficient recertification. If the employee never produces the recertification, the leave is not FMLA leave. Recertification does not apply to leave taken for a qualifying exigency or to care for a covered servicemember.

-(d) *Fitness-for-duty certification.* When requested by the employer pursuant to a uniformly applied policy for similarly-situated employees, the employee must provide medical certification, at the time the employee

seeks reinstatement at the end of FMLA leave taken for the employee's serious health condition, that the employee is fit for duty and able to return to work (*see* § 825.312(a)) if the employer has provided the required notice (*see* § 825.300(e)); the employer may delay restoration until the certification is provided. Unless the employee provides either a fitness-for-duty certification or a new medical certification for a serious health condition at the time FMLA leave is concluded, the employee may be terminated. *See also* § 825.213(a)(3).

## Subpart D—Enforcement Mechanisms

### § 825.400 Enforcement, general rules.

-(a) The employee has the choice of:

- (1) Filing, or having another person file on his or her behalf, a complaint with the Secretary of Labor, or
- (2) Filing a private lawsuit pursuant to section 107 of FMLA.<sup>84</sup>

<sup>84</sup> If a claimant employee is a member of a labor union, it may also be possible to file a grievance on the employer's FMLA violation. An employer's alleged statutory violation is almost always subject to a contractual grievance and arbitration procedure, unless the contract specifically says it is not.

The Supreme Court has long held that any doubts about an issue's arbitrability should be resolved in favor of arbitration. *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). "In the absence of any express provision excluding a particular grievance from arbitration... only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Id.* at 584-85. *See, e.g., Butler Mfg. Co., v. United Steelworkers of America*, 336 F.3d 629, 8 Wage & Hour Cas. 2d 1637 (7th Cir. 2003) (CBA provision that reads: "[employer] offers equal opportunity for employment, advancement in employment, and continuation of employment to all qualified individuals in accordance with the provisions of law and in accordance with the provisions of the Agreement for the represented employees covered by it" conferred upon arbitrator the authority to consider the FMLA).

Arbitrators generally recognize that they must apply external law when it is relevant. *See e.g. Laidlaw Transit, Inc. v. IBT, General Teamsters Local 959*, 109 Lab. Arb. 647, 650 (R.W. Landau 1997) ("Absent any express prohibition in the parties' contract, the arbitrator has the authority to consider and apply external law such as the FMLA.")  *citing Elkouri & Elkouri, How Arbitration Works*, 517-18 (5th ed. 1997); *Village of Arlington Hts v. Firefighters Ass'n, Local 3105*, 107 Lab. Arb. 1010, 1014-15 (E.H. Goldstein 1996) ("[A]rbitrators look to past practice, bargaining history, well recognized textual standards of Construction, and sources outside the contract such as external law to construe the provisions and get the proper interpretation of ambiguous or indefinite contract language. *See, Elkouri & Elkouri, [How Arbitration Works 342-365 (4th Ed. 1985)]*.... If... a contractual provision is susceptible to two interpretations, one compatible with and the other repugnant to an applicable statute, I believe that most arbitrators would find the statute to be a relevant factor and would seek to avoid a construction that would make the agreement invalid."). *See also* Robert G. Howlett, *The Arbitrator, the NLRB, and the Courts*, Proceedings of the 20th

<sup>83</sup> "If [the employee's] doctor does not cooperate—suppose he's on vacation and as a result unable to submit the medical certification in time... —that would be an extenuating circumstance that could excuse missing the deadline [in § 825.313 (b)]." *Townsend-Taylor v. Ameritech Services*, 523 F.3d 815, 818 (7th Cir. 2008).

(b) If the employee files a private lawsuit, it must be filed within two years after the last action which the employee contends was in violation of the Act, or three years if the violation was willful.<sup>85</sup>

(c) If an employer has violated one or more provisions of FMLA, and if justified by the facts of a particular case, an employee may receive one or more of the following: wages, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or, where no such tangible loss has occurred, such as when FMLA leave was unlawfully denied, any actual monetary loss sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 26 weeks of wages for the employee in a case involving leave to care for a covered servicemember or 12 weeks of wages for the employee in a case involving leave for any other FMLA qualifying reason. In addition, the employee may be entitled to interest on such sum, calculated at the prevailing rate. An amount equaling the preceding sums may also be awarded as liquidated damages unless such amount is reduced by the court because the violation was in good faith and the employer had reasonable grounds for believing the employer had not violated the Act. When appropriate, the employee may also obtain appropriate equitable relief, such as employment, reinstatement and promotion. When the employer is found in violation, the employee may recover a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action from the employer in addition to any judgment awarded by the court.

#### **§ 825.401 Filing a complaint with the Federal Government.**

(a) A complaint may be filed in person, by mail or by telephone, with the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor. A complaint may be filed at any local office of the Wage and Hour Division; the address and telephone number of local offices may be found in telephone directories or on the Department's Web site.

(b) A complaint filed with the Secretary of Labor should be filed within a reasonable time of when the

employee discovers that his or her FMLA rights have been violated. In no event may a complaint be filed more than two years after the action which is alleged to be a violation of FMLA occurred, or three years in the case of a willful violation.

(c) No particular form of complaint is required, except that a complaint must be reduced to writing and should include a full statement of the acts and/or omissions, with pertinent dates, which are believed to constitute the violation.

#### **§ 825.402 Violations of the posting requirement.**

Section 825.300 describes the requirements for covered employers to post a notice for employees that explains the Act's provisions. If a representative of the Department of Labor determines that an employer has committed a willful violation of this posting requirement, and that the imposition of a civil money penalty for such violation is appropriate, the representative may issue and serve a notice of penalty on such employer in person or by certified mail. Where service by certified mail is not accepted, notice shall be deemed received on the date of attempted delivery. Where service is not accepted, the notice may be served by regular mail.

#### **§ 825.403 Appealing the assessment of a penalty for willful violation of the posting requirement.**

(a) An employer may obtain a review of the assessment of penalty from the Wage and Hour Regional Administrator for the region in which the alleged violation(s) occurred. If the employer does not seek such a review or fails to do so in a timely manner, the notice of the penalty constitutes the final ruling of the Secretary of Labor.

(b) To obtain review, an employer may file a petition with the Wage and Hour Regional Administrator for the region in which the alleged violations occurred. No particular form of petition for review is required, except that the petition must be in writing, should contain the legal and factual bases for the petition, and must be mailed to the Regional Administrator within 15 days of receipt of the notice of penalty. The employer may request an oral hearing which may be conducted by telephone.

(c) The decision of the Regional Administrator constitutes the final order of the Secretary.

#### **§ 825.404 Consequences for an employer when not paying the penalty assessment after a final order is issued.**

The Regional Administrator may seek to recover the unpaid penalty pursuant to the Debt Collection Act (DCA), 31 U.S.C. 3711 *et seq.*, and, in addition to seeking recovery of the unpaid final order, may seek interest and penalties as provided under the DCA. The

Annual Meeting of the NAA, 67, 83 (1967) ("Arbitrators, as well as judges, are subject to and bound by law, whether it be the Fourteenth Amendment to the Constitution of the United States or a city ordinance. All contracts are subject to statute and common law; and each contract includes all applicable law."), cited in Elkouri & Elkouri, *How Arbitration Works*, 528 (5th ed. 1997); *Ohio Valley Coal Co.*, 110 Lab. Arb. 859 (J. West 1998); *Aerospace Center Support*, 112 Lab. Arb. 108 (H. Welch 1999).

<sup>85</sup> To show willfulness a claimant must establish the employer knew or showed reckless disregard for whether its conduct was prohibited by the Act. *Hillstrom v. Best Western TLC Hotel*, 354 F.3d 27, 9 Wage & Hour Cas. 2d 331 (1st Cir 2003) (applying FLSA willfulness standard to FMLA claims).

final order may also be referred to the Solicitor of Labor for collection. The Secretary may file suit in any court of competent jurisdiction to recover the monies due as a result of the unpaid final order, interest, and penalties.

### Subpart E--Recordkeeping Requirements

#### § 825.500 Recordkeeping requirements.

-(a) FMLA provides that covered employers shall make, keep, and preserve records pertaining to their obligations under the Act in accordance with the recordkeeping requirements of section 11(c) of the Fair Labor Standards Act (FLSA) and in accordance with these regulations. FMLA also restricts the authority of the Department of Labor to require any employer or plan, fund, or program to submit books or records more than once during any 12-month period unless the Department has reasonable cause to believe a violation of FMLA exists or the Department is investigating a complaint. These regulations establish no requirement for the submission of any records unless specifically requested by a Departmental official.

-(b) No particular order or form of records is required. These regulations establish no requirement that any employer revise its computerized payroll or personnel records systems to comply. However, employers must keep the records specified by these regulations for no less than three years and make them available for inspection, copying, and transcription by representatives of the Department of Labor upon request. The records may be maintained and preserved on microfilm or other basic source document of an automated data processing memory provided that adequate projection or viewing equipment is available, that the reproductions are clear and identifiable by date or pay period, and that extensions or transcriptions of the information required herein can be and are made available upon request. Records kept in computer form must be made available for transcription or copying.

-(c) Covered employers who have eligible employees must maintain records that must disclose the following:

—(1) Basic payroll and identifying employee data, including name, address, and occupation; rate or basis of pay and terms of compensation; daily and weekly hours worked per pay period; additions to or deductions from wages; and total compensation paid.

-(2) Dates FMLA leave is taken by FMLA eligible employees (*e.g.*, available from time records, requests for leave, *etc.*, if so designated). Leave must be designated in records as FMLA leave; leave so designated may not include leave required under State law or an employer plan which is not also covered by FMLA.

-(3) If FMLA leave is taken by eligible employees in increments of less than one full day, the hours of the leave.

-(4) Copies of employee notices of leave furnished to the employer under FMLA, if in writing, and copies of

all written notices given to employees as required under FMLA and these regulations *See* § 825.300(b)-(c). Copies may be maintained in employee personnel files.

-(5) Any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves.

-(6) Premium payments of employee benefits.

-(7) Records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and for the disagreement.

-(d) Covered employers with no eligible employees must maintain the records set forth in paragraph (c)(1) of this section.

-(e) Covered employers in a joint employment situation (*see* § 825.106) must keep all the records required by paragraph (c) of this section with respect to any primary employees, and must keep the records required by paragraph (c)(1) with respect to any secondary employees.

-(f) If FMLA-eligible employees are not subject to FLSA's recordkeeping regulations for purposes of minimum wage or overtime compliance (*i.e.*, not covered by or exempt from FLSA), an employer need not keep a record of actual hours worked (as otherwise required under FLSA, 29 CFR 516.2(a)(7)), provided that:

(1) Eligibility for FMLA leave is presumed for any employee who has been employed for at least 12 months; and

-(2) With respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written record maintained in accordance with paragraph (b) of this section.

-(g) Records and documents relating to certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files. If the Genetic Information Nondiscrimination Act of 2008 (GINA) is applicable, records and documents created for purposes of FMLA containing family medical history or genetic information as defined in GINA shall be maintained in accordance with the confidentiality requirements of Title II of GINA (*see* 29 CFR 1635.9), which permit such information to be disclosed consistent with the requirements of FMLA. If the ADA, as amended, is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements (*see* 29 CFR 1630.14(c)(1)), except that:

-(1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;

-(2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or

medical condition might require emergency treatment; and

-(3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

(h) Special rules regarding recordkeeping apply to employers of airline flight crew employees. See § 825.803.

#### **Subpart F—Special Rules Applicable to Employees of Schools**

##### **§ 825.600 Special rules for school employees, definitions.**

-(a) Certain special rules apply to employees of “local educational agencies,” including public school boards and elementary and secondary schools under their jurisdiction, and private elementary and secondary schools. The special rules do not apply to other kinds of educational institutions, such as colleges and universities, trade schools, and preschools.

-(b) Educational institutions are covered by FMLA (and these special rules) and the Act’s 50-employee coverage test does not apply. The usual requirements for employees to be eligible do apply, however, including employment at a worksite where at least 50 employees are employed within 75 miles. For example, employees of a rural school would not be eligible for FMLA leave if the school has fewer than 50 employees and there are no other schools under the jurisdiction of the same employer (usually, a school board) within 75 miles.

-(c) The special rules affect the taking of intermittent leave or leave on a reduced leave schedule, or leave near the end of an academic term (semester), by instructional employees. “*Instructional employees*” are those whose principal function is to teach and instruct students in a class, a small group, or an individual setting. This term includes not only teachers, but also athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. It does not include, and the special rules do not apply to, teacher assistants or aides who do not have as their principal job actual teaching or instructing, nor does it include auxiliary personnel such as counselors, psychologists, or curriculum specialists. It also does not include cafeteria workers, maintenance workers, or bus drivers.

-(d) Special rules which apply to restoration to an equivalent position apply to all employees of local educational agencies.

##### **§ 825.601 Special rules for school employees, limitations on intermittent leave.**

-(a) Leave taken for a period that ends with the school year and begins the next semester is leave taken consecutively rather than intermittently. The period during the summer vacation when the employee would

not have been required to report for duty is not counted against the employee’s FMLA leave entitlement. An instructional employee who is on FMLA leave at the end of the school year must be provided with any benefits over the summer vacation that employees would normally receive if they had been working at the end of the school year.

-(1) If an eligible instructional employee needs intermittent leave or leave on a reduced leave schedule to care for a family member with a serious health condition, to care for a covered servicemember, or for the employee’s own serious health condition, which is foreseeable based on planned medical treatment, and the employee would be on leave for more than 20 percent of the total number of working days over the period the leave would extend, the employer may require the employee to choose either to:

-(i) Take leave for a period or periods of a particular duration, not greater than the duration of the planned treatment; or

-(ii) Transfer temporarily to an available alternative position for which the employee is qualified, which has equivalent pay and benefits and which better accommodates recurring periods of leave than does the employee’s regular position.

-(2) These rules apply only to a leave involving more than 20 percent of the working days during the period over which the leave extends. For example, if an instructional employee who normally works five days each week needs to take two days of FMLA leave per week over a period of several weeks, the special rules would apply. Employees taking leave which constitutes 20 percent or less of the working days during the leave period would not be subject to transfer to an alternative position. *Periods of a particular duration* means a block, or blocks, of time beginning no earlier than the first day for which leave is needed and ending no later than the last day on which leave is needed, and may include one uninterrupted period of leave.

-(b) If an instructional employee does not give required notice of foreseeable FMLA leave (see § 825.302) to be taken intermittently or on a reduced leave schedule, the employer may require the employee to take leave of a particular duration, or to transfer temporarily to an alternative position. Alternatively, the employer may require the employee to delay the taking of leave until the notice provision is met.

##### **§ 825.602 Special rules for school employees, limitations on leave near the end of an academic term.**

-(a) There are also different rules for instructional employees who begin leave more than five weeks before the end of a term, less than five weeks before the end of a term, and less than three weeks before the end of a term. Regular rules apply except in circumstances when:

(1) An instructional employee begins leave more than five weeks before the end of a term. The employer may require the employee to continue taking leave until the end of the term if --

(i) The leave will last at least three weeks, and

(ii) The employee would return to work during the three-week period before the end of the term.

(2) The employee begins leave during the five-week period before the end of a term because of the birth of a son or daughter; the placement of a son or daughter for adoption or foster care; to care for a spouse, son, daughter, or parent with a serious health condition; or to care for a covered servicemember. The employer may require the employee to continue taking leave until the end of the term if--

(i) The leave will last more than two weeks, and

(ii) The employee would return to work during the two-week period before the end of the term.

(3) The employee begins leave during the three-week period before the end of a term because of the birth of a son or daughter; the placement of a son or daughter for adoption or foster care; to care for a spouse, son, daughter, or parent with a serious health condition; or to care for a covered servicemember. The employer may require the employee to continue taking leave until the end of the term if the leave will last more than five working days.

(b) For purposes of these provisions, *academic term* means the school semester, which typically ends near the end of the calendar year and the end of spring each school year. In no case may a school have more than two academic terms or semesters each year for purposes of FMLA. An example of leave falling within these provisions would be where an employee plans two weeks of leave to care for a family member which will begin three weeks before the end of the term. In that situation, the employer could require the employee to stay out on leave until the end of the term.

#### **§ 825.603 Special rules for school employees, duration of FMLA leave.**

(a) If an employee chooses to take leave for periods of a particular duration in the case of intermittent or reduced schedule leave, the entire period of leave taken will count as FMLA leave.

(b) In the case of an employee who is required to take leave until the end of an academic term, only the period of leave until the employee is ready and able to return to work shall be charged against the employee's FMLA leave entitlement. The employer has the option not to require the employee to stay on leave until the end of the school term. Therefore, any additional leave required by the employer to the end of the school term is not counted as FMLA leave; however, the employer shall be required to maintain the employee's group health insurance and restore the employee to the same or equivalent job including other benefits at the conclusion of the leave.

#### **§ 825.604 Special rules for school employees, restoration to an equivalent position.**

The determination of how an employee is to be restored to an equivalent position upon return from FMLA leave will be made on the basis of "established school board policies and practices, private school policies and practices, and collective bargaining agreements." The "established policies" and collective bargaining agreements used as a basis for restoration must be in writing, must be made known to the employee prior to the taking of FMLA leave, and must clearly explain the employee's restoration rights upon return from leave. Any established policy which is used as the basis for restoration of an employee to an equivalent position must provide substantially the same protections as provided in the Act for reinstated employees. See § 825.215. In other words, the policy or collective bargaining agreement must provide for restoration to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment. For example, an employee may not be restored to a position requiring additional licensure or certification.

#### **Subpart G—Effect of Other Laws, Employer Practices, and Collective Bargaining Agreements on Employee Rights Under FMLA**

##### **§ 825.700 Interaction with employer's policies.**

(a) An employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA. Conversely, the rights established by the Act may not be diminished by any employment benefit program or plan. For example, a provision of a CBA which provides for reinstatement to a position that is not equivalent because of seniority (e.g., provides lesser pay) is superseded by FMLA. If an employer provides greater unpaid family leave rights than are afforded by FMLA, the employer is not required to extend additional rights afforded by FMLA, such as maintenance of health benefits (other than through COBRA), to the additional leave period not covered by FMLA.

(b) Nothing in this Act prevents an employer from amending existing leave and employee benefit programs, provided they comply with FMLA. However, nothing in the Act is intended to discourage employers from adopting or retaining more generous leave policies.

##### **§ 825.701 Interaction with State laws.**

(a) Nothing in FMLA supersedes any provision of State or local law that provides greater family or medical leave rights than those provided by FMLA. The Department of Labor will not, however, enforce State

family or medical leave laws, and States may not enforce the FMLA. Employees are not required to designate whether the leave they are taking is FMLA leave or leave under State law, and an employer must comply with the appropriate (applicable) provisions of both. An employer covered by one law and not the other has to comply only with the law under which it is covered. Similarly, an employee eligible under only one law must receive benefits in accordance with that law. If leave qualifies for FMLA leave and leave under State law, the leave used counts against the employee's entitlement under both laws. Examples of the interaction between FMLA and State laws include:

(1) If State law provides 16 weeks of leave entitlement over two years, an employee needing leave due to his or her own serious health condition would be entitled to take 16 weeks one year under State law and 12 weeks the next year under FMLA. Health benefits maintenance under FMLA would be applicable only to the first 12 weeks of leave entitlement each year. If the employee took 12 weeks the first year, the employee would be entitled to a maximum of 12 weeks the second year under FMLA (not 16 weeks). An employee would not be entitled to 28 weeks in one year.

(2) If State law provides half-pay for employees temporarily disabled because of pregnancy for six weeks, the employee would be entitled to an additional six weeks of unpaid FMLA leave (or accrued paid leave).

(3) If State law provides six weeks of leave, which may include leave to care for a seriously-ill grandparent or a "spouse equivalent," and leave was used for that purpose, the employee is still entitled to his or her full FMLA leave entitlement, as the leave used was provided for a purpose not covered by FMLA. If FMLA leave is used first for a purpose also provided under State law, and State leave has thereby been exhausted, the employer would not be required to provide additional leave to care for the grandparent or "spouse equivalent."

(4) If State law prohibits mandatory leave beyond the actual period of pregnancy disability, an instructional employee of an educational agency subject to special FMLA rules may not be required to remain on leave until the end of the academic term, as permitted by FMLA under certain circumstances. See Subpart F of this part.

(b) [Reserved]

### § 825.702 Interaction with Federal and State anti-discrimination laws.

(a) Nothing in FMLA modifies or affects any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability (e.g., Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act). FMLA's legislative history explains that FMLA is "not intended to modify or affect the Rehabilitation Act of

1973, as amended, the regulations concerning employment which have been promulgated pursuant to that statute, or the Americans with Disabilities Act of 1990 [as amended] or the regulations issued under that act. Thus, the leave provisions of the [FMLA] are wholly distinct from the reasonable accommodation obligations of employers covered under the [ADA], employers who receive Federal financial assistance, employers who contract with the Federal government, or the Federal government itself. The purpose of the FMLA is to make leave available to eligible employees and employers within its coverage, and not to limit already existing rights and protection." S. Rep. No. 103-3, at 38 (1993). An employer must therefore provide leave under whichever statutory provision provides the greater rights to employees. When an employer violates both FMLA and a discrimination law, an employee may be able to recover under either or both statutes (double relief may not be awarded for the same loss; when remedies coincide a claimant may be allowed to utilize whichever avenue of relief is desired. *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 445 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978).

(b) If an employee is a qualified individual with a disability within the meaning of the ADA, the employer must make reasonable accommodations, etc., barring undue hardship, in accordance with the ADA. At the same time, the employer must afford an employee his or her FMLA rights. ADA's "disability" and FMLA's "serious health condition" are different concepts, and must be analyzed separately. FMLA entitles eligible employees to 12 weeks of leave in any 12-month period due to their own serious health condition, whereas the ADA allows an indeterminate amount of leave, barring undue hardship, as a reasonable accommodation. FMLA requires employers to maintain employees' group health plan coverage during FMLA leave on the same conditions as coverage would have been provided if the employee had been continuously employed during the leave period, whereas ADA does not require maintenance of health insurance unless other employees receive health insurance during leave under the same circumstances.

(c)(1) A reasonable accommodation under the ADA might be accomplished by providing an individual with a disability with a part-time job with no health benefits, assuming the employer did not ordinarily provide health insurance for part-time employees. However, FMLA would permit an employee to work a reduced leave schedule until the equivalent of 12 workweeks of leave were used, with group health benefits maintained during this period. FMLA permits an employer to temporarily transfer an employee who is taking leave intermittently or on a reduced leave schedule for planned medical treatment to an alternative position, whereas the ADA allows an accommodation of reassignment to an equivalent, vacant position only if the employee cannot perform the essential functions of the employee's present position and an accommodation

is not possible in the employee's present position, or an accommodation in the employee's present position would cause an undue hardship. The examples in the following paragraphs of this section demonstrate how the two laws would interact with respect to a qualified individual with a disability.

-(2) A qualified individual with a disability who is also an eligible employee entitled to FMLA leave requests 10 weeks of medical leave as a reasonable accommodation, which the employer grants because it is not an undue hardship. The employer advises the employee that the 10 weeks of leave is also being designated as FMLA leave and will count towards the employee's FMLA leave entitlement. This designation does not prevent the parties from also treating the leave as a reasonable accommodation and reinstating the employee into the same job, as required by the ADA, rather than an equivalent position under FMLA, if that is the greater right available to the employee. At the same time, the employee would be entitled under FMLA to have the employer maintain group health plan coverage during the leave, as that requirement provides the greater right to the employee.

-(3) If the same employee needed to work part-time (a reduced leave schedule) after returning to his or her same job, the employee would still be entitled under FMLA to have group health plan coverage maintained for the remainder of the two-week equivalent of FMLA leave entitlement, notwithstanding an employer policy that part-time employees do not receive health insurance. This employee would be entitled under the ADA to reasonable accommodations to enable the employee to perform the essential functions of the part-time position. In addition, because the employee is working a part-time schedule as a reasonable accommodation, the FMLA's provision for temporary assignment to a different alternative position would not apply. Once the employee has exhausted his or her remaining FMLA leave entitlement while working the reduced (part-time) schedule, if the employee is a qualified individual with a disability, and if the employee is unable to return to the same full-time position at that time, the employee might continue to work part-time as a reasonable accommodation, barring undue hardship; the employee would then be entitled to only those employment benefits ordinarily provided by the employer to part-time employees.

-(4) At the end of the FMLA leave entitlement, an employer is required under FMLA to reinstate the employee in the same or an equivalent position, with equivalent pay and benefits, to that which the employee held when leave commenced. The employer's FMLA obligations would be satisfied if the employer offered the employee an equivalent full-time position. If the employee were unable to perform the essential functions of that equivalent position even with reasonable accommodation, because of a disability, the ADA may require the employer to make a reasonable accommodation at that time by allowing the employee

to work part-time or by reassigning the employee to a vacant position, barring undue hardship.

-(d)(1) If FMLA entitles an employee to leave, an employer may not, in lieu of FMLA leave entitlement, require an employee to take a job with a reasonable accommodation. However, ADA may require that an employer offer an employee the opportunity to take such a position. An employer may not change the essential functions of the job in order to deny FMLA leave. See § 825.220(b).

-(2) An employee may be on a workers' compensation absence due to an on-the-job injury or illness which also qualifies as a serious health condition under FMLA. The workers' compensation absence and FMLA leave may run concurrently (subject to proper notice and designation by the employer). At some point the health care provider providing medical care pursuant to the workers' compensation injury may certify the employee is able to return to work in a light duty position. If the employer offers such a position, the employee is permitted but not required to accept the position. See § 825.220(d). As a result, the employee may no longer qualify for payments from the workers' compensation benefit plan, but the employee is entitled to continue on unpaid FMLA leave either until the employee is able to return to the same or equivalent job the employee left or until the 12-week FMLA leave entitlement is exhausted. See § 825.207(e). If the employee returning from the workers' compensation injury is a qualified individual with a disability, he or she will have rights under the ADA.

-(e) If an employer requires certifications of an employee's fitness for duty to return to work, as permitted by FMLA under a uniform policy, it must comply with the ADA requirement that a fitness for duty physical be job-related and consistent with business necessity.

-(f) Under Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, an employer should provide the same benefits for women who are pregnant as the employer provides to other employees with short-term disabilities. Because Title VII does not require employees to be employed for a certain period of time to be protected, an employee employed for less than 12 months by the employer (and, therefore, not an eligible employee under FMLA) may not be denied maternity leave if the employer normally provides short-term disability benefits to employees with the same tenure who are experiencing other short-term disabilities.

-(g) Under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301, *et seq.*, veterans are entitled to receive all rights and benefits of employment that they would have obtained if they had been continuously employed. Therefore, under USERRA, a returning servicemember would be eligible for FMLA leave if the months and hours that he or she would have worked (or, for airline flight crew employees, would have worked or been paid)



for the civilian employer during the period of absence due to or necessitated by USERRA-covered service, combined with the months employed and the hours actually worked (or, for airline flight crew employees, actually worked or paid), meet the FMLA eligibility threshold of 12 months of employment and the hours of service requirement. See § 825.110(b)(2)(i) and (c)(2) and 825802(c).

(h) For further information on Federal antidiscrimination laws, including Title VII and the ADA, individuals are encouraged to contact the nearest office of the U.S. Equal Employment Opportunity Commission.

### **Subpart H—Special Rules Applicable to Airline Flight Crew Employees**

#### **§ 825.800 Special rules for airline flight crew employees, general.**

(a) Certain special rules apply only to airline flight crew employees as defined in § 825.102. These special rules affect the hours of service requirement for determining the eligibility of airline flight crew employees, the calculation of leave for those employees, and the recordkeeping requirements for employers of those employees, and are issued pursuant to the Airline Flight Crew Technical Corrections Act (AFCTCA), Public Law 111-119.

(b) Except as otherwise provided in this subpart, FMLA leave for airline flight crew employees is subject to the requirements of the FMLA as set forth in Part 825, Subparts A through E, and G.

#### **§ 825.801 Special rules for airline flight crew employees, hours of service requirement.**

(a) An airline flight crew employee's eligibility for FMLA leave is to be determined in accordance with § 825.110 except that whether an airline flight crew employee meets the hours of service requirement is to be determined as provided below.

(b) Except as provided in paragraph (c) of this section, whether an airline flight crew employee meets the hours of service requirement is determined by assessing the number of hours the employee has worked or been paid over the previous 12 months. An airline flight crew employee will meet the hours of service requirement during the previous 12-month period if he or she has worked or been paid for not less than 60 percent of the employee's applicable monthly guarantee and has worked or been paid for not less than 504 hours.

(1) The *applicable monthly guarantee* for an airline flight crew employee who is not on reserve status is the minimum number of hours for which an employer has agreed to schedule such employee for any given month. The *applicable monthly guarantee* for an airline flight crew employee who is on reserve status is the number

of hours for which an employer has agreed to pay the employee for any given month.

(2) The hours an airline flight crew employee has worked for purposes of the hours of service requirement is the employee's duty hours during the previous 12-month period. The hours an airline flight crew employee has been paid is the number of hours for which an employee received wages during the previous 12-month period. The 504 hours do not include personal commute time or time spent on vacation, medical, or sick leave.

(c) An airline flight crew employee returning from USERRA-covered service shall be credited with the hours of service that would have been performed but for the period of absence from work due to or necessitated by USERRA-covered service in determining the employee's eligibility for FMLA-qualifying leave. Accordingly, an airline flight crew employee re-employed following USERRA-covered service has the hours that would have been worked for or paid by the employer added to any hours actually worked or paid during the previous 12-month period to meet the hours of service requirement. In order to determine the hours that would have been worked or paid during the period of absence from work due to or necessitated by USERRA-covered service, the employee's pre-service work schedule can generally be used for calculations.

(d) In the event an employer of airline flight crew employees does not maintain an accurate record of hours worked or hours paid, the employer has the burden of showing that the employee has not worked or been paid for the requisite hours. Specifically, an employer must be able to clearly demonstrate that an airline flight crew employee has not worked or been paid for 60 percent of his or her applicable monthly guarantee or for 504 hours during the previous 12 months in order to claim that the airline flight crew employee is not eligible for FMLA leave.

#### **§ 825.802 Special rules for airline flight crew employees, calculation of leave.**

(a) *Amount of leave.* (1) An eligible airline flight crew employee is entitled to 72 days of FMLA leave during any 12-month period for one, or more, of the FMLA-qualifying reasons set forth in §§ 825.112(a)(1)-(5). This entitlement is based on a uniform six-day workweek for all airline flight crew employees, regardless of time actually worked or paid, multiplied by the statutory 12-workweek entitlement for FMLA leave. For example, if an employee took six weeks of leave for an FMLA-qualifying reason, the employee would use 36 days (6 days x 6 weeks) of the employee's 72-day entitlement.

(2) An eligible airline flight crew employee is entitled to 156 days of military caregiver leave during a single 12-month period to care for a covered servicemember with a serious injury or illness under § 825.112(a)(6). This entitlement is based on a uniform

six-day workweek for all airline flight crew employees, regardless of time actually worked or paid, multiplied by the statutory 26-workweek entitlement for military caregiver leave.

(b) *Increments of FMLA leave for intermittent or reduced schedule leave.* When an airline flight crew employee takes FMLA leave on an intermittent or reduced schedule basis, the employer must account for the leave using an increment no greater than one day. For example, if an airline flight crew employee needs to take FMLA leave for a two-hour physical therapy appointment, the employer may require the employee to use a full day of FMLA leave. The entire amount of leave actually taken (in this example, one day) is designated as FMLA leave and counts against the employee's FMLA entitlement.

(c) *Application of § 825.205.* The rules governing calculation of intermittent or reduced schedule FMLA leave set forth in § 825.205 do not apply to airline flight crew employees except that airline flight crew employees are subject to § 825.205(a)(2), the physical impossibility provision.

#### **§ 825.803 Special rules for airline flight crew employees, recordkeeping requirements.**

(a) Employers of eligible airline flight crew employees shall make, keep, and preserve records in accordance with the requirements of Subpart E of this Part (§ 825.500).

(b) Covered employers of airline flight crew employees are required to maintain certain additional records "on file with the Secretary." To comply with this requirement, those employers shall maintain:

(1) Records and documents containing information specifying the applicable monthly guarantee with respect to each category of employee to whom such guarantee applies, including copies of any relevant collective bargaining agreements or employer policy documents; and

(2) Records of hours worked and hours paid, as those terms are defined in § 825.801(b)(2).





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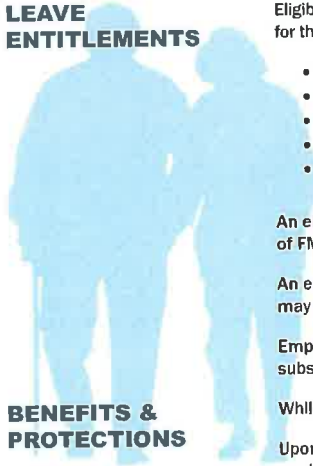
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# EMPLOYEE RIGHTS UNDER THE FAMILY AND MEDICAL LEAVE ACT

THE UNITED STATES DEPARTMENT OF LABOR WAGE AND HOUR DIVISION

## LEAVE ENTITLEMENTS



Eligible employees who work for a covered employer can take up to 12 weeks of unpaid, job-protected leave in a 12-month period for the following reasons:

- The birth of a child or placement of a child for adoption or foster care;
- To bond with a child (leave must be taken within 1 year of the child's birth or placement);
- To care for the employee's spouse, child, or parent who has a qualifying serious health condition;
- For the employee's own qualifying serious health condition that makes the employee unable to perform the employee's job;
- For qualifying exigencies related to the foreign deployment of a military member who is the employee's spouse, child, or parent.

An eligible employee who is a covered servicemember's spouse, child, parent, or next of kin may also take up to 26 weeks of FMLA leave in a single 12-month period to care for the servicemember with a serious injury or illness.

An employee does not need to use leave in one block. When it is medically necessary or otherwise permitted, employees may take leave intermittently or on a reduced schedule.

Employees may choose, or an employer may require, use of accrued paid leave while taking FMLA leave. If an employee substitutes accrued paid leave for FMLA leave, the employee must comply with the employer's normal paid leave policies.

While employees are on FMLA leave, employers must continue health insurance coverage as if the employees were not on leave.

Upon return from FMLA leave, most employees must be restored to the same job or one nearly identical to it with equivalent pay, benefits, and other employment terms and conditions.

An employer may not interfere with an individual's FMLA rights or retaliate against someone for using or trying to use FMLA leave, opposing any practice made unlawful by the FMLA, or being involved in any proceeding under or related to the FMLA.

## BENEFITS & PROTECTIONS

## ELIGIBILITY REQUIREMENTS

An employee who works for a covered employer must meet three criteria in order to be eligible for FMLA leave. The employee must:

- Have worked for the employer for at least 12 months;
- Have at least 1,250 hours of service in the 12 months before taking leave;\* and
- Work at a location where the employer has at least 50 employees within 75 miles of the employee's worksite.

\*Special "hours of service" requirements apply to airline flight crew employees.

## REQUESTING LEAVE

Generally, employees must give 30-days' advance notice of the need for FMLA leave. If it is not possible to give 30-days' notice, an employee must notify the employer as soon as possible and, generally, follow the employer's usual procedures.

Employees do not have to share a medical diagnosis, but must provide enough information to the employer so it can determine if the leave qualifies for FMLA protection. Sufficient information could include informing an employer that the employee is or will be unable to perform his or her job functions, that a family member cannot perform daily activities, or that hospitalization or continuing medical treatment is necessary. Employees must inform the employer if the need for leave is for a reason for which FMLA leave was previously taken or certified.

Employers can require a certification or periodic recertification supporting the need for leave. If the employer determines that the certification is incomplete, it must provide a written notice indicating what additional information is required.

## EMPLOYER RESPONSIBILITIES

Once an employer becomes aware that an employee's need for leave is for a reason that may qualify under the FMLA, the employer must notify the employee if he or she is eligible for FMLA leave and, if eligible, must also provide a notice of rights and responsibilities under the FMLA. If the employee is not eligible, the employer must provide a reason for ineligibility.

Employers must notify its employees if leave will be designated as FMLA leave, and if so, how much leave will be designated as FMLA leave.

## ENFORCEMENT

Employees may file a complaint with the U.S. Department of Labor, Wage and Hour Division, or may bring a private lawsuit against an employer.

The FMLA does not affect any federal or state law prohibiting discrimination or supersede any state or local law or collective bargaining agreement that provides greater family or medical leave rights.

For additional information or to file a complaint:

**1-866-4-USWAGE**

(1-866-487-9243) TTY: 1-877-889-5627



**WWW.WAGEHOUR.DOL.GOV**

U.S. Department of Labor | Wage and Hour Division

WH1420a REV 04/16





Notice of Eligibility and Rights & Responsibilities (Family and Medical Leave Act)

U.S. Department of Labor Wage and Hour Division



OMB Control Number: 1235-0003 Expires: 5/31/2018

In general, to be eligible an employee must have worked for an employer for at least 12 months, meet the hours of service requirement in the 12 months preceding the leave, and work at a site with at least 50 employees within 75 miles. While use of this form by employers is optional, a fully completed Form WH-381 provides employees with the information required by 29 C.F.R. § 825.300(b), which must be provided within five business days of the employee notifying the employer of the need for FMLA leave. Part B provides employees with information regarding their rights and responsibilities for taking FMLA leave, as required by 29 C.F.R. § 825.300(b), (c).

[Part A - NOTICE OF ELIGIBILITY]

TO: Employee

FROM: Employer Representative

DATE:

On , you informed us that you needed leave beginning on for:

- The birth of a child, or placement of a child with you for adoption or foster care;
Your own serious health condition;
Because you are needed to care for your spouse; child; parent due to his/her serious health condition.
Because of a qualifying exigency arising out of the fact that your spouse; son or daughter; parent is on covered active duty or call to covered active duty status with the Armed Forces.
Because you are the spouse; son or daughter; parent; next of kin of a covered servicemember with a serious injury or illness.

This Notice is to inform you that you:

- Are eligible for FMLA leave (See Part B below for Rights and Responsibilities)
Are not eligible for FMLA leave, because (only one reason need be checked, although you may not be eligible for other reasons):
You have not met the FMLA's 12-month length of service requirement. As of the first date of requested leave, you will have worked approximately months towards this requirement.
You have not met the FMLA's hours of service requirement.
You do not work and/or report to a site with 50 or more employees within 75-miles.

If you have any questions, contact or view the FMLA poster located in

[PART B-RIGHTS AND RESPONSIBILITIES FOR TAKING FMLA LEAVE]

As explained in Part A, you meet the eligibility requirements for taking FMLA leave and still have FMLA leave available in the applicable 12-month period. However, in order for us to determine whether your absence qualifies as FMLA leave, you must return the following information to us by . (If a certification is requested, employers must allow at least 15 calendar days from receipt of this notice; additional time may be required in some circumstances.) If sufficient information is not provided in a timely manner, your leave may be denied.

- Sufficient certification to support your request for FMLA leave. A certification form that sets forth the information necessary to support your request is/ is not enclosed.
Sufficient documentation to establish the required relationship between you and your family member.
Other information needed (such as documentation for military family leave):

No additional information requested Page 1

CONTINUED ON NEXT PAGE

Form WH-381 Revised February 2013

If your leave does qualify as FMLA leave you will have the following responsibilities while on FMLA leave (only checked blanks apply):

\_\_\_\_\_ Contact \_\_\_\_\_ at \_\_\_\_\_ to make arrangements to continue to make your share of the premium payments on your health insurance to maintain health benefits while you are on leave. You have a minimum 30-day (or, indicate longer period, if applicable) grace period in which to make premium payments. If payment is not made timely, your group health insurance may be cancelled, provided we notify you in writing at least 15 days before the date that your health coverage will lapse, or, at our option, we may pay your share of the premiums during FMLA leave, and recover these payments from you upon your return to work.

\_\_\_\_\_ You will be required to use your available paid \_\_\_\_\_ sick, \_\_\_\_\_ vacation, and/or \_\_\_\_\_ other leave during your FMLA absence. This means that you will receive your paid leave and the leave will also be considered protected FMLA leave and counted against your FMLA leave entitlement.

\_\_\_\_\_ Due to your status within the company, you are considered a "key employee" as defined in the FMLA. As a "key employee," restoration to employment may be denied following FMLA leave on the grounds that such restoration will cause substantial and grievous economic injury to us. We \_\_\_\_\_ have/ \_\_\_\_\_ have not determined that restoring you to employment at the conclusion of FMLA leave will cause substantial and grievous economic harm to us.

\_\_\_\_\_ While on leave you will be required to furnish us with periodic reports of your status and intent to return to work every \_\_\_\_\_. (Indicate interval of periodic reports, as appropriate for the particular leave situation).

If the circumstances of your leave change, and you are able to return to work earlier than the date indicated on the this form, you will be required to notify us at least two workdays prior to the date you intend to report for work.

If your leave does qualify as FMLA leave you will have the following rights while on FMLA leave:

- You have a right under the FMLA for up to 12 weeks of unpaid leave in a 12-month period calculated as:
  - \_\_\_\_\_ the calendar year (January – December).
  - \_\_\_\_\_ a fixed leave year based on \_\_\_\_\_.
  - \_\_\_\_\_ the 12-month period measured forward from the date of your first FMLA leave usage.
  - \_\_\_\_\_ a "rolling" 12-month period measured backward from the date of any FMLA leave usage.
- You have a right under the FMLA for up to 26 weeks of unpaid leave in a single 12-month period to care for a covered servicemember with a serious injury or illness. This single 12-month period commenced on \_\_\_\_\_.
- Your health benefits must be maintained during any period of unpaid leave under the same conditions as if you continued to work.
- You must be reinstated to the same or an equivalent job with the same pay, benefits, and terms and conditions of employment on your return from FMLA-protected leave. (If your leave extends beyond the end of your FMLA entitlement, you do not have return rights under FMLA.)
- If you do not return to work following FMLA leave for a reason other than: 1) the continuation, recurrence, or onset of a serious health condition which would entitle you to FMLA leave; 2) the continuation, recurrence, or onset of a covered servicemember's serious injury or illness which would entitle you to FMLA leave; or 3) other circumstances beyond your control, you may be required to reimburse us for our share of health insurance premiums paid on your behalf during your FMLA leave.
- If we have not informed you above that you must use accrued paid leave while taking your unpaid FMLA leave entitlement, you have the right to have \_\_\_\_\_ sick, \_\_\_\_\_ vacation, and/or \_\_\_\_\_ other leave run concurrently with your unpaid leave entitlement, provided you meet any applicable requirements of the leave policy. Applicable conditions related to the substitution of paid leave are referenced or set forth below. If you do not meet the requirements for taking paid leave, you remain entitled to take unpaid FMLA leave.

\_\_\_\_\_ For a copy of conditions applicable to sick/vacation/other leave usage please refer to \_\_\_\_\_ available at: \_\_\_\_\_.

\_\_\_\_\_ Applicable conditions for use of paid leave: \_\_\_\_\_

Once we obtain the information from you as specified above, we will inform you, within 5 business days, whether your leave will be designated as FMLA leave and count towards your FMLA leave entitlement. If you have any questions, please do not hesitate to contact:

\_\_\_\_\_ at \_\_\_\_\_

**PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT**

It is mandatory for employers to provide employees with notice of their eligibility for FMLA protection and their rights and responsibilities. 29 U.S.C. § 2617; 29 C.F.R. § 825.300(b), (c). It is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 10 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION.**

Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act)

U.S. Department of Labor Wage and Hour Division



DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR; RETURN TO THE PATIENT

OMB Control Number: 1235-0003 Expires: 5/31/2018

SECTION I: For Completion by the EMPLOYER

INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave due to a serious health condition to submit a medical certification issued by the employee's health care provider. Please complete Section I before giving this form to your employee. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies, and in accordance with 29 C.F.R. § 1635.9, if the Genetic Information Nondiscrimination Act applies.

Employer name and contact: \_\_\_\_\_

Employee's job title: \_\_\_\_\_ Regular work schedule: \_\_\_\_\_

Employee's essential job functions: \_\_\_\_\_

Check if job description is attached: \_\_\_\_\_

SECTION II: For Completion by the EMPLOYEE

INSTRUCTIONS to the EMPLOYEE: Please complete Section II before giving this form to your medical provider. The FMLA permits an employer to require that you submit a timely, complete, and sufficient medical certification to support a request for FMLA leave due to your own serious health condition. If requested by your employer, your response is required to obtain or retain the benefit of FMLA protections. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to provide a complete and sufficient medical certification may result in a denial of your FMLA request. 20 C.F.R. § 825.313. Your employer must give you at least 15 calendar days to return this form. 29 C.F.R. § 825.305(b).

Your name: \_\_\_\_\_  
First Middle Last

SECTION III: For Completion by the HEALTH CARE PROVIDER

INSTRUCTIONS to the HEALTH CARE PROVIDER: Your patient has requested leave under the FMLA. Answer, fully and completely, all applicable parts. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Limit your responses to the condition for which the employee is seeking leave. Do not provide information about genetic tests, as defined in 29 C.F.R. § 1635.3(f), genetic services, as defined in 29 C.F.R. § 1635.3(e), or the manifestation of disease or disorder in the employee's family members, 29 C.F.R. § 1635.3(b). Please be sure to sign the form on the last page.

Provider's name and business address: \_\_\_\_\_

Type of practice / Medical specialty: \_\_\_\_\_

Telephone: (\_\_\_\_\_) \_\_\_\_\_ Fax: (\_\_\_\_\_) \_\_\_\_\_

**PART A: MEDICAL FACTS**

1. Approximate date condition commenced: \_\_\_\_\_

Probable duration of condition: \_\_\_\_\_

**Mark below as applicable:**

Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility?  
\_\_\_ No \_\_\_ Yes. If so, dates of admission:

\_\_\_\_\_

Date(s) you treated the patient for condition:

\_\_\_\_\_

Will the patient need to have treatment visits at least twice per year due to the condition? \_\_\_ No \_\_\_ Yes.

Was medication, other than over-the-counter medication, prescribed? \_\_\_ No \_\_\_ Yes.

Was the patient referred to other health care provider(s) for evaluation or treatment (e.g., physical therapist)?  
\_\_\_ No \_\_\_ Yes. If so, state the nature of such treatments and expected duration of treatment:

\_\_\_\_\_

2. Is the medical condition pregnancy? \_\_\_ No \_\_\_ Yes. If so, expected delivery date: \_\_\_\_\_

3. Use the information provided by the employer in Section I to answer this question. If the employer fails to provide a list of the employee's essential functions or a job description, answer these questions based upon the employee's own description of his/her job functions.

Is the employee unable to perform any of his/her job functions due to the condition: \_\_\_ No \_\_\_ Yes.

If so, identify the job functions the employee is unable to perform:

\_\_\_\_\_

4. Describe other relevant medical facts, if any, related to the condition for which the employee seeks leave (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment):

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**PART B: AMOUNT OF LEAVE NEEDED**

5. Will the employee be incapacitated for a single continuous period of time due to his/her medical condition, including any time for treatment and recovery?  No  Yes.

If so, estimate the beginning and ending dates for the period of incapacity: \_\_\_\_\_

6. Will the employee need to attend follow-up treatment appointments or work part-time or on a reduced schedule because of the employee's medical condition?  No  Yes.

If so, are the treatments or the reduced number of hours of work medically necessary?  
 No  Yes.

Estimate treatment schedule, if any, including the dates of any scheduled appointments and the time required for each appointment, including any recovery period:

\_\_\_\_\_

Estimate the part-time or reduced work schedule the employee needs, if any:

\_\_\_\_\_ hour(s) per day; \_\_\_\_\_ days per week from \_\_\_\_\_ through \_\_\_\_\_

7. Will the condition cause episodic flare-ups periodically preventing the employee from performing his/her job functions?  No  Yes.

Is it medically necessary for the employee to be absent from work during the flare-ups?  
 No  Yes. If so, explain:

\_\_\_\_\_  
\_\_\_\_\_

Based upon the patient's medical history and your knowledge of the medical condition, estimate the frequency of flare-ups and the duration of related incapacity that the patient may have over the next 6 months (e.g., 1 episode every 3 months lasting 1-2 days):

Frequency : \_\_\_\_\_ times per \_\_\_\_\_ week(s) \_\_\_\_\_ month(s)

Duration: \_\_\_\_\_ hours or \_\_\_\_\_ day(s) per episode

**ADDITIONAL INFORMATION: IDENTIFY QUESTION NUMBER WITH YOUR ADDITIONAL ANSWER.**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



Certification of Health Care Provider for  
Family Member's Serious Health Condition  
(Family and Medical Leave Act)

U.S. Department of Labor  
Wage and Hour Division



DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR; RETURN TO THE PATIENT.

OMB Control Number: 1235-0003  
Expires: 5/31/2018

**SECTION I: For Completion by the EMPLOYER**

**INSTRUCTIONS to the EMPLOYER:** The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave to care for a covered family member with a serious health condition to submit a medical certification issued by the health care provider of the covered family member. Please complete Section I before giving this form to your employee. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees' family members, created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies, and in accordance with 29 C.F.R. § 1635.9, if the Genetic Information Nondiscrimination Act applies.

Employer name and contact: \_\_\_\_\_

**SECTION II: For Completion by the EMPLOYEE**

**INSTRUCTIONS to the EMPLOYEE:** Please complete Section II before giving this form to your family member or his/her medical provider. The FMLA permits an employer to require that you submit a timely, complete, and sufficient medical certification to support a request for FMLA leave to care for a covered family member with a serious health condition. If requested by your employer, your response is required to obtain or retain the benefit of FMLA protections. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to provide a complete and sufficient medical certification may result in a denial of your FMLA request. 29 C.F.R. § 825.313. Your employer must give you at least 15 calendar days to return this form to your employer. 29 C.F.R. § 825.305.

Your name: \_\_\_\_\_  
First Middle Last

Name of family member for whom you will provide care: \_\_\_\_\_  
First Middle Last

Relationship of family member to you: \_\_\_\_\_

If family member is your son or daughter, date of birth: \_\_\_\_\_

Describe care you will provide to your family member and estimate leave needed to provide care:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Employee Signature \_\_\_\_\_ Date \_\_\_\_\_

**SECTION III: For Completion by the HEALTH CARE PROVIDER**

**INSTRUCTIONS to the HEALTH CARE PROVIDER:** The employee listed above has requested leave under the FMLA to care for your patient. Answer, fully and completely, all applicable parts below. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Limit your responses to the condition for which the patient needs leave. Do not provide information about genetic tests, as defined in 29 C.F.R. § 1635.3(f), or genetic services, as defined in 29 C.F.R. § 1635.3(e). Page 3 provides space for additional information, should you need it. Please be sure to sign the form on the last page.

Provider's name and business address: \_\_\_\_\_

Type of practice / Medical specialty: \_\_\_\_\_

Telephone: ( \_\_\_\_\_ ) \_\_\_\_\_ Fax: ( \_\_\_\_\_ ) \_\_\_\_\_

**PART A: MEDICAL FACTS**

1. Approximate date condition commenced: \_\_\_\_\_

Probable duration of condition: \_\_\_\_\_

Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility?  
 No  Yes. If so, dates of admission: \_\_\_\_\_

Date(s) you treated the patient for condition: \_\_\_\_\_

Was medication, other than over-the-counter medication, prescribed?  No  Yes.

Will the patient need to have treatment visits at least twice per year due to the condition?  No  Yes

Was the patient referred to other health care provider(s) for evaluation or treatment (e.g., physical therapist)?  
 No  Yes. If so, state the nature of such treatments and expected duration of treatment:

\_\_\_\_\_  
\_\_\_\_\_

2. Is the medical condition pregnancy?  No  Yes. If so, expected delivery date: \_\_\_\_\_

3. Describe other relevant medical facts, if any, related to the condition for which the patient needs care (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



**PART B: AMOUNT OF CARE NEEDED:** When answering these questions, keep in mind that your patient's need for care by the employee seeking leave may include assistance with basic medical, hygienic, nutritional, safety or transportation needs, or the provision of physical or psychological care:

4. Will the patient be incapacitated for a single continuous period of time, including any time for treatment and recovery?  No  Yes.

Estimate the beginning and ending dates for the period of incapacity: \_\_\_\_\_

During this time, will the patient need care?  No  Yes.

Explain the care needed by the patient and why such care is medically necessary:

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5. Will the patient require follow-up treatments, including any time for recovery?  No  Yes.

Estimate treatment schedule, if any, including the dates of any scheduled appointments and the time required for each appointment, including any recovery period:

---

Explain the care needed by the patient, and why such care is medically necessary: \_\_\_\_\_

---

6. Will the patient require care on an intermittent or reduced schedule basis, including any time for recovery?  No  Yes.

Estimate the hours the patient needs care on an intermittent basis, if any:

\_\_\_\_\_ hour(s) per day; \_\_\_\_\_ days per week from \_\_\_\_\_ through \_\_\_\_\_

Explain the care needed by the patient, and why such care is medically necessary:

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7. Will the condition cause episodic flare-ups periodically preventing the patient from participating in normal daily activities?  No  Yes.

Based upon the patient's medical history and your knowledge of the medical condition, estimate the frequency of flare-ups and the duration of related incapacity that the patient may have over the next 6 months (e.g., 1 episode every 3 months lasting 1-2 days):

Frequency: \_\_\_\_\_ times per \_\_\_\_\_ week(s) \_\_\_\_\_ month(s)

Duration: \_\_\_\_\_ hours or \_\_\_\_\_ day(s) per episode

Does the patient need care during these flare-ups?  No  Yes.

Explain the care needed by the patient, and why such care is medically necessary: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**ADDITIONAL INFORMATION: IDENTIFY QUESTION NUMBER WITH YOUR ADDITIONAL ANSWER.**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
**Signature of Health Care Provider** **Date**

**PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT**

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210.  
**DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR; RETURN TO THE PATIENT.**



**PART A: QUALIFYING REASON FOR LEAVE**

1. Describe the reason you are requesting FMLA leave due to a qualifying exigency (including the specific reason you are requesting leave):

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2. A complete and sufficient certification to support a request for FMLA leave due to a qualifying exigency includes any available written documentation which supports the need for leave; such documentation may include a copy of a meeting announcement for informational briefings sponsored by the military; a document confirming the military member's Rest and Recuperation leave; a document confirming an appointment with a third party, such as a counselor or school official, or staff at a care facility; or a copy of a bill for services for the handling of legal or financial affairs. Available written documentation supporting this request for leave is attached.

Yes  No  None Available

**PART B: AMOUNT OF LEAVE NEEDED**

1. Approximate date exigency commenced: \_\_\_\_\_

Probable duration of exigency: \_\_\_\_\_

2. Will you need to be absent from work for a single continuous period of time due to the qualifying exigency?

Yes  No

If so, estimate the beginning and ending dates for the period of absence:

---

3. Will you need to be absent from work periodically to address this qualifying exigency? Yes  No

Estimate schedule of leave, including the dates of any scheduled meetings or appointments:

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Estimate the frequency and duration of each appointment, meeting, or leave event, including any travel time (i.e., 1 deployment-related meeting every month lasting 4 hours):

Frequency: \_\_\_\_\_ times per \_\_\_\_\_ week(s) \_\_\_\_\_ month(s)

Duration: \_\_\_\_\_ hours \_\_\_\_\_ day(s) per event.

**PART C:**

If leave is requested to meet with a third party (such as to arrange for childcare or parental care, to attend counseling, to attend meetings with school, childcare or parental care providers, to make financial or legal arrangements, to act as the military member's representative before a federal, state, or local agency for purposes of obtaining, arranging or appealing military service benefits, or to attend any event sponsored by the military or military service organizations), a complete and sufficient certification includes the name, address, and appropriate contact information of the individual or entity with whom you are meeting (i.e., either the telephone or fax number or email address of the individual or entity). This information may be used by your employer to verify that the information contained on this form is accurate.

Name of Individual: \_\_\_\_\_ Title: \_\_\_\_\_

Organization: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone: (\_\_\_\_\_) \_\_\_\_\_ Fax: (\_\_\_\_\_) \_\_\_\_\_

Email: \_\_\_\_\_

Describe nature of meeting: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**PART D:**

I certify that the information I provided above is true and correct.

Signature of Employee \_\_\_\_\_ Date \_\_\_\_\_

**PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT**

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. 2616; 29 CFR 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution AV, NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION; RETURN IT TO THE EMPLOYER.**



Certification for Serious Injury or  
Illness of a Current  
Servicemember - -for Military Family Leave  
(Family and Medical Leave Act)

U.S. Department of Labor

Wage and Hour Division



DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR; RETURN TO THE PATIENT

OMB Control Number: 1235-0003  
Expires: 5/31/2018

**Notice to the EMPLOYER**

**INSTRUCTIONS to the EMPLOYER:** The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA leave due to a serious injury or illness of a current servicemember to submit a certification providing sufficient facts to support the request for leave. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 CFR 825.310. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees or employees' family members created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 CFR 1630.14(c)(1), if the Americans with Disabilities Act applies, and in accordance with 29 CFR 1635.9, if the Genetic Information Nondiscrimination Act applies.

**SECTION I: For Completion by the EMPLOYEE and/or the CURRENT SERVICEMEMBER for whom the Employee Is Requesting Leave**

**INSTRUCTIONS to the EMPLOYEE or CURRENT SERVICEMEMBER:** Please complete Section I before having Section II completed. The FMLA permits an employer to require that an employee submit a timely, complete, and sufficient certification to support a request for FMLA leave due to a serious injury or illness of a servicemember. If requested by the employer, your response is required to obtain or retain the benefit of FMLA-protected leave. 29 U.S.C. 2613, 2614(c)(3). Failure to do so may result in a denial of an employee's FMLA request. 29 CFR 825.310(f). The employer must give an employee at least 15 calendar days to return this form to the employer.

**SECTION II: For Completion by a UNITED STATES DEPARTMENT OF DEFENSE ("DOD") HEALTH CARE PROVIDER or a HEALTH CARE PROVIDER who is either: (1) a United States Department of Veterans Affairs ("VA") health care provider; (2) a DOD TRICARE network authorized private health care provider; (3) a DOD non-network TRICARE authorized private health care provider; or (4) a health care provider as defined in 29 CFR 825.125**

**INSTRUCTIONS to the HEALTH CARE PROVIDER:** The employee listed on Page 2 has requested leave under the FMLA to care for a family member who is a current member of the Regular Armed Forces, the National Guard, or the Reserves who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list for a serious injury or illness. For purposes of FMLA leave, a serious injury or illness is one that was incurred in the line of duty on active duty in the Armed Forces or that existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank, or rating.

A complete and sufficient certification to support a request for FMLA leave due to a current servicemember's serious injury or illness includes written documentation confirming that the servicemember's injury or illness was incurred in the line of duty on active duty or if not, that the current servicemember's injury or illness existed before the beginning of the servicemember's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces, and that the current servicemember is undergoing treatment for such injury or illness by a health care provider listed above. Answer, fully and completely, all applicable parts. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Limit your responses to the servicemember's condition for which the employee is seeking leave. Do not provide information about genetic tests, as defined in 29 CFR 1635.3(f), or genetic services, as defined in 29 CFR 1635.3(e).

**SECTION I: For Completion by the EMPLOYEE and/or the CURRENT SERVICEMEMBER for whom the Employee Is Requesting Leave:**

(This section must be completed first before any of the below sections can be completed by a health care provider.)

**Part A: EMPLOYEE INFORMATION**

Name and Address of Employer (this is the employer of the employee requesting leave to care for the current servicemember):

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Name of Employee Requesting Leave to Care for the Current Servicemember:

---

First	Middle	Last
-------	--------	------

Name of the Current Servicemember (for whom employee is requesting leave to care):

---

First	Middle	Last
-------	--------	------

Relationship of Employee to the Current Servicemember:

Spouse  Parent  Son  Daughter  Next of Kin

**Part B: SERVICEMEMBER INFORMATION**

- (1) Is the Servicemember a Current Member of the Regular Armed Forces, the National Guard or Reserves?  
Yes  No

If yes, please provide the servicemember's military branch, rank and unit currently assigned to:

---

Is the servicemember assigned to a military medical treatment facility as an outpatient or to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients (such as a medical hold or warrior transition unit)?

Yes  No

If yes, please provide the name of the medical treatment facility or unit:

---

- (2) Is the Servicemember on the Temporary Disability Retired List (TDRL)?  
Yes  No

**Part C: CARE TO BE PROVIDED TO THE SERVICEMEMBER**

Describe the Care to Be Provided to the Current Servicemember and an Estimate of the Leave Needed to Provide the Care:

---



**SECTION II: For Completion by a United States Department of Defense (“DOD”) Health Care Provider or a Health Care Provider who is either: (1) a United States Department of Veterans Affairs (“VA”) health care provider; (2) a DOD TRICARE network authorized private health care provider; (3) a DOD non-network TRICARE authorized private health care provider; or (4) a health care provider as defined in 29 CFR 825.125. If you are unable to make certain of the military-related determinations contained below in Part B, you are permitted to rely upon determinations from an authorized DOD representative (such as a DOD recovery care coordinator).**

(Please ensure that Section I above has been completed before completing this section. Please be sure to sign the form on the last page.)

**Part A: HEALTH CARE PROVIDER INFORMATION**

Health Care Provider’s Name and Business Address:

\_\_\_\_\_

Type of Practice/Medical Specialty: \_\_\_\_\_

Please state whether you are either: (1) a DOD health care provider; (2) a VA health care provider; (3) a DOD TRICARE network authorized private health care provider; (4) a DOD non-network TRICARE authorized private health care provider, or (5) a health care provider as defined in 29 CFR 825.125:

\_\_\_\_\_

Telephone: ( ) \_\_\_\_\_ Fax: ( ) \_\_\_\_\_ Email: \_\_\_\_\_

**PART B: MEDICAL STATUS**

(1) The current Servicemember’s medical condition is classified as (Check One of the Appropriate Boxes):

**(VSI) Very Seriously Ill/Injured** – Illness/Injury is of such a severity that life is imminently endangered. Family members are requested at bedside immediately. (Please note this is an internal DOD casualty assistance designation used by DOD healthcare providers.)

**(SI) Seriously Ill/Injured** – Illness/injury is of such severity that there is cause for immediate concern, but there is no imminent danger to life. Family members are requested at bedside. (Please note this is an internal DOD casualty assistance designation used by DOD healthcare providers.)

**OTHER Ill/Injured** – a serious injury or illness that may render the servicemember medically unfit to perform the duties of the member’s office, grade, rank, or rating.

**NONE OF THE ABOVE** (Note to Employee: If this box is checked, you may still be eligible to take leave to care for a covered family member with a “serious health condition” under § 825.113 of the FMLA. If such leave is requested, you may be required to complete DOL FORM WH-380-F or an employer-provided form seeking the same information.)

(2) Is the current Servicemember being treated for a condition which was incurred or aggravated by service in the line of duty on active duty in the Armed Forces? Yes  No

(3) Approximate date condition commenced: \_\_\_\_\_

(4) Probable duration of condition and/or need for care: \_\_\_\_\_

(5) Is the servicemember undergoing medical treatment, recuperation, or therapy for this condition? Yes  No

If yes, please describe medical treatment, recuperation or therapy:

\_\_\_\_\_

**PART C: SERVICEMEMBER'S NEED FOR CARE BY FAMILY MEMBER**

(1) Will the servicemember need care for a single continuous period of time, including any time for treatment and recovery? Yes  No

If yes, estimate the beginning and ending dates for this period of time: \_\_\_\_\_

(2) Will the servicemember require periodic follow-up treatment appointments? Yes  No

If yes, estimate the treatment schedule: \_\_\_\_\_

(3) Is there a medical necessity for the servicemember to have periodic care for these follow-up treatment appointments? Yes  No

(4) Is there a medical necessity for the servicemember to have periodic care for other than scheduled follow-up treatment appointments (e.g., episodic flare-ups of medical condition)?  
Yes  No

If yes, please estimate the frequency and duration of the periodic care:

\_\_\_\_\_  
\_\_\_\_\_

**Signature of Health Care Provider:** \_\_\_\_\_ **Date:** \_\_\_\_\_

**PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT**

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years, in accordance with 29 U.S.C. 2616; 29 CFR 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution AV, NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION; RETURN IT TO THE PATIENT.**

## **Appendix B – Medical Release for Union Stewards**

Union stewards can often help their members with FMLA leave, although employers may be reluctant to share information about an employee's medical condition. Union members can use the medical release on the next page to give their stewards the right to look at their medical records.

This release is not part of the Department of Labor's regulations.



**AUTHORIZATION FOR RELEASE OF MEDICAL INFORMATION**

Patient Name: \_\_\_\_\_  
 Person authorizing release (if different): \_\_\_\_\_  
 Date of Birth: \_\_\_\_\_  
 Address: \_\_\_\_\_  
 Telephone: \_\_\_\_\_

**Release of Information.** I hereby authorize any employer, physician, hospital, or health care provider of any kind to release to my union representative, \_\_\_\_\_, any and all health information, whether oral or recorded in any form or medium, that: (1) is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and (2) relates to the past, present or future physical or mental health or condition of the above-named patient; the provision of health care to the above-named patient; or the past, present, or future payment for the provision of health care to the above-named patient. This document constitutes a release authorization for purposes of all applicable statutes and regulations, including, but not limited to, 45 CFR § 164.508.

**Scope of Release.** This authorization for release of health information includes the following:

- \_\_\_ All information of any kind, without limitation.
- \_\_\_ All information related to the following condition: \_\_\_\_\_

**Purpose.** This release is being prepared at the request of the above-named patient, or the patient's parent or legal guardian. The information will be used by the above-named union representative pursuant to the union's statutory representational responsibilities.

**Expiration.** This authorization shall expire on the earlier of the following: (1) one year from the signature date, below, or (2) on the date \_\_\_\_\_. Notwithstanding this expiration date, the patient/parent/legal guardian may revoke this authorization in writing at any time, in any manner not inconsistent with applicable law.

**Release to Designated Individuals.** This further authorizes the release of health information covered by this authorization to any individual specifically designated by the above-named union representative.

**Use of Copies.** A photocopy of this authorization shall have the same force and effect as the original.

**Notice to individual.** The patient/parent/legal guardian has been informed that information disclosed pursuant to this authorization may be subject to redisclosure by the recipient in any manner consistent with applicable law.

Signature: \_\_\_\_\_

Print name: \_\_\_\_\_

Relationship to patient: \_\_\_\_\_

Date: \_\_\_\_\_

Union rep. signature: \_\_\_\_\_

Print name: \_\_\_\_\_

Date: \_\_\_\_\_



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## Appendix C – FMLA Flowcharts

The following flowcharts provide an overview of the process that should be followed by employers and employees in a number of situations. The charts will help you answer these questions:

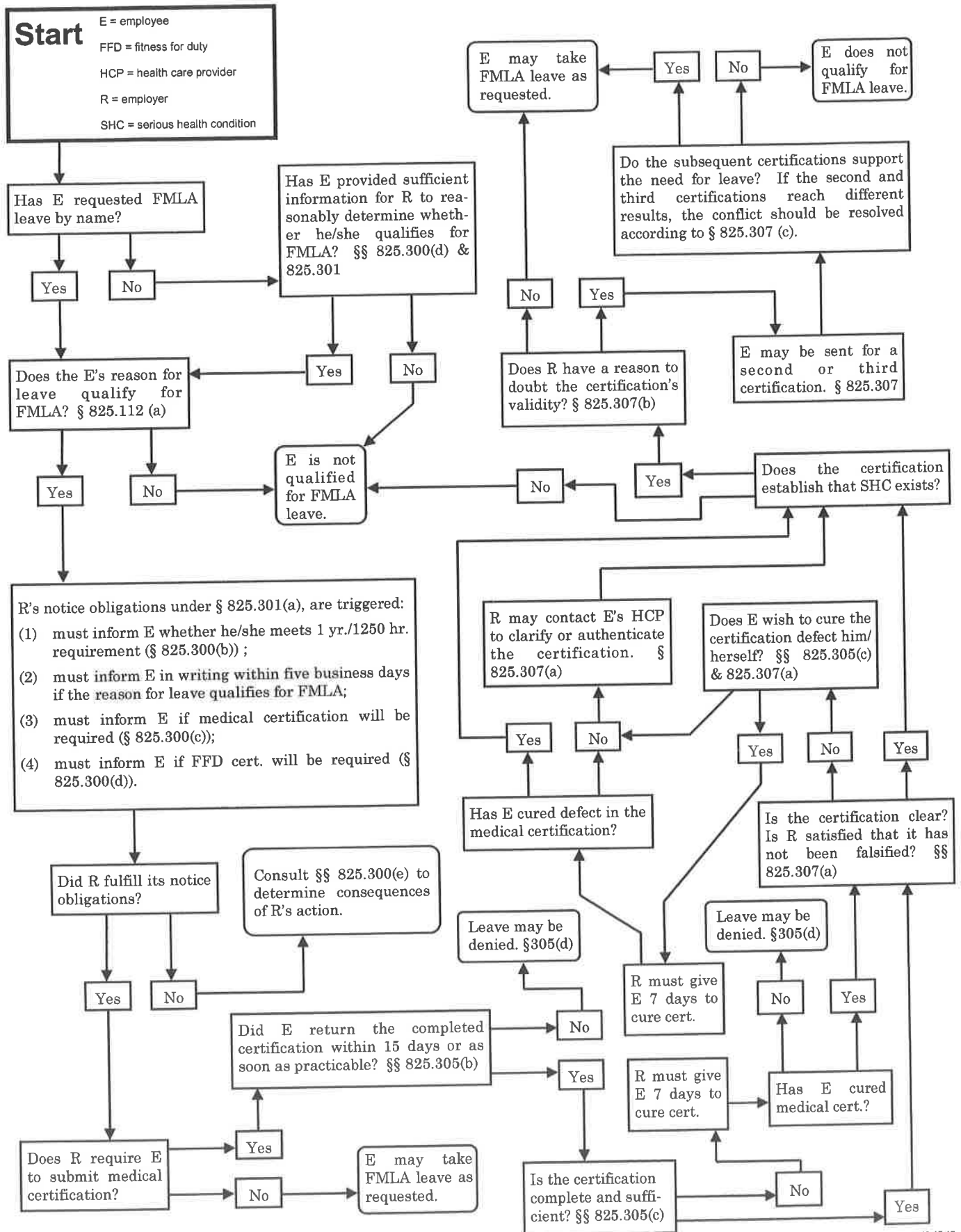
1. Is an employee qualified for FMLA leave?
2. When must an employee recertify or get a new certification for an existing serious health condition?
3. When must an employee provide a fitness for duty certification upon returning from FMLA leave?

These flowcharts are not part of the department's regulations and do not constitute legal authority. Moreover, they only provide an overview of some possible scenarios. They may not apply in all situations and should not be relied upon to determine anyone's rights or responsibilities under the FMLA. If you have any questions about the FMLA you should consult an attorney or the Department of Labor.



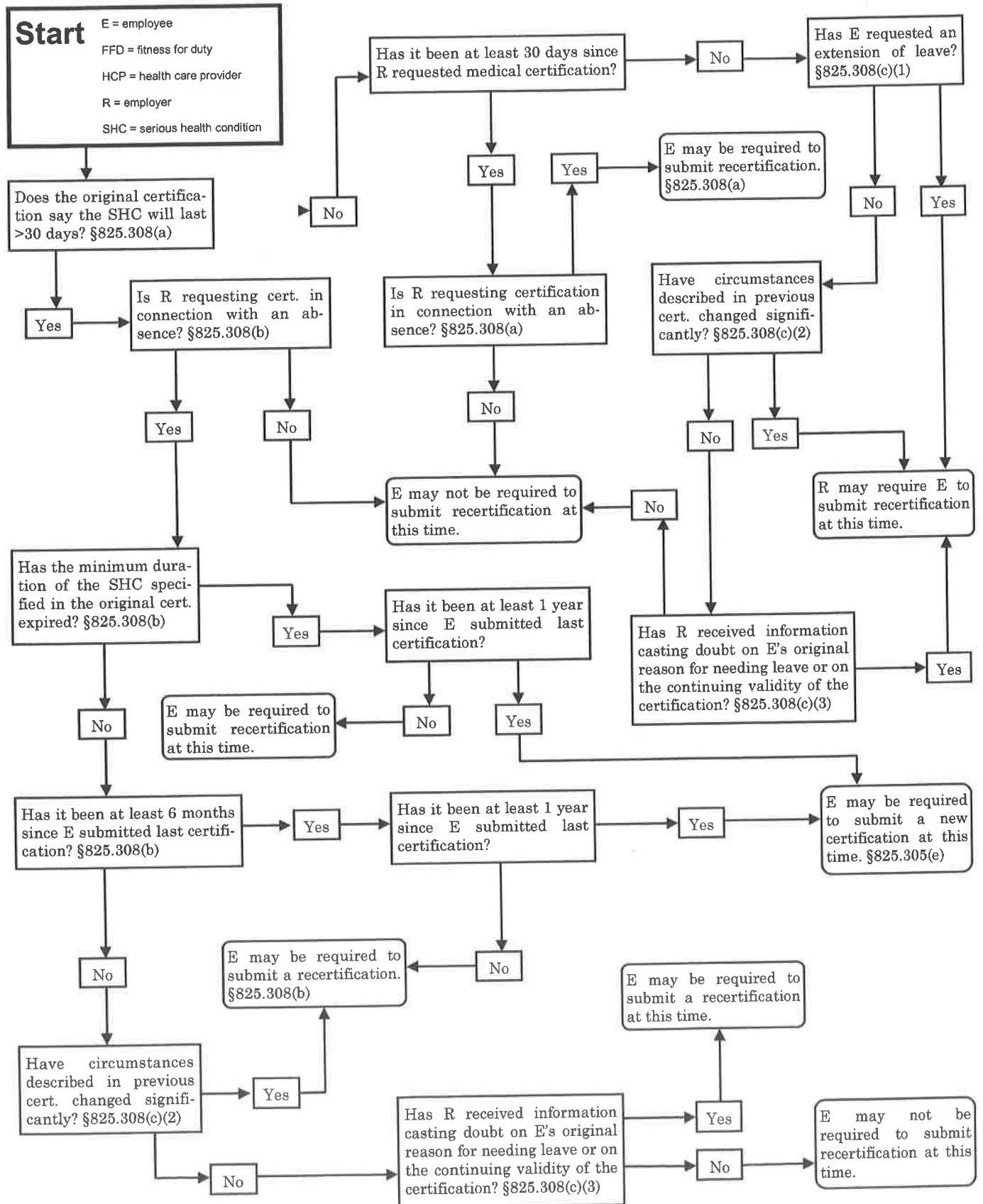


# Is the employee qualified for FMLA leave?



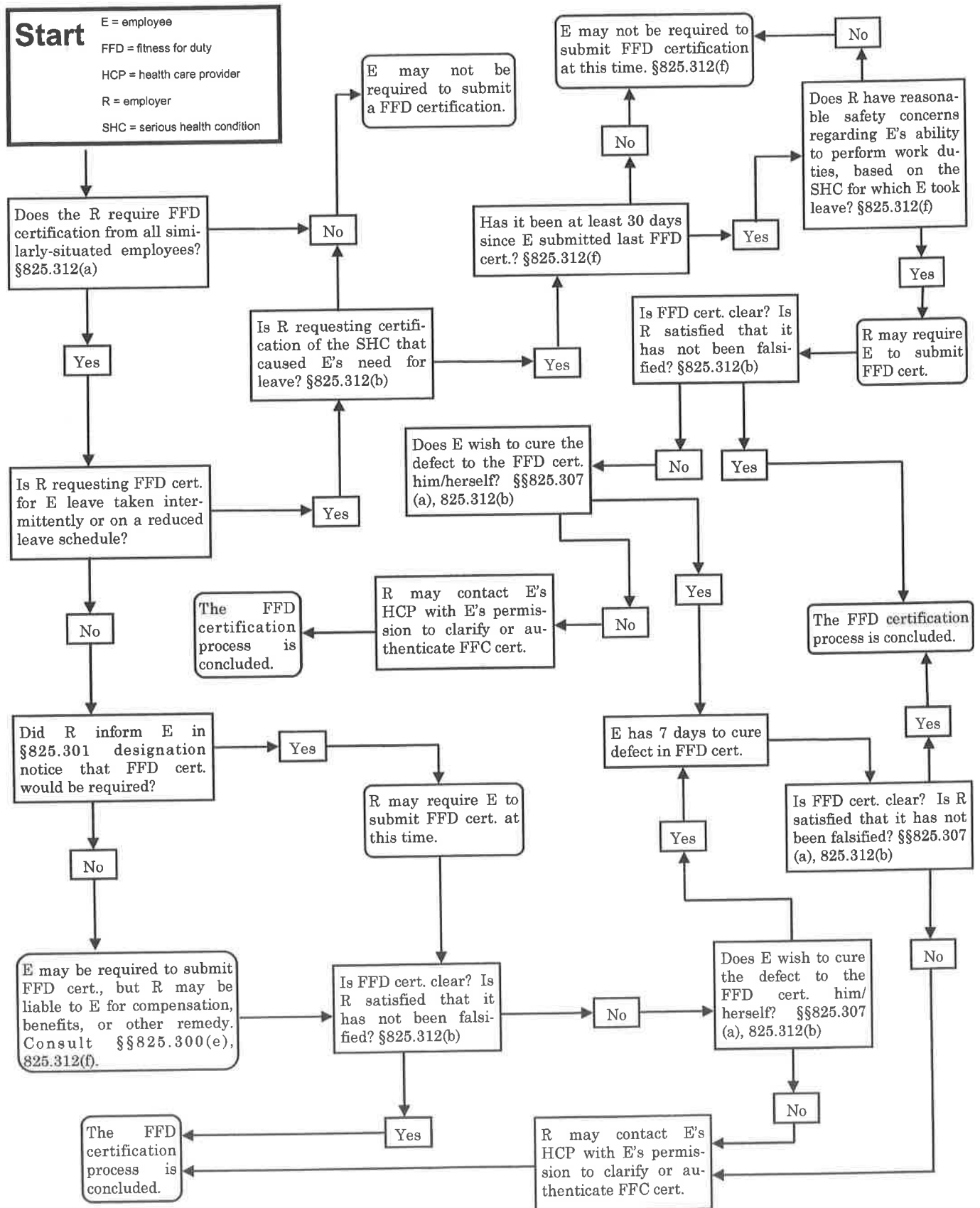


# When must an employee recertify or get a new certification for an existing serious health condition?





# May the employee be required to submit a fitness for duty certification?





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## Appendix D – Tips for union stewards

Union stewards can often help their members with FMLA leave. Below are some tips for stewards to consider when dealing with FMLA issues in their workplace. Whether these tips will be useful in any given situation will be up to the steward to determine. There is no substitute for good judgment and careful investigation.

These tips are not part of the Department of Labor's regulations and do not constitute legal authority. They should not be relied upon to determine anyone's rights or responsibilities under the FMLA. If you have any questions about the FMLA you should consult an attorney or the Department of Labor.

1. Accompany employees when they ask their supervisor department for FMLA leave. Make sure the employee provides the employer with all information necessary to determine if the employee has a serious health condition.
2. The employer has five business days to designate an employee's leave request as FMLA-qualifying once it has sufficient information to know leave is being requested for a qualifying reason, § 825.300 (d)(1) and (2), so make sure the employee provides the employer with all relevant information immediately upon requesting leave. Do not give the employer an excuse to wait until it receives the certification to make the designation, so as to avoid disrupting the employee's plans.
3. Whenever the employer rejects an employee's FMLA leave request get a full explanation for the rejection in writing.
4. When an employer requires an employee to submit medical certification under § 825.305, consider suggesting to the employee that they pick up the certification from their health care provider and deliver it to the employer themselves, rather than have the health care provider send it directly to the employer. That way the employee will have a chance to review the certification and rectify any problems or errors before it goes to the employer.
5. Advise employees to show their medical and fitness for duty certifications to you before they submit them to the employer so you can check for mistakes or omissions.
6. When an employer rejects an employee's certification because it is unclear or illegible, consider suggesting that the employee first try to cure the defect in the certification him- or herself, rather than allowing the employer to contact the employee's health care provider. If the defect cannot be cured despite the employee's best efforts, he or she can then authorize direct communication between the employer and the health care provider.

7. If an employer is going to telephone a health care provider to clarify or authenticate a certification, ask that you be allowed to listen in on the call, and participate in the conversation if possible.
8. If the employer tells you it cannot discuss an employee's use of FMLA with you because of privacy issues, ask the employee to execute a release authorization for you to show the employer. You can also have the employee execute a release if you need to communicate with the employee's health care provider. A sample release form appears in Appendix B.
9. Whenever an employer rejects a medical certification, or requests a recertification or a new certification, find out why. If the employer rejects a certification because it is incomplete or insufficient (§ 825.305 (c)), find out exactly what is required to fix the certification. If the employer is asking for a recertification because of a change in circumstances or because it has new information (§ 825.308 (c)), ask the employer to specify how circumstances have changed or what new information it has. If the employer rejects the certification because it believes it is not valid, § 825.307, ask the employer why it suspects the certification's validity.
10. Pay close attention to how much leave the employer charges employees for time spent on FMLA leave. FMLA must be calculated as a fraction of the employee's normal workweek. For example, if an employee who works a 40-hour, five day schedule takes one day of leave, she has used 1/5 of a week of leave, NOT 8 hours of leave. This will not make a difference in most cases, but can result in significant problems when with employees who work overtime or otherwise have irregular schedules. See § 825.205.









# Ohio Civil Service Employees Association

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American Federation of State, County, and Municipal Employees, Local 11

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