U.S. Family and Medical Leave Act

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he Family and Medical Leave Act ("FMLA") was, for the longest time, the first and only law that provided job-protected leave to employees who needed to take time off due to their own serious health condition, the serious health condition of a family member who required the employee's care, for bonding time with a newborn child or a newly adopted child, and to employees whose family members were in the military. On January 1, 2018, however, New York State passed its own family and medical leave law, albeit it was unpaid leave of absence. This chapter discusses the two family and medical leave laws applicable to New York employers: the New York Paid Family Leave ("PFL") and the FMLA.

OVERVIEW OF FMLA

First enacted in 1993, the FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave.

Eligible employees are entitled to twelve (12) workweeks of leave in a 12- month period for:

1. the birth of a child and to care for the newborn child within 1 year of birth;
2. the placement with the employee of a child for adoption or foster care and to care for the newly placed child within 1 year of placement;
3. to care for the employee's spouse, child, or parent who has a serious health condition;
4. a serious health condition that makes the employee unable to perform the essential functions of his or her job; and
5. 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."

Eligible employees who are the spouse, son, daughter, parent, or next of kin of a covered servicemember with a serious injury or illness are entitled to twenty-six (26) workweeks of leave during a single 12-month period to care for the covered servicemember (i.e., military caregiver leave).

COVERED EMPLOYERS

An employer covered by the 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 who meet the FMLA's 50-employee coverage requirement are deemed to be "engaged in commerce or in any industry or activity affecting commerce" within the meaning of the FMLA.

Any employee whose name appears on the employer's payroll will count toward the 50-employee coverage requirement even if the employee has received no compensation for the week, or was on paid or unpaid leave. Part-time employees maintained on the payroll are considered employed for each working day of the week. Employees on paid or unpaid leave, including FMLA leave, leaves of absence, disciplinary suspension, etc., are counted as long as there is a reasonable expectation that the employee will return to active employment. If there is no employer/employee relationship, such as when the employee is laid off, the individual is not counted.

Unpaid volunteers do not appear on the payroll and do not meet the definition of an "employee" and, therefore, are not counted when determining employer coverage or employee eligibility.

Employees who are jointly employed by two employers must be counted by both employers in determining employer coverage and employee eligibility under the FMLA, regardless of whether maintained on only one or both of the employers' payrolls. Temporary employees are ordinarily considered to be jointly employed by both the temporary employment agency and the worksite employer and are counted for coverage purposes by both entities. The FMLA uses the FLSA standard to determine whether employment of the same employee by two employers is to be considered joint employment or separate and distinct employment. Generally, a joint employment relationship will be considered to exist where:

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

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

3) 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.

Corporations are single employers under the FMLA and all employees of the corporation, at all locations, are counted for coverage purposes. Separate entities or corporations may be parts of a single employer for FMLA purposes if they meet the integrated employer test. Factors to be considered in determining if separate entities are an integrated employer include:

a. common management,

b. interrelation between operations,

c. centralized control of labor relations, and

d. degree of common ownership or financial control.

Public and private elementary and secondary schools are covered entities under the FMLA. Such schools are not subject to the FMLA's 50-employee coverage requirement. Other schools, such as public and private colleges and universities and day care providers, are subject to the same criteria as private employers.

COVERED EMPLOYEES

1) An employee is eligible for FMLA leave if he or she meets all of the following:

2) Works for an FMLA-covered employer,

3) Has been employed by the employer for at least 12 months,

4) Has at least 1,250 hours of service for the employer during the previous 12-month period, and

5) Is employed at a worksite with 50 or more employees at that site or within 75 miles of the worksite.

Employee eligibility is determined at the commencement of the first instance of leave for each FMLA-qualifying reason in the applicable 12-month period. An employee remains eligible for leave for that same qualifying reason during that applicable 12-month period. Eligibility may be retested when leave is for a different qualifying reason within that same 12-month period, or with the first instance of FMLA leave for any reason in a new 12-month period.

An employee's 12 months of employment for the employer need not be consecutive. However, an employer is not required to count periods of employment prior to a break in service of 7 years or

more, unless the break in service is caused by the employee's fulfillment of a Uniformed Services Employment and Reemployment Rights Act (USERRA)-covered service obligation, or a written agreement, including a collective bargaining agreement (CBA), exists concerning the employer's intention to rehire the employee after the break in service.

For purposes of determining if employees who work on an intermittent, casual, or occasional basis meet the 12 months of service requirement, 52 weeks is equal to 12 months. If an employee is maintained on the payroll for any part of a week, the week counts as a week of employment.

REASONS FOR LEAVE – LEAVE FOR BIRTH OR PREGNANCY

Eligible employees are entitled to FMLA leave for pregnancy or the birth of a child. Parents are entitled to up to 12 workweeks of FMLA leave for the birth and to be with the healthy newborn child (i.e., bonding time). Leave for bonding time must be completed during the 12- month period beginning on the date of the birth.

Pregnancy and childbirth are also considered FMLA-qualifying serious health conditions. The expectant 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. The mother's spouse is entitled to FMLA leave if the leave is needed to care for the mother during her prenatal care or when she is incapacitated during pregnancy or following the birth of the child. Employees are not entitled to any additional leave for twins or other multiple births.

FMLA leave may be taken intermittently or on a reduced leave schedule when medically necessary due to the pregnancy or birth. When the leave is for bonding time with the newborn child, the employee may take the leave intermittently or on a reduced leave schedule only if the employer agrees.

Spouses who are eligible and employed by the same employer may be limited to a combined total of 12 workweeks to care for the healthy child after birth.

Leave to bond with and care for a healthy newborn or newly placed child is distinguished from leave to care for a son or daughter with a serious health condition. An employer may not require a medical certification for leave for bonding with a child. However, an employer may require the employee to submit documentation of the relationship between the employee and the child.

The FMLA's definition of "son or daughter" includes a child of a person standing in loco parentis to the child. Therefore, an employee who will assume the responsibilities of a parent to the child

may take FMLA leave for the birth of the child and to bond with the child during the first 12 months following the birth. Whether an individual stands in loco parentis to a child depends on the particular facts of a given situation; however, a blood or legal relationship is not required. For example, an employee who is in a same-sex relationship and 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.

REASONS FOR LEAVE – PLACEMENT OF A CHILD FOR ADOPTION OR FOSTER CARE

Eligible employees are entitled to up to 12 workweeks of FMLA leave for placement with the employee of a son or daughter for adoption or foster care; such leave must be taken within 12 months of the placement. Adoption means legally and permanently assuming the responsibility of raising a child as one's own. Foster care is 24-hour care for children in substitution for, and away from, their parents or guardian. Such placements involve state action, voluntary or involuntary removal of the child from the parents or guardian, and an agreement between the state and foster family that the family will care for the child. FMLA leave may be taken for a foster care placement of any duration.

Employees may take FMLA leave before the actual placement of a child if an absence from work is required for the placement or adoption to proceed. For example, FMLA leave may be taken for required counseling sessions, court appearances or consultations with an attorney or doctor representing the child.

Leave taken after the placement of a healthy child for adoption or foster care may be taken intermittently or on a reduced leave schedule only with the employer's agreement.

Multiple placements for adoption or foster care in a single leave year are separate FMLA qualifying events. However, employees are not entitled to more than 12 weeks of leave for any combination of qualifying reasons in a single leave year. Leave for each individual child placed must be completed within 12 months of the date of the placement.

If a child is placed in a home for foster care and is subsequently adopted by the same family, only the placement for the foster care is an FMLA-qualifying event. The child would be newly placed at the time of the foster care placement rather than when the subsequent adoption occurs.

The FMLA's definition of "son or daughter" includes a child of a person standing in loco parentis to the child. Therefore, an employee who will assume the responsibilities of a parent to an

adopted or foster child is entitled to FMLA leave to bond with the child during the first 12 months following the placement, regardless of blood or legal relationship. For example, if one member of an unmarried couple adopts a child, and the other member of the couple will be assuming the responsibilities of a parent towards the child, then both individuals would be entitled to take FMLA leave for the placement of the child.

REASONS FOR LEAVE – TO CARE FOR SPOUSE, SON, DAUGHTER, OR PARENT WITH SERIOUS HEALTH CONDITION

An eligible employee is entitled to take up to 12 workweeks of FMLA leave in a 12-month period to care for a covered family member with a serious health condition. The employee must provide notice to the employer of the need for leave and provide requested certifications.

An employee is entitled to take intermittent leave or a reduced leave schedule to care for a family member only when medically necessary. This may include not only a situation where the condition of the family member is intermittent but also where the employee is only needed intermittently—such as where other care is normally provided by others.

1) The concept of "needed to care for" a family member encompasses both physical or psychological care, and may include one or more of the following:

2) Providing psychological comfort and reassurance to a child, parent, or spouse receiving inpatient or home care;

3) Providing basic nutritional, medical, hygienic care of the family member who is unable to care for these needs him or herself;

4) Providing safety for the family member with a serious health condition who cannot safely be left alone;

5) Providing transportation to doctor appointments, therapy, or other treatments; and

6) Attending care conferences during which the family member's health care provider discusses the family member's condition, immediate needs, incidents, and general well-being.

For purposes of leave to care for a spouse, son, daughter or parent, the following definitions apply:

- "Spouse" means a husband or wife as defined or recognized in the state where the individual was married and includes individuals in a same-sex marriage or common law marriage. "Spouse" also includes a husband or wife in a marriage that was validly entered into outside of the US if the marriage could have been entered into in at least one state.

- "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 under age 18; or 18 or older and incapable of self-care because of a physical or mental disability at the time that FMLA leave is to commence. It does not matter if the onset of the disability occurs before or after the son or daughter turns 18 for purposes of FMLA leave, provided that the disability exists and renders the adult child incapable of self-care at the time the employee's leave is to commence.

- "Physical or mental disability" means a physical or mental impairment that substantially limits one or more of the major life activities of an individual.

- "Incapable of self-care means that the individual requires active assistance or supervision to provide daily self-care in three or more activities of daily living or instrumental activities of daily living due to a disability.

- "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 by the FMLA). This term does not include parents-in-law.

- "In loco parentis" means "in the place of a parent." An employee who stands in loco parentis to a child is entitled to leave for bonding purposes or if leave is needed to care for a child with a serious health condition. An eligible employee is also entitled to FMLA leave to care for someone who stood in loco parentis to the employee when he or she was a child. Whether an in loco parentis relationship exists is dependent upon the specific facts of the case. Factors to be looked at in determining whether an in loco parentis relationship exists include: (a) the age of the child; (b) the degree to which the child is dependent on the person claiming in loco parentis status; (c) the amount of support, if any, provided; and (d) the extent to which duties commonly associated with parenthood are exercised. A

> blood or legal relationship is irrelevant to determining in loco parentis status. For example, 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 with the child, stands in loco parentis to the child. In addition, the fact that a child has a biological mother and father does not prevent a finding that another individual stands in loco parentis to the child.

REASONS FOR LEAVE – EMPLOYEE'S OWN SERIOUS HEALTH CONDITION

An eligible employee may take up to 12 workweeks of FMLA leave if he or she is unable to perform the functions of his or her job because of a serious health condition. An employee is unable to perform the functions of his or her position if 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 ADA.

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.

An employee who suffers from a serious health condition that does not prevent him or her from performing the essential functions of the position is not entitled to FMLA leave. Similarly, an employee who cannot perform one or more of the essential functions of the position, but whose condition does not meet the statutory and regulatory definition of a serious health condition, is not entitled to FMLA leave.

An employer may provide a statement of the essential functions of the employee's position held at the time notice is given or leave commenced, whichever is earlier, for the employee's health care provider to review during the medical certification process.

When such statement is provided, 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 position.

IMPORTANT DEFINITIONS UNDER THE FMLA

- A "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment. The FMLA is not intended to cover short-term conditions for which treatment and recovery are very brief. Unless complications arise, the following conditions generally will not meet the definition of an FMLA serious health condition: the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc. The objective test defining what constitutes a serious health condition under the FMLA is controlling. Common ailments such as those listed above ordinarily will not qualify for FMLA leave because they generally will not satisfy these regulatory criteria.

- "Incapacity" means the inability to work, attend school, or perform other regular daily activities due to a serious health condition or its treatment or recovery.

- "Treatment" includes examinations to determine if a serious health condition exists, evaluations of the condition, and actual treatment by or under the supervision of a health care provider to resolve or alleviate the condition. An examination or treatment requires a visit to the health care provider to qualify under the FMLA; a telephone conversation is not sufficient. Treatment does not include routine physical, eye, or dental exams.

- "Inpatient care" means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity or any subsequent treatment in connection with such inpatient care.

- Where a health condition involves "continuing treatment," such treatment includes any one of the following:

    - **Incapacity and treatment:** A period of incapacity of more than 3 consecutive, full calendar days, and any subsequent treatment or period of related incapacity that also involves: (a) an in-person treatment by a health care provider within 7 days of the first day of incapacity followed by at least one more in-person treatment within 30 days, unless extenuating circumstances exist; or (b) an in-person treatment by a health care provider within 7 days of the first day of incapacity which results in a regimen of continuing treatment under the supervision of the health care provider; or (c)

whether additional treatment visits or a regimen of continuing treatment are necessary within the 30-day period is to be determined by the health care provider. A regimen of continuing treatment includes, for example, a course of prescription medication or therapy requiring special equipment. It does not include only the taking of over-the-counter medications, bed rest, or drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, even if these are recommended by the health care provider.

- **Pregnancy or prenatal care:** Any period of incapacity due to pregnancy or for prenatal care. Absences occasioned by prenatal visits to a health care provider, severe morning sickness, or other complications of pregnancy constitute serious health conditions under the FMLA. Absences attributable to incapacity for pregnancy or prenatal care 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 3 consecutive, full calendar days. For example, an employee who is pregnant may be unable to report to work because of severe morning sickness.

- **Permanent or long-term conditions:** A period of incapacity that 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 of permanent or long-term conditions include but are not limited to Alzheimer's, a severe stroke, or the terminal stages of a disease.

- **Conditions requiring multiple treatments:** Any period of absence to receive multiple treatments (or a period of recovery from treatments) by a health care provider, or under the orders of a health care provider, for (a) restorative surgery after an accident or other injury; or (b) condition that would likely result in a period of incapacity of more than 3 consecutive, full calendar days in the absence of medical intervention or treatment. Examples of such conditions may include but are not limited to chemotherapy or radiation for cancer, physical therapy for severe arthritis, or dialysis for kidney disease.

- **Chronic conditions:** Any period of incapacity or treatment due to a condition that requires at least two visits per year for treatment by a health

care provider, or a nurse under direct supervisions of a health care provider, and that continues over an extended period of time (including recurring episodes of the same underlying condition).

Examples of chronic conditions that may meet the FMLA definition of a serious health condition include but are not limited to asthma, diabetes, epilepsy, migraine headaches, etc.

Chronic conditions frequently involve intermittent leave or leave on a reduced schedule. Absences attributable to incapacity for chronic conditions 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 3 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.

REASONS FOR LEAVE – QUALIFYING EXIGENCY LEAVE

Eligible employees may take FMLA leave for qualifying exigencies arising from the fact that the employee's spouse, son, daughter, or parent (the 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) in the Armed Forces.

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. "Armed Forces" is defined pursuant to 10 USC 101(a)(4) as the Army, Navy, Air Force, Marine Corps and Coast Guard and does not include the National Oceanic and Atmospheric Administration Commissioned Corps and the US Public Health Service Commissioned Corps.

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

1. **Short-notice deployment.** Leave may be taken 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 7 or fewer calendar days before the date of deployment. Leave taken for this purpose can be used for a period of 7 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.** Leave may be taken 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 of the military member. Leave may be taken 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 active duty of the military member.

3. **Childcare and school activities.** Leave may be taken to arrange for alternate childcare for the military member's child where the need to arrange such childcare is necessitated by the military member's covered active duty or to provide childcare on an urgent, immediate-need basis where the need to provide such care for the military member's child arises from the military member's covered active duty. FMLA leave may not be used for routine, regular, or everyday childcare.

   Further, school activities leave may be taken to enroll or transfer a child of the military member to a new school or day care facility when the enrollment or transfer is necessitated by the covered active duty of the military member, or to attend meetings with staff due to circumstances arising from the military member's covered active duty. Such meetings may include, for example, meetings with school officials regarding disciplinary measures, parent-teacher conferences, or meetings with school counselors. FMLA leave may not be used to meet with staff for routine events or academic concerns.

4. **Financial and legal arrangements.** Leave may be taken to make or update financial or legal arrangements necessary to address the military member's absence. For example, 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 ID cards, or preparing or updating a will or living trust.

   Leave may also be taken 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 and for a period of 90 days following the termination of covered active duty status.

5. **Counseling.** Leave may be taken to attend counseling provided by someone other than a health care provider (such as pastoral counseling) for oneself, for the military member, or for a child of the military member, provided the need for counseling arises from the covered active duty of the military member. In addition, leave for counseling by a health care provider may be FMLA-protected if the condition qualifies as a serious health condition.

6. **Rest and Recuperation.** Leave may be taken to spend time with a military member who is on short-term, temporary, Rest and Recuperation leave during the period of deployment.

   Leave taken for this purpose may be taken for a period of up to 15 calendar days. Leave for this reason is available beginning on the first day of the military member's Rest and Recuperation leave and must be taken within the period of time specified in the military member's Rest and Recuperation leave orders.

   The employee may take this leave in a continuous block of time or intermittently during the period of the military member's Rest and Recuperation leave.

   An employer may request a copy of the military member's Rest and Recuperation orders, or other documentation from the military indicating that the military member has been granted Rest and Recuperation leave and the date of the Rest and Recuperation leave, to determine the employee's specific leave period for this type of qualifying exigency leave.

7. **Post-deployment activities.** Events and briefings Leave may be taken 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.

   Leave may be taken to address issues that arise from the death of the military member while on covered active duty. Such leave may include meeting and recovering the body of the military member, making funeral arrangements, and attending funeral services.

8. **Parental care.** Leave may be taken 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 of the military member necessitates a change in the existing care arrangement.

Leave may be taken to provide care on an urgent, immediate-need basis for a parent of a military member when the parent is incapable of self-care and the need to provide such care arises out of the military member's covered active duty. FMLA leave is not available for routine, regular, or everyday care of the military member's parent.

Leave may be taken to admit or transfer a parent of the military member to a care facility when the parent is incapable of self-care and the admittance or transfer is necessitated by the covered active duty of the military member.

Leave may be taken to attend meetings with staff at a care facility for a parent of the military member, such as meetings with hospice or social service providers, when the parent is incapable of self-care and such meetings are necessitated by the covered active duty of the military member. FMLA leave is not available for routine or regular meetings.

For purposes of parental care leave, a parent of the military member means a 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. The military member must be the spouse, parent, son, or daughter of the employee requesting leave. No relationship is required between the parent of the military member on covered active duty and the employee requesting leave.

For purposes of leave for parental care, the parent of the military member must be incapable of self-care. 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 (ADLs) or instrumental ADLS (IADLs). ADLs include, but are not limited to, adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing, and eating. IADLs include, but are not limited to, cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

REASONS FOR LEAVE – MILITARY CAREGIVER LEAVE

Eligible employees who are the spouse, parent, son, daughter, or next of kin of a covered servicemember with a serious injury or illness are entitled to up to 26 workweeks of FMLA leave in a single 12-month period to care for that covered servicemember. Covered servicemembers include current members of the Regular or Reserve components of the Armed Forces and certain veterans.

Employers were not required to provide military caregiver leave for the care of a veteran until the Department of Labor defined a qualifying serious injury or illness of a veteran through regulations and those regulations became effective. Regulations defining a qualifying serious injury or illness of a veteran became effective on 03/08/2013.

A covered servicemember means:

1. A Current Servicemember - A current member of the Armed Forces of the US, including a member of the National Guard or Reserves; who has a serious injury or illness for which he or she is undergoing medical treatment, recuperation, or therapy; is in outpatient status; or is on the temporary disability retired list for a serious injury or illness.

2. Veteran - A veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness and 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 period of 5 years preceding the date on which the employee first takes leave to care for the veteran (the 5-year period).

COUNTING FMLA LEAVE USAGE

An eligible employee is entitled to up to 12 workweeks of FMLA leave per 12-month period for FMLA-qualifying reasons other than military caregiver leave. Multiple serious health conditions or qualifying reasons for leave do not increase the FMLA leave entitlement. However, an employee is entitled to up to 12 workweeks of leave for any one or for multiple qualifying reasons in the same leave year and additional leave for the same qualifying reason, including the same serious health condition, in subsequent leave years.

When counting leave for reasons other than military caregiver leave, the employer may select any one of the following methods for determining the 12-month period during which the 12 workweeks of leave entitlement occur:

1. The calendar year
2. Any fixed 12-moth leave year, such as a fiscal year
3. A 12-month period measured forward from the first date of FMLA leave for the employee
4. A rolling 12-month period measured backwards from the first date of FLMA
    a. Scenario 1: Employee A used 8 weeks of FMLA leave during the past 12 months; Employee A has an additional 4 weeks of FMLA leave available.
    b. Scenario 2: Employee B used 4 weeks of FMLA beginning 02/01/2011, 4 weeks beginning 06/01/2011, and 4 weeks beginning 12/01/2011. Employee B may not take any additional leave FMLA leave until 02/01/2012. Beginning on 02/01/2012, Employee B is entitled to use 1 additional day of FMLA leave each day for 4 weeks. Employee B also begins to regain additional days of FMLA leave beginning on 06/01/2012, and additional days beginning on 12/01/2012.

Employers may choose any method as long as it is applied uniformly and consistently to all employees. An exception to this uniformity applies in the case of a multi-state employer who must comply with a state requirement for determination of the leave year. In this case the employer may comply with the state requirement for employees in that state and uniformly choose another method for all its other employees.

An employer may change to another leave year determination only after providing 60 days' notice to all employees. During the 60-day transition, employees retain full benefit of their 12 workweeks of leave under whichever method provides the greatest benefit.

If an employer fails to select one of these methods for setting the 12-month period, the employer must use the 12-month period calculation method that is most beneficial to the employee.

INTERMITTENT FMLA LEAVE

FMLA leave may be taken intermittently or on a reduced leave schedule under the following conditions:

A. When there is a medical need for leave that can be best accommodated through an intermittent or reduced leave schedule for an employee'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. Such leave may be necessary for planned and/or unanticipated medical treatment of a serious health condition or of a serious injury or illness of a covered servicemember, or during recovery from treatment. It may also be taken to provide care or psychological comfort to a spouse, parent, son, or daughter with a serious health condition or a covered servicemember with a serious injury or illness. Notably, intermittent leave or a reduced leave schedule after the birth of a healthy child or placement of a healthy child for adoption or foster care may only be taken if the employer agrees.

   Examples of medically necessary intermittent leave include:

   1. Leave taken for a condition 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

   2. Leave taken by a pregnant employee for prenatal examinations or for periods of severe morning sickness

   3. Leave taken for absences where a family member is incapacitated or the employee is unable to perform the essential functions of the position intermittently because of a chronic serious health condition, even if he or she does not receive treatment from a health care provider

B. When leave is taken due to a qualifying exigency. If an employee needs leave intermittently or on a reduced leave schedule for planned medical treatment, the employee must make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations. If an employee needs intermittent leave that is foreseeable based on planned medical treatment, the employer may require the employee to transfer temporarily, during the period that the intermittent or

> reduced leave schedule is required, to an alternative position for which the employee is qualified and that better accommodates recurring periods of leave.

An employer must provide equivalent pay and benefits in the alternative position, but the position does not have to have equivalent duties. The employer may increase the pay and benefits of an existing alternative position to make them equivalent to those of the employee's regular job. Where an employer's normal practice bases benefits on the number of hours worked, the employer may proportionately reduce benefits for an employee's reduced hours worked.

An employer may not transfer an employee to an alternative position in order to discourage the employee from taking leave or otherwise work a hardship on the employee. When an employee no longer needs to continue on intermittent or reduced schedule leave and is able to return to full-time work, the employer must place the employee in the same or equivalent job as the job the employee left when the leave commenced. The employee may not be required to take more leave than necessary to address the circumstance that precipitated the need for leave.

The FMLA limits an employer's ability to require that an employee transfer to an alternate position to situations involving foreseeable leave for planned medical treatment. This is the only situation where an employer may require a transfer.

INCREMENTS OF LEAVE

The employer must account for intermittent leave or reduced schedule leave by no greater than the shortest period of time used to account for other forms of leave, provided it is not greater than 1 hour and does not reduce the employee's FMLA entitlement by more than the amount of leave actually taken. For example, if an employer accounts for the use of annual leave in increments of 1 hour and the use of sick leave in increments of ½ hour, then FMLA leave use must be accounted for using increments no larger than ½ hour. If the employer accounts for other forms of leave use in increments greater than 1 hour during the period FMLA leave is taken, the employer must account for FMLA leave in increments no greater than 1 hour.

If an employer uses varying increments to account for leave usage at different times of the day or shift, the employer may not account for FMLA leave in a larger increment than the shortest period used to account for other leave during the period the FMLA leave is taken. For example, if an employer usually accounts for all types of leave in increments of 15 minutes, but accounts for all non-FMLA leave for the first hour of the day in 30-minute increments, the employer may also

account for FMLA leave in an increment no greater than 30 minutes only during the first hour of the day.

While rest breaks of up to 20 minutes are generally compensable under the Fair Labor Standards Act (FLSA), the FMLA expressly provides that FMLA-protected leave may be unpaid. Employees who take FMLA-protected breaks, however, must receive as many compensable rest breaks as their coworkers receive.

Where it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to commence or end work midway through a shift, the entire period that the employee is forced to be absent is designated as FMLA leave and counts against the employee's entitlement. The physical impossibility provision is intended to be narrowly construed and applied only in instances of true physical impossibility. Thus, if the exception applies to a flight attendant, train conductor, ferry operator, bus driver, or truck driver whose worksite is on board an airplane, train, boat, bus, or truck; or to a laboratory technician whose workplace is inside a clean room that must remain sealed for a certain period of time; the exception will only apply until the vehicle has returned to the departure site or while the clean room remains sealed.

SUBSTITUTION OF ACCRUED PAID LEAVE

An eligible employee may choose, or the employer may require the employee, to substitute accrued paid leave for FMLA leave. "Substitute" means that the paid leave provided by the employer will run concurrently with the unpaid FMLA leave.

For the purpose of substituting accrued paid leave, the employee must have both earned the leave and be able to use that leave during the FMLA leave period. The employer may not require the employee to substitute leave that is not yet available to the employee to use under the terms of the employer's leave plan. This, however, would neither prevent an employer from voluntarily advancing paid leave to an employee nor an employee from voluntarily accepting such leave during an FMLA absence.

When accrued paid leave is substituted, the employee receives pay pursuant to the employer's applicable paid leave policy during the 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. For example, pursuant to an employer's uniform policy for all employees, an employer may request a doctor's note in order for the employee to receive paid sick leave. The employer must inform the employee that he or she must satisfy any procedural requirements of the paid leave policy to receive payment for the substituted leave. If the employee does not

comply with the additional requirements of the employer's paid leave policy, the employee is no longer entitled to substitute accrued paid leave, but remains entitled to take unpaid FMLA leave.

If an employee receives paid disability benefits during an FMLA-qualifying leave, the provision for substitution of paid leave is applicable and neither the employer nor the employee may require substitution of paid leave. However, where state law permits, employers and employees may agree to supplement paid disability benefits with accrued paid leave, such as in instances where the employee's disability benefits only cover a portion of the employee's wages.

Regardless of whether the FMLA leave ends up being paid or not, the employee's FMLA-qualifying absence remains protected by the Act. If an employee uses paid leave under circumstances which do not qualify as FMLA leave, the leave will not count against the 12 weeks of FMLA to which the employee is entitled.

SPOUSES EMPLOYED BY THE SAME EMPLOYER

Spouses employed by the same employer are limited to a combined total of 12 workweeks for the birth or placement of a healthy child, care for a healthy child after birth or placement, or to care for a parent with a serious health condition. The limitation would apply even if the spouses are employed at locations more than 75 miles apart but would not apply if one of the spouses was ineligible for FMLA leave.

Spouses are entitled to 12 workweeks each for their own serious health condition or to care for a spouse, son, or daughter with a serious health condition.

Where a spouse uses a portion of his or her leave for a purpose that is subject to the combined 12-week limit, that employee has the remainder of his or her 12 workweeks for any leave that is not subject to the combined limit.

Spouses employed by the same employer may also be limited to a combined total of 26 workweeks of leave for the care of a covered servicemember with a serious injury or illness.

EMPLOYEE NOTICE REQUIREMENTS

When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee does not have to expressly assert rights under the FMLA or even mention the FMLA. When an employee seeks leave due to a FMLA-qualifying reason for which he or she has previously taken

leave, the employee must specifically reference the qualifying reason for leave or the need for FMLA leave. This requirement applies to both foreseeable and unforeseeable leave requests. 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 inquiries may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying.

An employee must provide the employer at least 30 days' advance notice before FMLA leave is to begin if the need for leave is foreseeable based on an expected birth, placement for adoption or foster care, planned medical treatment for a serious health condition, or planned 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 the leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as possible and practical taking into account all of the circumstances.

Whether FMLA leave is to be continuous or intermittent, notice need only be given one time, but the employee must advise the employer as soon as practicable if the dates of scheduled leave change or are extended, or were initially unknown.

If the need for leave was foreseeable based on an expected birth or placement for adoption or foster care, for planned medical treatment of a serious health condition of the employee or family member or a serious injury or illness of a covered servicemember, and the employee fails to provide 30 days' advance notice, the employee may be required, at the employer's request, to explain why such notice was not practicable.

For foreseeable leave due to a qualifying exigency, an employee must provide notice as soon as practicable, regardless of how far in advance such leave is foreseeable.

An employee must 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. In all cases the employer is expected to inquire further if it is necessary to obtain more information about whether the employee is seeking FMLA-protected leave. When the employee has taken leave previously for more than one FMLA-qualifying reason, the employer may need to ask additional questions to determine for which qualifying reason the employee is seeking FMLA leave.

The employee must make a reasonable effort to schedule planned medical treatment so as not to unduly disrupt the employer's operations. An employee should consult with his or her employer

prior to scheduling treatment in order to work out a schedule that best suits the employee's and employer's needs.

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 possible and practical within the time prescribed by the employer's usual and customary notice requirements. An employee must provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request. Calling in sick without providing more information is not considered sufficient notice to trigger an employer's obligations under the FMLA. The employer is expected to obtain additional information through informal means.

FAILURE TO COMPLY WITH FMLA NOTICE REQUIREMENTS

If an employee has been provided notice of the FMLA notice requirements and fails to comply with those requirements, his or her FMLA coverage may be delayed. If an employee knows of the need for leave and the approximate date the leave would be taken 30 days in advance of the leave but fails to give notice of the need for leave with no reasonable excuse, the employer may delay FMLA coverage until 30 days after the date the employee provides notice. If the employee knows of the need for leave fewer than 30 days in advance but fails to give notice of the need for leave as soon as practicable under the circumstances, the extent to which the employer may delay leave depends on the facts of the particular case. For example, if an employee reasonably should have given the employer 2 weeks' notice but instead only provided 1 week's notice, then the employer may delay FMLA-protected leave for 1 week. If the need for leave is unforeseen, the extent to which the employer may delay leave depends on the circumstances. For example, if it was practicable for the employee to provide notice very soon after the need for leave arises but the employee does not provide notice until 2 days after the leave began, then the employer may delay FMLA coverage of the leave by 2 days.

EMPLOYERS' POSTER AND POLICY REQUIREMENTS

All covered employers, including those with no eligible employees, are required to keep posted a notice explaining the provisions of the FMLA and providing information concerning the procedures for filing complaints of FMLA violations with the Wage and Hour Division (WHD) of the US Department of Labor. The poster and text must be large enough to be easily read and be prominently posted where it may readily be seen by employees and applicants.

Electronic posting is sufficient provided it meets all other requirements. Electronic posting does not excuse the employer from the statutory requirement to post the notice in a location viewable by applicants for employment. Therefore, if the employer posts such information on an intranet that is not accessible to applicants, additional posting would be necessary.

If a covered employer has any eligible employees, it must also provide this general notice to each employee. If the employer has an employee handbook or other written guidance to employees concerning benefits or leave rights, the FMLA general notice must also be included therein. If the employer does not have such written materials, the employer must distribute a copy of the FMLA general notice to each new employee upon hiring. In either case, distribution may be accomplished electronically. The employer must translate the notice if a significant portion of workers are not literate in English into a language in which the employees are literate.

ELIGIBILITY NOTICES UNDER THE FMLA

When an employee requests FMLA leave, or when the employer acquires 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 5 business days, absent extenuating circumstances. The notice must state whether the employee is eligible for FMLA leave, and if not, at least one reason why the employee is not eligible.

The eligibility notice must be provided to the employee following the first request for FMLA leave in each 12-month leave year and only for subsequent requests for FMLA leave for a different qualifying reason within the same 12-month leave year if the employee's eligibility status has changed from the first notice.

Notice may be oral or in writing; employers may use a US DOL Form to provide the eligibility notice. The employer must translate the notice if a significant portion of workers are not literate in English into a language in which the employees are literate.

RIGHTS AND RESPONSIBILITIES NOTICE

Employers must provide written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. This notice must be provided to the employee each time the eligibility notice is provided. If the employee's leave has already begun, the notice must be mailed to the employee's address of record. The notice must include, as appropriate, the following:

- that the leave may be designated and counted against the employee's FMLA entitlement;
- any requirements for the employee to furnish certification and the consequences of failing to do so;
- the employee's right to substitute paid leave, whether the employer will require the substitution of paid leave, the conditions related to substitution, and the employee's entitlement to take unpaid FMLA leave if the employee does not meet the conditions for paid leave;
- any requirement for the employee to make any premium payments to maintain health benefits, the arrangements for making such payments, and the consequences for failure to make timely payments;
- the employee's status as a key employee, the potential consequence that restoration may be denied following FMLA leave, and explanation of the conditions required for denial of restoration;
- the employee's rights to maintenance of benefits during FMLA leave and restoration upon return from FMLA leave; and
- 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.

The notice may include additional information or be accompanied by a certification form but is not required to do so. Employers may use a US DOL Form and may adapt it as appropriate to meet the notice requirements. Electronic distribution is permitted so long as it otherwise meets the requirements. The employer must translate the notice if a significant portion of workers are not literate in English into a language in which the employees are literate.

If any of the information in the notice changes, the employer must provide written notice referencing the prior notice and providing the changes to an employee within 5 business days of receipt of the employee's first notice of need for leave subsequent to any change.

Employers are expected to be responsive in answering questions from employees concerning their rights and responsibilities under the FMLA.

FMLA DESIGNATION NOTICE

When the employer has enough information to determine whether leave is being taken for an FMLA-qualifying reason, the employer must notify the employee of that designation in writing within 5 business days, absent extenuating circumstances. If the employer requires paid leave to be substituted for unpaid FMLA leave, the employer must inform the employee of this designation at the time of designating FMLA leave. If the employer will require a fitness-for-duty certification for restoration to employment, notice of this requirement must be provided with the designation notice.

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 of designation, 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 exact time that will be counted (such may be the case with unforeseeable intermittent leave), then upon request by the employee, the employer must provide notice of the amount of leave counted against the employee's FMLA leave entitlement, but no more often than once in a 30-day period and only if leave is taken in that period. This notice may be oral or in writing, but if given orally, must be confirmed in writing no later than the next payday, and can be in any form, including a note on the employee's pay stub.

Only one notice of designation is required for each FMLA-qualifying reason per applicable 12-month period. If the leave is not designated as FMLA because it does not meet the requirements, the notice to the employee that the leave is not designated as FMLA leave may be a simple written statement.

If the information provided in the notice changes, the employer must provide written notice of the change within 5 business days of receiving the employee's first notice of need for leave after the change.

DESIGNATION OF FMLA LEAVE

The employer is responsible in all circumstances for designating leave as FMLA-qualifying once the employer has knowledge that the leave is being taken for an FMLA-qualifying reason. In any circumstance where the employer does not have sufficient information about the employee's reason for leave, the employer should inquire further of the employee to determine whether leave is potentially FMLA-qualifying. The employer's determination on whether leave is FMLA-qualifying must be based only on information received from the employee or the employee's spokesperson. Once the employer has acquired knowledge that the leave is being taken for a FMLA-qualifying reason, the employer must notify the employee.

If the employer fails to designate leave in a timely manner (i.e., within 5 business days absent unusual circumstances), the employer may retroactively designate leave as FMLA leave with appropriate notice to the employee 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.

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.

CERTIFICATION AND DOCUMENTATION

Employers may require employees seeking leave to care for a covered family member with a serious health condition or for their own serious health condition to support the request with a certification issued by the health care provider of the family member or the employee, respectively, and subsequent recertification, as appropriate. In certain circumstances, an employer may also require a fitness-for duty certification for restoration to employment when the leave is for the employee's own serious health condition.

An employer may also require that an employee's leave due to a qualifying exigency or to care for a covered servicemember with a serious injury or illness be supported by a certification.

An employer may not request certification of leave to care for a healthy newborn child, or for placement with the employee of a son or daughter for adoption or foster care, although the employer may request documentation of the family relationship.

An employer must give notice to the employee each time a certification is required. When required for the rights and responsibilities notice, the notification must be written. Requests for subsequent certification may be oral. When requesting a certification, the employer must advise an employee of the consequences of an employee's failure to provide adequate certification. 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 5 business days. 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.

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, or the employer provides more than 15 calendar days to return the requested certification. The employee must provide the employer with a complete and sufficient certification. It is the employee's responsibility 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 family member in order for the healthcare provider to release a complete and sufficient certification to the employer to support the employee's FMLA request.

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 the employee to obtain a medical certification at the employee's expense.

The FMLA provides that a medical certification is sufficient if it states:

a. the date the serious health condition commenced and probable duration of the condition;

b. the contact information of the health care provider and type of practice/specialization;

c. the appropriate medical facts within the knowledge of the health care provider regarding the condition sufficient to support the need for leave;

d. for leave to care for a family member, a statement that the employee is needed to care for the family member and an estimate of the amount of time needed; or for leave for the employee's own serious health condition, a statement that the employee is unable to perform the essential functions of the position and the likely duration of such inability; and

e. for intermittent or reduced schedule leave, the certification must also include:

   i. for planned medical treatment of the employee's or the employee's family member's serious health condition, a statement of the medical necessity for intermittent or reduced leave schedule and the dates treatment is expected and duration of such treatment;

   ii. for unforeseeable leave for the employee's own serious health condition (including pregnancy) that causes unforeseen periods of incapacity, a statement of the medical necessity for intermittent or reduced leave schedule and an estimation of the frequency and duration of such periods of incapacity; and

   iii. for unforeseeable leave for a family member's serious health condition, a statement that the leave schedule is medically necessary for the care of the family member, which can include assisting in the family member's recovery, and an estimate of the frequency and duration of the intermittent or reduced schedule leave.

Where leave for a serious health condition lasts beyond a single leave year, a new medical certification may be required in each subsequent FMLA leave year. The employer may request a medical certification with the first absence in a new 12-month leave year. The employer may seek authentication and clarification and second and third opinions for these new medical certifications.

The employer may contact the health care provider for purposes of clarification and authentication of the medical certification after the employer has given the employee an opportunity to cure any deficiencies. Employers may not ask for additional information beyond that required by the certification form. 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 may the employee's direct supervisor contact the employee's health care provider. 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 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. No additional information may be requested.

An employer who has reason to doubt the validity of a medical certification may request a second opinion at the employer's expense. The employer is permitted to designate the health

care provider for the second opinion as long as the provider is not employed on a regular basis by the employer, is not under contract with the employer, or is not regularly utilized by the employer. An exception can be made if the employee is located in an area where access to health care is extremely limited, such as a rural area where there may be only one or two doctors in a relevant specialty. The designated health care provider must be within normal commuting distance, except in very unusual circumstances, and the employer must reimburse the employee for reasonable travel expenses. Pending receipt of the additional medical opinion, the employee is provisionally entitled to FMLA benefits, including maintenance of group health benefits. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave cannot be designated as FMLA leave and may be treated as paid or unpaid leave under the employer's established leave policy. If the first and second opinions differ, a third and binding opinion may be required at the employer's expense. The third health care provider must be approved jointly by the employer and the employee. The employer and the employee must each act in good faith to reach agreement on the third opinion provider. If the employer does not act in good faith, the employer will be bound by the first medical certification. If the employee does not act in good faith, the employee will be bound by the second medical certification. Upon request by the employee, the employer must provide copies of second or third opinions within 5 business days absent extenuating circumstances. If a second or third opinion health care provider requests relevant medical information from an employee's (or his or her family member's) health care provider, and the employee (or his or her family member) does not authorize his or her health care provider to release relevant medical information, the employer may deny FMLA leave.

An employer may request a recertification for leave taken because of an employee's own serious health condition or the serious health condition of a family member. Generally, an employer may ask for recertification no more frequently than every 30 days and only in connection with an absence by the employee. However, if the minimum duration indicated on the medical certification exceeds 30 days, an employer must wait the indicated minimum duration before requesting a recertification (unless the below-stated exception applies). In all cases, however, an employer may request a recertification of a medical condition every 6 months in connection with an absence by the employee. This could apply when, for example, the health care provider indicates a condition will last a lifetime. The employer may ask for the same information as permitted for the initial medical certification. In addition, the employer may provide a record of the employee's absence pattern to the health care provider and ask if the serious health condition and need for leave is consistent with such pattern. The employer must allow at least 15 calendar days for the employee to provide the requested recertification, unless it is not practicable under the particular circumstances despite the employee's diligent, good faith efforts. The employer may contact the health care provider to authenticate or clarify the

recertification. No second or third opinions may be required on a recertification. The recertification is at the employee's expense.

An employer may request recertification in less than 30 days if: (a) the employee requests an extension of leave; (b) circumstances described by the previous certification have changed significantly (for example, if the certification stated the employee needed leave for 1 to 2 days for a particular serious health condition and the employee's absences for that condition lasted 4 days each of the last two times leave was needed, the increased duration might constitute a significant change); or (c) the employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification.

Recertification does not apply to leave taken for a qualifying exigency or to care for a covered servicemember with a serious injury or illness (i.e., military caregiver leave).

FITNESS FOR DUTY CERTIFICATION

An employer may have a uniformly-applied policy or practice that requires all similarly situated employees who take leave for their own serious health condition to obtain and present certification from the employee's health care provider that the employee is able to resume work as a condition of restoring an employee. The fitness-for-duty certification can only be requested for the health condition that caused the employee's need for FMLA leave. The employee has the same obligation to participate and cooperate as in the medical certification process. The cost of the fitness-for-duty certification is borne by the employee.

When the employee is on intermittent or reduced schedule leave, the employer is only entitled to a certification of fitness to return to duty up to once every 30 days and only 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 FMLA leave. Reasonable safety concerns" means a reasonable belief of significant risk of harm to the employee or others. In determining the reasonableness of safety concerns, an employer should consider the nature and severity of the potential harm and the likelihood that potential harm will occur.

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. An employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. In such case, the employer must indicate that in the designation notice and include a list of the essential functions of the employee's position.

An employer may contact the employee's health care provider for authentication and/or clarification of a fitness-for-duty certification, but may not delay reinstatement of the employee during the authentication or clarification period. Second and third opinions may not be required on fitness-for-duty certifications.

If an employee fails to provide certification in a timely manner for foreseeable leave, an employer may deny FMLA coverage for the leave until the required certification is provided. For example, if an employee is given 15 days to provide certification and does not provide certification for 45 days without sufficient reason for the delay, the employer may deny FMLA protections for the period following expiration of the 15-day time period (i.e., from day 16 through day 45). 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. 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.

If an employee fails to provide a recertification within the time requested by the employer (which must be at least 15 calendar days) or as soon as practicable under the 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.

An employer may delay employment restoration until an employee submits a required fitness-for-duty certification unless the employer has failed to provide the proper notification. If the employee never submits the fitness-for-duty certification or a new medical certification, the employee may be terminated.

MAINTENANCE OF EMPLOYEE BENEFITS DURING FMLA

An employer is required to maintain an employee's health benefit coverage under any group health plan for the duration of any FMLA leave period at the level and under the conditions that coverage would have been provided if the employee had remained continuously employed during the entire FMLA leave period. A group health plan is any employer plan, or plan contributed to by an employer, to provide health care to employees, former employees, or the families of such employees. Such plans may include a self-insured plan.

A group health plan does not include insurance programs providing health coverage where employees purchase individual policies from insurers, provided that:

- no contributions are made by the employer;
- participation in the program is completely voluntary for employees;
- 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;
- 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
- the premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

If an employer provides a new health plan or benefits, or changes health options while an employee is on FMLA leave, the employee is entitled to the new or changed benefits to the same extent as if the employee were not on leave. Any plan changes that apply to all employees would apply to an employee on FMLA leave. Notice of any opportunity to change plans or benefits must be given to an employee on FMLA leave and such change in benefits must be made available while an employee is on FMLA leave. An employer must maintain benefit coverage during an employee's FMLA leave for dental care, eye care, mental health counseling, etc. if such coverage is provided in the 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. If the employer is providing health insurance to discharge the health and welfare benefits requirement under a McNamara-O'Hara Service Contract Act wage determination, that benefit must continue during the entire period of FMLA leave. If an employer pays cash wages in lieu of the health and welfare benefits, the employer is not required to continue such payments while the employee is on FMLA leave.

An employee may choose not to retain group health plan coverage during FMLA leave. However, the employee retains his or her entitlement to be reinstated after the leave on the same terms as prior to taking the leave, without any qualifying period, physical exam, exclusion of pre-existing conditions, etc.

Any share of group health plan premiums 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 is required to pay the new premium rates. Employers paying money through a flexible saving account or other component of a "cafeteria plan," a portion of which the employee uses to pay the premium payments for the employer's group health plan (including dental care, eye care, mental health counseling, substance abuse treatment, etc.), must continue to pay that same amount to the cafeteria plan during the period of FMLA leave.

If accrued paid leave is substituted for unpaid FMLA leave, the employee's share of premiums must be paid by the method normally used during any paid leave, presumably as a payroll deduction. An employee who is receiving payments from a workers' compensation injury must make arrangements with the employer for payment of group health plan benefits when simultaneously taking FMLA leave.

If FMLA leave is unpaid, the employer has a number of options for obtaining payment from the employee for the employee's share of the premium. The employer may require that payment be made to the employer or to the insurance carrier, but no additional charge may be added for administrative expenses. The employer must provide advance written notice to the employee with the terms and conditions for payments to be made. The employer may require the employee to pay in any of the following ways:

- Payment due at the same time as if made by payroll deduction;
- Payment due on the same schedule as under the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA):
- At the employee's option, payment prepaid to a cafeteria plan;
- Payment according to the employer's existing rules for payment by employees on leave without pay, provided these rules do not require payment prior to the start of leave or premiums higher than if the employee had continued to work; or
- Another system voluntarily agreed to between the employer and the employee.

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

An employer's obligation to maintain health insurance coverage ceases under the FMLA if an employee's premium payment is more than 30 days late, unless the employer has an established policy providing a more generous grace period. 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 before then. Coverage for the employee may be terminated at the end of the 30-day grace period (where the 15-day notice has been provided) unless the employer has established policies regarding other forms of unpaid leave that allow the employer to end coverage retroactively to the date the unpaid premium payment was due.

When coverage lapses because the employee has not made required premium payments or any other valid reason, upon the employee's return to work the employer must restore the employee to coverage and benefits that are equivalent to those the employee would have had if leave had not been taken and the premium payment(s) had not been missed or coverage had not been canceled, including family or dependent coverage. The employee cannot be required to meet any qualification requirements imposed by the plan, including any pre-existing condition requirements or waiting period, to wait for an open season, or to pass a medical examination to obtain reinstatement of coverage. If an employer fails to restore the employee's health insurance upon the employee's return to work, the employer may be liable for benefits lost, for other actual monetary losses sustained as a direct result, and for appropriate equitable relief tailored to the harm suffered.

MAINTAINING NON-HEALTH BENEFITS

The taking of FMLA leave cannot result in the loss of any employment benefit accrued prior to the commencement of the leave, except for the use of accrued paid leave to substitute for unpaid FMLA leave.

An employee's entitlement to benefits other than group health benefits during a period of FMLA leave is determined by the employer's established policy for providing such benefits when an employee is on other forms of leave, paid or unpaid, as appropriate. If benefits such as vacation or holiday pay accrue to employees on other types of paid and/or unpaid non-FMLA leave, employees on corresponding paid or unpaid FMLA leave are entitled to such accrual.

Maintenance of other benefits, including health insurance policies that are not part of the employer's group health plan, is 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.

An employee's right to continue living in employer-provided housing is determined by the employer's established policy. If the policy provides that employees on leave for both FMLA and

non-FMLA reasons must vacate the property, the employer will not be in violation of the FMLA so long as the employer restores the employee the lodging upon completion of FMLA leave. The employer may not, however, require an FMLA-eligible employee to vacate the employer-provided lodging during the term of an FMLA leave period as an attempt to interfere with or restrain an employee's attempt to exercise rights under the FMLA.

EMPLOYER'S PAYMENT OF EMPLOYEE'S PREMIUM PAYMENTS

An employer may choose to pay an employee's share of premium payments continuously while the employee is on FMLA leave. For example, an employer may choose to maintain an employee's group health plan benefits or other benefits, such as life insurance or disability insurance, during an employee's FMLA leave to avoid a lapse of coverage and ensure that it can meet its responsibilities to provide equivalent benefits upon the employee's return to work. If the employer elects to maintain such benefits during the leave, at the conclusion of the leave, the employer is entitled to recover the costs incurred for paying for the employee's share of any premiums whether or not the employee returns to work.

If the employer pays the employee's share of premium payments to maintain health plan coverage when the employee fails to make payments, the employer may recover that expense from the employee. In addition, the employer may recover its share of health plan premiums during a period of unpaid FMLA leave from the employee if the employee fails to return to work after the FMLA leave entitlement has been exhausted or expires. However, the employer may not recover its costs if the employee does not return due to a continued need for leave for a serious health condition of the employee or eligible family member, or a serious illness or injury of a covered servicemember, or to other circumstances beyond the employee's control.

- When the employer cannot recover its share of benefit payments due to the employee's continued need for FMLA leave, the employer may require medical certification of the serious health condition of the employee or family member or the serious injury or illness of a covered servicemember. If the employer requires such medical certification, the certification must be provided to the employer within 30 days of the employer's request. It is the employee's responsibility to provide the certification and pay any cost incurred.

- If the employee fails to provide the certification, or the reason for leave does not meet the test of circumstances beyond the employee's control, the employer may

recover 100 percent of the health benefit premiums it paid during the period of unpaid FMLA leave.

If an employer elects to maintain other benefits by paying the employee's share of premiums during unpaid FMLA leave, such as life insurance, disability insurance, etc., at the conclusion of the 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.

For the purposes of the employer' recovery of benefit costs, an employee who has returned 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 returning to work is deemed to have returned to work.

When paid leave is substituted for FMLA leave, the employer may not recover its share of benefit premiums for any period of FMLA leave covered by the paid leave. Similarly, when FMLA leave runs concurrently with paid leave provided under workers' compensation or a temporary disability plan, recovery of premiums does not apply.

Self-insured employers may recover only the employer's share of allowable premiums as calculated under COBRA, excluding the 2 percent fee for administrative costs.

Any share of premiums that the employer is entitled to collect when an employee fails to return to work is a debt owed by the employee to the employer. Such a debt does not alter the employer's responsibilities for health benefit coverage or payment of claims incurred during FMLA leave under a self-insurance plan. The employer may recover the costs through deductions from any sums due to the employee as allowed under state and federal law, or the employer may initiate legal action against the employee to recover such costs.

GOVERNMENT JURISDICTION

The Wage and Hour Division (WHD) of the US Department of Labor is responsible for administering and enforcing the FMLA for most employees. Federal and certain Congressional employees are covered by the law, but the US Office of Personnel Management oversees FMLA as it applies to these employees.

JOB RESTORATION

On return from FMLA leave, an employee is entitled to be restored 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. The job-restoration protections of the FMLA are contingent upon the employee's continued ability to perform the essential functions of his or her job.

If the returning employee is no longer qualified for the position because of his or her inability to continue to meet job requirements as a result of the leave (e.g., attend a necessary course, renew a license, fly a minimum number of hours, etc.), the employer must give the employee a reasonable opportunity to fulfill those conditions after he or she returns to work.

If an employee would have been laid off had he or she not been on FMLA leave, the employee's right to reinstatement is whatever it would have been had the employee not been on leave when the layoff occurred. If a position has been eliminated, the employer bears the burden of establishing that the job would have been eliminated and the employee not otherwise employed at the time of restoration if the employee had continued to work instead of taking leave.

If the provisions of a collective bargaining agreement (CBA) govern an employee's return to work, those provisions will apply to the extent they do not conflict with the FMLA. For example, if the CBA prohibits a fitness-for-duty certification, the employer may not require one even though such certification is typically permitted if administered in accordance with 29 USC 2614(a)(4) and 29 CFR 825.312. Conversely, even if the CBA allows the employer to return the employee to a different, non-equivalent position because of seniority, the employer remains bound by the equivalent-position requirements of the FMLA.

Limited exceptions provide for an employer to deny job restoration to an employee when:

- the employment relationship ended and would have done so even if the employee had been continuously working,
- a key employee's reinstatement would cause substantial and grievous economic injury to the employer,
- the employee is unable to perform an essential function of his or her job because of a physical or mental condition, or
- the employee fraudulently obtained FMLA leave.

If an employee chooses not to or is unable to return to work after exhausting his or her FMLA leave, all entitlements and rights under the FMLA cease at that time. The employee is no longer entitled to any further job restoration rights under the FMLA and may be terminated.

An employee on FMLA leave maintains the same rights he or she would have if the employee had continued to work instead of taking FMLA leave. This applies to reinstatement and other benefits and conditions of employment. An employer must be able to show that an employee would not otherwise have been employed at the time for reinstatement in order to deny restoration.

RECORDKEEPING REQUIREMENTS

Employers subject to the FMLA are required to make, keep, and preserve records in accordance with the recordkeeping requirements of the Fair Labor Standards Act and FMLA regulations. Employers are not required to retain records in any particular order or form so long as those records are made available upon request. Electronic records are permitted.

Employers must keep records for no less than 3 years and make them available for inspection, copying, and transcription by representatives of the DOL upon request.

Employers are not required to submit records to the DOL unless specifically requested by a DOL official.

Covered employers who employ FMLA-eligible employees must maintain records that include the following information:

1. Basic payroll and identifying employee data, including: Name, address, and occupation of the employee; Rate or basis of pay and terms of compensation; Daily and weekly hours worked each pay period; Additions to and deductions from wages; Total compensation paid; Records of any dispute between the employer and employee regarding the designation of leave as FMLA leave (e.g., emails or other written statements between an employee and his or her employer regarding a disagreement on the designation of the employee's FMLA leave request).

2. Dates FMLA leave is taken (which must be designated in the records as FMLA leave)

3. Hours of FMLA leave used if leave is taken in increments of less than a day

4. Copies of FMLA notices provided by an employee to his or her employer and by an employer to its employees concerning the FMLA (including any written requests for leave from the employee as well as any required notice that the employer provides to the employee concerning FMLA leave)

5. Any documents describing employee benefits or employer policies and practices regarding the taking of paid or unpaid leave

6. Premium payments for employee benefits

Covered employers are required to maintain records and documents relating to medical certifications and recertifications of employees or their family members as confidential medical records. Such records are to be maintained in separate files from the usual personnel files. If the ADA, as amended, and/or the Genetic Information Nondiscrimination Act (GINA) is applicable, such records are to be maintained in conformance with ADA and GINA confidentially requirements. Supervisors and managers may be informed of necessary restrictions on work duties and necessary accommodations. First aid and safety personnel may be informed, as appropriate, if the employee's condition might require emergency treatment. Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

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