NATIONAL

SUMMARY

Leave of absence laws give employees the right to leave for a variety of reasons—personal or family illness, pregnancy, military service, family military leave, and other personal reasons. A leave of absence of between 12 and 26 weeks must be given to qualifying employees under the federal **Family and Medical Leave Act (FMLA).** The medical leave act provisions require covered employers to grant leave to eligible employees for their own serious health conditions, to care for a covered family member with a serious health condition, and for family military leave for a qualifying exigency or to care for a seriously injured or ill servicemember or veteran. The family leave provisions also require covered employers to grant leave to eligible employees after the birth, adoption or foster care placement of a child, to bond with the child.

FAMILY AND MEDICAL LEAVE ACT OF 1993 (FMLA)

FMLA (29 USC 2601) requires covered employers to provide up to 12 weeks of unpaid family and medical leave to eligible employees. The FMLA has also been expanded to allow for 26 weeks of unpaid leave in a single 12-month period for qualified employees caring for a military servicemember or veteran. The FMLA does not supersede state laws if those laws provide greater leave rights to employees. This means that employers covered by the FMLA *and* a state law must take steps to ensure that employees receive the full benefit of both. For more information on state law requirements, see the state ***LEAVE OF ABSENCE*** section.

DOL's Wage and Hour Division is responsible for enforcing the FMLA. Employers that violate the law are liable for damages for wages, salaries, employment benefits, or other compensation denied or lost to employees because of violations, including interest on the monies. Reinstatement, promotion, or other appropriate remedies may also be ordered.

WHICH EMPLOYERS ARE COVERED BY FMLA?

The FMLA affects private employers with 50 or more employees for each working day during each of 20 or more weeks in the current or preceding year. All public employers are covered, regardless of size. There are also special provisions for teachers and other instructional employees of public and private elementary and secondary schools. For more information on employer coverage, go to http://hr.blr.com/state-comparison-charts/2-FMLA-Employer-Coverage-and-Employee-Eligibility-.

WHICH EMPLOYEES ARE COVERED BY FMLA?

Employees eligible for leave are those who have worked for at least 12 months for the employer from whom leave is requested, *and* for at least 1,250 hours during the 12 months immediately preceding the start of the leave.

12 months' service. Employment periods prior to a break in service of 7 years or more need not be counted in determining whether the employee has been employed by the employer for at least 12 months. However, FMLA's final regulations state that employers must "count" service beyond the 7-year cap if the employee's break in service is caused by his or her service in the National Guard or reserves, or if the employee and employer have a written agreement concerning the employer's intention to rehire the employee after the break in service (e.g., for purposes of the employee furthering his or her education or for child-rearing purposes). This includes collective bargaining agreements. Employers may also choose, as a matter of policy for all types of leave, to consider employment prior to a continuous break in service of more than 7 years when determining whether an employee has met the 12-month employment requirement.

CROSS-REFERENCE

Death in Family *D–1*
Disabilities *D–17*
ERISA *E–59*
Fair Labor Standards Act (FLSA) *F–7*
Healthcare Benefits *H–3*
Maternity and Pregnancy *M–1*
Military Service *M–19*
Personal Leave *P–27*
Workers' Compensation *W–61*

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The minimum service requirement is calculated as of the date leave begins, not the date leave is requested. If an employee requests leave before the eligibility criteria have been met, the employer may have to project when the date of eligibility begins. An employee may be on non-FMLA leave at the time he or she meets the eligibility requirements and, in that event, any portion of the leave taken for an FMLA-qualifying reason after the employee meets the eligibility requirement would be FMLA-qualifying leave. The 12-month service requirement does not require consecutive months of service.

1,250 hours. The number of hours an employee has worked is determined in accordance with principles established under the **Fair Labor Standards Act (FLSA).** The FLSA requires that nonexempt employees be paid for the hours they actually worked. Hours an employee was on vacation or on leave, even if the vacation or leave is paid, do not count as time actually worked and, therefore, are not included in determining if an employee satisfies the 1,250-hour threshold. As with the 12-month service requirement, when determining whether the employee worked the 1,250 hours of service, an employee returning from fulfilling his or her National Guard or military reserve obligation must be credited with the hours of service that would have been performed but for the period of military service.

Special rule for airline industry. FMLA was specifically amended by the **Airline Flight Crew Technical Corrections Act of 2009** to allow the hours that pilots or flight attendants work or for which they are paid to be included for FMLA eligibility. The FMLA provides that an airline flight crew member is eligible to take FMLA leave if (1) he or she has worked or been paid for 60 percent of the applicable monthly guarantee or the equivalent amount annualized over the preceding 12-month period and (2) he or she has worked or been paid for at least 504 hours during the previous 12-month period.

The applicable monthly guarantee for employees other than those on reserve status is defined as the minimum number of hours for which the employer has agreed to schedule the employee for any given month under the applicable collective bargaining agreement or the employer’s policies. For an employee who is on reserve status, the applicable monthly guarantee means the minimum number of hours for which the employer has agreed to pay the employee for the month under the collective bargaining agreement or the employer’s policies.

Number of employees. FMLA requires that an employee also must work at a worksite where there are 50 or more employees on-site or within a 75-mile radius of the worksite. The 75-mile distance is measured by surface miles, using surface transportation over public streets, roads, highways, and waterways by the shortest route from the facility where the employee requesting leave is employed. For employees with no fixed worksite, the “worksite” is the site to which they are assigned as their home base, from which their work is assigned, or to which they report. Whether 50 employees are employed within 75 miles is determined when the employee gives notice of the need for leave. The employee’s eligibility is not affected by any subsequent change in the number of employees employed.

For more information on employee eligibility, go to http://hr.blr.com/state-comparison-charts/2-FMLA-Employer-Coverage-and-Employee-Eligibility-.

REASONS FOR LEAVE

The law allows eligible employees to take up to 12 workweeks for leave during any 12-month period for the following reasons:

- The birth of a child or the placement of a child with the employee for adoption or for foster care
- To care for a spouse, son, daughter, or parent with a serious health condition
- The employee’s own serious health condition
- Any qualifying exigency arising out of the fact that the spouse or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the armed forces

For more information on reasons for leave, go to http://hr.blr.com/state-comparison-charts/3-Qualifying-Reasons-for-FMLA-Leave.

Servicemember caregiver leave. An eligible employee is entitled to a total of up to 26 workweeks of leave during any single 12-month period if the employee is the spouse, son, daughter, parent, or next of kin caring for a covered military servicemember or veteran recovering from an injury or illness suffered while on active duty in the armed forces, that existed before the beginning of the member’s active duty and was aggravated by service, or that manifested itself before or after the member became a veteran.

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The 26 workweeks leave is available only during one, single 12-month period. Eligible employees are entitled to a combined total of 26 workweeks of leave in the 12-month period for leave to care for a covered military servicemember or veteran *plus* any other FMLA-qualified leave (e.g., serious health condition, birth of a child). The provisions of the law allowing for leave to care for an injured or ill servicemember or veteran do not limit the availability of leave for other FMLA-qualified reasons during any other 12-month period.

Spouses with same employer. A husband and wife who are eligible for FMLA leave and who are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for birth of the employee's child or to care for the child after birth, for placement of a child with the employee for adoption or foster care or to care for the child after placement, to care for the employee's parent with a serious health condition, or leave for a qualifying exigency.

Leave for Birth, Adoption, or Foster Care

Employees can take a full 12 weeks of FMLA leave (assuming that they have had no other leave-qualifying events during the 12-month period) for the birth, adoption, or foster care of a child (sometimes referred to as "bonding leave"). Bonding leave is available to either men or women, and no medical certification is required. However, bonding leave must be *completed* within 12 months of the date of birth or placement. *The courts have expressed a clear intent that both men and women be eligible for FMLA leave to care for a newborn or newly placed child. Employers should not under any circumstances question the right of a male parent to take FMLA leave for bonding.*

Intermittent leave for bonding. An eligible employee may use intermittent or reduced schedule leave after the birth to be with a healthy newborn child only if the employer agrees. (Note, however, that the employer's agreement is not required for intermittent leave required by the serious health condition of the mother or newborn child). If the employer agrees to permit intermittent or reduced schedule leave for the birth of a child, the employer may require the employee to transfer temporarily to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, federal law (such as the Americans with Disabilities Act), and state law. Transfer to an alternative position may also include altering an existing job to better accommodate the employee's need for intermittent or reduced leave.

Adoption and foster care. Employees may take FMLA leave before the actual placement for adoption or foster care of a child if an absence from work is required for the adoption or foster care to proceed (e.g., counseling sessions, court appearances, meetings with an attorney, travel to a foreign country). The "source" of an adopted child (e.g., whether from a licensed placement agency or otherwise) may not considered in determining eligibility for FMLA leave. An eligible employee may use intermittent or reduced schedule leave after the placement of a healthy child for adoption or foster care under the same conditions as described for bonding leave, above.

For additional information on leave for the birth, adoption, or placement of a child, go to http://hr.blr.com/state-comparison-charts/3-Qualifying-Reasons-for-FMLA-Leave.

Serious Health Condition

The definition of a "serious health condition" includes an illness, injury, impairment, or physical or mental condition that involves either inpatient care (i.e., an overnight stay in a hospital, hospice, or residential care facility) *or* continuing treatment by a healthcare provider.

To qualify as "continuing treatment," the condition must involve:

- A period of incapacity of more than 3 consecutive, full calendar days, and any subsequent treatment or period of incapacity for the same condition that also involves either:
  1. Treatment by a healthcare provider two or more times within 30 days of the first day of incapacity, unless extenuating circumstances exist, or
  2. Treatment by a healthcare provider at least once that results in a regimen of continuing treatment under the supervision of the healthcare provider (The requirement for treatment by a healthcare provider means an in-person visit to that healthcare provider. The first (or only) in-person treatment visit must take place within 7 days of the first day of incapacity.)
- Any period of incapacity because of pregnancy or prenatal care

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- Any period of incapacity because of a chronic, serious condition (A chronic, serious health condition is one that requires periodic visits, at least twice a year, for treatment by a healthcare provider (e.g., asthma, diabetes, epilepsy)
- A period of incapacity that is permanent or long-term because of a condition for which treatment may not be effective (e.g., Alzheimer's disease)
- Any period of absence to receive multiple treatments by a healthcare provider (e.g., for reconstructive surgery after an accident or injury) or for a condition that would likely result in a period of incapacity of more than 3 consecutive, full days if untreated, such as for cancer (chemotherapy) or kidney disease (dialysis)

Where there is any doubt as to whether a condition constitutes a serious health condition, it is wise to request medical certification of the condition from a healthcare provider. See **MEDICAL CERTIFICATION** in this section for details.

For more information on what constitutes a "serious health condition," go to http://hr.blr.com/state-comparison-charts/3-Qualifying-Reasons-for-FMLA-Leave.

Healthcare provider. FMLA's regulations define a "health care provider" as a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the state in which the doctor practices or any other person determined by the DOL to be capable of providing healthcare services.

Others "capable of providing healthcare services" include podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as shown by X ray to exist) who are authorized to practice in the state and perform within the scope of their practices as defined under state law. Also included are nurse practitioners, nurse-midwives, clinical social workers, and physician assistants who are authorized to practice under state law and who perform within the scope of their practices as defined under state law, and Christian Science practitioners listed with The Church of Christ, Scientist, in Boston, Massachusetts.

FMLA's definition of a covered healthcare provider also includes any healthcare provider from whom an employer or the employer's group health plan's benefits manager will accept certification to substantiate a claim for benefits. For employees or their covered family members who are located outside of the United States, FMLA allows certification by healthcare providers listed above who practice in a country other than the United States, who are authorized to practice in accordance with the law of that country, and who are performing within the scope of their practice as defined under such law.

Leave for Treatment of Substance Abuse

Substance abuse may be a serious health condition if one of the tests for establishing a "serious health condition" is met. However, FMLA leave may be taken only for treatment of substance abuse by a healthcare provider or by a provider of healthcare services on referral by a healthcare provider. Absence because of the employee's use of the substance, rather than for treatment, does *not* qualify for FMLA leave. This distinction is important.

Treatment for substance abuse does not prevent an employer from taking employment action against an employee. However, an employer may not take action against an employee because the employee has exercised his or her right to take FMLA leave for treatment. If the employer has an established policy, applied in a nondiscriminatory manner, communicated to all employees, and that provides under certain circumstances an employee may be terminated for substance abuse, the employee may be terminated pursuant to that policy even if the employee is presently taking FMLA leave. An employee may also take FMLA leave to care for a covered family member who is receiving treatment for substance abuse.

Pregnancy

A mother is entitled to FMLA leave for incapacity due to pregnancy, for prenatal care, or for her own serious health condition following the birth of the child. Circumstances may require that FMLA leave begin before the actual date of birth of a child. An expectant mother may take FMLA leave before the birth of the child for prenatal care or if her condition makes her unable to work. The mother is entitled to leave for incapacity due to pregnancy even though she does not receive treatment from a healthcare provider during the absence, and even if the absence does not last for more than 3 consecutive calendar days (29 CFR 825.120(4)). A husband is also entitled to FMLA leave if needed to care for his pregnant spouse who is incapacitated, if needed to care for her during her prenatal care, or if needed to care for the spouse following the birth of a child if the spouse has a serious health condition.

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NATIONAL *(continued)*

Family Military Leave

The FMLA allows qualified employees with family members actively or formerly in the military to take leave under two circumstances:

- **Qualifying exigency.** An eligible employee is entitled to take up to 12 weeks of FMLA leave in a 12-month period "because of any qualifying exigency arising out of the fact that the spouse or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the armed forces
- **Servicemember caregiver.** An eligible employee is entitled to a total of up to 26 workweeks of leave during any single 12-month period if the employee is the spouse, son, daughter, parent, or next of kin caring for a covered military servicemember or veteran recovering from an injury or illness suffered while on active duty in the armed forces, that existed before the beginning of the member's active duty and was aggravated by service, or that manifested itself before or after the member became a veteran.

Several states have passed legislation allowing employees leave to spend time with deployed or recovering family members in the military. See the state ***LEAVE OF ABSENCE*** section for more information.

Qualifying Exigency Leave

An eligible employee is entitled to take up to 12 weeks of FMLA leave in the 12-month period because of any qualifying exigency arising out of the fact that the spouse, son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the armed forces.

Covered active duty. The term "covered active duty" means duty during the deployment with the armed forces to a foreign country in the case of a member of a regular component of the armed forces and duty during the deployment with the armed forces to a foreign country under a call or order to covered active duty in the case of a member of a reserve component of the armed forces.

Qualifying exigency. The term "qualifying exigency" is defined in the final FMLA regulations as falling into one of eight categories:

1. **Short-notice deployment.** To address any issue that arises from the fact that a covered military member is notified of an impending call or order to covered active duty 7 or less calendar days prior to the date of deployment. Leave taken for this purpose can be used for a period of 7 calendar days beginning on the date a covered military member is notified of an impending call or order to covered active duty.
2. **Military events and related activities.** To attend any official ceremony, program, or event sponsored by the military that is related to the covered active duty or call to covered active duty status of a covered military member. To attend family support or assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross that are related to the covered active duty or call to covered active duty status of a covered military member.
3. **Child care and school activities.** To arrange for alternative child care when the covered active duty or call to covered active duty status of a covered military member necessitates a change in the existing childcare arrangement for a covered child of a military member, or a child for whom a covered military member stands in *loco parentis*. To provide child care for a covered child on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the need to provide such care arises from the active duty or call to active duty status of a covered military member. To enroll in or transfer to a new school or daycare facility a covered child, when enrollment or transfer is necessitated by the covered active duty or call to covered active duty status of a covered military member. To attend meetings with staff at a school or a daycare facility, such as meetings with school officials regarding disciplinary measures, parent-teacher conferences, or meetings with school counselors, for a covered child, when such meetings are necessary due to circumstances arising from the covered active duty or call to covered active duty status of a covered military member.
4. **Financial and legal arrangements.** To make or update financial or legal arrangements to address the covered military member's absence while on covered active duty or call to covered active duty status, such as preparing and executing financial and healthcare powers of attorney, transferring bank account signature authority, enrolling in the Defense Enrollment Eligibility Reporting System (DEERS), obtaining military identification cards, or preparing or updating a will or living trust. To act as the covered military member's representative before a federal, state, or local

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agency for purposes of obtaining, arranging, or appealing military service benefits while the covered military member is on covered active duty or call to covered active duty status, and for a period of 90 days following the termination of the covered military member's covered active duty status.

5. **Counseling.** To attend counseling provided by someone other than a healthcare provider for oneself, for the covered military member, or for a covered child provided that the need for counseling arises from the covered active duty or call to covered active duty status of a covered military member.
6. **Rest and recuperation.** To spend time with a covered military member who is on short-term, temporary, rest and recuperation leave during the period of deployment. Eligible employees may take up to 5 days of leave for each instance of rest and recuperation.
7. **Post-deployment activities.** For up to 90 days after termination of the covered military member's active duty status, 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 covered military member's active duty status; and to address issues that arise from the death of a covered military member while on active duty status, such as meeting and recovering the body of the covered military member and making funeral arrangements.
8. **Additional activities.** To address other events that arise out of the covered military member's covered active duty or call to covered active duty status provided that the employer and employee agree that such leave qualifies as an exigency, and agree to both the timing and duration of such leave.

Certification of leave for a qualifying exigency. The first time an employee requests leave because of a qualifying exigency arising out of the covered active duty or call to covered active duty status of a covered military member, an employer may require the employee to provide a copy of the covered military member's active duty orders or other documentation issued by the military that indicates that the covered military member is on covered active duty or call to covered active duty status and the dates of the covered military member's active duty service. This information need only be provided to the employer once.

An employer may require that leave for any qualifying exigency be supported by a certification from the employee that sets forth an extensive list of information relating to the qualifying exigency. Certifications could include documents such as meeting announcements for informational briefings, a document confirming a meeting with a counselor or school official, or a bill of service for legal or financial affairs. *DOL's Certification of Qualifying Exigency for Family Military Leave* (Form WH-384) contains all of the permissible inquiries and information required for employers to make a FMLA eligibility determination for qualifying exigencies.

For more information on what constitutes leave for a qualifying exigency, go to http://hr.blr.com/state-comparison-charts/3-Qualifying-Reasons-for-FMLA-Leave.

Servicemember Caregiver Leave

Eligible employees are entitled to FMLA leave to care for a covered family member who is:

- A member of the armed forces (including a member of the National Guard or reserves) who is undergoing medical treatment, recuperation, or therapy; is otherwise in outpatient status; or is otherwise on the temporary disability retired list for a serious injury or illness; *or*
- 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) at any time during the period of 5 years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy.

Up to 26 weeks of unpaid FMLA leave may be taken by an eligible employee in a single 12-month period to care for a spouse, son, daughter, parent, covered service member, or next of kin during the time the family member needs care while recovering from a qualifying injury or illness.

Covered military members. A "covered military member" for servicemember caregiver leave extends to regular career service military personnel, as well as those in the National Guard or reserves. Several states have passed legislation allowing employees leave to spend time with deployed or recovering family members in the military. Therefore, it is important to review state law rules whenever there is a request for military family leave. For more information, see the state ***LEAVE OF ABSENCE*** section.

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Serious injury or illness. In the case of a covered current or former member of the armed forces (including a member of the National Guard or reserves), the term "serious injury or illness" means an injury or illness that was incurred in the line of duty while on active duty in the armed forces (or existed before the beginning of the member's active duty and was aggravated by service in the line of duty while on active duty in the armed forces) and that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating.

In the case of a veteran who was a member of the armed forces (including a member of the National Guard or reserves), a "serious injury or illness" means a qualifying injury or illness that was incurred by the member in the line of duty on active duty in the armed forces (or existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the armed forces) and that manifested itself before or after the member became a veteran.

Designation of servicemember caregiver leave. The employer is responsible for designating leave, paid or unpaid, as FMLA-qualifying, and for giving notice of the designation to the employee as in the final FMLA regulations. In the case of leave that qualifies as both leave to care for a covered servicemember and leave to care for a family member with a serious health condition during a "single 12-month period," the employer must designate the leave as leave to care for a covered servicemember in the first instance.

Leave that qualifies as both leave to care for a covered servicemember and leave taken to care for a family member with a serious health condition during a "single 12-month period" must not be designated and counted as both leave to care for a covered servicemember and leave to care for a family member with a serious health condition. Retroactive designation of caregiver leave is permitted under the same circumstances as other types of FMLA leave (i.e., lack of information, no harm to employee).

Medical certification. When leave is taken to care for a covered servicemember with a serious injury or illness, an employer may require an employee to obtain a certification completed by an authorized healthcare provider of the covered servicemember. Any one of the following healthcare providers may complete such a certification: (1) a U.S. Department of Defense (DOD) healthcare provider; (2) a U.S. Department of Veterans Affairs (VA) healthcare provider; (3) a DOD TRICARE network authorized private healthcare provider; or (4) a DOD nonnetwork TRICARE authorized private healthcare provider. If the authorized healthcare provider is unable to make certain military-related determinations, they may rely on determinations from an authorized DOD representative (such as a DOD recovery-care coordinator).

An employer may request that the covered servicemember's healthcare provider provide an extensive list of information that is contained in the DOL's *Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave* (Form WH-385). No information may be required beyond that specified by the regulations (and contained in the WH-385). Second and third opinions and recertifications are expressly prohibited for leave to care for a covered servicemember.

Important note on certification forms for family military leave: The DOL has not yet revised its family military leave certification forms to reflect the changes bought about by the 2010 NDAA. Therefore, employers utilizing the DOL's family military leave certification forms are advised to amend or edit the language of the DOL's certification forms, if necessary, when requiring certification of family military leave.

Employees who must travel to care for a servicemember (ITOs and ITAs). An employer requiring an employee to submit a certification for leave to care for a covered servicemember must accept "invitational travel orders" (ITOs) or "invitational travel authorizations" (ITAs) issued to any family member to join an injured or ill servicemember at his or her bedside as sufficient certification, in lieu of the WH-385 or an employer's own certification form. An ITO or ITA is sufficient certification for the duration of time specified in the ITO or ITA.

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

The leave entitlement for servicemember caregiver leave is to be applied on a per-covered-servicemember, per-injury basis. Thus, an eligible employee may be entitled to take more than one period of 26 workweeks of leave

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if the leave is to care for different covered servicemembers or to care for the same servicemember with a subsequent serious injury or illness. Note, however, that no more than 26 workweeks of leave may be taken within any "single 12-month period." When an eligible employee takes leave to care for more than one covered servicemember or for a subsequent serious injury or illness of the same covered servicemember, and the single 12-month periods corresponding to the different military caregiver leave entitlements overlap, the employee is limited to taking no more than 26 workweeks of leave in each single 12-month period.

For more information on reasons for servicemember caregiver leave, go to http://hr.blr.com/state-comparison-charts/3-Qualifying-Reasons-for-FMLA-Leave.

Covered Family Members

FMLA's leave provisions and regulations specifically define covered family members.

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

Policy issue—domestic partners. A growing number of organizations are offering benefits such as health-care coverage to domestic partners. Such an organization will have to determine whether it also wants to offer leave comparable to FMLA leave to domestic partners. In addition, a number of jurisdictions have antidiscrimination laws based on sexual orientation. In those states, employees may raise claims of discrimination if they are excluded from leave because of sexual orientation. If this situation occurs, consult legal counsel.

Parent. "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 child. This term does not include parents in-law. Persons who are *in loco parentis* include those with day-to-day responsibilities to care for *or* financially support a child or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

DOL has specified that an *in loco parentis* relationship is one in which the employee has put himself or herself in the situation of a parent by assuming and discharging the obligations of a parent to a child with whom he or she has no legal or biological connection. It exists when an individual intends to take on the role of a parent. Under the FMLA, employees who are *in loco parentis* include those with day-to-day responsibilities to care for *or* financially support a child.

Courts have indicated some factors to be considered in determining *in loco parentis* status, including:

- The age of the child;
- The degree to which the child is dependent on the person;
- The amount of financial support, if any, provided; *and*
- The extent to which duties commonly associated with parenthood are exercised.

An eligible employee is entitled to take FMLA leave to care for a person who stood *in loco parentis* to the employee when the employee was a child. The fact that the employee also has a biological, adoptive, step, or foster parent does not preclude a determination that another individual stood *in loco parentis* to the employee when the employee was a child. According to DOL "neither the statute nor the regulations restrict the number of parents a child may have under the FMLA." The specific facts of each situation will determine whether an individual stood *in loco parentis* to the employee within the meaning of the FMLA (DOL Administrator's Interpretation No. 2010-3).

Unmarried or same-sex partners. In its Administrator's Interpretation No. 2010-3, DOL notes that "where an employee provides day-to-day care for his or her unmarried partner's child (with whom there is no legal or biological relationship) but does not financially support the child, the employee could be considered to stand *in loco parentis* to the child and therefore be entitled to FMLA leave to care for the child if the child had a serious health condition." DOL has stated that the same principles apply to leave for the birth of a child and to bond with a child within the first 12 months following birth or placement. According to DOL, an employee who will share equally in the raising of a child with the child's biological parent would be entitled to leave for the child's birth because he or she will stand *in loco parentis* to the child. Similarly, an employee who will share equally in the raising of an adopted

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child with a same-sex partner, but who does not have a legal relationship with the child, would be entitled to leave to bond with the child following placement, or to care for the child if the child had a serious health condition, because the employee stands *in loco parentis* to the child.

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

"Incapable of self-care" means that the individual requires active assistance or supervision to provide daily self-care in three or more of the "activities of daily living" (ADLs) or "instrumental activities of daily living" (IADLs). ADLs include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing, and eating. IADLs include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc. "Physical or mental disability" has the same meaning as is defined by the **Americans with Disabilities Act (ADA).**

Documentation of an *in loco parentis* relationship. The employer's right to documentation of family relationship is the same for an employee who asserts the need to care for an individual who stood *in loco parentis* to the employee as it is for a biological, adoptive, step, or foster parent. Such documentation may take the form of a simple statement asserting the relationship. For an employee seeking leave to care for an individual who stood *in loco parentis* to the employee, such a statement may include, for example, the name of the individual and a statement of the individual's *in loco parentis* relationship to the employee when the employee was a child. An employee should provide sufficient information to make the employer aware that the individual in need of care stood *in loco parentis* to the employee when the employee was a child.

For additional information on leave for a family member with a serious health condition, go to http://hr.blr.com/state-comparison-charts/3-Qualifying-Reasons-for-FMLA-Leave.

Son or daughter on covered active duty or call to covered active duty status. "Son or daughter on active duty or call to active duty status" means the employee's biological, adopted, step or foster child; legal ward; or a child for whom the employee stood *in loco parentis.* The child must be on covered active duty or call to covered active duty status, but may be any age.

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

Parent of a covered servicemember. "Parent of a covered servicemember" means a covered service-member's biological, adoptive, step, or foster father or mother, or any other individual who stood *in loco parentis* to the covered servicemember. This term does not include parents in-law.

Next of kin. "Next of kin" is defined as the nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions; brothers and sisters; grandparents; aunts and uncles; and first cousins. This order of priority does not apply if the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members are considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual must be deemed to be the covered servicemember's only next of kin.

Documenting relationships. For purposes of confirmation of family relationship, the employer may require the employee to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, etc. The employer is entitled to examine documentation but must return the documentation to the employee.

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Discussion Continues ➡

CALCULATING AND TRACKING THE 12-MONTH PERIOD

DOL regulations allow employers to use any one of four different methods to determine the 12-month period for counting and tracking leave. Employers may choose any one of the four methods, but DOL regulations say the method selected must be used consistently and uniformly for all employees nationwide. The only exception to this rule is when a state FMLA law requires a particular method. The employer must then comply with that law, but it may select another method for its employees in other states. If an employer fails to select one of the options for measuring the 12-month period, the option that provides the most beneficial outcome for the employee is used.

Methods of calculation. The methods for calculating the FMLA 12-week limit may be based on:

- The calendar year;
- Any fixed 12-month period (such as a fiscal year, year required by state law, or year that begins with an employee's anniversary date);
- A 12-month period, measured forward, that begins on the date an employee first starts the FMLA leave; *or*
- A "rolling" 12-month period, measured backward, from the date an employee last used any FMLA leave.

An employer wishing to change to another method of calculating the 12-month period is required to give at least 60 days' notice to all employees, and the transition must take place so that employees retain the full benefit of 12 weeks of leave under the method that affords the greatest benefit to the employee. Under no circumstances may a new method be implemented in order to avoid the FMLA's leave requirements.

A primary advantage shared by the first two methods is that recordkeeping and administration may be easier. This is because the methods used are consistent for all employees and may easily be linked with other systems, such as attendance, that are on the same schedule. A major disadvantage to employers that use the first three methods is that each allows "stacking" of leave time by employees. This means that employees theoretically could take 24 weeks in a row; for example, the last 12 weeks of a calendar year and the first 12 weeks of the next calendar year. Such a protracted leave is not allowed under the fourth method, rolling calculation of leave. This method avoids any possibility of stacking, but may be more difficult to administer.

For more information on calculating and tracking the 12-month period, go to http://hr.blr.com/state-comparison-charts/3-Qualifying-Reasons-for-FMLA-Leave.

Leave for a qualifying exigency. The family military leave provisions of FMLA require that eligible employees be granted 12 weeks of unpaid leave in a 12-month period because of any qualifying exigency arising out of the fact that the spouse, son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty). Leave for a qualifying exigency is counted during whichever 12-month period the employer uses to calculate other types of FMLA leave (e.g., calendar year, rolling 12-month period).

Calculating servicemember caregiver leave. For special rules regarding tracking the 12-month leave period for servicemember caregiver leave, see the section on servicemember caregiver leave, above.

CALCULATING THE 12-WEEK LEAVE PERIOD

An eligible employee is permitted to take up to 12 weeks of unpaid FMLA leave in a 12-month period (for all types of FMLA leave other than servicemember caregiver leave). A "week" is determined by the employee's regular workweek. For example, an employee who works Monday through Friday has a 5-day workweek. An employee who works Monday, Wednesday, and Friday has a 3-day workweek.

Where leave is taken on an intermittent or reduced work schedule basis, it is important to determine the number of days of leave an employee may take. An employee who has a 5-day workweek is entitled to 60 days' leave in a 12-month period (5 days multiplied by 12 weeks). An employee who works a 3-day workweek is entitled to only 36 days' leave in a 12-month period (3 days multiplied by 12 weeks).

Holidays during FMLA leave. For purposes of determining the amount of leave used by an employee, the fact that a holiday may occur within the week taken as FMLA leave has no effect, and the week is counted as a week of FMLA

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leave. However, if an employee is using FMLA leave in increments of less than 1 week, the holiday will not count against the employee's FMLA entitlement unless the employee was otherwise scheduled and expected to work during the holiday. Similarly, if for some reason the employer's business activity has temporarily ceased and employees generally are not expected to report for work for 1 or more weeks (e.g., a school closing of 2 weeks for the Christmas/New Year holiday or the summer vacation or an employer closing a plant for retooling or repairs), the days on which the employer's activities have ceased do not count against the employee's FMLA leave entitlement.

Overtime hours. If an employee would normally be required to work overtime but is unable to do so because of an FMLA-qualifying reason, the hours that the employee would have been required to work may be counted against the employee's FMLA entitlement. In such a case, the employee is using intermittent or reduced schedule leave. For example, if an employee would normally be required to work for 48 hours in a particular week but, due to a serious health condition, the employee is unable to work more than 40 hours that week, the employee would use 8 hours of FMLA-protected leave out of the 48-hour workweek (8 divided by 48 equals $^1/_6$ workweek). Voluntary overtime hours that an employee does not work due to a serious health condition may not be counted against the employee's FMLA leave entitlement.

For more information on calculating and tracking the 12-week period, go to http://hr.blr.com/state-comparison-charts/3-Qualifying-Reasons-for-FMLA-Leave.

SUBSTITUTION OF PAID LEAVE FOR UNPAID FMLA LEAVE

Leave provided under the FMLA is unpaid. However, the employee may elect or the employer may require that paid leave be substituted for unpaid FMLA leave under the following circumstances.

Accrued paid leave. If an employee does not choose to substitute accrued paid leave, the employer may require the employee to substitute accrued paid leave for unpaid FMLA leave. An employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employer's normal leave policy. When an employee chooses or an employer requires substitution of accrued paid leave, the employer must inform the employee that the employee must satisfy any procedural requirements of the paid leave policy in order to be paid.

Disability leave. Leave taken pursuant to a disability leave plan would be considered FMLA leave for a serious health condition and counted against the leave entitlement permitted under FMLA. Because leave taken under a disability benefit plan is paid (at least in part), an employer may not require the employee to substitute accrued paid leave during such disability leave. However, employers and employees may agree, where state law permits, to have paid leave *supplement* the disability plan benefits, such as in the case where a plan provides only replacement income for ⅔ of an employee's salary.

Workers' compensation. Time taken off from work due to an injury covered under a state workers' compensation program may be counted against the employee's FMLA leave entitlement if the employer designates the leave as FMLA leave. Because the workers' compensation absence is paid (at least in part), the employer may not require the substitution of accrued paid leave during workers' compensation leave. However, employers and employees may agree, where state law permits, to have paid leave supplement workers' compensation benefits. When workers' compensation benefits end, the employee may elect or the employer may require the use of accrued paid leave.

Light duty. If the healthcare provider treating the employee for the workers' compensation injury certifies that the employee is able to return to a light-duty job but is unable to return to the same or equivalent job, the employee may decline the employer's offer of a light-duty job. As a result, the employee may lose workers' compensation payments, but is entitled to remain on unpaid FMLA leave until the employee's FMLA leave entitlement is exhausted.

The FMLA regulations make it clear that time spent working in a light-duty assignment may not be counted against the employee's FMLA leave allotment. An employee's acceptance of the light-duty assignment does not constitute a waiver of the employee's prospective rights, including the right to be restored to the same position the employee held when the

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FMLA leave commenced or an equivalent position. The employee's right to restoration is essentially held in abeyance during the period of time an employee performs a light-duty assignment pursuant to a voluntary agreement between the employee and the employer. Note, however, that an employee who voluntarily returns to a light-duty position retains the right to job restoration to the same or equivalent position only until the end of the 12-month period that the employer uses to calculate FMLA leave.

INTERMITTENT AND REDUCED SCHEDULE LEAVE

FMLA leave may be taken intermittently or on a reduced leave schedule under certain circumstances. Intermittent or reduced schedule leave may be taken due to an employee's serious health condition, to care for a covered family member with a serious health condition, or for family military leave. Leave for an employee's personal medical condition is limited to the times scheduled for treatment or for recovery from illness or treatment. Employees are expected to give reasonable notice before scheduled treatment, so as to not disrupt the employer's operations. Employees must establish the need for intermittent or reduced schedule leave only once, before such leave begins. Once leave is approved, employees may not be asked to reestablish the need for leave each time leave is needed.

Intermittent leave is leave taken in separate blocks of time due to a single illness or injury. For example, an employee who needs to take leave occasionally due to medical appointments. An expectant mother also might require intermittent leave for prenatal care.

Reduced schedule leave occurs when an employee requires a work schedule change or hours reduction over a period of weeks or months. Usually, the change is from a full-time to a part-time schedule. If the employee can provide a medical certification establishing that working a reduced schedule would be medically appropriate, the employee will most likely be entitled to reduced schedule leave covering the hours or days not worked under the reduced schedule.

Medical necessity. There must be a medical need for intermittent leave or leave on a reduced leave schedule taken because of an employee's own serious health condition; to care for a parent, son, or daughter with a serious health condition; or to care for a covered servicemember with a serious injury or illness. In addition, the leave and the medical need must be best accommodated through an intermittent or reduced leave schedule. The treatment regimen and other information described in the medical certification of a serious health condition and in the certification of a serious injury or illness, if required by the employer, should address the medical necessity of intermittent leave or leave on a reduced leave schedule.

Leave may be taken intermittently or on a reduced leave schedule when medically necessary for planned or unanticipated medical treatment for or recovery from a serious health condition or of a covered servicemember's serious injury or illness. It may also be taken to provide care or psychological comfort to a covered family member with a serious health condition or a covered servicemember with a serious injury or illness.

Pregnant employees. A pregnant employee may take leave intermittently for prenatal examinations or for her own condition, such as for periods of severe morning sickness.

Birth or placement. When leave is taken after the birth of a healthy child or placement of a healthy child for adoption or foster care, an employee may take leave intermittently or on a reduced leave schedule only if the employer agrees. Such a schedule reduction might occur, for example, where an employee, with the employer's agreement, works part-time after the birth of a child, or takes leave in several segments. The employer's agreement is not required, however, for leave during which the mother has a serious health condition in connection with the birth of her child or if the newborn child has a serious health condition.

Qualifying exigency. Family military leave due to a qualifying exigency may be taken on an intermittent or reduced leave schedule basis.

Scheduling intermittent or reduced schedule leave. 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 unduly disrupt the employer's operations.

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Keeping Track of Intermittent and Reduced Schedule Leave

When an employee takes FMLA leave intermittently or on a reduced leave schedule, the employer must account for the leave using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave. However, the increment of time may not be greater than 1 hour. An employee's FMLA leave entitlement may not be reduced by more than the amount of leave actually taken. Meaning, if an employee leaves during the last half-hour of his or her shift for an FMLA-covered event, the employee may not be "docked" a full hour of FMLA leave (even if this is the shortest period of time that the employer uses to account for use of other forms of leave).

Varying increments. An employer may account for use of leave in varying increments at different times of the day or shift. However, 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 in which the FMLA leave is taken.

If an employer accounts for other forms of leave use in increments greater than 1 hour, the employer must account for FMLA leave use in increments no greater than 1 hour. An employer may account for FMLA leave in shorter increments than used for other forms of leave. For example, an employer that accounts for other forms of leave in 1-hour increments may account for FMLA leave in a shorter increment when the employee arrives at work several minutes late, and the employer wants the employee to begin work immediately. Such accounting for FMLA leave does not alter the increment considered to be the shortest period used to account for other forms of leave or the use of FMLA leave in other circumstances.

Inaccessible workplaces. Where it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to begin or end work midway through a shift (e.g., where a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train or when a laboratory employee is unable to enter or leave a sealed "clean room" during a certain period of time), the entire period that the employee is forced to be absent is designated as FMLA leave and counts against the employee's FMLA entitlement. This exception is applied narrowly, and only when an employee is physically unable to enter a worksite midshift.

Temporary Transfer During Reduced Schedule or Intermittent Leave

Employers are given a little more leeway with job transfers during reduced and intermittent leave than they are with respect to employees returning from regular FMLA leave. With the returning employee, the employer is obligated to provide the same position, or a position that is equivalent in "pay, benefits, and other terms and conditions of employment." See **Return to Same or Equivalent Position** below for more information on reinstatement from regular FMLA leave.

Duties and benefits during transfer. In the case of reduced and intermittent leave, an employer may temporarily move an employee to a different job for the duration of the intermittent or reduced leave, if this will allow the employer to better accommodate the need for leave. The alternative position may be different in duties from the employee's regular position (even if the duties of the alternative position are inferior to those of the regular position). However, the pay and benefits for the position must be the same as those paid to the employee for his or her regular position.

An employee transferred to a part-time position to better accommodate a leave must receive the same salary and benefits he or she receives in the full-time position. However, the employer can proportionately reduce salary and earned benefits (e.g., vacation) when transferring the person to a part-time position. Benefits such as life insurance, health insurance, and others received by the employee as a full-time worker also would be required to be provided in the part-time position, even though part-time employees, in general, are ineligible for such benefits.

Limits on transfers. Transferring an employee while on reduced leave is not permissible when it violates any applicable collective bargaining agreement, ADA, or state law. Employers should review any applicable collective bargaining agreement carefully before implementing a transfer, and consult with any state laws that might apply to the ADA.

Transfers intended to deter an employee from taking reduced or intermittent leave, or to punish the employee for taking such a leave, are prohibited by the FMLA. Thus, a person employed in a professional capacity cannot be assigned janitorial duties, and a day worker cannot be reassigned to the night shift, for example. DOL makes it clear that an employer may alter an existing job, such as the employee's own job, in such a way that it better accommodates the need for intermittent or reduced leave. For example, an employer may temporarily reassign certain functions, whether essential or marginal, to lower the number of hours worked by the person.

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MARRIED EMPLOYEES

When both husband and wife work for the same employer, the full amount of leave is limited to an aggregate of 12 weeks for the birth, adoption, or foster care placement of a single child or to care for a parent with a serious health condition.

When both husband and wife work for the same employer, the aggregate amount of leave that can be taken by the husband and wife is 26 weeks in a single 12-month period for servicemember caregiver leave or a combination of active duty leave and servicemember caregiver leave. The aggregate number of workweeks of leave to which both that husband and wife can take for active duty leave only is 12 weeks.

EMPLOYER'S NOTICE REQUIREMENTS

Under FMLA, employers are required to provide several different types of notice to employees. Those notice requirements include general notice and postings, eligibility notice, notice of rights and responsibilities, and FMLA designation notice.

General Notice

Every employer covered by the FMLA is required to post a general FMLA notice and keep it posted on its premises. The DOL's *Notice to Employees of Rights Under FMLA* (WH Publication 1420) satisfies this general notice requirement. Covered employers must post this general notice even if no employees are eligible for FMLA leave. If an FMLA-covered employer has any eligible employees, it must also provide this general notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring. In either case, distribution may be accomplished electronically.

Language requirements. Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the FMLA rules require that the employer provide the general notice in a language in which the employees are literate. Employers furnishing FMLA notices to sensory-impaired individuals must also comply with all applicable requirements under federal or state law.

Penalty for noncompliance. The penalty for willful violation of the general notice posting requirement is a civil fine of not more than $110 for each separate offense.

Eligibility Notice

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. Employee eligibility is determined (and notice must be provided) at the commencement of the first instance of leave for each FMLA-qualifying reason in the applicable 12-month period. All FMLA absences for the same qualifying reason are considered a single leave, and employee eligibility for that reason for leave does not change during the applicable 12-month period.

Content of eligibility notice. The eligibility notice must state whether the employee is eligible for FMLA leave. If the employee is not eligible for FMLA leave, the notice must state at least one reason why the employee is not eligible, including (if applicable) the number of months the employee has been employed by the employer, the number of hours of service worked for the employer during the 12-month period, and whether the employee is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. Notification of eligibility may be oral or in writing; but employers are advised to use DOL's *Notice of Eligibility and Rights & Responsibilities* (Form WH-381) to provide proper eligibility notice to employees.

Change in status. If, at the time an employee provides notice of a subsequent need for FMLA leave during the applicable 12-month period due to a different FMLA-qualifying reason, and the employee's eligibility status has not changed, no additional eligibility notice is required. If, however, the employee's eligibility status has changed (e.g., if the employee has worked less than 1,250 hours of service for the employer in the 12 months preceding the

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commencement of leave for the subsequent qualifying reason or the size of the workforce at the worksite has dropped below 50 employees), the employer must notify the employee of the change in eligibility status within 5 business days, absent extenuating circumstances.

Notice of Rights and Responsibilities

Employers are required to provide written notice detailing the specific expectations and obligations of the employee, including the use of paid leave, and explaining any consequences of a failure to meet those obligations. The rights and responsibilities notice must be provided to the employee each time the eligibility notice is provided. *DOL's Notice of Eligibility and Rights & Responsibilities* (Form WH-381) satisfies these regulatory requirements.

If leave has already begun, the notice should be mailed to the employee's address of record. The notice of rights and responsibilities may be accompanied by any required certification form. The notice may be distributed electronically as long as it otherwise meets the requirements of the final regulation. **Note:** The employer is obligated to translate the rights and responsibilities notice in any situation in which it is obligated to do so for the general notice requirement. In addition, the final FMLA regulations make it clear that employers are expected to answer questions from employees concerning their rights and responsibilities under the FMLA.

Notice of change. If the specific information provided by the notice of rights and responsibilities changes, the employer must, within 5 business days of receipt of the employee's first notice of need for leave subsequent to any change, provide written notice referencing the prior notice and setting forth any of the information in the notice of rights and responsibilities that has changed. For example, if the initial leave period was paid leave, and the subsequent leave period would be unpaid leave, the employer may need to give notice of the arrangements for making premium payments.

Notice of Designation

The employer is always responsible for designating leave as FMLA-qualifying and for giving notice of the designation to the employee. When the employer has enough information to determine whether the leave is being taken for a FMLA-qualifying reason (e.g., after receiving a certification), the employer must notify the employee whether the leave will be designated and will be counted as FMLA leave *within 5 business days*, absent extenuating circumstances. Only one notice of designation is required for each FMLA-qualifying reason per applicable 12-month period, regardless of whether the leave taken due to the qualifying reason will be a continuous block of leave or intermittent or reduced schedule leave.

Content of notice of designation. Completion and service of the DOL's *Designation Notice to Employee of FMLA Leave* (Form WH-382) to the employee satisfies all regulatory requirements for the notice of designation. If the information provided by the employer to the employee in the designation notice changes (e.g., the employee exhausts the FMLA leave entitlement), the employer must provide written notice of the change *within 5 business days*of receipt of the employee's first notice of need for leave subsequent to any change. If the leave is not designated as FMLA leave because it does not meet the requirements of the Act, the notice to the employee that the leave is not designated as FMLA leave may be in the form of a simple written statement. If the employer requires paid leave to be substituted for unpaid FMLA leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, the employer must inform the employee of this designation at the time of designating the FMLA leave. The designation notice must be in writing.

Failure of employer to provide notice designating FMLA leave. Under the new FMLA regulations, if an employer does not designate leave as required, the employer *may* retroactively designate leave as FMLA leave with appropriate notice to the employee, provided that the employer's failure to designate leave in a timely manner 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.

Penalties for failing to designate FMLA leave. If an employer fails to timely designate and causes the employee to suffer harm, DOL states that the employer may be liable for "interference with, restraint of, or denial of" the exercise of an employee's FMLA rights. An employer may be liable for compensation and benefits lost as a result of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or

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other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered.

EMPLOYEE'S NOTICE REQUIREMENTS

The FMLA regulations clarify the employee's responsibilities when requesting leave and providing medical and other certifications including fitness for duty certifications. Under the FMLA, an employee giving notice of the need for FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice. An employee does need to state a qualifying reason for the needed leave or otherwise satisfy the notice requirements.

Foreseeable Leave

An employee must provide the employer *at least 30 days' advance notice* before FMLA leave is to begin if the need for the leave is foreseeable. An employee need not specifically mention the FMLA, but he or she 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. Whether FMLA leave is to be continuous or is to be taken intermittently or on a reduced schedule basis, notice need only be given one time, but the employee must advise the employer as soon as practicable if dates of scheduled leave change, are extended, or were initially unknown.

Obligation to clarify. An employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employer inquiries regarding the leave request may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying. Under the new FMLA regulations, if an employee gives less than 30 days' notice for a foreseeable leave, the employee must respond to an employer inquiry as to why it was not practicable to give 30 days' notice.

Failure to provide notice of foreseeable leave. When the need for FMLA leave is foreseeable at least 30 days in advance and an employee fails to give timely advance notice with no reasonable excuse, the employer may delay FMLA coverage until 30 days after the date the employee provides notice. In order to delay, the need for leave and the approximate date leave would be taken must have been clearly foreseeable to the employee 30 days in advance of the leave. When the need for FMLA leave is foreseeable less than 30 days in advance and an employee fails to give notice as soon as practicable under the particular facts and circumstances, the extent to which an employer may delay FMLA coverage for leave depends on the facts of the particular case.

Previously certified leave. When an employee seeks leave due to an FMLA-qualifying reason for which the employer has previously provided FMLA-protected leave, the employee must specifically reference the qualifying reason for leave or the need for FMLA leave. When an employee has been previously certified for leave due to more than one FMLA-qualifying reason, the employer may need to inquire further to determine for which qualifying reason the leave is needed.

Qualifying exigency leave. For "qualifying exigency" leave, the 30-day advance notice is relaxed. The regulations provide that notice for qualifying exigency leave must be provided as soon as practicable, regardless of how far in advance such leave is foreseeable. For FMLA leave taken because of a qualifying exigency, the employee must provide sufficient information that indicates that a family member is on covered active duty or called to covered active duty status, that the requested leave is for one of the qualifying exigencies, and the anticipated duration of the absence.

Unforeseeable Leave

For unforeseeable leave with no unusual circumstances, employees must provide notice of leave according to an employer's usual and customary notice requirements for such leave. For example, an employer may require employees to call a designated number or a specific individual to request leave. However, if an employee requires emergency medical treatment, he or she would not be required to follow the call-in procedure until his or her condition is stabilized, and he or she has access to, and is able to use, a phone. Similarly, in the case of an emergency requiring leave because of an FMLA-qualifying reason (e.g., a family member's or an employee's own serious health condition, a qualifying exigency, or to care for a covered servicemember or veteran with a serious injury or illness), written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved.

As with foreseeable leave, 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 regarding

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the leave request may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying.

Failure to provide notice of unforeseeable leave. When the need for FMLA leave is unforeseeable and an employee fails to give notice in accordance with an employer's usual and customary notice requirements for such leave, the extent to which an employer may delay FMLA coverage for leave depends on the facts of the particular case. For example, if it would have been practicable for an employee to have given the employer notice of the need for leave very soon after the need arises consistent with the employer's policy, but instead the employee provided notice 2 days after the leave began, then the employer may delay FMLA coverage of the leave by 2 days.

MEDICAL CERTIFICATION

Under FMLA, employers are permitted to request medical certification of the need to take leave for the employee's own serious health condition or the serious health condition or serious illness or injury of a covered family member. Under the new FMLA regulations, an employer may utilize DOL certification forms designed for this purpose (WH-380E and WH-380F); or the employee may choose to comply with the certification requirement by providing the employer with an authorization, release, or waiver allowing the employer to communicate directly with the employee's or the family member's healthcare provider. The employee may not be required to provide such an authorization, release, or waiver.

Timing. In most cases, requests for medical certification of the need for FMLA leave should be made immediately after the employee gives notice of the need for leave or *within 5 business days thereafter*, or, in the case of unforeseen leave, within 5 business days after the leave commences. The employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration.

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 unless the employer allows more than 15 calendar days to return the requested certification.

Insufficient certification. FMLA's regulations require that an employer advise an employee whenever the employer finds a certification incomplete or insufficient, and the employer must state in writing what additional information is necessary to make the certification complete and sufficient. The employer must advise the employee *within 7 calendar days* (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to fix any deficiency.

If the deficiencies specified by the employer are not fixed in the resubmitted certification, the employer may deny the FMLA leave. It is the employee's responsibility to provide the employer with a complete and sufficient certification and to clarify the certification if necessary. If an employee chooses not to provide the employer with authorization allowing the employer to clarify the certification with the healthcare provider, and does not otherwise clarify the certification, the employer may deny the FMLA leave if the certification is unclear. See Authentication and Clarification of Medical Certification below for more details on what an employer can do to fix insufficient certification. A certification form that is not returned to the employer is not considered incomplete or insufficient, but constitutes a failure to provide certification.

Essential functions. The FMLA rules provide that an employer has the option to provide a statement of the essential functions of the employee's position for the healthcare provider to review. A sufficient medical certification must specify what functions of the employee's position the employee is unable to perform so that the employer can determine whether the employee is unable to perform one or more essential functions of the position (29 CFR 825.306).

ADA, workers' compensation, and FMLA. Employers may follow procedures for requesting medical information under the ADA, paid leave, or workers' compensation programs without violating the FMLA. Any information received under those laws or benefit programs may be used by employers in determining an employee's entitlement to FMLA-protected leave.

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

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An employee is also "needed to care for" a family member when the employee may be needed to substitute for others who normally care for the family member or covered servicemember or to make arrangements for changes in care, such as transfer to a nursing home. The employee need not be the only individual or family member available to care for the family member or covered servicemember.

Genetic Information and Medical Certification

The **Genetic Information Nondiscrimination Act (GINA)** prohibits employers from requesting genetic information or discriminating against an employee or applicant on the basis of genetic information. The law applies to all public employers, private employers with 15 or more employees, employment agencies, and labor organizations. Under the law, "genetic information" is defined to include information about an individual's genetic tests, genetic tests of family members, and a disease or disorder in the family.

An employer that receives genetic information in response to a request for medical information under the FMLA will be in violation of GINA unless the employer specifically directs the individual or healthcare provider *not to provide genetic information* (i.e., by providing the employee with a safe harbor statement accompanying the request for medical certification). The GINA regulations provide model safe harbor language for this affirmative warning. According to the regulations, if an employer provides the safe harbor notice with the request for medical certification, any receipt of genetic information in response to the request will be considered inadvertent (and will not violate GINA). Therefore, when requesting FMLA certification, it is highly recommended that an employer provide a statement including GINA's model safe harbor language.

Model safe harbor language. The following is the model safe harbor language provided in the regulations implementing GINA:

> "The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of employees or their family members. In order to comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. `Genetic information,' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services."

For more information on GINA, see the national ***DISABILITIES*** section.

Important note: GINA provides a specific exception for employers requesting medical certification for FMLA leave to care for a family member. As a result, when requesting medical certification for FMLA leave to care for a family member, employers should include the following statement at the end of the model safe harbor language:
"Please note that information about the health condition of your patient may be provided as needed to complete the certification request."

Authentication and Clarification of Medical Certification

Employers are entitled to authenticate or clarify information received on a medical certification form. It is important to note that the definitions of what constitutes permissible authentication and clarification are very limited. See definitions below for details.

An employer may contact the healthcare provider for purposes of clarification and authentication of the medical certification (whether an initial certification or a recertification) after the employer has given the employee an opportunity to fix any deficiencies. To make such contact with the employee's healthcare provider, the employer may only use a healthcare 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 healthcare provider.

"Authentication" defined. "Authentication" means providing the healthcare provider with a copy of the medical certification and requesting verification that the information contained on the certification form was completed and/or authorized by the healthcare provider who signed the document. No additional medical information may be requested. No consent is required for authentication.

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"Clarification" defined. "Clarification" means contacting the employee's healthcare provider in order to understand the handwriting or to understand the meaning of the responses contained within the certification. Employers may not ask healthcare providers for additional information beyond that required by the certification form. The employee's healthcare provider may require the employee's consent for such clarification, and the employee must provide such consent or FMLA leave may be denied.

HIPAA and the medical certification requirement. The requirements of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule must be satisfied when individually identifiable health information of an employee is shared with an employer by a HIPAA-covered healthcare provider. Under HIPAA, the employee must furnish written consent, including the name of the healthcare provider, a description of health information to be disclosed, the name of the person information is to be disclosed to, a description of the purpose of the requested disclosure, an expiration date or event for the authorization, and a signature of the individual making the authorization (45 CFR 164.508(c)(1)). Statements regarding the revocation of certification must also be included.

With a release and authorization from the employee, the employer can contact a healthcare provider and request *additional* information above and beyond that which is already on the medical certification form and which can be obtained through authentication and clarification. See the national ***HEALTH INFORMATION PRIVACY*** section for more details.

Servicemember caregiver leave. An employer may seek authentication and clarification of the ITO or ITA just as it would a medical certification.

Second Opinions

Whenever the employer has reason to doubt the validity of the original certification, the employer is allowed to require a second opinion—paid for by the employer—from a healthcare provider chosen by the employer. This healthcare provider may not be someone who is employed on a regular basis by the employer.

Third Opinions

Employers may require the employee to obtain a third opinion—at the expense of the employer—when the second opinion differs from the first. The healthcare provider for the third opinion should be approved by both the employer and the employee. This third opinion is considered to be final and binding on both the employer and employee.

Note: Second and third opinion are not permitted for recertification.

Second and third opinion reports. The employer is required to provide the employee with a copy of the second and third medical opinions, where applicable, upon request by the employee. Requested copies are to be provided *within 5 business days* unless extenuating circumstances prevent such action.

Servicemember caregiver leave. An employer may not require or request a second or third opinion or recertification during the period of time in which leave is supported by an ITO or ITA.

Medical Recertification

An employer may request recertification of an employee's serious health condition no more often than every 30 days, unless one of the following specific exceptions discussed below applies:

- The employee requests an extension of leave;
- Circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of the absence, the nature or severity of the illness, complications); *or*
- The employer receives information that casts doubt on the employee's stated reason for the absence or the continuing validity of the certification.

If the medical condition is a chronic or long-term condition certified to last more than 30 days, an employer must wait for the minimum duration of the condition (appearing in the certification) to expire before requesting a recertification, unless one of the specific exceptions discussed above applies.

The employee must provide the requested recertification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good-faith efforts. Second and third opinions on medical recertifications are not permitted. Recertifications are not permitted for a qualifying exigency or for servicemember caregiver leave.

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Employee Status and Intent

An employer may periodically request reports on the employee's status and intent to return to work. An employer, however, may not refuse to reinstate an employee able to return within the 12-week leave period because he or she failed periodically to report on his or her status and intent to return.

EMPLOYMENT AND BENEFITS PROTECTION

FMLA provides specific protections for covered employees on leave. Those protections include:

Return to Same or Equivalent Position

With some exceptions, the law requires that employers provide each returning employee with the same position or an equivalent position. An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits, and working conditions including privileges, perquisites, and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

The employee must be reinstated to the same or a geographically proximate worksite (i.e., one that does not involve a significant increase in commuting time or distance) from where the employee had previously been employed. The returning employee must have the same or an equivalent opportunity for bonuses, profit-sharing, and other similar discretionary and nondiscretionary payments.

FMLA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, or position that better suits the employee's personal needs on return from leave, or to offer a promotion to a better position. However, FMLA prohibits employers from inducing an employee to accept a different position against the employee's wishes.

Equivalent pay. An employee is entitled to any unconditional pay increases that may have occurred during the FMLA leave period, such as cost of living increases. Pay increases conditioned upon seniority, length of service, or work performed must be granted in accordance with the employer's policy or practice with respect to other employees on an equivalent leave status for a reason that does not qualify as FMLA leave. An employee is entitled to be restored to a position with the same or equivalent pay premiums, such as a shift differential.

Bonuses. "Equivalent pay" includes any bonus or payment conditioned upon seniority, length of service, or work performed and must be granted in accordance with the employer's policy or practice with respect to other employees on an equivalent leave status for a reason that does not qualify as FMLA leave.

However, if a bonus or other payment is based on the achievement of a specified goal (e.g., hours worked, products sold, or perfect attendance), and the employee has not met the goal due to FMLA leave, the payment may be denied unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave. For example, if an employee who used paid vacation leave for a non-FMLA purpose would receive the payment, the employee who used paid vacation leave for an FMLA-protected purpose also must receive the payment.

Benefits. The employee's right to "equivalent" benefits upon return from FMLA leave includes all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer through an employee benefit plan. At the end of an employee's FMLA leave, benefits must be resumed in the same manner and at the same levels as provided when the leave began, plus any changes in benefit levels that may have taken place during the period of FMLA leave affecting the entire workforce, unless otherwise elected by the employee.

An employee cannot be required to requalify for any benefits the employee enjoyed before FMLA leave began (including family or dependent coverages). Accordingly, some employers may find it necessary to modify life insurance and other benefits programs in order to restore employees to equivalent benefits upon return from FMLA leave, make arrangements for continued payment of costs to maintain such benefits during unpaid FMLA leave, or pay these costs subject to recovery from the employee on return from leave.

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

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Pension and retirement plans. With respect to pension and other retirement plans, any period of unpaid FMLA leave may not be treated as a break in service for purposes of vesting and eligibility to participate. If the plan requires an employee to be employed on a specific date in order to be credited with a year of service for vesting, contributions, or participation purposes, an employee on unpaid FMLA leave on that date will be deemed to have been employed on that date. However, unpaid FMLA leave periods need *not* be treated as credited service for purposes of benefit accrual, vesting, and eligibility to participate.

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

Health Insurance Protection

Employers are required to maintain coverage for employees during leave under a group health plan at the same level and conditions of coverage that would have been provided had the employees not taken leave. During the leave period, the employer and employee continue to pay their usual respective portions of the premium.

Note: Employers may require employees to repay the employer's share of the premium if the employee does not return from a leave for reasons other than a continuation, recurrence, or onset of a serious health condition or other circumstances beyond the employee's control.

LIMITS ON THE RIGHT TO REINSTATEMENT

Although an employee returning from FMLA leave is usually entitled to reinstatement to his or her same position or an equivalent position, there are exceptions. Those exceptions are:

No greater right to reinstatement. An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. To satisfy this exception, an employer must be able to show that an employee would not otherwise have been employed at the time of reinstatement.

For example, if an employee is laid off during the course of taking FMLA leave and employment is terminated, the employer's responsibility to continue FMLA leave, maintain group health plan benefits, and restore the employee ends at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise. An employer has the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration. Restoration to a job slated for layoff when the employee's original position is not would not meet the requirements of an equivalent position.

Key employees. An employer may deny job restoration to certain "key employees" when to do so would cause substantial and grievous economic injury to the employer's operations. A "key employee" is a salaried FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed by the employer within 75 miles of the employee's worksite. Employers must give required notice to key employees of their status. This does not mean that an employer may deny leave to key employees. There is a fine distinction between a leave without a rehire guarantee and denial of the leave, but there is a distinction—by taking the leave, the highly paid employee may continue healthcare coverage.

Failure to provide fitness-for-duty certification. An employer may delay restoration to an employee who fails to provide a fitness-for-duty certificate to return to work, as long as the employer gave adequate notice that a fitness-for-duty certificate would be required. Please note that GINA's limitations on obtaining genetic information also apply to fitness-for-duty certifications. See the discussion under **Genetic Information and Medical Certification,** above, for details.

Unable to perform job. If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition or an injury or illness also covered by workers' compensation, the employee has no right to restoration to another position under the FMLA. The employer's obligations may, however, be governed by the ADA, state leave laws, or workers' compensation laws.

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

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

RECORDKEEPING REQUIREMENTS

An employer is required to keep certain records under the FMLA. Many of these records already are maintained by employers pursuant to the FLSA (Section 11(c)), as well as by DOL regulations under that statute. Specifically, the FMLA requires that employers maintain the following records for a 3-year period:

- Basic payroll information and identifying employee data, including compensation paid the employee and the manner in which it was determined, including all additions and reductions in pay (even employers with no FMLA-covered employees must keep these records).
- A record of dates FMLA leave is taken by FMLA-eligible employees (e.g., available from time records, requests for leave, etc., if so designated). Leave must be designated in records as FMLA leave. However, leave so designated may not include leave required under state law or an employer plan that is not also covered by the FMLA.
- The hours of the leave, if FMLA leave is taken by eligible employees in increments of less than one full day.
- Copies of all notices given by the employer to employees, as well as any received by the employer requesting FMLA leave. Copies may be maintained in employee personnel files.
- Information stored in any form (paper or electronic) that explains employer policies and employee benefits and the payment for benefits.
- Records of any dispute between the employer and an eligible employee regarding the designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation or for the disagreement.
- Records similar to those required by the FLSA for nonexempt employees are not required for exempt employees or for employers not covered by the FLSA as long as (1) exempt employees who have been employed for at least 12 months are presumed eligible for leave *and* (2) a written record details agreements between employer and employees for the work schedules for reduced and intermittent leaves.
- Records clearly showing that exempt employees worked fewer than 1,250 hours in the 12-month period, if leave is denied.
- FMLA-related medical records and documents, created for the purposes of the FMLA, relating to medical certifications, recertifications, or medical histories of employees or employees' family members.

Neither the FMLA nor its regulations require any specific manner in which records must be maintained to comply with the recordkeeping requirements of the FMLA. DOL may inspect these records no more than once every 12 months, unless it is investigating a complaint or has reasonable cause to believe there is a violation.

SPECIAL CONSIDERATIONS FOR EDUCATION EMPLOYERS

Public and private elementary and secondary schools are covered by the FMLA regardless of size. For eligibility purposes, full-time teachers of an elementary or secondary school system, institute of higher education, or other educational establishment are deemed to meet the 1,250-hour test. If an employer wants to challenge the presumption, it must be able to clearly demonstrate that such an employee did not work 1,250 hours during the previous 12 months. The FMLA imposes special conditions for taking intermittent leave by instructional employees of such schools. These employees may be required to take leave in a block of time, rather than taking intermittent leave, if they will be absent more than 20 percent of the time. There are also special considerations for taking leave near the end of a school term. These requirements are intended to minimize disruptions in the classroom.

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OTHER LAWS AND REGULATIONS RELATED TO LEAVES OF ABSENCE

State Leave of Absence Laws

Many states have laws regarding family and medical leave. Employers must be careful to coordinate their federal and state leave law compliance programs to ensure full compliance with both. For further information, see the state ***LEAVE OF ABSENCE*** section.

Title VII of the Civil Rights Act of 1964

This law provides that pregnancy and related conditions are to be treated the same as other temporary disabilities for all employment purposes, including leaves of absence. (In other words, if a man who had a heart attack is granted leave, a pregnant woman must be granted leave.) Furthermore, a leave policy that is more liberal toward pregnant employees than other employees may be considered lawful, despite the fact that it may seem to discriminate against workers who request leaves of absence for reasons not related to pregnancy. For additional information, see the national ***MATERNITY AND PREGNANCY*** section.

Uniformed Services Employment and Reemployment Rights Act (USERRA)

Time away from employment spent on active military duty counts toward an employee's 12-month, 1,250 hours of work eligibility requirements under FMLA. USERRA entitles employees who also are members of the U.S. reserves or the National Guard to absent themselves from employment to perform military service. USERRA protects the employment benefits and reemployment rights of these employees. A reservist or guard member who is taking military leave under USERRA might have actually neither worked for his or her employer for a total of 12 months nor have met the 1,250-hour requirement when he or she left for military duty. However, according to DOL, employers must still count the months and hours that U.S. reservists or National Guard members would have worked if they had not been called to military duty toward the 12-month and 1,250-hour requirement for FMLA eligibility. For more information, see the national ***MILITARY SERVICE*** section.

Consolidated Omnibus Budget Reconciliation Act (COBRA)

COBRA is a federal law mandating continuation of medical benefits for departing employees under certain circumstances. Pursuant to DOL regulations, taking an FMLA leave is not an event that triggers COBRA coverage. However, in cases in which an employee who is covered under the employer's medical plan does not return to work at the end of an FMLA leave, COBRA's notice requirements are triggered. For details, see the national ***HEALTHCARE INSURANCE*** section.

Employee Retirement Income Security Act (ERISA)

The FMLA requires that all employee benefits as defined by ERISA, such as group life, health, or disability insurance, including benefits provided pursuant to an employee benefits plan, be resumed when an employee returns from an FMLA leave, without any qualifying period. This requirement may make it necessary for employers to review their employment benefits plans to ensure that an employee returning from leave will be able to be fully reinstated to all benefits. For example, it may be necessary for the employer to continue life insurance for an employee on FMLA leave to avoid the employee's having to pass a new physical for the life insurance carrier. In addition, any period of FMLA leave must be treated as continued service for purposes of vesting and eligibility to participate in pension and other retirement plans.

FLSA

The FMLA and the FLSA interact in two important ways. First, the FMLA provides a special FLSA exemption for salaried, exempt employees. Second, the FMLA requires that FMLA-covered entities maintain records in accordance with the FLSA.

Exemption for salaried employees. The FLSA exempts broad categories of "white-collar" jobs from minimum wage and overtime requirements if they meet certain tests regarding job duties and responsibilities and are paid a certain minimum salary. These categories include executives, administrative employees, professional employees, and outside sales personnel. The courts of appeals are split on whether the FLSA prohibits employers from "docking" an exempt employee's pay for time not worked in a day without jeopardizing the employee's exempt status. Under the FMLA, an employer may deduct hourly amounts from an employee's salary when providing FMLA leave without affecting the employee's exempt

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status under the FLSA. Thus, an employer may "dock" the pay of otherwise salaried employees for family and medical leave-related absences of less than 1 full day without affecting their exempt status.

This special exemption to the FLSA applies only to eligible employees (12 months' service, 1,250 hours, and 50 employees in a 75-mile radius) of FMLA-covered entities (50 or more employees) and to leaves that qualify as one of the four types of FMLA leave. Hourly or other deductions may not be taken for exempt employees who work for an entity that is not covered by the FMLA or who are on a leave not covered by the FMLA (personal or education leaves, for example). In cases in which an employer is not covered by the FMLA or an employee is taking a leave not covered by the FMLA, an employer should not make hourly deductions for exempt employees; if such deductions are made, the employer may be deemed a nonexempt employee. In that case, the employer may be liable for overtime pay for that employee and possibly for other employees. An employer should periodically review the duties of exempt employees to ensure that they still qualify for exempt status, especially if the company has undergone restructuring or downsizing.

Recordkeeping requirements. The burden of proof is on the employer to prove an employee is ineligible for leave because he or she has not worked the requisite 1,250 hours. In determining an employee's eligibility for leave under the FMLA, the appropriate measure of "hours of service" is the standard used by the FLSA that considers only actual hours worked by the employee. Absent time records, the employer may have a difficult time establishing its case. To this end, the FMLA requires employers to make, keep, and preserve records related to their obligations under FMLA, according to the recordkeeping requirements of FLSA. For more on FLSA recordkeeping requirements that apply to FMLA situations, see **EMPLOYER'S NOTICE REQUIREMENTS** and **RECORDKEEPING REQUIREMENTS** in this section.

Health Insurance Portability and Accountability Act (HIPAA)

The HIPAA Privacy Rules create national standards to protect individuals' medical records and other personal health information. While the Privacy Rules do not regulate employers as such, it does regulate them in their role as sponsors of group health plans, as health insurers or HMOs, and as healthcare providers. For additional information, see the national ***HEALTH INFORMATION PRIVACY*** section.

Workers' Compensation Laws (WC Laws)

Under the laws of many states, employees absent from work for compensable injuries are regarded as being on a leave of absence until final determination of their situation is made, at which time they either return or are separated if unable to continue work. See the state ***WORKERS' COMPENSATION*** section for more information. Also, see the following discussion on the complicated interactions of the ADA, the FMLA, and workers' compensation (WC).

ADA

The granting of leave time may be a reasonable accommodation under the ADA. When a disability also qualifies as a serious health condition under the FMLA, a question arises about the extent of the employer's duty to provide leave time. An employee would be entitled to only 12 weeks of leave under the FMLA. However, if the disability/health condition continues after 12 weeks, the employer may have an obligation to give more time off as a reasonable accommodation if the employee's condition constitutes a disability under the ADA. See the national ***DISABILITIES*** section for more information. Also, see the following discussion on the complicated interactions of the ADA, the FMLA, and WC.

HOW ADA, FMLA, AND WC LAWS INTERACT

Who Is Covered?

ADA. Private employers of 15 or more people who worked in 20 or more weeks of the current or preceding calendar year.

FMLA. Private employers of 50 or more within a 75-mile radius and at work for 20 or more weeks in the year; virtually all public employees; covered employees must have logged 12 months' and 1,250 hours' service.

WC. Varies by state; in most, all employees have medical coverage from day 1 but a 3-day to 2-week wait for wage replacement, usually retroactive.

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Querying Job Applicants

Before an offer:

ADA. Can ask about person's ability to perform specific job function, but not if he or she has a disability; accommodation can be discussed if disability is obvious or applicant discloses it.

FMLA. Inadvisable to ask about past use of leave.

WC. No bars under state law, but inquiries prohibited under ADA.

After an offer:

ADA. May ask for medical documentation of need for accommodation; may require medical exam if required of all applicants for same job.

FMLA. N/A.

WC. No bars under state law, but cannot exceed ADA limits.

Medical Documentation

ADA. Can be required to explain/support any request for accommodation.

FMLA. Employer can require certification of illness/injury, expected duration, proposed treatment; second and third opinions can be requested, at employer's expense (for non-servicemember caregiver leaves).

WC. Healthcare provider must keep employer informed; second opinion can be requested, at employer's expense.

Qualifying Events

ADA. Employee has record of, or is regarded as having, impairment that substantially limits major life activity.

FMLA. Employee's or his or her parent's, child's, or spouse's serious illness/injury; injury or illness sustained during covered active military duty; birth, adoption, foster care placement of child; or a qualifying exigency arising from an employee's parent's, child's, or spouse's covered active duty, or call to covered active duty.

WC. Illness or injury "arising out of" and "in the course of" employment.

Disqualifying Events

ADA. Employee's refusal of a reasonable accommodation; failure to provide medical certification for requested accommodation; in some circuits, getting Social Security total disability benefits bars accommodation.

FMLA. Employee's failure to comply with the employer's usual and customary procedures for leave notice, failure to provide medical certification of illness/injury.

WC. Illness or injury not work-related, e.g., "going and coming"; caused by drug or alcohol abuse or employee's misconduct or attempt to harm another; deliberately caused by employer; refusal of medical exam or of work after physician's release.

Notification from Employees

ADA. Unless disability is obvious, applicants/employees must disclose it and discuss accommodation.

FMLA. Employees who foresee need for leave must give reasonable notice (30 days), or use employer's usual and customary procedures for unforeseeable leave notice. Medical certification may be required.

WC. Injured/ill employees must give notice promptly; state laws vary, but generally must file claims within 2 to 5 years of onset, longer for some hard-to-detect conditions.

Exceptions for Employers

ADA. Need not give accommodation that is too expensive, displaces another employee, violates union contract; need not accommodate worker whose impairment poses direct threat/significant risk to self or others.

FMLA. Certain key employees at top 10 percent of salaried compensation cannot demand equivalent positions on return from leave. Certain exceptions to reinstatement rule.

WC. Those listed under **Disqualifying Events** and those in certain occupations are generally excepted.

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Leave Requirements

ADA. Absence lengths will be negotiated, depending on case-by-case circumstances; intermittent leave can be a reasonable accommodation.

FMLA. Up to 12 weeks' job-protected leave, normally without pay; paid leave may be substituted. Up to 26 weeks of job-protected unpaid leave in a single 12-month period to care for spouse, child, parent, or next of kin with a serious injury or illness sustained in active duty in the armed forces, or existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty, or that manifested itself before or after the member became a veteran.

WC. Healthcare provider determines length of leave and whether employee returns to light or regular duty.

Benefit Issues

ADA. If unpaid leave is given, employer cannot modify/restrict worker's pre-leave benefits.

FMLA. Medical coverage must be maintained during leave; right to certain benefits at reinstatement.

WC. Employers must cover expenses for work-related injury/illness, but state laws generally cannot require them to maintain regular healthcare coverage.

ADDITIONAL INFORMATION

DOL's Wage and Hour Division administers the FMLA. Call 866-487-9243 for basic information and/or information on how to reach your area's regional office. You may also want to visit DOL's website at http://www.dol.gov for information on the FMLA, the FLSA, and other federal labor laws administered by DOL. For information on the ADA, visit the Equal Employment Opportunity Commission (EEOC) website at http://www.eeoc.gov, or call them at 800-669-4000. For information on HIPAA, visit the Health and Human Services Department website at http://www.hhs.gov, or call them at 877-696-6775.

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