FMLA

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THE FAMILY AND MEDICAL LEAVE ACT

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This booklet should not be construed as legal advice or legal opinion on any specific facts or circumstances. You are urged to consult your lawyer concerning your particular situation and any specific legal questions you may have. Employers are specifically encouraged to consult an attorney to determine whether they are subject to other unique state requirements that extend beyond the scope of this booklet.

The Family and Medical Leave Act (FMLA) became law in 1993, and underwent significant changes in 2008 and 2009. According to its Congressional sponsors, the purpose of FMLA was to promote development of the family unit and to enhance worker productivity. The Act was also intended to address the potential for sexual discrimination against women, who have traditionally been the primary caretakers in our society.

The Act's protections were extended to employees whose family members were either in the military or retired military and needed care from those family members or whose service created a qualifying exigency as addressed below. But in the process of addressing these laudable goals, Congress has created one of the most complex statutes of all those that mandate employment related benefits. It imposes significant restrictions on a company's treatment of employees who request, take and return from leave and requires strict notice obligations.

OVERVIEW OF THE ACT

FMLA applies to private employers having 50 or more employees for a 20-week period during the current or preceding calendar year, as well as to all governmental employers, local educational agencies, and schools, both public and private without regard to number of employees.

Covered employers must generally provide eligible employees up to 12 work weeks of unpaid leave and other FMLA entitlements. These include continuation of health insurance during leave on the same terms and conditions while not on leave, as well as restoration to the same or an equivalent position upon returning from leave.

An employer may not discriminate against any employee or interfere with, restrain, or deny the exercise or the attempt to exercise any right provided under the Act. An employer may not retaliate against any individual for opposing practices made illegal by the Act.

ARE YOUR EMPLOYEES ENTITLED TO FMLA BENEFITS?

The first step in evaluating your employees' rights and obligations under FMLA is to determine whether your company is covered by the Act. If covered, you must then determine whether the employee at issue is eligible for benefits under FMLA.

A. Is Your Business Covered?

You are a covered employer under FMLA if you:

- employ 50 or more employees
- each working day
- for 20 or more calendar workweeks (not necessarily consecutive)
- in the current or preceding calendar year.

The test of "employment" is relatively broad, and it includes:

- employees on the payroll even if no compensation is received;
- employees on leave if there is a reasonable expectation that they will return; and
- part-time employees.

The number of employees employed during a calendar workweek does not include those:

- who have been laid off (temporarily or permanently);
- who begin work after the first working day of a calendar week; or
- who terminate employment before the last working day of a calendar week.

The term "employer" includes any persons who act directly or indirectly in the interest of an employer. This means that individuals, such as corporate officers, may be liable for FMLA violations. An employer remains covered until it no longer employs at least 50 employees for 20 workweeks in the current and preceding calendar years.

B. Is The Employee Eligible?

Even if you meet the coverage test, not all of your employees are eligible. An "eligible employee" is one who has been employed:

- for at least 12 months (note: periods of employment within the prior seven years must be added together to determine whether this requirement is met; longer if the break in service was due to certain military service);
- for at least 1,250 hours during the previous 12-month period; and
- at a worksite where 50 or more employees are employed within 75 surface miles.

If an employee is maintained on your payroll for any part of a week, including periods of leave, that week counts as a week of employment. (Note that this is different from the test for coverage, where employees must be employed for a full week to be counted toward coverage). For purposes of determining whether intermittent employment qualifies as "at least 12 months," 52 weeks is deemed to be equal to 12 months.

The 12-month and 1,250-hour tests are determined as of the date leave is to commence, rather than the date leave is requested.

If you fail to maintain accurate records of hours worked, then you have the burden of showing that an employee has not worked the requisite number of hours.

The determination of whether 50 employees are employed within 75 surface miles of the worksite is made at the time of notice of leave. An employee's worksite will ordinarily be the site to which he or she reports, or from which the work is assigned. An employee's initial eligibility is not affected by any subsequent change in the number of employees employed.

CIRCUMSTANCES TRIGGERING THE LEAVE REQUIREMENT

Eligible employees may be entitled to FMLA leave for any of six general reasons:

- childbirth and subsequent care of the newborn;
- placement of a child for adoption or foster care;
- to care for the employee's spouse, child or parent who has a "serious health condition";
- the employee's own serious health condition that makes it impossible for the employee to perform the functions of the job;
- a "qualifying exigency" caused by a spouse, son, daughter, or parent's call to covered active military duty; or
- to care for a covered servicemember with a serious injury or illness who is the employee's spouse, child, parent, or next of kin.

With one exception, the maximum amount of leave that may be taken in a 12-month period for all reasons combined is 12 weeks. For leave to care for a covered servicemember, the maximum combined leave entitlement is 26 weeks, with leaves for all other reasons constituting no more than 12 of those 26 weeks.

A. Birth Of A Child

Both male and female employees are eligible for FMLA leave upon the birth of a child. Employees may not take leave for the birth of a child more than 12 months after the date of the birth. Leave to care for a newborn child may not be taken on an intermittent basis without the employer's consent.

B. Placement Of A Child For Adoption Or Foster Care

Male and female employees may take leave upon the adoption of or placement of a child in foster care as they would

for the birth of a child. If needed, the employee may take the leave before the adoption or the placement in foster care. Leave to care for an adopted child may not be taken on an intermittent basis without the employer's consent.

C. Care For An Employee's Spouse, Child, Or Parent With A Serious Health Condition

FMLA allows leave for the care of a spouse, child or parent with a "serious health condition" (defined below). A spouse is a husband or wife as recognized by state law.

A parent is either the biological, adoptive, step, or foster parent of the employee or an individual standing in loco parentis to the employee. To be considered standing in loco parentis, the individual must have or have had day-to-day responsibility to care for and financially support the child.

An individual is a qualifying child if the child is under the age of 18 and is a biological or adopted child, a step-child, foster child, a legal ward of an employee, or if the individual is a child of an employee standing in loco parentis. An employee may take leave to care for a child 18 and over if the child is unable to provide for his or her own daily self-care, or if the child is physically or mentally disabled.

To be entitled to take FMLA leave because of the serious health condition of a family member, the serious health condition must necessitate the need for the employee's presence to care for the condition, and must be supported by a health care provider's opinion if requested. This care may be either physical or psychological. Physical necessities may range from taking care of the family member's daily hygiene to transporting the family member to the doctor. Psychological care generally means that the presence of the employee would be beneficial to the psychological wellbeing of the family member. Therefore, an employee may in some cases be entitled to leave in order to provide moral support to a child, parent, or spouse with a serious health condition.

An employee is entitled to intermittent leave in situations where the care and the employee's presence is only needed sporadically (such as to accompany the patient to weekly doctor's appointments). The employer may require the employee to provide medical certification that the patient requires assistance for basic physical needs or that the presence of the employee would be psychologically beneficial.

D. The Employee's Own Serious Health Condition

FMLA provides an employee with leave for a serious health condition that makes the employee "unable to perform the functions of the position of such employee." An employee is unable to perform the functions of his position when he is either completely unable to work or simply unable to perform one or more essential functions of his job. This includes occasional absences required for treatment, examination, and monitoring.

E. Qualifying Exigency Leave

Eligible employees may take unpaid "Qualifying Exigency Leave" to tend to certain non-medical "exigencies" arising out of the fact that the employee's spouse, son, daughter, or parent is on covered active military duty or has been notified of an impending call to covered active duty status. The call to active duty must generally be a federal call to active duty; state calls to active duty are not covered unless under order of the President of the United States.

Persons who can be ordered to active duty include active and retired members of the Regular Armed Forces, certain members of the retired Reserve, and various other Reserve members including the Ready Reserve, the Selected Reserve, the Individual Ready Reserve, the National Guard, state military, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard, Air Force Reserve, and Coast Guard Reserve.

Qualifying Exigency Leave is available under the following circumstances:

- Short-notice deployment. To address issues arising out of a notice of an impending call or order to active duty of seven days or less.

- Military events and related activities. To attend any official military ceremony, program, or event related to active duty or a call to active duty status or to attend certain family support or assistance programs and informational briefings.

- Childcare and school activities. To arrange for alternative childcare; to provide childcare on an urgent, immediate need basis; to enroll in or transfer to a new school or daycare facility; or to attend meetings with staff at a school or daycare facility.

- Financial and legal arrangements. To make or update various financial or legal arrangements; or to act as the covered military member's representative before a federal, state, or local agency in connection with service benefits.

- Counseling. To attend non-medical counseling (by someone other than a health care provider) for the employee, the covered military member, or for a child or dependent when necessary as a result of active duty or call to active duty status.

- Temporary rest and recuperation. To spend up to five days with a covered military member who is on rest and recuperation leave.

- Post-deployment activities. To attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of up to 90 days following termination of the covered military member's active duty status. This also encompasses leave to address issues that arise from the death of a covered military member while on active duty status.

- Mutually-agreed leave. Other events that arise from the close family member's active duty or call to active duty status, provided that the employer and employee agree that the leave qualifies as an exigency and agree to both the timing and duration of such leave.

You may require an employee seeking Qualifying Exigency Leave to submit appropriate supporting documentation in the form of a copy of the covered military member's active duty orders or other military documentation indicating the appropriate military status and the dates of active duty status, along with a statement setting forth the nature and details of the specific exigency, the amount of leave needed and the employee's relationship to the military member. This documentation must be provided within 15 days of the employer's request, unless it is not practicable under the circumstances to do so.

F. Military Caregiver Leave

Military Caregiver Leave is designed to allow eligible employees to care for certain family members who have sustained serious injuries or illnesses in the line of duty while on active duty.

The family member must be a "covered servicemember," which means: 1) a current member or veteran of the Armed Forces, National Guard or Reserves, 2) who is undergoing medical treatment, recuperation, or therapy or, in the case of a veteran, who was a current member of the Armed Forces, National Guard or Reserves within five years prior to the treatment for which an eligible employee requests leave; is otherwise in outpatient status, or is otherwise on the temporary disability retired list, 3) for a serious injury or illness that may render a current member medically unfit to perform the duties of the member's office, grade, rank, or rating. Military Caregiver Leave is not available to care for servicemembers on the *permanent* disability retired list.

To be "eligible" for Military Caregiver Leave, the employee must be a spouse, son, daughter, parent, or next of kin of the covered servicemember. "Next of kin" means the nearest blood relative of the servicemember, other than the servicemember's spouse, parent, son, or daughter.

An eligible employee may take up to 26 workweeks of Military Caregiver Leave to care for a covered servicemember in a "single 12-month period." The "single 12-month period" begins on the first day leave is taken to care for a covered servicemember and ends 12 months later, regardless of the method otherwise used to determine leave availability for other FMLA-qualifying reasons. If an employee does not exhaust his or her 26 workweeks of Military Caregiver Leave during this "single 12-month period," the remainder is forfeited.

Military Caregiver Leave applies on a per-injury basis for each servicemember. Consequently, an eligible employee may take separate periods of caregiver leave for different servicemembers, or for subsequent injuries or illnesses of the same servicemember. In any case, no more than 26 workweeks of Military Caregiver Leave may be taken within any "single 12-month period."

An employee seeking Military Caregiver Leave may be required to provide appropriate certification from the covered servicemember and completed by an authorized health care provider within 15 days.

G. What Qualifies As A Serious Health Condition?

A "serious health condition" is an illness, injury, impairment or mental or physical condition that requires either 1) inpatient care in a hospital, hospice or other medical facility or, 2) continuing treatment by a health care provider.

1. **Inpatient Care**
   If an eligible employee or family member is hospitalized for an overnight stay for an injury or illness, the injury or illness constitutes a serious health condition, and absences related to that condition are generally protected.

2. **Continuing Treatment**
FMLA includes five categories of serious health conditions under the umbrella of "continuing treatment."

The five categories are:

- incapacity for more than three full consecutive calendar days, plus continuing treatment (two or more treatments by a health care provider within a 30-day period with one occurring in the first seven days of incapacity or one treatment by a health care provider resulting in a continuing regimen of care);
- any period of incapacity caused by a pregnancy or for prenatal care;
- any period of incapacity due to a chronic serious health condition;
- a long-term period of incapacity due to an untreatable condition, plus continuing supervision of a health care provider; and
- any period of absence to receive multiple treatments for either restorative surgery after an accident, or a condition that, if not treated, would likely result in an incapacity of more than three consecutive calendar days.

Substance abuse may be a serious health condition, but FMLA leave may only be taken for treatment of the condition, not for absences caused by the abuse. Employers are not prohibited from taking action against an employee who has violated its substance abuse policies simply because the employee is now seeking treatment.

EMPLOYEE NOTICE OBLIGATIONS

While some employees will formally request leave under FMLA, an employee may make a request for a FMLA-covered absence without invoking the law by name and without making a formal leave request. An employer's numerous FMLA obligations are triggered as soon as an employer acquires knowledge that an absence is potentially FMLA-qualifying. If an employee fails to provide sufficient information to make this determination, then you should inquire further to ascertain whether the leave may be FMLA-qualifying.

Absent unusual circumstances, an employee must follow an employer's ordinary notice procedures for leaves and absences when seeking FMLA leave, i.e., calling in an absence to a particular individual.

A. Foreseeable Leave

FMLA requires an employee desiring to take foreseeable leave on account of the birth or placement of a child, a planned medical treatment for a serious health condition of the employee or covered family member, or planned medical treatment for a covered servicemember with a serious injury or illness, to give the employer 30 days notice of the need for leave. When 30 days notice is not possible or practicable, such as when the need for medical treatment arises less than 30 days prior to the date of treatment, then the employee is required to provide notice as soon as possible and practicable.

If an employee fails in these obligations, the employer may delay the beginning of the employee's leave until 30 days after first notice was given. But if, after giving notice, circumstances change requiring the leave to begin earlier, i.e., a baby being born two months prematurely, you may not deny the leave. Where circumstances change, the employee should give notice as soon as possible and practicable under those circumstances.

Employees must make a reasonable effort to schedule treatment so as not to unduly disrupt the operations of the employer. Where notice for the need to take leave is given

but the employee neglects to schedule the leave so as not to disrupt business, you may require the employee to attempt to reschedule treatment, if possible and if consistent with appropriate health considerations.

B. Unforeseeable Leave

An employee must provide notice of unforeseeable leave as soon as practicable. As soon as practicable should ordinarily be consistent with the timing of requesting similar leave under the employer's existing leave policies. This information may be provided by an employee's spokesperson if the employee is unable to do so personally.

After an employer has designated leave for a particular condition to be FMLA qualifying, the employee must reference either the condition or FMLA when later seeking FMLA leave for the same condition. At that point, employees may not simply call in and state that they are "sick" to invoke the protections of the Act.

C. Consequences Of Failing To Provide Notice

If you have properly complied with the company's notice obligations, you may delay or deny leave when an employee fails to comply with the employee's notice obligations. Whether an employee has complied with the notice obligations is a fact-intensive inquiry depending on the particular circumstances of each case. Delaying or denying leave on this basis should be done only after careful consideration.

PROCESSING A REQUEST FOR LEAVE

Once an employee requests leave potentially covered by FMLA, the law requires employers to provide specific notices and to formally determine whether the leave is covered by FMLA.

A. Eligibility Notice

When employees give notice of the need for FMLA leave, or you learn that employees need leave for a FMLA-qualifying reason, you must notify the employees of their general eli-

gibility under FMLA leave within five business days. This "eligibility" notice refers to whether the employee meets the definition of eligible employee (i.e., 12 months of employment and 1,250 hours of service in the past year at a facility with 50 or more employees within 75 miles), not whether the particular need for leave is covered. If the employee is not eligible, the employer must provide at least one reason why (e.g., less than 1,250 hours worked in the past year). An Eligibility Notice need be given only once in a twelve-month period as long as the employee's status has not changed.

B. Rights And Responsibilities Notice

At the same time an employer provides an Eligibility Notice, it must also provide an employee a "Rights and Responsibilities" notice. This notice must inform the employee:

- that the leave may count against the 12-week leave entitlement;
- of the applicable 12-month period over which the leave is to be taken;
- of any requirement that the employee provide certification of the need for leave;
- that the employee may have the right to substitute paid leave for unpaid leave and the conditions under which it is provided, or that the employer will require the employee to substitute paid leave;
- of the employee's right to maintenance of benefits during leave and restoration upon return from leave;
- that the employee may be required to pay health premiums and other benefit premiums, the arrangements for such payments, and the consequences of failing to make the payments;
- of the employee's potential liability for repayment of any premiums paid by his employer during an unpaid leave if he fails to return to work; and,

- of the employee's status as a "key employee" and the conditions under which restoration may be denied such an employee.

The Rights and Responsibilities notice may include other information and may be accompanied by certification forms, the completion of which are necessary to make the determination as to whether the requested leave qualifies under FMLA.

C. Designation Notice

Once you have received all the information you need to determine whether the employee's leave qualifies for FMLA protection (typically a completed certification form), you have five business days to provide the employee with a "Designation" notice. In this notice, the employer must advise the employee:

- whether the leave is to be designated as FMLA leave and counted against the annual 12-week entitlement;
- of any requirement for the substitution of paid leave;
- of any requirement that the employee must submit a fitness-for-duty certification when returning to work; and,
- of the amount of leave that will be counted against the employee's 12-week entitlement. If the amount of leave an employee will use cannot be determined at the time of the Designation notice, then the employer must notify the employee of how much leave has been used once every 30 days upon the employee's request.

Violations of these notice provisions could be considered an interference with the employee's use of FMLA leave. Nevertheless, effective January 16, 2009, errors in notices may be corrected after the fact without monetary penalties so long as the mistakes caused the employee no economic loss.

D. Certifying The Reason For Leave As FMLA Qualifying

1. General Requirements

An employer is not entitled to require any form of certification with respect to leave taken for the birth or placement of a child, but may require certification for leaves taken for the employee's own serious health condition or for the serious health condition of a child, parent, or spouse, a serious illness or injury of a covered servicemember, or for a qualifying exigency.

The initial request for certification must be written. All subsequent requests for certification may be verbal. The request for certification should be made within five business days of the notice of the leave request or within five business days of the beginning of leave in the case of an unforeseeable leave (i.e., at the same time as the Eligibility Notice). At the time of the request, the employer must also advise the employee of the anticipated consequences of an employee's failure to provide adequate certification.

The employee must return the completed certification form to the employer within 15 days of the request unless it is not practicable to do so. If the employee returns an insufficient certification, i.e., one missing information or containing vague or ambiguous information, the employer must notify the employee in writing that the certification is insufficient and identify the deficiencies. The employee has seven calendar days to return the corrected certification. The employee's failure to provide the requested certification or a corrected certification in a timely manner allows the employer to deny FMLA leave.

2. Certification Of A Serious Health Condition Of An Employee Or Family Member

A certification for leave due to the employee's or a family member's serious health condition may request the following information:

- the approximate date the condition developed and likely duration;

- the medical facts that establish the condition as a serious health condition;

- when leave is for the employee's own serious health condition, sufficient information to establish the employee is unable to perform the essential functions of his job, any other limitations, and the likely duration of such inability;

- when leave is for the serious health condition of a family member, sufficient information to establish that the family member is in need of care and an estimate of the frequency and duration of the leave required to provide the care;

- for intermittent leave for a planned medical treatment of the employee or family member, sufficient information to establish the medical necessity for such intermittent leave and estimate of dates and duration for such treatments and any period of recovery;

- for unforeseeable intermittent leave for the employee's own serious health condition, information sufficient to establish the medical necessity for the intermittent leave and an estimate of the frequency and duration of the episodes of incapacity;

- for reduced schedule leave to care for the employee's own serious health condition, information sufficient to establish the medical necessity of the reduced schedule;

- for unforeseeable intermittent leave or reduced schedule leave to care for a family member, a statement that such leave is medically necessary and an estimate of the anticipated frequency and duration of the required leave.

It is the employee's responsibility to provide a complete, understandable certification. If the certification is complete, but remains unclear or ambiguous after providing

the employee with the seven-day cure period, certain personnel of the employer may contact the employee's health care provider to obtain clarification (but not additional information).

If the employer doubts the validity of the initial certification, it may, at its own expense, require a second certification by a health care provider, which it designates or approves. The health care provider cannot be regularly employed by the employer.

If the first and second opinions conflict, the employer may, at its own expense, require a third certification, supplied by a health care provider designated or approved jointly by the employer and the employee. The third opinion is final and binds both the employer and the employee.

You may generally request recertification of a serious health condition no more often than every 30 days since the last certification. But you may not request recertification until the duration of the condition noted in the initial certification has been reached if that period is less than six months. An employer may always request recertification on a six-month basis. You may also request recertification in less then 30 days if the circumstances surrounding the leave have changed or there is reason to cast doubt on the continuing validity of the initial certification.

An employee has 15 days to return the requested recertification. The recertification can seek the same information as the initial certification. The employer may also submit to the health care provider the pattern of the employee's absences and ask if that pattern is consistent with the employee's condition.

3. Certification Of Leave Taken For A Qualifying Exigency

In order to assess a request for qualifying exigency leave, the employer may request:

- a copy of the covered military member's active duty/call to active duty papers;

- any other documentation issued by the military that indicates the covered military member is on active duty or on call to active duty status; and
- the dates of the military member's active duty service.

In addition to the military documents, the employer may require the employee provide a statement including:

- the nature and details of the specific exigency;
- the employee's relationship to the military member;
- the date on which the exigency commenced or will commence;
- if leave is needed for a single block of time, the beginning and ending dates of the leave;
- if leave is to be taken intermittently, an estimate of the frequency and duration of the episodes of leave; and
- if leave is taken to attend a meeting with a third party, contact information for the third party and a brief description of the purpose of the meeting.

This information can be requested only once in conjunction with each call to active duty. The employee is required to provide the information to the employer within 15 days of the request.

4. Certification Of Military Caregiver Leave

When leave is taken to care for a covered servicemember with a serious illness or injury, you may request a certification from the employee seeking leave. This certification, unlike the serious health condition certification, requires responses that ordinarily can only be made by Department of Defense and Veterans Administration health care providers. If it is being filled out by a non-DOD/VA provider, that person may obtain information related to the military portions of the form from an authorized DOD representative.

The certification may seek the following information:

- whether the health care provider is a DOD, VA, authorized DOD TRICARE network, or authorized DOD

TRICARE non-network provider;

- a statement of the medical facts sufficient to support the request for leave including whether the illness or injury has rendered the servicemember unfit to perform the duties of his office, grade, rank;
- whether the servicemember is receiving medical treatment, recuperation, or therapy;
- information sufficient to establish that the servicemember is in need of care;
- whether the care will be needed for a single continuous period of time or on an intermittent basis;
- for planned intermittent leave for treatment, information showing the medical necessity of the treatment and the approximate dates and duration; and
- for unplanned intermittent leave, information showing the medical necessity for the individual to receive periodic care and an estimate of the frequency and duration of the care.

The certification form may also seek the following information:

- the relationship of the employee to the covered servicemember;
- the covered servicemember's current enlistment in the Armed Forces, or National Guard including his branch, rank, and current unit assignment;
- whether the covered servicemember is assigned to a military medical facility;
- whether the covered servicemember is on the military temporarily disabled list; and
- a description of the care to be provided and an estimate of the duration of the leave.

You may seek certification of the need for leave to care for a covered servicemember only once. You may not seek recertification or second or third opinions, but you may

seek clarification of a certification in the same manner as for serious health conditions.

5. Failure To Provide Proper Certification

For foreseeable leave, if the employee does not timely provide medical certification, the employer may delay the leave until the required certification is provided. If the leave is not foreseeable and the employee does not provide requested certification in a reasonable time under the circumstances, usually within 15 days after the request, you may delay continuation of the leave. If the employee does not produce the certification, the leave is not protected by FMLA. When, due to a change in circumstances, an employee learns that more or less leave than originally requested is necessary, the employee must inform the employer.

6. Return-To-Work And Fitness-For-Duty Certifications

You may require employees to indicate whether they intend to return to work. This request can be made periodically. The request must be nondiscriminatory (i.e., must be made to all employees on similar leaves, not just those on FMLA-covered leaves). When employees provide unequivocal notice that they do not intend to return to work, you are no longer obligated to maintain health benefits or to restore the employee at the end of leave. But an employee's expression of doubt about his or her ability to return to work is not a statement of an intent not to return.

If you wish to obtain a fitness-for-duty certification when an employee returns from FMLA leave, you must notify the employee that the certification will be required when you provide the Designation Notice. If you want the fitness-for-duty certification to address the employee's ability to perform the essential functions of his job, then you must include a list of those essential functions with the Designation Notice.

This condition to restoration must be imposed pursuant to an employer's uniformly-applied policy or practice that requires submission of fitness-for-duty reports from all

employees returning to work after suffering similar serious health conditions. The fitness-for-duty report can only be requested when it is job-related (i.e. the condition affects the employee's ability to do his job). It may only relate to the condition for which FMLA leave was taken. The cost of the certification is to be borne by the employee.

You may not require certification of fitness to return each time an employee takes intermittent or reduced schedule leave, but may request a fitness-for-duty certification for intermittent and reduced schedule leave every 30 days if a reasonable safety concern exists about the employee's ability to perform his duties based on the condition for which leave was taken.

An employer may not require a second or third opinion on a fitness-for-duty certification, but may seek clarification of any ambiguity in the report. You may delay reinstatement until certification is provided, and may deny reinstatement if the employee wholly fails to provide the fitness-for-duty certification.

E. Substituting Accrued Paid Leave

Although the leave mandated by FMLA is unpaid (absent Congressional action to the contrary), an employee may choose, or an employer may require, that the employee use accrued paid leave concurrently with FMLA leave. Doing so does not extend the amount of FMLA leave.

When an employer or employee substitutes paid leave for unpaid FMLA leave, the employee can be required to satisfy the terms of the employer's leave policy in order to be paid for the leave. You must notify the employees if they will be required to comply with any such requirements. If employees fail to do so, but do comply with FMLA's requirements, they can be denied pay, but not FMLA leave. Where paid leave is not substituted for unpaid leave, employees remain fully entitled to the paid leave in addition to the full 12 weeks of leave under the Act.

An employee may substitute or an employer may require substitution in circumstances where the situation would qualify for paid leave under the terms of an employer's paid

leave policy. For example, if an employer's sick leave policy allows employees to use sick leave in order to care for ill family members, then that sick leave could be substituted for FMLA leave to care for a spouse with a serious health condition. Conversely, if an employer's vacation pay plan requires two weeks notice prior to being able to use vacation, an employee who fails to comply with the two-weeks notice provision would not be able to use vacation time in conjunction with an FMLA leave.

RIGHTS AND OBLIGATIONS DURING FMLA LEAVE

Eligible employees are entitled to job-protected benefits for the duration of their FMLA leave, which may last up to 12 weeks (26 weeks in the case of Military Caregiver Leave) during any 12-month period. These benefits include maintenance of health benefits, and the right to return to the same or an equivalent position upon return from leave with no loss of accrued benefits. In certain cases, leave may be taken intermittently or on a reduced schedule.

A. Calculating The 12-Month Period

For all forms of leave other than Military Caregiver Leave, the 12-month period may be calculated by any of the following methods:

- a calendar year;
- any fixed 12-month period, such as a fiscal year or anniversary date;
- a rolling 12-month period measured forward from the leave commencement date; or,
- a rolling 12-month period measured backward from the date of leave.

The majority of employers find the rolling 12-month period is most beneficial, since it prevents "stacking" or joining of multiple leave periods together, back-to-back.

You must choose from one of these methods and apply it uniformly (unless you are operating under unique state

requirements). If you fail to select a method and notify employees of your selection, then the option most beneficial to them will be used. To change methods, you must give employees 60 days advance notice.

For Military Caregiver Leave, the 12-month period is defined in every case by the first date of leave taken and concludes 12 months afterwards.

B. Dealing With Intermittent Leave

Leave for the care of family members or due to the employee's serious health condition may be taken intermittently or on a reduced leave schedule when medically necessary. Intermittent leave is also permitted for Military Caregiver Leave or for a military-qualifying exigency leave. You may limit intermittent leave increments to the shortest period of time used to account for other absences, provided it is not greater than one hour.

> Example: Joe normally works a five-day week. If he takes one day of intermittent leave, he has used 1/5 of a week of FMLA. Jane normally works a 30-hour week. If she takes 10 hours of intermittent leave, then she has used 1/3 of a week.

If the employee's schedule varies from week to week, a weekly average of the hours worked over the previous 12 months is used to calculate his or her normal workweek. Unfortunately, this means an employee could continue to work on an intermittent or reduced leave schedule indefinitely, yet never use up 12 weeks in any 12-month period of leave entitlement.

1. Temporary Transfers

If employees request foreseeable intermittent leave or leave on a reduced schedule, you may require them to temporarily transfer to available alternative positions for which they are qualified, and which have equivalent pay and benefits (no need for equivalent duties) that better accommodate recurring periods of leave. You may increase the pay and benefits of an existing alternative position to meet this requirement.

When the employee returns from leave, he or she must still be placed in the same or an equivalent position. Benefits may not be reduced or eliminated, but you may proportionately reduce benefits, such as vacation, where the normal practice is to base such benefits on the number of hours worked.

2. Deductions For Exempt Employees

If an employee is exempt from overtime requirements of the Fair Labor and Standards Act, deducting their salary for intermittent FMLA leave does not affect their exempt status. Note, however, that an employee paid under the fluctuating workweek method for computing overtime may only be compensated on an hourly basis for hours worked during the intermittent leave period, even during weeks when no leave is taken. If you do not elect to convert the employee's compensation to hourly pay, no salary deduction is allowed.

3. Leave For Birth Or Placement

Leave for the birth or placement of a child for adoption may not be taken intermittently or on a reduced leave schedule without your consent. Entitlement to leave for birth or placement of a child expires one year after the birth or placement.

FMLA leave may begin before birth or placement if needed for such events as prenatal care, or for counseling sessions and court appearances to enable the placement process to proceed. If you employ a husband and wife who are both entitled to leave for birth or placement, you may limit them to a combined total of 12 workweeks for such leave.

C. Employment And Benefits Protection

1. Protection

An employee is entitled to be restored to his or her job, or an "equivalent" position, upon return from FMLA leave. An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits, work-

ing conditions, duties, skill, authority, privileges, and status. This position must be in the same or a geographically proximate worksite with an equivalent work schedule and shift.

2. Benefits Protection

FMLA protects employees from the loss of any employment benefit accrued prior to the commencement of leave. While this does not entitle an employee to the accrual of any additional seniority or benefits during leave, you must maintain coverage under any group health plan under the same conditions as those existing before the leave.

Therefore, if the company was paying all or part of an employee's premium payments before leave, the company must continue such payments during the leave. An employee may choose not to (or may not be able to) retain group health plan coverage during FMLA leave. Nevertheless, the employee will be entitled to reinstatement into the plan on the same terms as before, without any qualifying period or physical examination, upon returning to work. This may require you to make premium payments for the employee during leave, subject to a "right of recovery." If benefits are added or changed during leave, the employee is entitled to these additions and changes.

You may recover the employee's share of premiums you paid for maintaining coverage. In addition, you may recover the company's share of premiums paid for maintaining coverage if the employee fails to return to work after FMLA leave expires, so long as the failure to return is not due to the serious health condition of a family member or the employee, or other circumstances beyond their control.

Note: If a spouse transfers to another location greater than 75 miles from the worksite, if a layoff occurs, or if a "key employee" does not return upon being notified of your intention to deny restoration, then recovery of benefits is precluded.

Employees who return to work for at least 30 calendar days are considered to have "returned" to work. Where a serious health condition prevents them from returning, you may require a certification.

When FMLA leave is substituted by paid leave or paid leave is provided by a disability plan or workers' compensation, you may not recover your share of premium costs.

3. Pay Increases And Bonuses

Employees remain entitled to any unconditional pay increases granted during leave (e.g., cost of living adjustments). However, you may deny or prorate payment of a bonus or other payment based on achievement of a goal (e.g. hours worked, products sold, or perfect attendance) that the employee fails to achieve due to FMLA absences, provided such payment is not made to employees on equivalent leaves that are not protected by FMLA. For example, a policy denying a perfect attendance bonus to anyone taking an unpaid leave of absence would affect both FMLA and non-FMLA absences equally.

4. Key Employee Exception

A "key employee" is any salaried employee among the highest paid 10% of employees employed within 75 miles of the worksite. You may deny job restoration (but not FMLA leave or maintenance of health benefits) to any key employee if:

- you notify the employee when he or she provides notice of leave that they are a key employee, and of the potential consequences of this status;
- you subsequently determine that restoration would cause substantial and grievous economic injury to your operations;
- you notify the employee of your intent to deny restoration at the time this determination is made; and
- upon receiving a request to return to work, you confirm your determination and notify the employee that restoration has been denied.

The issue is not whether absence of the key employee will cause substantial and grievous injury. Rather, it is whether restoration will cause such injury. FMLA provides little guidance on the definition of "substantial and griev-

ous economic injury," but it does state that the test is more stringent than the Americans With Disabilities Act's "undue hardship" test.

5. Terminating Job And Benefits Protection

All FMLA obligations end when the employment relationship would otherwise have terminated. For example, if the employee's position was eliminated in a nondiscriminatory reduction in force or the employee informs you of an intent not to return to work, then the employment relationship terminates and FMLA obligations end.

You may also deny benefits to an employee who fraudulently obtains FMLA leave, or who violates a uniformly-applied policy prohibiting outside employment. Similarly, if the employee is unable to perform an essential function of the position, then the employee has no right to restoration under FMLA. Note, however, that you may still have accommodation obligations under the ADA. You may also have COBRA obligations when you terminate health coverage. These laws may have broad implications for employees returning from FMLA leave, and a thorough discussion of them is beyond the scope of this booklet.

NOTICE, POSTING AND RECORD-KEEPING

A. Posting Requirements

Covered employers must post a notice explaining FMLA to employees and applicants, regardless of whether the employees or applicants are currently eligible for leave, and must also include information regarding FMLA in employee handbooks that contains at least as much information as the poster. If the employer does not have a handbook, then it must distribute a copy of the FMLA notice to all employees upon hire. As of 2009, employers may post the required notices electronically.

B. Recordkeeping Requirements

FMLA also imposes strict recordkeeping and confidentiality requirements. For example, employers must maintain

records specified by FMLA regulations for no less than three years, including:

- basic payroll and identifying employee data;
- dates FMLA leave is taken by FMLA-eligible employees;
- copies of employee notices of leave furnished under FMLA; and,
- records of any dispute regarding designation of leave.

Records relating to medical certifications, recertifications or medical histories of employees or family members, created for purposes of FMLA, must be maintained as confidential medical records in separate files from the usual personnel files.

PROHIBITED ACTS AND ENFORCEMENT

It is unlawful to interfere with the exercise of any right provided under FMLA, or to discharge or discriminate against an individual for filing a charge or giving information relating to possible FMLA violations. Prohibited acts also include deliberate attempts to avoid "covered employer" status or employee eligibility.

Civil actions may be brought by aggrieved individuals in state or federal court, or through enforcement by the Secretary of Labor. Available remedies may include:

- payment of wages, salary, employment benefits, and other compensation;
- interest;
- liquidated damages equal to the sum of the amounts above;
- equitable relief such as employment, reinstatement, and promotion; and,
- reasonable attorney and expert witness fees and other costs.

The court may, in its discretion, deny recovery of liquidated damages if it finds that the violation was in good faith *and* that the employer had reasonable grounds for believing that its acts were not a violation of the law. The statute of limitations is two years, or three years in the case of "willful" violations. Employees may not prospectively waive their FMLA rights, and employers may not induce such a waiver. Employees may, however, effectively release any claims they have under FMLA as part of an otherwise valid severance or settlement agreement.

EFFECT ON OTHER LAWS AND AGREEMENTS

FMLA does not affect federal or state laws prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability. Similarly, FMLA does not supersede any state laws, collective bargaining agreements, or employment benefit plans which provide greater family or medical leave rights, and employers must still comply with COBRA upon termination of FMLA health maintenance benefits. Employers remain free to adopt or retain more generous leave provisions than those mandated by FMLA.

THE PRACTICAL RESPONSE

FMLA was designed to promote the development of the family and to address the serious potential for gender discrimination in the workplace, as well as to provide leaves of absence for family members of military servicemembers. Certainly these are goals everyone supports. As the summary provided in this booklet demonstrates, however, the law's provisions are exceedingly complex, and even an innocent failure to comply could result in serious ramifications.

Making matters even more difficult for employers is the need to coordinate the effect of FMLA's provisions with differing state laws governing family and medical leave, coverage provided by the Americans With Disabilities Act, workers' compensation statutes, and laws regulating other types of leave.

We urge that you review all your leave policies, written and unwritten, to be sure they are valid, and then develop control procedures to ensure compliance. These include the adoption of model forms satisfying the Eligibility, Rights and Responsibility, and Designation Notice requirements of FMLA, a uniform process for handling all leave requests, training of all supervisory and management personnel who might receive a potentially FMLA-qualifying leave request, and recordkeeping procedures and benefits maintenance that satisfy FMLA's many requirements.

Finally, various policy considerations should be thought through, such as whether to substitute paid leave for FMLA leave, and how best to communicate your policies and procedures.

Careful attention to those details will not only give you the assurance that you are in compliance, but provide the opportunity for increased productivity and employee morale, as well as safeguard the important rights this law was designed to protect.

For further information about this topic, contact any office of Fisher & Phillips LLP or visit our website at www.laborlawyers.com

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Age Discrimination In Employment Act

Americans With Disabilities Act
(Employment Aspects)

Americans With Disabilities Act
(Public Accommodations)

Business Immigration

COBRA

Employment Discrimination

Fair Labor Standards Act
(Exemptions & Recordkeeping)

Fair Labor Standards Act
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