HR Compliance Focus

New Year, New FMLA

Changes You Need To Make Now

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NEW YEAR, NEW FMLA CHANGES YOU NEED TO MAKE NOW

On November 17, 2008, the U.S. Department of Labor (DOL), Wage and Hour Division issued final regulations governing the Family and Medical Leave Act (FMLA). The final regulations make some long-awaited changes to the way FMLA leave is administered, including some improvements to areas employers have long struggled with including intermittent leave. "The overarching theme of the regulations," observes Frank Alvarez, national coordinator of Jackson Lewis' Disability, Leave & Health Management Practice Group, "is shared responsibility. Employers must do a better job educating employees, and employees must do a better job communicating their need for leave and supplying appropriate and timely medical certifications."

Effective January 16, 2009, the new rule gives America's military families special job-protected rights to care for family members wounded or injured servicing their countries and to manage their affairs when a family member is called to active duty, DOL noted in its press release. Elaine L. Chao, U.S. Secretary of Labor, also said that "the final rule provides needed clarity about general FMLA rights and obligations for both workers and employers."

WHAT SHOULD EMPLOYERS DO?

Employers subject to the requirements of the FMLA must act to comply with the new FMLA regulatory requirements. What should employers do? BLR offers the following suggestions.

Review and Revise Policies

The final FMLA regulations have changed a variety of terms and conditions for requesting and receiving FMLA leave. These range from providing definitions and procedures related to the new family military leave provisions to big changes to the notice requirements when FMLA leave is requested. In order to comply with the new FMLA regulations, employers must take the following steps to review and revise leave policies. In addition, we have attached as Exhibit A a sample policy that you may want to use as a starting point when creating a new FMLA policy.

(1) Family Military Leave: Add and Revise Policy Provisions

The National Defense Authorization Act for Fiscal Year 2008 (NDAA) amended FMLA to allow qualified employees with family members 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 active duty (or has been notified of an impending call or order to active duty) in the armed forces in support of a contingency operation."
- **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 military servicemember recovering from an injury or illness suffered while on active duty in the armed forces.

The effective date for provisions requiring leave for a "qualifying exigency" was delayed until the Secretary of Labor issued final regulations interpreting key terminology in the provisions. The provisions for servicemember caregivers took effect in January 2008, when President Bush

signed the NDAA. Now that the FMLA regulations governing family military leave are final, employers must take action to ensure that they are FMLA-compliant.

- **Use key terms carefully.** When adding and revising policies to address the new family military leave requirements, employers must be sure to not mix the key terms of family military leave such as next of kin, sons, daughters, and parents, with those terms as they are used for other types of FMLA leave. The definitions of these key terms for family military leave differ from other types of FMLA leave and should be defined separately in the employer's family military leave policy. (See the *Details of the New FMLA*, in this report, for more details.)
- **Describe the conditions under which family military leave is available.** DOL has gone to great lengths in the final FMLA regulations to describe what constitutes a "qualifying exigency" or the circumstances under which an employee is eligible for servicemember caregiver leave. Employers should incorporate those standards into their policies for such leave.
- **Describe required documentation for certification needs.** The final FMLA regulations lay out detailed requirements for documentation of the need for family military leave and the certification that can be permitted for such leave by employers. (See the *Details of the New FMLA*, in this report, below for more information.)

(2) Review Policies for Other Types of FMLA Leave

DOL's final FMLA regulations also alter the way in which employers will administer their FMLA leave policies for the employee's or a family member's serious health conditions, and the birth, adoption, or foster care placement of a child.

- **Check definitions for qualifying serious health conditions.** Employers should review their policies to ensure that references to serious health conditions comply with the new FMLA rules. Specifically, DOL has changed definitions for what constitutes "continuing treatment" for a serious health condition (now a 30-day limit on the required two consecutive visits to a healthcare provider), and a 7-day limit (from the onset of incapacity) on the first visit to the provider. Note also that chronic health conditions require at least two doctor's visits per year.
- **Check policy or process for obtaining a certification.** If a certification is incomplete or insufficient, the final regulations require the employer to give the employee written notice of the additional information needed and allow the employee 7 days to cure the deficiency. Also, while a manager or HR professional can contact an employee's healthcare provider to clarify or authenticate a certification, the employee's immediate supervisor may not. The fitness-for-duty certification may address the specifics of any employee's ability to perform the essential functions of the job.
- **Check policies against key changes in leave provisions.** The final DOL regulations also make changes to leave for adoption, the definitions related to an employee's adult children, when an employee is "needed to care for" a family member, and the list of covered healthcare providers. These changes may affect the way in which employers phrase their current FMLA leave policies. (See the *Details of the New FMLA*, in this report, for more information.)
- **Check policies regarding substitution of paid leave for unpaid FMLA leave.** In the final FMLA regulations, DOL made changes in its position on the substitution of paid vacation and personal leave. Now, DOL allows employers to apply their normal leave policies to the substitution of all types of paid leave for unpaid FMLA leave. Employers may choose to change their substitution rules accordingly. Be aware, however, that employers must notify employees of any additional requirements for the use of paid leave.

- **Check policies regarding bonus or other payments.** Under the new FMLA regulations, employers are permitted to disqualify an employee from bonus or other payments based on the achievement of a specified goal such as hours worked, product sold, or perfect attendance, where the employee has not met the goal due to FMLA leave. This is permitted so long as the payment is not otherwise paid to employees on equivalent leave that does not qualify as FMLA leave. According to the preamble to the final FMLA regulations, safety and attendance awards are considered by DOL to be predicated on the achievement of a specified job-related performance goal, and, therefore, are not protected by FMLA.

Update FMLA Notice and Certification Forms and Procedures

In addition, to revising policies, employers need to develop better systems for administering FMLA and communicating with employees. Some of the biggest changes brought about by the final FMLA regulations were to the provisions for FMLA notice and medical certification. In response to those changes, DOL has issued seven new standard forms for medical certification and notice of FMLA leave. Copies of DOL's new forms are included as exhibits at the end of this HR Compliance Focus. Employers are strongly advised to familiarize themselves with these new forms and begin using them on the January 16, 2009, effective date. Some employers may choose to brand these forms for their organization, but they should take great care not to add more or different requests for information.

(1) General Notice Obligations

Employers covered by the FMLA must post a general FMLA notice even when they have no FMLA-eligible employees.

- **Electronic posting.** Electronic posting of the general FMLA notice is allowed, so long as the employer has otherwise met all of the requirements for notice (i.e., posted where applicants can see, in language spoken by a significant portion of employees, and where all employees can have access to online documents).
- **Handbooks.** If an employer does not have an employee handbook or other written leave materials, the employer must provide the general notice to new employees upon being hired. If the company does have an employee handbook or policy manual, it should include an FMLA policy that covers the required notice provisions.
- **Language requirements.** Where a workforce is comprised of a significant portion of workers who are not literate in English, the employer continues to be obligated to provide general notice in a language in which the employees are literate.

To see a sample general notice form, see the documents included at the end of this *HR Compliance Focus*.

(2) Eligibility Notice

Absent "extenuating circumstances," an employer must notify an employee of their eligibility to take FMLA leave within 5 business days of the employee's request for FMLA leave, or when employers acquire knowledge that an employee's leave may be for an FMLA-qualifying reason.

- **New DOL eligibility notice Form (WH-381).** This form contains all of the requisite notice requirements from the final FMLA regulations. However, it is important to note that employers denying leave based on eligibility must now indicate at least one reason why the employee is not eligible. *See Exhibit D for a copy of the form.*

(3) Rights and Responsibilities Notice

This notice is combined with the DOL's WH-381 eligibility notice and, likewise, must be delivered within 5 business days of the employee's request for FMLA leave, or when employers acquire knowledge that an employee's leave may be for an FMLA-qualifying reason. *See Exhibit B for a copy of the form.*

- **Content of notice.** The notice of "Rights and Responsibilities" (R&R) enumerates specific expectations and obligations of employees and consequences of an employee's failure to meet those obligations. Specifically, via the R&R notice, employers must notify FMLA-eligible employees of medical certification requirements (if any), rights and rules regarding the substitution of paid leave, the ways in which an employee may pay premiums for continuing benefits, and job restoration rights after FMLA leave has concluded.
- **Medical certification.** If the employer requires medical certification, the certification form (DOL's WH-380E) for employee's own serious health condition or WH-380F for a family member's serious health condition) may be included with the WH-381 (Notice of Eligibility and Rights & Responsibilities). *See Exhibit B for a copy of the form.*
- **Preliminary designation no longer necessary.** DOL's changes to the three-tiered notice system eliminates the need to provide a "preliminary" or "provisional" designation of FMLA leave. Instead, once the "Eligibility Notice" has been provided, employers may delay actual designation until 5 business days after they receive medical certifications and any other required information.

DETAILS OF THE NEW FMLA

As noted above, there were changes to many of the existing FMLA regulations helping to clarify some definitions and both the employee's and the employer's obligations to provide information when leave is needed. In addition, the regulations, for the first time, explain the details of the new military family leave provisions.

Military Family Leave Obligations Explained

In January 2008, President Bush signed into law the NDAA. This amended the FMLA to add military family leave for employees who have family members serving in the armed forces. While the new law has been in effect since it was signed by the president, employers have had little guidance on what key terms in the law mean and how to administer this new category of leave. The regulations provide the needed definitions and guidance.

There are two categories of military family leave: (1) Leave due to a qualifying exigency and (2) servicemember caregiver leave. The requirements for each are described in detail below.

Qualifying Exigency Leave

In January 2008, the FMLA was amended to allow qualified employees 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 active duty (or has been notified of an impending call or order to active duty) in the armed forces in support of a contingency operation.

The Final FMLA Regulations provide much needed clarification on who is eligible for qualifying exigency leave, and on the definition of qualifying exigency.

Who is eligible for qualifying exigency leave? The new regulations make it clear that this applies to employees with a covered family member in the National Guard or reserves, when that covered family member is on active duty or receives a call or order to active duty in support of a contingency operation. A covered family member includes the employee's spouse, son, daughter (of any age), or parent. An employee whose family member is on active duty or called to active duty status in support of a contingency operation as a member of the *regular* armed forces is not eligible to take leave because of a qualifying exigency.

What constitutes a qualifying exigency? The new regulations set out the various circumstances that would trigger an employee's right to use qualifying exigency leave.

(1) Short-notice deployment.

(i) To address any issue that arises from the fact that a covered military member is notified of an impending call or order to active duty in support of a contingency operation 7 or less calendar days prior to the date of deployment;

(ii) 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 active duty in support of a contingency operation;

(2) Military events and related activities.

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

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

(3) Childcare and school activities.

(i) To arrange for alternative childcare when the active duty or call to active duty status of a covered military member necessitates a change in the existing childcare arrangement for a biological, adopted, or foster child, a stepchild, or a legal ward of a covered military member, or a child for whom a covered military member stands in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence (hereinafter referred to as "a covered child");

(ii) To provide childcare 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 for a covered child;

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

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

(4) Financial and legal arrangements.

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

(ii) To act as the covered military member's representative before a federal, state, or local agency for purposes of obtaining, arranging, or appealing military service benefits while the covered military member is on active duty or call to active duty status, and for a period of 90 days following the termination of the covered military member's 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 active duty or call to active duty status of a covered military member;

(6) Rest and recuperation.

(i) To spend time with a covered military member who is on short-term, temporary, rest and recuperation leave during the period of deployment;

(ii) 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:

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

(ii) 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 active duty or call to active duty status provided that the employer and employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave.

Documentation of a call to active duty. According to the final regulations, the active duty orders of a covered military member will generally specify if the servicemember is serving in support of a contingency operation by citation to the relevant section of Title 10 of the United States Code and/or by reference to the specific name of the contingency operation.

A military operation qualifies as a "contingency operation" if it:

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

(2) Results in the call or order to, or retention on, active duty of members of the uniformed services during a war or during a national emergency declared by the president or Congress. (citing 10 USC 101(a)(13)).

Certification of active duty orders. Under the final FMLA rules, the first time an employee requests leave because of a qualifying exigency arising out of the active duty or call to 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 active duty or call to active duty status in support of a contingency operation, and the dates of the covered military member's active duty service. This information need only be provided to the employer once.

A copy of new active duty orders or other documentation issued by the military must be provided to the employer if the need for leave because of a qualifying exigency arises out of a *different* active duty or call to active duty status of the same or a different covered military member.

Under the new FMLA regulations, 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 for which FMLA leave is requested. 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. *See Exhibit F for a copy of the form.* Form WH-384, or another form containing the same basic information, may be used by the employer; however, no information may be required beyond that specified by the regulations and listed on the WH-384.

If an employee submits a complete and sufficient certification to support his or her request for leave because of a qualifying exigency, the employer may not request additional information from the employee. However, if the qualifying exigency involves meeting with a third party, the employer may contact the individual or entity with whom the employee is meeting for purposes of verifying a meeting or appointment schedule and the nature of the meeting between the employee and the specified individual or entity.

The employee's permission is not required in order to verify meetings or appointments with third parties, but no additional information may be requested by the employer. An employer also may contact an appropriate unit of the U.S. Department of Defense to request verification that a covered military member is on active duty or call to active duty status; no additional information may be requested and the employee's permission is not required.

Impact on employers. As mentioned, understanding the legal definitions for family military leave is critical to properly following the law. DOL's rather expansive definition of qualifying exigencies will allow many employees leave for family military needs. As a result of the passage of the family military leave law, an estimated 139,000 more employees will take leave in the coming year, according to DOL's estimates.

Servicemember Caregiver Leave

The January 2008 amendment to the FMLA also created a new category of protected leave known as servicemember caregiver leave. Under this new category, 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, or next of kin during the time the family member needs care while recovering from a serious injury or illness suffered while on active duty in the armed forces.

The definition for a "covered military member" for servicemember caregiver leave is broader than for qualifying exigency leave. Caregiver leave extends to regular career service military personnel, as well as those in the National Guard or Reserves. In addition, the 12-month period used to calculate this type of leave is calculated differently than the 12-month period used for other types of FMLA leave.

Note: 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 the rules in your states whenever there is a request for military family leave.

Covered servicemember. Covered servicemembers include an active member of the National Guard or reserves, or a member of the armed forces, the National Guard, or reserves who is on the temporary disability retired list.

The servicemember must have a serious injury or illness incurred in the line of duty while on active duty for which he or she is undergoing medical treatment, recuperation, or therapy; or otherwise in outpatient status; or otherwise on the temporary disability retired list.

A "serious injury or illness'' means an injury or illness incurred by a covered servicemember in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank, or rating.

Definitions of family members and next of kin. The final regulations provide detailed definitions of family members included in the servicemember caregiver leave provisions.

(1) Next of kin of a covered servicemember. "Next of kin of a covered servicemember'' means the nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority:

Blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA.

When no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members must be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual will be deemed to be the covered servicemember's only next of kin.

(2) Son or daughter on active duty or call to active duty status. "Son or daughter on active duty or call to active duty status'' means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on active duty or call to active duty status, and *who is of any age.* (29 CFR 825.122(g)) (emphasis added).

(3) Parent of a covered servicemember. "Parent of a covered servicemember'' means a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered servicemember. This term does not include parents "in law." (29 CFR 825.122(i)) (emphasis added).

Documentation of family relationship. The final regulations allow that, for purposes of confirming family relationship, the employer may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, etc. The employer is entitled to examine documentation such as a birth certificate, etc., but the employee is entitled to the return of the official document submitted for this purpose.

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

The leave entitlement for servicemember caregiver leave is to be applied on a per-covered-servicemember, per-injury basis such that an eligible employee may be entitled to take more than one period of 26 workweeks of leave if the leave is to care for *different* covered servicemembers or to care for the same servicemember with a subsequent serious injury or illness. Note, however that no more than 26 workweeks of leave may be taken within any "single 12-month period."

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

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 described 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 the "single 12-month period", the employer must designate such leave as leave to care for a covered servicemember in the first instance.

Leave that qualifies as both leave to care for a covered servicemember and leave taken to care for a family member with a serious health condition during the "single 12-month period" 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).

Certification for servicemember caregiver leave. Certification for servicemember caregiver leave differs substantially from the certification required for a FMLA serious health condition. Like certification for a "qualifying exigency," DOL experts were faced with the task of creating a certification system for injured and ill military personnel, parallel to (if not slightly outside of) the system they had created for certifying serious health conditions.

According to DOL's final FMLA regulations, 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.

For purposes of leave taken to care for a covered servicemember, DOL has stated that 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). See Exhibit G for a copy of the form.

This optional form reflects certification requirements that permit the employee to furnish appropriate information to support his or her request for leave to care for a covered servicemember with a serious injury or illness. The WH-385, or another form containing the same basic information, may be used by the employer; however, no information may be required beyond that specified by the regulations (and contained in the WH-385). Accordingly, employers are well-advised to use DOL's form for this purpose.

An employer may require an employee to provide confirmation of covered family relationship to the seriously injured or ill servicemember. In all instances the information on the certification must relate only to the serious injury or illness for which the current need for leave exists.

As with all other types of FMLA leave, in all instances in which certification is requested, it is the employee's responsibility to provide the employer with complete and sufficient certification and failure to do so may result in the denial of FMLA leave.

The final FMLA regulations permit an employer to seek authentication and/or clarification of the covered servicemember's certification under the FMLA's rules governing authentication and clarification discussed later in this report. However, second and third opinions and recertifications are expressly prohibited for leave to care for a covered servicemember.

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 as sufficient certification, in lieu of the WH-385 or an employer's own certification form, "invitational travel orders" (ITOs) or "invitational travel authorizations" (ITAs) issued to any family member to join an injured or ill servicemember at his or her bedside.

An ITO or ITA is sufficient certification for the duration of time specified in the ITO or ITA. During that time period, an eligible employee may take leave to care for the covered servicemember in a continuous block of time or on an intermittent basis. An eligible employee who provides an ITO or ITA to support his or her request for leave may not be required to provide any additional or separate certification that leave taken on an intermittent basis during the period of time specified in the ITO or ITA is medically necessary.

An ITO or ITA is sufficient certification for an employee entitled to take FMLA leave to care for a covered servicemember regardless of whether the employee is named in the order or authorization. Note, however, that an employer may require an employee to provide confirmation of covered family relationship to the seriously injured or ill servicemember when an employee supports his or her request for FMLA leave with a copy of an ITO or ITA.

If an employee will need leave to care for a covered servicemember beyond the expiration date specified in an ITO or ITA, an employer may request that the employee have one of the authorized healthcare providers complete the DOL optional certification form (WH-385) or an employer's own form, as requisite certification for the remainder of the employee's necessary leave period.

An employer may seek authentication and clarification of the ITO or ITA; however, it may *not* request or require a second or third opinion or request recertification during the period of time in which leave is supported by an ITO or ITA.

Military family leave impact on employers. The potential for overlapping 12-month time periods for servicemember caregiver leave and other FMLA leave will create difficult administrative challenges for employers. Careful recordkeeping and documentation will be necessary, and it is

highly likely that DOL will address the newer family military leave provisions in upcoming guidance documents, FAQs, and opinion letters. Stay tuned.

In addition, it will be critical for employers to have a detailed understanding of the definitions for family military leave in order to comply with the law. Employers should refer to these technical definitions as a matter of course when making family military leave designations and decisions.

New Employer Notice Requirements and Forms

After the addition of rules regarding family military leave, the most dramatic change to DOL's FMLA regulations were to the employer and employee notice requirements.

The final FMLA rule consolidates all the employer notice requirements into a "one-stop" section of the regulations and reconciles some conflicting provisions and time periods. The final rule clarifies and strengthens the employer notice requirements in order to better inform employees and allow for a better exchange of information between employers and employees. Once employers familiarize themselves with the changes in the final regulations, designation notice should seem easier than under the "old" rules.

DOL's revised notice requirements include the creation of seven new certification, notice, and designation forms. Those new forms, included in appendices to the final rule, are:

1. Certification of Health Care Provider (Forms WH-380E for employees). *(Exhibit B1)*
2. Certification of Health Care Provider (Forms WH-380F for covered family members) *(Exhibit B2)*
3. Notice to Employees of Rights Under FMLA (WH Publication 1420) *(Exhibit C)*
4. Notice of Eligibility and Rights & Responsibilities (Form WH-381) *(Exhibit D)*
5. Designation Notice to Employee of FMLA Leave (Form WH-382) *(Exhibit E)*
6. Certification of Qualifying Exigency for Military Family Leave (Form WH-384) *(Exhibit F)*
7. Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave (Form WH-385) *(Exhibit G)*

Poster and notice to employees of rights under FMLA. The new FMLA rule states that employers will be required to provide employees with a general notice about the FMLA (through a poster, and by including the information in an employee handbook or policy, or providing to employees upon hire).

Every employer covered by the FMLA is required to post a general FMLA notice and keep it posted on its premises. DOL's *Notice to Employees of Rights Under FMLA* (WH Publication 1420) satisfies this general notice requirement. *See Exhibit C for a copy of the form.*

Under the new FMLA rules, the penalty for willful violation of the posting requirement is a civil fine of not more than $110 for each separate offense.

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.

Note: Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the final 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.

Notice to employee of eligibility for FMLA leave. 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. Under the old rules, employers only had 2 days to provide this notice.

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 as to that reason for leave does not change during the applicable 12-month period.

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. *(See Exhibit C for a copy of the form.)*

Note: 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 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 to employee 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. *(See Exhibit C for a copy of the form.)*

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 so long as it otherwise meets the requirements of the final regulation.

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 health insurance premium payments.

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 to employee designating leave as FMLA protected. 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. The notice must include the following information also contained in DOL's *Designation Notice to Employee of FMLA Leave* (Form WH-382). *(See Exhibit E for a copy of the form.)*

1. Fitness for duty. If the employer will require the employee to present a fitness-for-duty certification to be restored to employment, the employer must provide notice of such requirement with the designation notice. If the employer will require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the employee's position, the employer must so indicate in the designation notice, and must include a list of the essential functions of the employee's position.

Exception. If the employer has a handbook or other written documents (if any) clearly stating that a fitness-for-duty certification will be required in specific circumstances (e.g., in all cases of back injuries for employees in a certain occupation), the employer is *not* required to provide written notice of the requirement with the designation notice. However, the employer must provide oral notice no later than with the designation notice.

2. Leave accounting. The employer must notify the employee of the amount of leave counted against the employee's FMLA leave entitlement. If the amount of leave needed is known at the time the employer designates the leave as FMLA-qualifying, the employer must notify the employee of the number of hours, days, or weeks that will be counted against the employee's FMLA leave entitlement in the designation notice.

If it is not possible to provide the hours, days, or weeks that will be counted against the employee's FMLA leave entitlement (such as in the case of unforeseeable intermittent leave), then the employer must provide notice of the amount of leave counted against the employee's FMLA leave entitlement upon request by the employee, but *no more often than once in a 30-day period* and only if leave was taken in that period.

The notice of the amount of leave counted against the employee's FMLA entitlement may be oral or in writing. If such notice is oral, it must be confirmed in writing no later than the following payday (unless the payday is less than 1 week after the oral notice, in which case the notice must be no later than the subsequent payday). Such written notice may be in any form, including a notation on the employee's pay stub.

3. Change in information. 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.

4. Denial of FMLA leave. If the employer determines that the leave will not be designated as FMLA-qualifying, the employer must notify the employee of that determination.

If the leave is not designated as FMLA leave because it does not meet the requirements of the Act, the notice to the employee that the leave is not designated as FMLA leave may be in the form of a simple written statement.

5. Substitution of paid leave. 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 requirement 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 timely designate leave does not cause harm or injury to the employee. In all cases where leave would qualify for FMLA protections, an employer and an employee can mutually agree that leave be retroactively designated as FMLA leave.

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

This change is an important clarification for employers. Since the U.S. Supreme Court's 2002 decision in the case of *Ragsdale v. Wolverine World Wide, Inc.,* (535 U.S. 81 (2002)), employers sat in limbo, waiting for definitive word from DOL on the issue of failure to designate leave and the effect of retroactive designation. Finally, the questions created by the *Ragsdale* decision have been put to rest. In addition, the new regulations do away with the older method of "provisional designation" by the employer—conditionally designating leave as FMLA-eligible pending the receipt of either medical certification or more facts supporting FMLA-eligibility. Now, with more time to give notice and certify, such provisional notice is no longer necessary, says DOL.

New Notice Obligations for Employees For Both Foreseeable and Unforeseeable Leave

The final regulations also 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, though the employee would need to state a qualifying reason for the needed leave and otherwise satisfy the notice requirements. The new FMLA regulations further clarify the type of information that is necessary and the time frames within which such qualifying reasons and documentation must be given to the employer.

The final FMLA rules explain the consequences for both foreseeable leave (with or without 30 days notice) and unforeseeable leave (29 CFR 825.304). According to DOL, the new regulations "clarify" what an employer may do if an employee fails to provide proper notice for FMLA

leave. However, it is critical that the employee's have actual notice of the FMLA notice requirement before they are penalized for not complying. According to the final regulations, this condition would be satisfied by the employer's proper posting and distribution of the *Notice to Employees of Rights and Responsibilities Under FMLA* (WH-1420) described earlier.

Employee notice requirements for foreseeable leave. Changes to the employee notice provisions for foreseeable leave are intended to increase the level of communication between employer and employee. Requiring the employee to respond to reasonable requests for information should enable many more employers to get the information they need to make a determination of FMLA eligibility. In addition, by giving employer call-in procedures with appropriate timing requirements the stamp of approval, DOL enables many employers to manage leave and operate more efficiently.

Under the "old" FMLA regulations, an employee was required to provide the employer at least 30 days' advance notice before FMLA leave is to begin if the need for the leave is foreseeable. Whether FMLA leave is to be continuous or is to be taken intermittently or on a reduced schedule basis, notice needed to be given one time, but the employee had to advise the employer as soon as practicable if dates of scheduled leave change, are extended, or were initially unknown. The "old" rule also required an employee to provide at least verbal notice sufficient to make the employer aware that the employee needed FMLA-qualifying leave, and the anticipated timing and duration of the leave.

In the new final FMLA rules, DOL states that the facts included in the employee's notice will depend on the employee's situation. For example, the employee's notice may state that a condition renders the employee unable to perform the functions of the job, that the employee is pregnant or has been hospitalized overnight, or whether the employee or the employee's family member is under the continuing care of a healthcare provider. If the leave is required to care for a family member, the employee's notice may state that the condition renders the family member unable to perform daily activities, or that the family member is a covered servicemember with a serious injury or illness, as well as the anticipated duration of the absence, if known.

When an employee seeks leave due to a FMLA-qualifying reason for which the employer has previously provided FMLA-protected leave the employee must specifically reference the qualifying reason for leave, or the need for FMLA leave. When an employee has been previously certified for leave due to more than one FMLA-qualifying reason, the employer may need to inquire further to determine for which qualifying reason the leave is needed. An employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employer inquiries regarding the leave request may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying.

Under the new FMLA regulations, if an employee gives less than 30 days' notice for foreseeable leave, the employee must respond to an employer inquiry as to why it was not practicable to give 30 days' notice.

An employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances.

For example, an employer may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave. An employee also may be required by an employer's policy to contact a specific individual when requesting leave or reporting on status during a leave.

According to DOL's FMLA regulations, "unusual circumstances" would include situations such as when an employee is unable to comply with the employer's policy that requests for leave

should be made by contacting a specific number because on the day the employee needs to provide notice of his or her need for FMLA leave, there is no one to answer the call-in number, and the voicemail box is full.

Where an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied. However, FMLA-protected leave may not be delayed or denied where the employer's policy requires notice to be given sooner than practicable and the employee provides timely notice.

For example, an employer may enforce a nondiscriminatory call-in procedure, except where the procedures are more stringent than the timing for FMLA notice. In that situation, the employer may not enforce the more stringent timing requirement of its internal policy.

Note: 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 active duty or called to active duty status, that the requested leave is for one of the allowable qualifying exigencies, and the anticipated duration of the absence.

Employee notice requirements for unforeseeable leave. For unforeseeable leave and absent unusual circumstances, the new FMLA regulations require employees to 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 a 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 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.

If an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied.

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

Allowing employers to use their "usual and customary notice procedures" will allow employers to uniformly apply familiar rules for leave notice. However, employers should be familiar with the exceptions to this rule—namely "unusual circumstances" or an emergency requiring leave because of a FMLA-qualifying reason.

Medical Certification Requirements Explained

Since the FMLA first became law in 1993, employers were permitted to request medical certification of the need to take leave for the employee's own serious health condition or the serious

health condition of a covered family member. The new regulations expand the time frame in which to provide medical certification. This should allow more employees to obtain the requested certification in time.

Employers should note that the burden placed on them to specify what information is necessary to make the certification complete must be made in writing. This may be achieved by filling out the portion of DOL's *Designation Notice Form* (WH-382), which addresses the issue of sufficiency of certification. *(See Exhibit E for a copy of the form.)*

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

Under the final regulations, the employer must 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 provide the employee with *7 calendar days* (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any deficiency.

If the deficiencies specified by the employer are not cured in the resubmitted certification, the employer may deny the taking of FMLA leave. A certification that is not returned to the employer is not considered incomplete or insufficient, but constitutes a failure to provide certification.

Content of medical certification for a serious health condition. Although DOL declined to list medical facts that must be included in medical certifications for serious health conditions, DOL did create two new optional forms for employers to use to certify leave for employees and their covered family members.

DOL's new medical certification forms provide employers with a comprehensive set of questions to help gather information regarding an employee's or family member's serious health condition. An employer may, but is not required to, provide a list of essential functions when requesting medical certification. However (according to DOL's preamble to the final rule), if the employer does not provide a list of essential functions, the healthcare provider may rely on the employee's description of job functions. This is a clear message to employers that they should provide a list of essential functions with all medical certification requests.

The new forms, the *Certification of Health Care Provider* Forms WH-380E (for employees) and WH-380F (for covered family member), contain the full set of information requests that employers may utilize for medical certification of serious health conditions. *(See Exhibit B for copies of the form.)* Beware, however, that some state laws prohibit certain inquiries regarding an employee's specific medical condition (e.g., California). As a result, use of the WH-380E and WH-380F may not be permitted in some states.

Under the new FMLA regulations an employee may choose to comply with the certification requirement by providing the employer with an authorization, release, or waiver allowing the employer to communicate directly with the employee's or the family member's healthcare provider. However, the employee may not be required to provide such an authorization, release, or waiver.

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

Authentication and clarification of medical certification. This section of the final regulations provides new, much needed guidance on how and when employers can authenticate or clarify information received on a medical certification form. It is important to note that, with a release and authorization from the employee, the employer can contact a healthcare provider and request *additional* information. This is a change from the original regulations.

According to the final FMLA regulations, an employer may contact the healthcare provider for purposes of clarification and authentication of the medical certification (whether initial certification or recertification) after the employer has given the employee an opportunity to cure any deficiencies as allowed under the regulations.

To make such contact with the employee's healthcare provider, the employer must use a healthcare provider, a human resources professional, a leave administrator, or a management official. Under no circumstances, however, may the employee's direct supervisor contact the employee's healthcare provider.

"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.

"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, unless a HIPAA-compliant release and authorization is provided by the employee or family member.

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 healthcare provider, a description of health information to be disclosed, the name of 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.

Employee's obligation to cure any deficiencies in the certification. 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 taking of FMLA leave if the certification is unclear.

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

Medical certification abroad. The final FMLA regulations address a perplexing problem experienced by employers—medical certifications executed by doctors in countries outside the United

States. According to the final regulations, in circumstances in which the employee or a family member is visiting in another country or a family member resides in another country, and a serious health condition develops, the employer must accept a medical certification as well as second and third opinions from a healthcare provider who practices in that country. Where a certification by a foreign healthcare provider is in a language other than English, the employee must provide the employer with a written translation of the certification upon request.

When an employee fails to provide required certifications. In the final regulations governing FMLA leave, DOL allowed that an employer may "deny" FMLA leave until the required certification is provided. This represents a marked change from the previous regulations, which only allowed an employer to "delay" FMLA leave. Any absences that occur during the period in which an employer has the right to deny FMLA protection due to the failure to provide timely certification may be treated under the employer's normal attendance policies.

The final regulations also require that employees be provided at least 15 calendar days to provide the requested certification and are entitled to additional time when they are unable to meet that deadline despite their diligent, good-faith efforts. Employers may deny FMLA protection when an employee fails to provide a timely certification or recertification, but are not required to do so. Employers always have the option of accepting an untimely certification, according to DOL.

In the case of foreseeable leave, if an employee fails to provide certification in a timely manner, then an employer may *deny* FMLA coverage until the required certification is provided. For example, if an employee has 15 days to provide a certification and does not provide the certification for 45 days without sufficient reason for the delay, the employer can deny FMLA protections for the 30-day period following the expiration of the 15-day time period, if the employee takes leave during such period.

In the case of unforeseeable leave, an employer may *deny* FMLA coverage for the requested leave if the employee fails to provide a certification within 15 calendar days from receipt of the request for certification unless not practicable due to extenuating circumstances. For example, in the case of a medical emergency, it may not be practicable for an employee to provide the required certification within 15 calendar days. Absent such extenuating circumstances, if the employee fails to timely return the certification, the employer can deny FMLA protections for the leave following the expiration of the 15-day time period until a sufficient certification is provided. If the employee never produces the certification, the leave is not FMLA leave.

The ability to deny rather than delay FMLA leave provides important leverage to employers trying to obtain necessary certification. The threat of losing FMLA protections may be enough to encourage some employees to provide timely certification forms.

Recertification. An employee must provide recertification within the time requested by the employer (which must allow at least 15 calendar days after the request) or as soon as practicable under the particular facts and circumstances. If an employee fails to provide a recertification within a reasonable time under the particular facts and circumstances, the employer may *deny* continuation of the FMLA leave protections until the employee produces a sufficient recertification. If the employee never produces the recertification, the leave is not FMLA leave. Recertification is not permitted for leave taken for a qualifying exigency or to care for a covered servicemember.

Fitness for Duty Certification Requirements Further Defined

The "old" FMLA regulations allowed employers to enforce uniformly applied policies or practices that require all similarly situated employees who take leave to provide a certification that they are able to resume work—the so-called "fitness-for-duty" certification.

The final rule made two changes to the fitness-for-duty certification process. First, an employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. Second, where reasonable job safety concerns exist, an employer may require a fitness-for-duty certification before an employee may return to work when the employee takes intermittent leave.

Essential functions. An employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. In order to require such a certification, an employer must provide an employee with a list of the essential functions of the employee's job no later than with the designation notice, and must indicate in the designation notice that the certification must address the employee's ability to perform those essential functions.

If the employer satisfies these requirements, the employee's healthcare provider must certify that the employee can perform the identified essential functions of his or her job.

Reasonable safety concerns. An employer is entitled to a certification of fitness to return to duty for such absences up to once every 30 days if reasonable safety concerns exist regarding the employee's ability to perform his or her duties, based on the serious health condition for which the employee took such leave.

If an employer chooses to require a fitness-for-duty certification based on reasonable safety concerns, the employer must inform the employee at the same time it issues the designation notice that for each subsequent instance of intermittent or reduced schedule leave, the employee will be required to submit a fitness-for-duty certification unless one has already been submitted within the past 30 days. Alternatively, an employer can set a different interval for requiring a fitness-for-duty certification as long as it does not exceed once every 30 days and as long as the employer advises the employee of the requirement in advance of the employee taking the intermittent or reduced schedule leave. The employer may not terminate the employment of the employee while awaiting such a certification of fitness to return to duty for an intermittent or reduced schedule leave absence.

"Reasonable safety concerns" means a reasonable belief of significant risk of harm to the individual employee or others. In determining whether reasonable safety concerns exist, an employer should consider the nature and severity of the potential harm and the likelihood that potential harm will occur. According to the preamble to the final FMLA regulations, DOL intends this to be a high standard.

Failure to provide fitness-for-duty certification. When requested by the employer pursuant to a uniformly applied policy for similarly situated employees, the employee must provide medical certification (1) at the time the employee seeks reinstatement at the end of FMLA leave taken for the employee's serious health condition, (2) that the employee is fit for duty and able to return to work if the employer has provided the required notice, and (3) the employer may *delay restoration* until the certification is provided. Unless the employee provides either a fitness-for-duty certification or a new medical certification for a serious health condition at the time FMLA leave is concluded, the employee *may be terminated*.

Impact on employers. Employers bear the burden of notifying employees that a fitness-for-duty certification will be required upfront at the designation notice stage. If the employer will require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the employee's position, the employer must also indicate this in the designation notice and must include a list of the essential functions of the employee's position. Therefore, the burden is on the employer to establish an organized method of determining when and for which positions or health conditions the employer will require fitness-for-duty certifications, and ensuring that they have accurate, current descriptions of the essential functions for those positions.

Help for Employers in Administering Intermittent FMLA

Intermittent leave has historically been one of the most problematic areas for employers in their efforts to comply with the FMLA. The changes made by the final regulations are arguably small for such a large employer headache. However, some modifications to the rules, such as the increase in the smallest increment of allowable intermittent leave, may represent a positive change for many employers who, prior to the new, final regulations, had been accounting for intermittent leave in the smallest increments their timekeeping systems could record.

According to the final FMLA regulations, employees who take intermittent leave for planned medical treatment have an obligation to make a *reasonable effort* to schedule such treatment so as to not disrupt unduly the employer's operations. The previous version of the regulations had said only that the employee had to "attempt" to do so.

Temporary transfers during intermittent leave. If an employee needs intermittent leave or leave on a reduced leave schedule that is foreseeable, based on planned medical treatment, or if the employer agrees to permit intermittent or reduced schedule leave for the birth of a child or for placement of a child for adoption or foster care, the employer may require the employee to transfer temporarily, during the period that the intermittent or reduced leave schedule is required.

Such transfer must be made 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. The alternative position must have equivalent pay and benefits, but not equivalent duties.

Increments of FMLA leave for intermittent or reduced schedule leave. When an employee takes FMLA leave on an intermittent or reduced leave schedule basis, the employer must account for the leave using an *increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave provided that it is not greater than 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).

Accounting by varying increments. According to the new regulations, if an employer accounts for use of leave in varying increments at different times of the day or shift, the employer may not account for FMLA leave in a larger increment than the shortest period used to account for other leave during the period 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 will not alter the increment considered to be the shortest period used to account for other forms of leave or the use of FMLA leave in other circumstances.

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

Substitution of Paid Leave and the Interaction of FMLA with Workers' Compensation and Disability Rules

The pitfalls of the dreaded "Bermuda Triangle" of leave management (FMLA, disability, and workers' compensation) coordination are at least partially addressed in the final FMLA regulations. When resolving the issue of paid leave substitution, employers no longer need to navigate the tricky issue of which leave types may be substituted and by which party, employer or employee. Now, employers need only follow their own normal leave policies for the substitution of all types of paid leave for unpaid FMLA leave.

Clarification of rules on substitution of paid leave for unpaid leave. In the final FMLA regulations, DOL changed its position on the substitution of paid vacation and personal leave to allow employers to apply their normal leave policies to the substitution of all types of paid leave for unpaid FMLA leave.

The final FMLA regulations state that 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 only in connection with the receipt of such payment. This notice is provided in the federal form WH-381. If an employee does not comply with the additional requirements in an employer's paid leave policy, the employee is not entitled to substitute accrued paid leave, but the employee remains entitled to take unpaid FMLA leave.

Interplay of disability leave and FMLA leave. Leave taken pursuant to a disability leave plan is considered FMLA leave for a serious health condition and counted in the leave entitlement permitted under FMLA if it meets the legal criteria for FMLA eligibility for a serious health condition. In such cases, the employer may designate the leave as FMLA leave and count the leave against the employee's FMLA leave entitlement.

Because leave pursuant to a disability benefit plan is paid (at least in part), the provision for substitution of the employee's accrued paid leave is inapplicable, and neither the employee nor the employer may require the substitution of paid leave. However, employers and employees may agree, where state law permits, to have paid leave supplement the disability plan benefits, such as in the case where a plan only provides replacement income for two-thirds of an employee's salary.

Leave taken for workers' compensation. When leave is taken for a serious health condition resulting from an on the job injury (triggering workers' compensation), and the employer designates the leave as FMLA, the leave counts against the employee's FMLA leave entitlement. Because the workers' compensation absence is not unpaid, the provision for substitution of the employee's accrued paid leave is not applicable, and neither the employee nor the employer may require the substitution of paid leave.

However, as with disability leave, employers and employees may agree, where state law permits, to have paid leave supplement workers' compensation benefits, such as in the case where workers' compensation only provides replacement income for two-thirds of an employee's salary.

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

of the date workers' compensation benefits cease, the substitution provision becomes applicable, and either the employee may elect or the employer may require the use of accrued paid leave.

Other Important Changes to the FMLA Regulations

Calculation of 12 months of service. Section 29 CFR 825.110 of the new FMLA rules provides that "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, employment periods preceding a break in service of more than 7 years *must* be counted if:

- The employee's break in service is occasioned by the fulfillment of his or her National Guard or reserve military service. (However, employees are not entitled to any greater leave entitlement than would be available under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 USC 4301, *et seq.*); *or*
- A written agreement, including a collective bargaining agreement, exists concerning the employer's intention to rehire the employee after the break in service (e.g., for purposes of the employee furthering his or her education or for childrearing purposes).

The time period for achieving 12 months of employment for FMLA eligibility was previously unlimited, so now at least employers have an end-date, albeit a lengthy one. Just in case an employer wants to be more generous with FMLA eligibility, the new FMLA regulations do allow an employer to consider employment time/service outside the 7-year cap if it does so for all employees.

Employee threshold for joint employers. When determining whether the 50 employees are employed within 75 miles of worksite of a jointly employed employee, the final FMLA regulations state:

> "When an employee is jointly employed by two or more employers […], the employee's worksite is the primary employer's office from which the employee is assigned or reports, unless the employee has physically worked for at least 1 year at a facility of a secondary employer, in which case the employee's worksite is that location."

The employee is also counted by the secondary employer to determine eligibility for the secondary employer's full-time or permanent employees. The final rules also provide that telecommuters are counted as part of the office to which they report and assignments are made (not their homes).

This answers a long-standing question regarding liability for joint employers, and the more recent question of how to (or if to) count telecommuters.

Continuing treatment (serious health conditions). Although DOL refused to change the existing definition of what conditions qualify as "serious health conditions" under FMLA, the Department did make changes to the requirements for what constitutes "continuing treatment."

Under the new FMLA regulations, a serious health condition involving continuing treatment by a healthcare provider includes any one or more of the following:

(a) **Incapacity and treatment.** A period of incapacity of more than 3 consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

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

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

"Treatment by healthcare provider" (for either (1) or (2), above) means an in-person visit to a healthcare provider, which must take place within 7 days of the first day of incapacity.

The term "extenuating circumstances'' means circumstances beyond the employee's control that prevent the follow-up visit from occurring as planned by the healthcare provider. Whether a given set of circumstances are extenuating depends on the facts. For example, the regulations provide, "extenuating circumstances exist if a healthcare provider determines that a second in-person visit is needed within the 30-day period, but the healthcare provider does not have any available appointments during that time period."

A chronic condition is defined in the new regulations as any period of incapacity or treatment for such incapacity which "Requires periodic visits *(defined as at least twice a year)* for treatment by a healthcare provider, or by a nurse under direct supervision of a healthcare provider …" (29 CFR 825.115(c)).

DOL's limitation of the 30-day treatment period and 7-day limit for first visits will aid employers in limiting the scope to what constitutes "continuing treatment." The implementation of the twice yearly doctor's visits for chronic conditions will likely have little or no impact on employers.

Leave taken for the birth of a child. The final FMLA rule clarifies that a *husband* is entitled to FMLA leave if needed to care for his pregnant spouse who is incapacitated or if needed to care for her during her prenatal care, or if needed to care for the spouse following the birth of a child if the spouse has a serious health condition." According to the preamble to the final regulations, this clears up prior confusion as to whether boyfriends or fiancées were eligible for such leave—they are not.

If employers were puzzled by this, they should now be assured. Employers in states that recognize rights for domestic partners or civil unions should be aware that state leave laws may be interpreted differently.

Leave for adoption/foster care. The new FMLA rules provide that leave may be taken before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed. For example, the regulations state, an employee may be required to attend counseling sessions, appear in court, consult with his or her attorney or the doctor(s) representing the birth parent, submit to a physical examination, or travel to another country to complete an adoption.

Like leave for the birth of a child, a husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for the placement of the employee's son or daughter or to care for the child after placement. The rule would apply even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. Similarly, intermittent leave after the adoption or placement (for nonserious health condition reasons) requires the agreement by both the employer and employee.

The previous regulations governing adoption and foster care placement were less detailed. Employers now have clear authority for administering leave for adoption and foster care.

Definitions of family members. For nonfamily military leave, there were very few changes to the definitions of who constituted a "family member." Of note is the addition of "adoptive, step, or foster" mothers and fathers to the FMLA's definition of who is a "parent." For adult children

incapable of self-care, the new FMLA regulations require that the adult child be "incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence" (29 CFR 825.122(c)).

Documentation allowed. The final regulations allow that, for purposes of confirming family relationship, the employer may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, etc. The employer is entitled to examine documentation such as a birth certificate, etc., but the employee is entitled to the return of the official document submitted for this purpose.

Defining when an employee is needed to care for a covered family member. The FMLA provision allowing qualified employees leave to "care for" a covered family member are interpreted even more broadly in the final FMLA regulations. The final regulations allow that the term "needed to care for" does not mean that the employee must be the only individual or family member available to care for the family member or covered servicemember.

However, the preamble to the final rules do indicate an intention by DOL to limit the type of care that can be given, stating " FMLA leave may only be taken to care for the family member with a serious health condition or the covered servicemember with a serious illness or injury. An employee may not use FMLA leave to work in a family business, for example."

This revision to the regulations allow for a more expansive reading of which employees are "needed to care for" covered family members. Although DOL intended on limiting the type of care to be given, it may be difficult for employers to regulate what, exactly an employee on leave is doing.

Healthcare providers. In its final regulations, DOL added to the list of covered "health care providers" by including "physician assistants [PAs] who are authorized to practice under state law and who are performing within the scope of their practice as defined under state law." However, despite public comments requesting such a change, DOL refused to expand the definition of covered healthcare providers to registered nurses or occupational nurses.

This common-sense change addressed the reality of health care—an increased use of physician assistants. Its actual impact on employers may be somewhat diminished since many doctors functionally oversee any medical care and certifications carried out by PAs.

Amount of leave used and treatment of holidays during FMLA leave. The final FMLA regulations (29 CFR 825.200(h)) were changed in order to clarify the DOL's position that, for purposes of determining the amount of leave used by an employee, the fact that a holiday may occur within a full week taken as FMLA leave has no effect; the entire week is counted as a week of FMLA leave.

However, DOL states, 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 2 weeks for the Christmas/New Year holiday or the summer vacation or an employer closing the plant for retooling or repairs), the days the employer's activities have ceased do not count against the employee's FMLA leave entitlement.

Calculation of overtime. In an unannounced change, DOL issued final rules stating that if an employee would normally be required to work overtime, but is unable to do so because of a FMLA-qualifying reason, the hours which the employee would have been required to work may be counted against the employee's FMLA entitlement. In such a case, the employee is using intermittent or reduced schedule leave.

For example, if an employee would normally be required to work for 48 hours in a particular week, but due to a serious health condition, the employee is unable to work more than 40 hours that week, the employee would utilize 8 hours of FMLA-protected leave out of the 48-hour workweek (8/48 = 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.

DOL states in the preamble to the regulations that its statement regarding calculation of overtime is simply intended to clarify, in the regulations, the Department's existing policy

Defining equivalent position for purposes of reinstatement after FMLA leave. The final FMLA regulations state that if a bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied, unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave. Bonuses that are not premised on the achievement of a goal, such as a holiday bonus given to all employees may not be denied to an employee because he or she took FMLA leave.

DOL clarifies in the preamble to the final regulations that safety awards, like attendance awards are predicated on the achievement of a specified job-related performance goal, and therefore are to be treated similarly to attendance awards.

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

Protection for employees who request leave or otherwise assert FMLA rights. The statutory prohibition against interference with FMLA rights applies to employees or prospective employees who have exercised or attempted to exercise FMLA rights. The FMLA's regulatory provision stating that "Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA" applies only to *prospective* FMLA rights; it does not prevent employees from settling past FMLA claims without DOL or court approval.

For light duty, the FMLA waiver prohibition does not prevent an employee's voluntary and uncoerced acceptance of a light-duty assignment while recovering from a serious health condition. The 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 FMLA leave commenced or an equivalent position. Thus, an employee who voluntarily returns to a light-duty position retains the right to job restoration to the same or equivalent position until the end of the 12-month period that the employer uses to calculate FMLA leave.

Note: Contrary to some court's opinions, the FMLA's regulations make it clear that time spent on a light-duty assignment does *not* count against the employee's FMLA leave entitlement.

DOL's position that employees may settle past FMLA claims without approval from DOL or the courts provides assurance to employers negotiating such settlements and distinguishes FMLA claims from wage and hour claims under the Fair Labor Standards Act, which still require such approval.

Exhibit A—Sample Family and Medical Leave Policy

Sample Family and Medical Leave Policy

The federal Family & Medical Leave Act of 1993 (FMLA) as amended in 2008 requires employers with 50 or more employees to provide eligible employees with unpaid leave. There are two types of leave available, including the basic 12-week leave entitlement (Basic FMLA Leave), as well as the military family leave entitlements (Military Family Leave) described in this policy.

In addition to FMLA leave, you may also be eligible for leave under a similar state law. To find out about the availability of state leave, please contact ***[name or department to contact]***.

Eligibility for FMLA Leave

Employees are eligible for FMLA leave if they:

1. Have worked for the company for at least 12 months;
2. Have worked at least 1,250 hours for the company during the 12 calendar months immediately preceding the request for leave; *and*
3. Are employed at a work site that has 50 or more employees within a 75-mile radius.

The 12 months of service need not be consecutive. Employment before a break in service of 7 years or more will not be counted, unless the break in service was caused by the employee's active duty with the National Guard or reserve, or there was a written agreement that the employer intended to rehire the employee after the break in service.

Employees with any questions about their eligibility for FMLA leave should contact ***[name of FMLA administrator]*** for more information.

Basic FMLA Leave

Employees who meet the eligibility requirements described above are eligible to take up to 12 weeks of unpaid leave during any 12-month period for one of the following reasons:

1. To care for the employee's son or daughter during the first 12 months following birth;
2. To care for a child during the first 12 months following placement with the employee for adoption or foster care;
3. To care for a spouse, son, daughter, or parent ("covered relation") with a serious health condition;
4. For incapacity due to the employee's pregnancy, prenatal medical or child birth; *or*
5. Because of the employee's own serious health condition that renders the employee unable to perform an essential function of his or her position.

Married couples. In cases where a married couple is employed by the same company, the two spouses together may take a *combined total* of 12 weeks' leave during any 12-month period for reasons 1 and 2, or to care for the same individual pursuant to reason 3.

Military Family Leave

There are two types of Military Family Leave available.

1. Qualifying exigency leave. Employees meeting the eligibility requirements described above may be entitled to use up to 12 weeks of their Basic FMLA Leave entitlement to address certain qualifying exigencies. Leave may be used if the employee's spouse, son, or daughter, is on active duty or called to active duty status in the National Guard or Reserves in support of a contingency operation. Qualifying exigencies may include:

- Short-notice deployment (up to 7 days of leave)
- Attending certain military events
- Arranging for alternative childcare
- Addressing certain financial and legal arrangements
- Periods of rest and recuperation for the servicemember (up to 5 days of leave)
- Attending certain counseling sessions
- Attending post-deployment activities (available for up to 90 days after the termination of the covered servicemember's active duty status)
- Other activities arising out of the servicemember's active duty or call to active duty and agreed upon by the company and the employee

2. Leave to care for a covered servicemember. There is also a special leave entitlement that permits employees who meet the eligibility requirements for FMLA leave to take up to 26 weeks of leave to care for a covered servicemember during a single 12-month period. A covered servicemember is a current member of the Armed Forces, including a member of the National Guard or Reserves, who has been rendered medically unfit to perform his or her duties due to a serious injury or illness incurred in the line of duty while on active duty that may render the servicemember medically unfit to perform his or her duties for which the servicemember is undergoing medical treatment, recuperation, or therapy; or is in outpatient status; or is on the temporary disability retired list.

When both husband and wife work for the same employer, the aggregate amount of leave that can be taken by the husband and wife to care for a covered servicemember is 26 weeks in a single 12-month period.

Use of Leave

An employee does not need to use this leave entitlement in one block. Leave can be taken intermittently or on a reduced leave schedule when medically necessary. Employees must make reasonable efforts to schedule leave for planned medical treatment so as not to unduly disrupt the employer's operations. Military Family Leave due to qualifying exigencies may also be taken on an intermittent basis. Leave may not be taken on an intermittent basis when used to care for the employee's own child during the first year following birth, or to care for a child placed with the employee for foster care or adoption, unless both the employer and employee agree to such intermittent leave.

Pay, Benefits, and Protections During FMLA Leave

Leave is unpaid. Family medical leave is unpaid leave (although employees may be eligible for short- or long-term disability payments and/or workers' compensation benefits under those insurance plans) if leave is taken because of an employee's own serious health condition.

Substitution of paid time off for unpaid 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, as determined by the terms and conditions of the employer's normal leave policy.

If an employee requests leave because of birth, adoption, or foster care placement of a child, any accrued paid vacation ***[personal leave or family leave]*** first will be substituted for unpaid family/medical leave.

If an employee requests leave because of the employee's own serious health condition, or to care for a covered relation with a serious health condition, any accrued paid vacation ***[personal leave, family or medical/sick leave]*** first will be substituted for any unpaid family/medical leave.

The substitution of paid leave time for unpaid leave time does not extend the 12-week leave period. Furthermore, in no case can the substitution of paid leave time for unpaid leave time result in the receipt of more than 100 percent of an employee's salary. An employee's family medical leave runs concurrently with other types of leave, i.e., paid vacation. ***[Employers may elect to make leave paid or unpaid. The bracketed material must be modified depending on whether the company provides paid personal, family, or medical/sick leave and under what circumstances these paid leaves may be used.]***

For leave taken for a qualifying exigency, an employee may elect or the employer may require substitution of paid personal, vacation, or family leave time for unpaid FMLA leave. The same rules apply as if the employee took FMLA leave to care for a family member with a serious health condition or for the birth or placement of a child.

For leave to care for a seriously injured or ill family member in the military, an employee may substitute paid personal, vacation, family leave, sick, or medical leave time for unpaid FMLA leave. The same rules apply as if the employee took leave for his or her own serious health condition. The employer will not provide paid sick leave or paid medical leave in any situation in which the employer would not normally provide any such paid leave.

Medical and other benefits. During an approved family medical leave, the company will maintain the employee's health benefits as if the employee continued to be actively employed. If paid leave is substituted for unpaid family medical leave, the company will deduct the employee's portion of the health plan premium as a regular payroll deduction. If leave is unpaid, the employee must pay his or her portion of the premium through ***[employers should specify the method they will use].***

An employee's healthcare coverage will cease if the employee's premium payment is more than 30 days late. If the payment is more than 15 days late, the company will send the employee a letter to this effect. If the company does not receive the co-payment within 15 days after the date of that letter, the employee's coverage may cease. If the employee elects not to return to work for at least 30 calendar days at the end of the leave period, the employee will be required to reimburse the company for the cost of the premiums paid by the company for maintaining coverage during the unpaid leave, unless the employee cannot return to work because of a serious health condition or other circumstances beyond the employee's control.

During FMLA leave, the employer must maintain the employee's health coverage under any "group health plan" on the same terms as if the employee had continued to work. Use of FMLA leave will not result in the loss of any employment benefit that accrued prior to the start of the employee's leave.

[The company must decide what, if any, other benefits will continue to accrue during leave periods. There is no obligation to continue to provide or accrue any benefits other than health care under FMLA.]

Return to job at end of FMLA leave. Upon return from FMLA leave, eligible employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.

Employee Responsibilities When Requesting FMLA Leave

If the need to use FMLA leave is foreseeable, the employee must give the company at least 30 days' prior notice of the need to take leave. When 30 days' notice is not possible, the employee must give notice as soon as practicable (within 1 or 2 business days of learning of the need for leave except in extraordinary circumstances). Failure to provide such notice may be grounds for delaying the start of the FMLA leave.

Whenever possible, requests for FMLA leave should be submitted to ***[Human Resources or name of FMLA administrator]*** **using the Request for Family/Medical Leave form available from** ***[Human Resources; name of FMLA administrator; company intranet].***

When submitting a request for leave, the employee must provide sufficient information for the company to determine if the leave might qualify as FMLA leave, and also provide information on the anticipated date when the leave would start as well as the duration of the leave. Sufficient information may include that the employee is unable to perform job functions; that a family member is unable to perform daily activities; that the employee or family member needs hospitalization or continuing treatment by a healthcare provider; or the circumstances supporting the need for military family leave. Employees also must inform the company if the requested leave is for a reason for which FMLA leave was previously taken or certified. Employees also will be required to provide a certification and periodic recertification supporting the need for leave.

Employer Responsibilities

When an employee requests leave, the company will inform the employee whether he or she is eligible under the FMLA. If the employee is, the employee will be given a written notice that includes details on

any additional information he or she will be required to provide. If the employee is not eligible under the FMLA, the company will provide the employee with a written notice indicating the reason for ineligibility.

If leave will be designated as FMLA-protected, the company will inform the employee in writing and provide information on the amount of leave that will be counted against the employee's 12- or 26-week entitlement.

Medical Certification

If the employee is requesting leave because of the employee's own or a covered relation's serious health condition, the employee and the relevant healthcare provider must supply appropriate medical certification. Employees may obtain Medical Certification forms from ***[the Human Resources department].*** When the employee requests leave, the company will notify the employee of the requirement for medical certification and when it is due (no more than 15 days after you request leave). If the employee provides at least 30 days' notice of medical leave, he or she should also provide the medical certification before leave begins.

Failure to provide requested medical certification in a timely manner may result in denial of leave until it is provided. The company, at its expense, may require an examination by a second healthcare provider designated by the company, if it reasonably doubts the medical certification initially provided. If the second healthcare provider's opinion conflicts with the original medical certification, the company, at its expense, may require a third, mutually agreeable, healthcare provider to conduct an examination and provide a final and binding opinion.

The company may require subsequent medical recertification. Failure to provide requested certification within 15 days, except in extraordinary circumstances, may result in the delay of further leave until it is provided. Employees may also be required to provide a fitness-for-duty certification upon return to work, or during intermittent leave, as required.

Reporting While on Leave

If an employee takes leave because of the employee's own serious health condition or to care for a covered relation, the employee must contact the company on the first and third Tuesday of each month regarding the status of the condition and his or her intention to return to work. [**Note:** This is only a *suggested* method for leave reporting. Employers may establish different intervals for reporting, as long as it is not unduly burdensome on the employee or enforced unequally.] In addition, the employee must give notice as soon as practicable (within 2 business days, if feasible) if the dates of the leave change, are extended, or were unknown initially.

Exemption for Highly Compensated Employees

Highly compensated employees (i.e., highest-paid 10 percent of employees at a worksite or within a 75-mile radius of that worksite) may not be returned to their former or equivalent position following a leave if restoration of employment will cause substantial economic injury to the company. (This fact-specific determination will be made by the company on a case-by-case basis.) The company will notify employees if they qualify as "highly compensated" employees if the company intends to deny reinstatement, and of employees' rights in such instances.

Intermittent and Reduced-Schedule Leave

Leave because of a serious health condition, or either type of family military leave may be taken intermittently (in separate blocks of time due to a single health condition) or on a reduced-schedule leave (reducing the usual number of hours worked per workweek or workday) if medically necessary. If leave is unpaid, the company will reduce the employee's salary based on the amount of time actually worked. In addition, while an employee is on an intermittent or reduced-schedule leave, the company may temporarily transfer the employee to an available alternative position that better accommodates the recurring leave and that has equivalent pay and benefits.

Exhibit B1—Certification of Health Care Provider for Employee's Serious Health Condition (Form WH-380-E)

Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

U.S. Wage and Hour Division

OMB Control Number: 1215-0181
Expires: 12/31/2011

SECTION I: For Completion by the EMPLOYER

INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave due to a serious health condition to submit a medical certification issued by the employee's health care provider. Please complete Section I before giving this form to your employee. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies.

Employer name and contact: _____

Employee's job title: _____ Regular work schedule: _____

Employee's essential job functions: _____

_____

Check if job description is attached: _____

SECTION II: For Completion by the EMPLOYEE

INSTRUCTIONS to the EMPLOYEE: Please complete Section II before giving this form to your medical provider. The FMLA permits an employer to require that you submit a timely, complete, and sufficient medical certification to support a request for FMLA leave due to your own serious health condition. If requested by your employer, your response is required to obtain or retain the benefit of FMLA protections. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to provide a complete and sufficient medical certification may result in a denial of your FMLA request. 20 C.F.R. § 825.313. Your employer must give you at least 15 calendar days to return this form. 29 C.F.R. § 825.305(b).

Your name: _____
First Middle Last

SECTION III: For Completion by the HEALTH CARE PROVIDER

INSTRUCTIONS to the HEALTH CARE PROVIDER: Your patient has requested leave under the FMLA. Answer, fully and completely, all applicable parts. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Limit your responses to the condition for which the employee is seeking leave. Please be sure to sign the form on the last page.

Provider's name and business address: _____

Type of practice / Medical specialty: _____

Telephone: (_____)_____ Fax:(_____)_____

PART A: MEDICAL FACTS

1. Approximate date condition commenced: _____

   Probable duration of condition: _____

   Mark below as applicable:
   Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility?
   ___No ___Yes. If so, dates of admission:

   _____

   Date(s) you treated the patient for condition:

   _____

   Will the patient need to have treatment visits at least twice per year due to the condition? ___No ___ Yes.

   Was medication, other than over-the-counter medication, prescribed? ___No ___Yes.

   Was the patient referred to other health care provider(s) for evaluation or treatment (e.g., physical therapist)?
   ____No ____Yes. If so, state the nature of such treatments and expected duration of treatment:

   _____

2. Is the medical condition pregnancy? ___No ___Yes. If so, expected delivery date: _____

3. Use the information provided by the employer in Section I to answer this question. If the employer fails to provide a list of the employee's essential functions or a job description, answer these questions based upon the employee's own description of his/her job functions.

   Is the employee unable to perform any of his/her job functions due to the condition: ____ No ____ Yes.

   If so, identify the job functions the employee is unable to perform:

   _____

4. Describe other relevant medical facts, if any, related to the condition for which the employee seeks leave (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment):

   _____

   _____

   _____

   _____

   _____

   _____

   _____

PART B: AMOUNT OF LEAVE NEEDED

5. Will the employee be incapacitated for a single continuous period of time due to his/her medical condition, including any time for treatment and recovery? ___No ___Yes.

   If so, estimate the beginning and ending dates for the period of incapacity: _____

6. Will the employee need to attend follow-up treatment appointments or work part-time or on a reduced schedule because of the employee's medical condition? ___No ___Yes.

   If so, are the treatments or the reduced number of hours of work medically necessary? ___No ___Yes.

   Estimate treatment schedule, if any, including the dates of any scheduled appointments and the time required for each appointment, including any recovery period:

   _____

   Estimate the part-time or reduced work schedule the employee needs, if any:

   _____ hour(s) per day; _____ days per week from _____ through _____

7. Will the condition cause episodic flare-ups periodically preventing the employee from performing his/her job functions? ____No ____Yes.

   Is it medically necessary for the employee to be absent from work during the flare-ups? ____ No ____Yes. If so, explain:

   _____

   _____

   Based upon the patient's medical history and your knowledge of the medical condition, estimate the frequency of flare-ups and the duration of related incapacity that the patient may have over the next 6 months (e.g., 1 episode every 3 months lasting 1-2 days):

   Frequency: _____ times per _____ week(s) _____ month(s)

   Duration: _____ hours or ___ day(s) per episode

ADDITIONAL INFORMATION: IDENTIFY QUESTION NUMBER WITH YOUR ADDITIONAL ANSWER.

_____

_____

_____

_____

_____

_____

Signature of Health Care Provider **Date**

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210. **DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR; RETURN TO THE PATIENT.**

Exhibit B2—Certification of Health Care Provider for Employee's Family Member's Serious Health Condition (Form WH-380-F)

Certification of Health Care Provider for Family Member's Serious Health Condition (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

U.S. Wage and Hour Division

OMB Control Number: 1215-0181
Expires: 12/31/2011

SECTION I: For Completion by the EMPLOYER

INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave to care for a covered family member with a serious health condition to submit a medical certification issued by the health care provider of the covered family member. Please complete Section I before giving this form to your employee. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees' family members, created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies.

Employer name and contact: _____

SECTION II: For Completion by the EMPLOYEE

INSTRUCTIONS to the EMPLOYEE: Please complete Section II before giving this form to your family member or his/her medical provider. The FMLA permits an employer to require that you submit a timely, complete, and sufficient medical certification to support a request for FMLA leave to care for a covered family member with a serious health condition. If requested by your employer, your response is required to obtain or retain the benefit of FMLA protections. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to provide a complete and sufficient medical certification may result in a denial of your FMLA request. 29 C.F.R. § 825.313. Your employer must give you at least 15 calendar days to return this form to your employer. 29 C.F.R. § 825.305.

Your name: _____
First Middle Last

Name of family member for whom you will provide care: _____
First Middle Last

Relationship of family member to you: _____

If family member is your son or daughter, date of birth: _____

Describe care you will provide to your family member and estimate leave needed to provide care:

_____

_____

_____

_____ _____
Employee Signature Date

SECTION III: For Completion by the HEALTH CARE PROVIDER

INSTRUCTIONS to the HEALTH CARE PROVIDER: The employee listed above has requested leave under the FMLA to care for your patient. Answer, fully and completely, all applicable parts below. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Limit your responses to the condition for which the patient needs leave. Page 3 provides space for additional information, should you need it. Please be sure to sign the form on the last page.

Provider's name and business address:_____

Type of practice / Medical specialty: _____

Telephone: (_____)_____ Fax:(_____)_____

PART A: MEDICAL FACTS

1. Approximate date condition commenced: _____

   Probable duration of condition: _____

   Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility?
   ___No ___Yes. If so, dates of admission: _____

   Date(s) you treated the patient for condition: _____

   Was medication, other than over-the-counter medication, prescribed? ___No ___Yes.

   Will the patient need to have treatment visits at least twice per year due to the condition? ___No ____ Yes

   Was the patient referred to other health care provider(s) for evaluation or treatment (e.g., physical therapist)?
   ____ No ____Yes. If so, state the nature of such treatments and expected duration of treatment:

   _____

   _____

2. Is the medical condition pregnancy? ___No ___Yes. If so, expected delivery date: _____

3. Describe other relevant medical facts, if any, related to the condition for which the patient needs care (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment):

_____

_____

_____

_____

PART B: AMOUNT OF CARE NEEDED: When answering these questions, keep in mind that your patient's need for care by the employee seeking leave may include assistance with basic medical, hygienic, nutritional, safety or transportation needs, or the provision of physical or psychological care:

4. Will the patient be incapacitated for a single continuous period of time, including any time for treatment and recovery? ___No ___Yes.

   Estimate the beginning and ending dates for the period of incapacity: _____

   During this time, will the patient need care? __ No __ Yes.

   Explain the care needed by the patient and why such care is medically necessary:

   _____

   _____

   _____

   _____

   _____

5. Will the patient require follow-up treatments, including any time for recovery? ___No ___Yes.

   Estimate treatment schedule, if any, including the dates of any scheduled appointments and the time required for each appointment, including any recovery period:

   _____

   Explain the care needed by the patient, and why such care is medically necessary: _____

   _____

6. Will the patient require care on an intermittent or reduced schedule basis, including any time for recovery? __ No __ Yes.

   Estimate the hours the patient needs care on an intermittent basis, if any:

   _____ hour(s) per day; _____ days per week from _____ through _____

   Explain the care needed by the patient, and why such care is medically necessary:

   _____

   _____

   _____

   _____

7. Will the condition cause episodic flare-ups periodically preventing the patient from participating in normal daily activities? ____No ____Yes.

   Based upon the patient's medical history and your knowledge of the medical condition, estimate the frequency of flare-ups and the duration of related incapacity that the patient may have over the next 6 months (e.g., 1 episode every 3 months lasting 1-2 days):

   Frequency: _____ times per _____ week(s) _____ month(s)

   Duration: _____ hours or ___ day(s) per episode

   Does the patient need care during these flare-ups? ____ No ____ Yes.

   Explain the care needed by the patient, and why such care is medically necessary: _____

_____

_____

_____

_____

ADDITIONAL INFORMATION: IDENTIFY QUESTION NUMBER WITH YOUR ADDITIONAL ANSWER.

_____

_____

_____

_____

_____

_____

_____ _____

Signature of Health Care Provider **Date**

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210.
DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR; RETURN TO THE PATIENT.

Exhibit C—FMLA General Notice Form (WH Publication 1420)

EMPLOYEE RIGHTS AND RESPONSIBILITIES
UNDER THE FAMILY AND MEDICAL LEAVE ACT

Basic Leave Entitlement
FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to eligible employees for the following reasons:

- For incapacity due to pregnancy, prenatal medical care or child birth;
- To care for the employee's child after birth, or placement for adoption or foster care;
- To care for the employee's spouse, son or daughter, or parent, who has a serious health condition; or
- For a serious health condition that makes the employee unable to perform the employee's job.

Military Family Leave Entitlements
Eligible employees with a spouse, son, daughter, or parent on active duty or call to active duty status in the National Guard or Reserves in support of a contingency operation may use their 12-week leave entitlement to address certain qualifying exigencies. Qualifying exigencies may include attending certain military events, arranging for alternative childcare, addressing certain financial and legal arrangements, attending certain counseling sessions, and attending post-deployment reintegration briefings.

FMLA also includes a special leave entitlement that permits eligible employees to take up to 26 weeks of leave to care for a covered servicemember during a single 12-month period. A covered servicemember is a current member of the Armed Forces, including a member of the National Guard or Reserves, who has a serious injury or illness incurred in the line of duty on active duty that may render the servicemember medically unfit to perform his or her duties for which the servicemember is undergoing medical treatment, recuperation, or therapy; or is in outpatient status; or is on the temporary disability retired list.

Benefits and Protections
During FMLA leave, the employer must maintain the employee's health coverage under any "group health plan" on the same terms as if the employee had continued to work. Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.

Use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

Eligibility Requirements
Employees are eligible if they have worked for a covered employer for at least one year, for 1,250 hours over the previous 12 months, and if at least 50 employees are employed by the employer within 75 miles.

Definition of Serious Health Condition
A serious health condition is an illness, injury, impairment, or physical or mental condition that involves either an overnight stay in a medical care facility, or continuing treatment by a health care provider for a condition that either prevents the employee from performing the functions of the employee's job, or prevents the qualified family member from participating in school or other daily activities.

Subject to certain conditions, the continuing treatment requirement may be met by a period of incapacity of more than 3 consecutive calendar days combined with at least two visits to a health care provider or one visit and a regimen of continuing treatment, or incapacity due to pregnancy, or incapacity due to a chronic condition. Other conditions may meet the definition of continuing treatment.

Use of Leave
An employee does not need to use this leave entitlement in one block. Leave can be taken intermittently or on a reduced leave schedule when medically necessary. Employees must make reasonable efforts to schedule leave for planned medical treatment so as not to unduly disrupt the employer's operations. Leave due to qualifying exigencies may also be taken on an intermittent basis.

Substitution of Paid Leave for Unpaid Leave
Employees may choose or employers may require use of accrued paid leave while taking FMLA leave. In order to use paid leave for FMLA leave, employees must comply with the employer's normal paid leave policies.

Employee Responsibilities
Employees must provide 30 days advance notice of the need to take FMLA leave when the need is foreseeable. When 30 days notice is not possible, the employee must provide notice as soon as practicable and generally must comply with an employer's normal call-in procedures.

Employees must provide sufficient information for the employer to determine if the leave may qualify for FMLA protection and the anticipated timing and duration of the leave. Sufficient information may include that the employee is unable to perform job functions, the family member is unable to perform daily activities, the need for hospitalization or continuing treatment by a health care provider, or circumstances supporting the need for military family leave. Employees also must inform the employer if the requested leave is for a reason for which FMLA leave was previously taken or certified. Employees also may be required to provide certification and periodic recertification supporting the need for leave.

Employer Responsibilities
Covered employers must inform employees requesting leave whether they are eligible under FMLA. If they are, the notice must specify any additional information required as well as the employees' rights and responsibilities. If they are not eligible, the employer must provide a reason for the ineligibility.

Covered employers must inform employees if leave will be designated as FMLA-protected and the amount of leave counted against the employee's leave entitlement. If the employer determines that the leave is not FMLA-protected, the employer must notify the employee.

Unlawful Acts by Employers
FMLA makes it unlawful for any employer to:

- Interfere with, restrain, or deny the exercise of any right provided under FMLA;
- Discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.

Enforcement
An employee may file a complaint with the U.S. Department of Labor or may bring a private lawsuit against an employer.

FMLA does not affect any Federal or State law prohibiting discrimination, or supersede any State or local law or collective bargaining agreement which provides greater family or medical leave rights.

FMLA section 109 (29 U.S.C. § 2619) requires FMLA covered employers to post the text of this notice. Regulations 29 C.F.R. § 825.300(a) may require additional disclosures.

For additional information:
1-866-4US-WAGE (1-866-487-9243) TTY: 1-877-889-5627
WWW.WAGEHOUR.DOL.GOV

U.S. Wage and Hour Division

U.S. Department of Labor | Employment Standards Administration | Wage and Hour Division WHD Publication 1420 Revised January 2009

Exhibit D—Notice of Eligibility and Rights & Responsibilities (Form WH-381)

Notice of Eligibility and Rights & Responsibilities (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

OMB Control Number: 1215-0181
Expires: 12/31/2011

In general, to be eligible an employee must have worked for an employer for at least 12 months, have worked at least 1,250 hours in the 12 months preceding the leave, and work at a site with at least 50 employees within 75 miles. While use of this form by employers is optional, a fully completed Form WH-381 provides employees with the information required by 29 C.F.R. § 825.300(b), which must be provided within five business days of the employee notifying the employer of the need for FMLA leave. Part B provides employees with information regarding their rights and responsibilities for taking FMLA leave, as required by 29 C.F.R. § 825.300(b), (c)**.**

[Part A – NOTICE OF ELIGIBILITY]

TO: _____
Employee

FROM: _____
Employer Representative

DATE: _____

On _____, you informed us that you needed leave beginning on _____ for:

_____ The birth of a child, or placement of a child with you for adoption or foster care;

_____ Your own serious health condition;

_____ Because you are needed to care for your ____ spouse; _____child; _____ parent due to his/her serious health condition.

_____ Because of a qualifying exigency arising out of the fact that your ____ spouse; _____son or daughter; _____ parent is on active duty or call to active duty status in support of a contingency operation as a member of the National Guard or Reserves.

_____ Because you are the ____ spouse; _____son or daughter; _____ parent; _____ next of kin of a covered servicemember with a serious injury or illness.

This Notice is to inform you that you:

_____ Are eligible for FMLA leave (See Part B below for Rights and Responsibilities)

_____ Are **not** eligible for FMLA leave, because (only one reason need be checked, although you may not be eligible for other reasons):

_____ You have not met the FMLA's 12-month length of service requirement. As of the first date of requested leave, you will have worked approximately ___ months towards this requirement.
_____ You have not met the FMLA's 1,250-hours-worked requirement.
_____ You do not work and/or report to a site with 50 or more employees within 75-miles.

If you have any questions, contact _____ or view the FMLA poster located in _____.

[PART B-RIGHTS AND RESPONSIBILITIES FOR TAKING FMLA LEAVE]

As explained in Part A, you meet the eligibility requirements for taking FMLA leave and still have FMLA leave available in the applicable 12-month period. **However, in order for us to determine whether your absence qualifies as FMLA leave, you must return the following information to us by _____.** (If a certification is requested, employers must allow at least 15 calendar days from receipt of this notice; additional time may be required in some circumstances.) If sufficient information is not provided in a timely manner, your leave may be denied.

____ Sufficient certification to support your request for FMLA leave. A certification form that sets forth the information necessary to support your request ____**is**/____ **is not** enclosed.

____ Sufficient documentation to establish the required relationship between you and your family member.

____ Other information needed: _____

_____

_____

____ No additional information requested

If your leave does qualify as FMLA leave you will have the following **responsibilities** while on FMLA leave (only checked blanks apply):

____ Contact _____ at _____ to make arrangements to continue to make your share of the premium payments on your health insurance to maintain health benefits while you are on leave. You have a minimum 30-day (or, indicate longer period, if applicable) grace period in which to make premium payments. If payment is not made timely, your group health insurance may be cancelled, provided we notify you in writing at least 15 days before the date that your health coverage will lapse, or, at our option, we may pay your share of the premiums during FMLA leave, and recover these payments from you upon your return to work.

____ You will be required to use your available paid _____ **sick**, _____ **vacation**, and/or _____**other leave** during your FMLA absence. This means that you will receive your paid leave and the leave will also be considered protected FMLA leave and counted against your FMLA leave entitlement.

____ Due to your status within the company, you are considered a "key employee" as defined in the FMLA. As a "key employee," restoration to employment may be denied following FMLA leave on the grounds that such restoration will cause substantial and grievous economic injury to us. We ___**have**/____ **have not** determined that restoring you to employment at the conclusion of FMLA leave will cause substantial and grievous economic harm to us.

____ While on leave you will be required to furnish us with periodic reports of your status and intent to return to work every _____. (Indicate interval of periodic reports, as appropriate for the particular leave situation).

If the circumstances of your leave change, and you are able to return to work earlier than the date indicated on the reverse side of this form, you will be required to notify us at least two workdays prior to the date you intend to report for work.

If your leave does qualify as FMLA leave you will have the following **rights** while on FMLA leave:

- You have a right under the FMLA for up to 12 weeks of unpaid leave in a 12-month period calculated as:

  _____ the calendar year (January – December).

  _____ a fixed leave year based on _____.

  _____ the 12-month period measured forward from the date of your first FMLA leave usage.

  _____ a "rolling" 12-month period measured backward from the date of any FMLA leave usage.

- You have a right under the FMLA for up to 26 weeks of unpaid leave in a single 12-month period to care for a covered servicemember with a serious injury or illness. This single 12-month period commenced on _____.
- Your health benefits must be maintained during any period of unpaid leave under the same conditions as if you continued to work.
- You must be reinstated to the same or an equivalent job with the same pay, benefits, and terms and conditions of employment on your return from FMLA-protected leave. (If your leave extends beyond the end of your FMLA entitlement, you do not have return rights under FMLA.)
- If you do not return to work following FMLA leave for a reason other than: 1) the continuation, recurrence, or onset of a serious health condition which would entitle you to FMLA leave; 2) the continuation, recurrence, or onset of a covered servicemember's serious injury or illness which would entitle you to FMLA leave; or 3) other circumstances beyond your control, you may be required to reimburse us for our share of health insurance premiums paid on your behalf during your FMLA leave.
- If we have not informed you above that you must use accrued paid leave while taking your unpaid FMLA leave entitlement, you have the right to have **____ sick, ____vacation,** and/or ___ **other leave** run concurrently with your unpaid leave entitlement, provided you meet any applicable requirements of the leave policy. Applicable conditions related to the substitution of paid leave are referenced or set forth below. If you do not meet the requirements for taking paid leave, you remain entitled to take unpaid FMLA leave.

  ____For a copy of conditions applicable to sick/vacation/other leave usage please refer to _____ available at: _____.

  ____Applicable conditions for use of paid leave:_____

  _____

  _____

  _____

  _____

Once we obtain the information from you as specified above, we will inform you, within 5 business days, whether your leave will be designated as FMLA leave and count towards your FMLA leave entitlement. If you have any questions, please do not hesitate to contact:

_____at _____.

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

It is mandatory for employers to provide employees with notice of their eligibility for FMLA protection and their rights and responsibilities. 29 U.S.C. § 2617; 29 C.F.R. § 825.300(b), (c). It is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 10 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION.**

Exhibit E—Designation Notice (Form WH-382)

Designation Notice (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

U.S. Wage and Hour Division

OMB Control Number: 1215-0181
Expires: 12/31/2011

Leave covered under the Family and Medical Leave Act (FMLA) must be designated as FMLA-protected and the employer must inform the employee of the amount of leave that will be counted against the employee's FMLA leave entitlement. In order to determine whether leave is covered under the FMLA, the employer may request that the leave be supported by a certification. If the certification is incomplete or insufficient, the employer must state in writing what additional information is necessary to make the certification complete and sufficient. While use of this form by employers is optional, a fully completed Form WH-382 provides an easy method of providing employees with the written information required by 29 C.F.R. §§ 825.300(c), 825.301, and 825.305(c).

To: _____

Date: _____

We have reviewed your request for leave under the FMLA and any supporting documentation that you have provided. We received your most recent information on _____ and decided:

_____ **Your FMLA leave request is approved. All leave taken for this reason will be designated as FMLA leave.**

The FMLA requires that you notify us as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown. Based on the information you have provided to date, we are providing the following information about the amount of time that will be counted against your leave entitlement:

_____ Provided there is no deviation from your anticipated leave schedule, the following number of hours, days, or weeks will be counted against your leave entitlement: _____

_____ Because the leave you will need will be unscheduled, it is not possible to provide the hours, days, or weeks that will be counted against your FMLA entitlement at this time. You have the right to request this information once in a 30-day period (if leave was taken in the 30-day period).

Please be advised (check if applicable):

_____ You have requested to use paid leave during your FMLA leave. Any paid leave taken for this reason will count against your FMLA leave entitlement.

_____ We are requiring you to substitute or use paid leave during your FMLA leave.

_____You will be required to present a fitness-for-duty certificate to be restored to employment. If such certification is not timely received, your return to work may be delayed until certification is provided. A list of the essential functions of your position ___ **is** ___ **is not** attached. If attached, the fitness-for-duty certification must address your ability to perform these functions.

_____ **Additional information is needed to determine if your FMLA leave request can be approved:**

_____ The certification you have provided is not complete and sufficient to determine whether the FMLA applies to your leave request. You must provide the following information no later than _____, unless it is not
(Provide at least seven calendar days)
practicable under the particular circumstances despite your diligent good faith efforts, or your leave may be denied.

_____
(Specify information needed to make the certification complete and sufficient)

_____

_____ We are exercising our right to have you obtain a second or third opinion medical certification at our expense, and we will provide further details at a later time.

_____ Your FMLA Leave request is Not Approved.
_____ The FMLA does not apply to your leave request.
_____ You have exhausted your FMLA leave entitlement in the applicable 12-month period.

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

It is mandatory for employers to inform employees in writing whether leave requested under the FMLA has been determined to be covered under the FMLA. 29 U.S.C. § 2617; 29 C.F.R. §§ 825.300(d), (e). It is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 10 – 30 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION.**

Form WH-382 January 2009

Exhibit F—Certification of Qualifying Exigency for Military Family Leave (Form WH-384)

Certification of Qualifying Exigency
For Military Family Leave
(Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

U.S. Wage and Hour Division

OMB Control Number: 1215-0181
Expires: 12/31/2011

SECTION I: For Completion by the EMPLOYER

INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA leave due to a qualifying exigency to submit a certification. Please complete Section I before giving this form to your employee. Your response is voluntary, and while you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. § 825.309.

Employer name: _____

Contact Information: _____

SECTION II: For Completion by the EMPLOYEE

INSTRUCTIONS to the EMPLOYEE: Please complete Section II fully and completely. The FMLA permits an employer to require that you submit a timely, complete, and sufficient certification to support a request for FMLA leave due to a qualifying exigency. Several questions in this section seek a response as to the frequency or duration of the qualifying exigency. Be as specific as you can; terms such as "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Your response is required to obtain a benefit. 29 C.F.R. § 825.310. While you are not required to provide this information, failure to do so may result in a denial of your request for FMLA leave. Your employer must give you at least 15 calendar days to return this form to your employer.

Your Name: _____
First Middle Last

Name of covered military member on active duty or call to active duty status in support of a contingency operation:

_____
First Middle Last

Relationship of covered military member to you: _____

Period of covered military member's active duty: _____

A complete and sufficient certification to support a request for FMLA leave due to a qualifying exigency includes written documentation confirming a covered military member's active duty or call to active duty status in support of a contingency operation. Please check one of the following:

___ A copy of the covered military member's active duty orders is attached.
___ Other documentation from the military certifying that the covered military member is on active duty (or has been notified of an impending call to active duty) in support of a contingency operation is attached.
___ I have previously provided my employer with sufficient written documentation confirming the covered military member's active duty or call to active duty status in support of a contingency operation.

PART A: QUALIFYING REASON FOR LEAVE

1. Describe the reason you are requesting FMLA leave due to a qualifying exigency (including the specific reason you are requesting leave):

_____

_____

_____

_____

_____

_____

2. A complete and sufficient certification to support a request for FMLA leave due to a qualifying exigency includes any available written documentation which supports the need for leave; such documentation may include a copy of a meeting announcement for informational briefings sponsored by the military, a document confirming an appointment with a counselor or school official, or a copy of a bill for services for the handling of legal or financial affairs. Available written documentation supporting this request for leave is attached. __ Yes __ No __ None Available

PART B: AMOUNT OF LEAVE NEEDED

1. Approximate date exigency commenced: _____

   Probable duration of exigency: _____

2. Will you need to be absent from work for a single continuous period of time due to the qualifying exigency? ___No ___Yes.

   If so, estimate the beginning and ending dates for the period of absence:

   _____.

3. Will you need to be absent from work periodically to address this qualifying exigency? ___No ___Yes.

   Estimate schedule of leave, including the dates of any scheduled meetings or appointments:_____

   _____

   _____

   _____

   Estimate the frequency and duration of each appointment, meeting, or leave event, including any travel time (i.e., 1 deployment-related meeting every month lasting 4 hours):

   Frequency: _____ times per _____ week(s) _____ month(s)

   Duration: _____ hours ___ day(s) per event.

PART C:

If leave is requested to meet with a third party (such as to arrange for childcare, to attend counseling, to attend meetings with school or childcare providers, to make financial or legal arrangements, to act as the covered military member's representative before a federal, state, or local agency for purposes of obtaining, arranging or appealing military service benefits, or to attend any event sponsored by the military or military service organizations), a complete and sufficient certification includes the name, address, and appropriate contact information of the individual or entity with whom you are meeting (i.e., either the telephone or fax number or email address of the individual or entity). This information may be used by your employer to verify that the information contained on this form is accurate.

Name of Individual: _____ Title: _____

Organization: _____

Address: _____

Telephone: (_____)_____ Fax: (_____)_____

Email: _____

Describe nature of meeting: _____

_____

_____

_____

_____

_____

_____

_____

_____

PART D:

I certify that the information I provided above is true and correct.

_____ _____

Signature of Employee Date

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution AV, NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION; RETURN IT TO THE EMPLOYER.**

Exhibit G—Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave (Form WH-385)

Certification for Serious Injury or Illness of Covered Servicemember - - for Military Family Leave (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

OMB Control Number: 1215-0181
Expires: 12/31/2011

Notice to the EMPLOYER **INSTRUCTIONS to the EMPLOYER:** The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA leave due to a serious injury or illness of a covered servicemember to submit a certification providing sufficient facts to support the request for leave. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. § 825.310. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees or employees' family members, created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies.

SECTION I: For Completion by the EMPLOYEE and/or the COVERED SERVICEMEMBER for whom the Employee Is Requesting Leave **INSTRUCTIONS to the EMPLOYEE or COVERED SERVICEMEMBER:** Please complete Section I before having Section II completed. The FMLA permits an employer to require that an employee submit a timely, complete, and sufficient certification to support a request for FMLA leave due to a serious injury or illness of a covered servicemember. If requested by the employer, your response is required to obtain or retain the benefit of FMLA-protected leave. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to do so may result in a denial of an employee's FMLA request. 29 C.F.R. § 825.310(f). The employer must give an employee at least 15 calendar days to return this form to the employer.

SECTION II: For Completion by a UNITED STATES DEPARTMENT OF DEFENSE ("DOD") HEALTH CARE PROVIDER or a HEALTH CARE PROVIDER who is either: (1) a United States Department of Veterans Affairs ("VA") health care provider; (2) a DOD TRICARE network authorized private health care provider; or (3) a DOD non-network TRICARE authorized private health care provider **INSTRUCTIONS to the HEALTH CARE PROVIDER:** The employee listed on Page 2 has requested leave under the FMLA to care for a family member who is a member of the Regular Armed Forces, the National Guard, or the Reserves who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list for a serious injury or illness. For purposes of FMLA leave, a serious injury or illness is one that was incurred in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank, or rating.

A complete and sufficient certification to support a request for FMLA leave due to a covered servicemember's serious injury or illness includes written documentation confirming that the covered servicemember's injury or illness was incurred in the line of duty on active duty and that the covered servicemember is undergoing treatment for such injury or illness by a health care provider listed above. Answer, fully and completely, all applicable parts. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Limit your responses to the condition for which the employee is seeking leave.

Certification for Serious Injury or Illness of Covered Servicemember - - for Military Family Leave (Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

U.S. Wage and Hour Division

SECTION I: For Completion by the EMPLOYEE and/or the COVERED SERVICEMEMBER for whom the Employee Is Requesting Leave: (This section must be completed first before any of the below sections can be completed by a health care provider.)

Part A: EMPLOYEE INFORMATION

Name and Address of Employer (this is the employer of the employee requesting leave to care for covered servicemember):

_____

Name of Employee Requesting Leave to Care for Covered Servicemember:

_____
First Middle Last

Name of Covered Servicemember (for whom employee is requesting leave to care):

_____
First Middle Last

Relationship of Employee to Covered Servicemember Requesting Leave to Care:
? Spouse ? Parent ? Son ? Daughter ? Next of Kin

Part B: COVERED SERVICEMEMBER INFORMATION

(1) Is the Covered Servicemember a Current Member of the Regular Armed Forces, the National Guard or Reserves? ___Yes ____No

If yes, please provide the covered servicemember's military branch, rank and unit currently assigned to:

_____

Is the covered servicemember assigned to a military medical treatment facility as an outpatient or to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients (such as a medical hold or warrior transition unit)? ___Yes ___No If yes, please provide the name of the medical treatment facility or unit:

_____

(2) Is the Covered Servicemember on the Temporary Disability Retired List (TDRL)? ____Yes ____No

Part C: CARE TO BE PROVIDED TO THE COVERED SERVICEMEMBER

Describe the Care to Be Provided to the Covered Servicemember and an Estimate of the Leave Needed to Provide the Care:

_____

SECTION II: For Completion by a United States Department of Defense ("DOD") Health Care Provider or a Health Care Provider who is either: (1) a United States Department of Veterans Affairs ("VA") health care provider; (2) a DOD TRICARE network authorized private health care provider; or (3) a DOD non-network TRICARE authorized private health care provider. If you are unable to make certain of the military-related determinations contained below in Part B, you are permitted to rely upon determinations from an authorized DOD representative (such as a DOD recovery care coordinator). (Please ensure that Section I above has been completed before completing this section.) Please be sure to sign the form on the last page.

Part A: HEALTH CARE PROVIDER INFORMATION
Health Care Provider's Name and Business Address:

_____

Type of Practice/Medical Specialty: _____

Please state whether you are either: (1) a DOD health care provider; (2) a VA health care provider; (3) a DOD TRICARE network authorized private health care provider; or (4) a DOD non-network TRICARE authorized private health care provider: _____

Telephone: ( ) _____ Fax: ( ) _____ Email: _____

PART B: MEDICAL STATUS

(1) Covered Servicemember's medical condition is classified as (Check One of the Appropriate Boxes):

? **(VSI) Very Seriously Ill/Injured** – Illness/Injury is of such a severity that life is imminently endangered. Family members are requested at bedside immediately. (Please note this is an internal DOD casualty assistance designation used by DOD healthcare providers.)

? **(SI) Seriously Ill/Injured** – Illness/injury is of such severity that there is cause for immediate concern, but there is no imminent danger to life. Family members are requested at bedside. (Please note this is an internal DOD casualty assistance designation used by DOD healthcare providers.)

? **OTHER Ill/Injured** – a serious injury or illness that may render the servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating.

? **NONE OF THE ABOVE** (Note to Employee: If this box is checked, you may still be eligible to take leave to care for a covered family member with a "serious health condition" under § 825.113 of the FMLA. If such leave is requested, you may be required to complete DOL FORM WH-380 or an employer-provided form seeking the same information.)

(2) Was the condition for which the Covered Service member is being treated incurred in line of duty on active duty in the armed forces? ____ Yes ____ No

(3) Approximate date condition commenced: _____

(4) Probable duration of condition and/or need for care: _____

(5) Is the covered servicemember undergoing medical treatment, recuperation, or therapy? ____Yes ___No. If yes, please describe medical treatment, recuperation or therapy:

PART C: COVERED SERVICEMEMBER'S NEED FOR CARE BY FAMILY MEMBER

(1) Will the covered servicemember need care for a single continuous period of time, including any time for treatment and recovery? ___ Yes ___ No
If yes, estimate the beginning and ending dates for this period of time: _____

(2) Will the covered servicemember require periodic follow-up treatment appointments?
___ Yes ___ No If yes, estimate the treatment schedule: _____

(3) Is there a medical necessity for the covered servicemember to have periodic care for these follow-up treatment appointments? ____Yes _____No

(4) Is there a medical necessity for the covered servicemember to have periodic care for other than scheduled follow-up treatment appointments (e.g., episodic flare-ups of medical condition)? ____Yes ____No If yes, please estimate the frequency and duration of the periodic care:

_____

_____

Signature of Health Care Provider: _____ Date: _____

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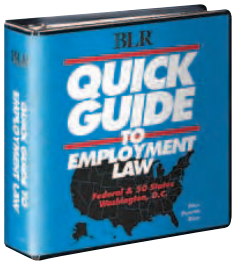

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