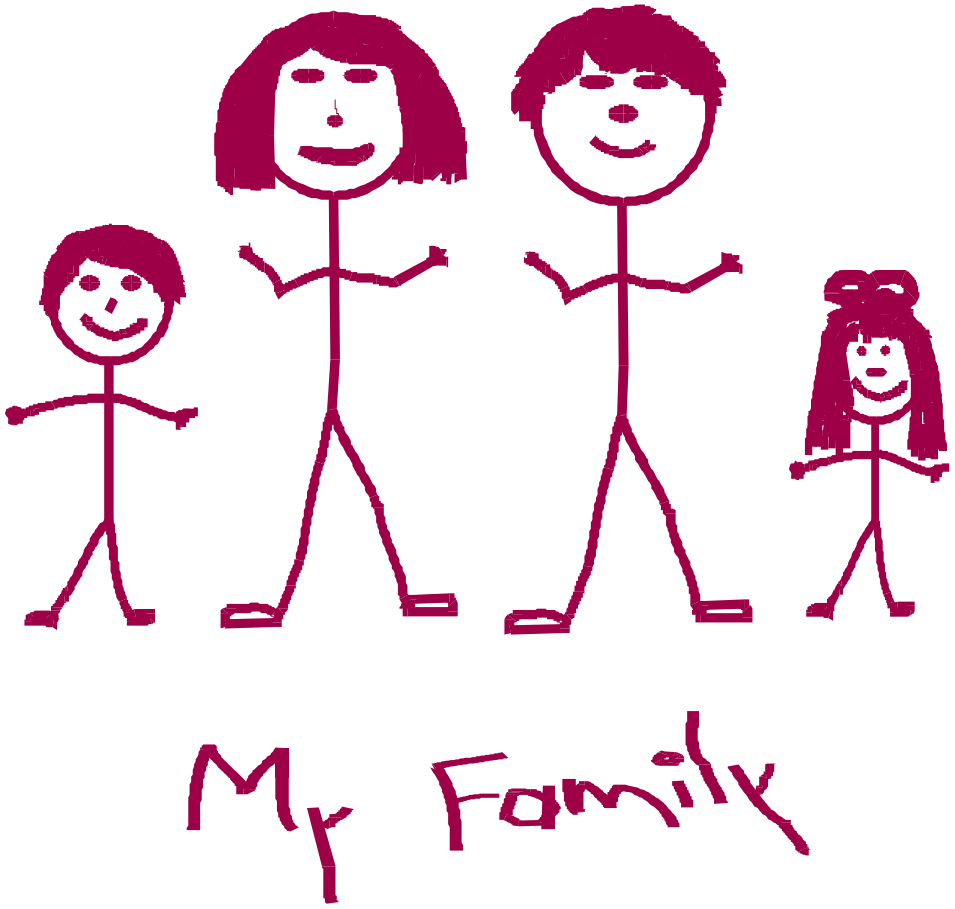
A comprehensive guide to the

FMLA

Family & Medical Leave Act



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Human Resources Division

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Introduction to the Family and Medical Leave Act Manual

Welcome to the wonderful world of the Family and Medical Leave Act (FMLA)! We realize that as FMLA Coordinators many of you have had training and/or have received information about how to administer FMLA leave. We hope this manual will serve as a comprehensive reference tool with all the information you need to administer the FMLA in one easy-to-locate resource.

On the first few pages of this manual is a quick-reference guide, or "to do" list, which pinpoints the eight basic responsibilities of an FMLA Coordinator and some helpful tips relating to those responsibilities. The quick-reference guide also refers to applicable sections of the manual for more detailed information.

The bulk of the manual is a comprehensive view of the FMLA, building on the topics outlined in the quick-reference guide. Be sure to look for this special signal which will remind you of the hot tips from the quick-reference guide:

A definitions section and question and answer (Q&A) section are also included. The Q& A section provides practical examples for how to handle common situations.

So that you may quickly and easily locate additional information on a particular topic, we have included a topical index to citations to the federal regulations, case law summaries, and/or department of labor opinion letters. The cases referenced are, by no means, all of the cases on the FMLA, but a sampling of how the courts are deciding these cases.

Finally, in the appendices, you will find several useful resources. You will find the posted notice that should be located in prominent places throughout your agency, and various other forms you may wish to use. **All forms should be adapted to meet the needs of your agency.** The State's model FMLA policy is also included. We strongly recommend that all agencies adopt an FMLA policy. While there are a few areas where an agency may have discretion to vary from this policy, they are very few. We encourage you to contact the Department of Administrative Services, Human Resources Division for assistance in developing an agency-specific policy. Finally, the last document in the Appendices is a copy of the annotated regulations with which you should become very familiar.

Please contact the Department of Administrative Services, Human Resources Division, Office of Policy Development, at 728-9494 if we may provide assistance with your journey through the FMLA!

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I. FMLA COORDINATOR BASIC "TO-DO" LIST (A QUICK-REFERENCE GUIDE)

As the FMLA Coordinator, your major responsibilities are to ensure all employees are aware of their FMLA rights and that FMLA leave is appropriately granted to all eligible employees.

The preliminary step an FMLA Coordinator should take is to ensure that he or she has a copy of the FMLA regulations. Once you familiarize yourself with the FMLA regulations, your role as the FMLA Coordinator becomes a matter of:

- being available to answer any FMLA questions,
- properly requesting, reviewing, and maintaining medical certifications,
- properly notifying employees of their rights under the FMLA, and
- ensuring employees' FMLA leave is properly captured on payroll.

The following *"to do"* list is provided as a quick reference guide to your basic responsibilities as an FMLA coordinator.

1. Post *Your Rights Under the Family and Medical Leave Act of 1993* notice in prominent places throughout your organization.

A sample notice is provided in the appendices. A copy of this notice may also be obtained by calling the U.S. Department of Labor, Wage and Hour Division office nearest you.

Cincinnati area:	(513) 684-2908
Cleveland area:	(216) 522-3892
Columbus area:	(614) 469-5677 or 5678

2. Verify employee's FMLA eligibility.

All state of Ohio employees who have one year of service (yes, prior service counts) and have been in *active pay status* for at least 1,250 hours in the previous twelve months are eligible for FMLA leave. ***HOT TIP!*** You can verify an employee's FMLA eligibility in CICS-FIN. Once you log in to CICS-FIN and clear the screen:

- Type **fmla** (catchy, huh?) and press **Enter**.
- Type the employee's **social security number** and press **Enter**.

This screen will show the number of hours the employee was paid and the number of FMLA hours the employee has used in the previous 26 pay periods. If you haven't seen this application, try it as soon as you get a chance. It is a real time saver!

3. Familiarize yourself with the definitions section of the federal regulations.

Knowing these definitions will enable you to review employees' medical certification forms (ADM 4260) to determine if their conditions qualify for FMLA leave. ***HOT TIP!*** The definitions for *health care provider, serious health condition,* and *needed to care for a family member* will probably come into play most often.

4. Know your options when an employee submits a medical certification form with insufficient information.

If an employee submits a medical certification form that does not establish why the condition prevents the employee from performing the essential duties, you should inform the employee that you are not able to determine whether the condition qualifies under the FMLA. You should provide the employee an opportunity to correct any deficiencies, generally within fifteen days. **CAUTION:** the FMLA regulations specifically prohibit you from contacting the employee's health care provider directly! Your best bet is to inform the employee of the specific areas of the form you need the health care provider to address.

5. Know when it may be necessary to send the employee for a second/third opinion.

If a health care provider properly completes the certification form, but you still question whether the medical condition prevents an employee from performing the essential duties, you may send the employee to a second health care provider. If the second health care provider's opinion is different from the opinion of the employee's health care provider, you should send the employee to a third health care provider for a final and binding opinion. A more detailed discussion regarding second and third medical opinions is provided in the "A Closer Look" section on medical certifications.

6. Know when to request medical recertifications.

You can generally request an employee to submit a new medical certification form as often as once every thirty days, unless the original certification specified a longer period of time. Any requests for recertification must be in relation to an absence! You may request a recertification more frequently if one of the following apply:

- If the absences are more frequent or longer in duration than provided in the original certification.
- If you receive information that casts doubt on the validity of the certification.

7. Familiarize yourself with the FMLA notice requirements, and follow them!

An agency FMLA Coordinator should request that an employee submit a medical certification form (ADM 4260) as soon as possible after an agency representative (Supervisor/Personnel Officer) becomes aware that the employee is requesting/using leave for what may be an FMLA-qualifying condition. The initial request to submit the recertification form may be either verbal or in writing (but must be followed up in writing by the next payday). ***HOT TIP!*** You could kill two birds with one stone by notifying the employee of his or her FMLA rights in the letter you use to send the certification form. The letter should state that the leave is being considered FMLA leave pending the receipt of sufficient medical documentation. A sample letter you can use for this purpose is provided in the appendices. Remember, the sooner an employee is notified of his or her rights under the FMLA, the sooner the agency can start counting time toward the employee's twelve-week FMLA entitlement!

Important Notice Requirements:

A. An employee must at least be given **verbal notice** that his or her leave is being counted toward the twelve-week FMLA entitlement **within two days** from the date your agency became aware of the employee's need for FMLA leave or from the date your agency starts capturing FMLA leave.

B. An employee must be sent **written notification** of his or her rights under the FMLA **by the next payday**, unless the payday is less than one week from the date oral notice is provided, then written notification can be provided by the subsequent payday. See

section 825 of the regulations. The following eight areas need to be addressed in the written notice:

- Confirmation that the leave will be counted against the employee's FMLA leave entitlement.

- Specific requirements for the employee to provide medical certification for a serious illness and consequences of failing to do so.

- The employee's right to use paid leave or the agency's requirement for an employee to use all or certain portions of accrued paid leave prior to going on unpaid leave.

- The employee's obligation to make any payment to maintain health benefits and the process for making such payments. For example, an employee should be directed to pay his or her share of the health insurance premium to the payroll office by the fifteenth of the month prior to the month of desired coverage. You may direct the employee to contact the Payroll/Benefits person.

- Your agency's specific requirements for the employee to provide a fitness-for-duty certificate upon returning to work.

- The employee's right to restoration to the same or equivalent position upon returning from FMLA leave.

- Employee's potential liability for payment of health insurance premiums paid by the employer during the employee's FMLA leave if the employee does not return to work after taking leave, unless the reason for not returning was due to circumstances beyond the employee's control.

- Generally, the regulations require the employee be notified of the employee's status as a "key employee" (if applicable), potential consequences for denial of restoration following FMLA leave, and conditions required for such denial. *Since we have been unable to establish any state employee as a "key employee", this is not applicable and does not need to be addressed in the notice.*

8. Do not count compensatory time used toward the 12-week leave entitlement.

An employee has the right to use compensatory time for FMLA-qualifying reasons, but such time cannot count as part of an employee's 12-week entitlement. Be careful to deduct any compensatory time from the leave an employee uses during a period in which you are posting FMLA leave.

II. SUMMARY OVERVIEW OF THE FAMILY AND MEDICAL LEAVE ACT (FMLA) OF 1993

A. INTRODUCTION

1. General

The Family and Medical Leave Act (FMLA) is a federal law enforced by the U.S. Department of Labor's Employment Standards Administration, Wage and Hour Division.

FMLA covers:

- private, state and local government employees,
- most federal employees,
- some congressional employees.

(Covered federal and congressional employees are subject to the jurisdiction of the U.S. Office of Personnel Management or the Congress).

2. When Did The FMLA Become Effective?

The FMLA became effective on August 5, 1993, for most employers. If a collective bargaining agreement (CBA) was in effect on that date, the FMLA became effective on the expiration date of the CBA or February 5, 1993, whichever was earlier. The final regulations issued on January 6, 1995 were effective for governmental employers on April 6, 1995.

3. How Much Leave Is An Eligible Employee Entitled To?

The FMLA entitles eligible employees to take up to 12 weeks of unpaid, job-protected leave in a 12-month period for specified family and medical reasons.

As the 12-month period, the employer may elect to use:

- the calendar year,

-
- a fixed 12-month leave or fiscal year, or
- a 12-month period prior to or after the commencement of leave.

The state has elected to use the 12-month period immediately prior to the request for leave.

4. What Does The Law Cover?

The law addresses:

- employer coverage,
- employee eligibility for the law's benefits,
- entitlement to leave,
- maintenance of health benefits during leave,
- job restoration after leave,
- notice and certification of the need for FMLA leave, and
- protection for employees who request or take FMLA leave.

The law also requires employers to keep certain records.

B. DEFINITIONS

You should become very familiar with the definitions section of the regulations so that you can review employees' medical certification forms. The definitions for *health care provider*, *serious health condition* and "*needed to care for*" will come into play most frequently.

1. Who Is A "Health Care Provider"?

A:	WHO IS:
• Doctor of medicine • Doctor of osteopathy	authorized to practice medicine or surgery by the state in which the doctor practices
• Podiatrist • Dentist • Clinical psychologist • Optometrist • Chiropractor (limited to manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist)	authorized to practice, and performing within the scope of their practice, under state law
• Nurse practitioner • Nurse-midwife • Clinical social worker	authorized to practice, and performing within the scope of their practice, as defined under state law
• Christian Science practitioner	listed with the First Church of Christ, Scientist in Boston, Massachusetts
• Any health care provider	recognized by the employer or the employer's group health plan benefits manager
• A health care provider as defined above who practices in a country other than the United States	licensed to practice in that country

2. What Is A "Serious Health Condition"?

An illness, injury, impairment, or physical or mental condition that involves either:

a) Inpatient care (i.e. an overnight stay);

IN A	AND
• hospital • hospice • residential medical care facility	any period of incapacity or subsequent treatment in connection with such inpatient care.

OR b) Continuing treatment by a health care provider, which includes any one or more of the following:

	WHICH
(i) A period of incapacity (i.e., inability to work, attend school or perform other regular daily activities)	• lasts more than three consecutive calendar days, and • includes: –treatment two or more times by or under the supervision of a health care provider, OR –one treatment by a health care provider with a continuing regimen of treatment under supervision of a health care provider
(ii) Pregnancy or prenatal care (includes severe morning sickness)*	
(iii) A chronic serious health condition (e.g., asthma, diabetes)*	• continues over an extended period of time, • requires periodic visits to a health care provider or nurse or physician's assistant under supervision of a health care provider, **AND** • may involve occasional episodes of incapacity rather than continuing incapacity
(iv) A permanent or long-term condition for which treatment may not be effective (e.g. Alzheimer's, a severe stroke, terminal cancer)	requires the employee or family member to be under continuing supervision of a health care provider but need not require active treatment
(v) Any absences to receive multiple treatments (including recovery from)	are necessary either for restorative surgery after an accident or other injury or for a condition (e.g. chemotherapy, radiation, physical therapy for severe arthritis, dialysis for kidney disease) which would likely result in a period of incapacity of more than three days if not treated.

* A visit to the health care provider is not necessary for each absence.

3. What Does "Needed To Care For" Mean?

The term "needed to care for" is a medical certification provision that can apply in the following situations:

PHYSICAL CARE	PSYCHOLOGICAL CARE
• Where, because of a serious health condition, the employee's family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety • Where, because of a serious health condition, the employee's family member is unable to transport himself or herself to the doctor • Where the employee may be needed to fill in for others who are caring for the family member, or to make arrangements for changes in care, such as transfer to a nursing home	• Where an employee can provide psychological comfort and reassurance that would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care

C. WHICH EMPLOYERS ARE COVERED BY THE FMLA?

The FMLA applies to all:

PUBLIC AGENCIES*, including	PRIVATE SECTOR EMPLOYERS**, if
• State employees • Local employees • Federal employees • Local education agencies (schools)	• employed 50 or more employees in 20 or more workweeks in the current or preceding calendar year • are engaged in commerce or in any industry or activity affecting commerce

* Public agencies are covered employers without regard to the number of employees employed.

** Includes joint employers and successors of covered employers if meet qualifications in chart.

D. WHICH EMPLOYEES ARE ELIGIBLE FOR FMLA LEAVE?

To be eligible for FMLA benefits, an employee must:

- work for a covered employer (includes all state agencies);
- have worked for the employer for a total of 12 months (need not be consecutive);
- have been in active pay status at least 1,250 hours over the previous 12 months; AND
- work at a location in the United States or in any territory or possession of the United States where at least 50 employees are employed by the employer within 75 miles.

Verify the employee's eligibility on CICS-FIN. Log on to CICS-FIN and clear the screen:

- Type **fmla**, press enter
- Type the employee's social security number, press enter

This screen shows the number of hours the employee used in the previous 26 pay periods.

E. WHAT ARE THE REASONS FOR WHICH AN EMPLOYEE MAY BE ENTITLED TO FMLA LEAVE?

1. General

A covered employer must grant an eligible employee up to a total of 12 workweeks of unpaid leave during any 12-month period for one or more of the following reasons:

- for the birth and care of the newborn child of the employee;
- for placement with the employee of a son or daughter for adoption or foster care;
- to care for an immediate family member (spouse, child, or parent) with a serious health condition; or
- to take medical leave when the employee is unable to work because of a serious health condition.

2. What If Both Spouses Work For The Same Employer?

Spouses employed by the same employer may be limited to a combined total of 12 work-weeks of family leave for the birth and care of the newborn child, for placement of a child for adoption or foster care, and to care for a parent who has a serious health condition. Thus, individual appointing authorities may establish a policy allowing each employee 12 weeks or limiting the spouses to a combined 12 weeks.

3. When Must Leave For Childbirth, Adoption, Or Foster Care Be Taken?

Leave for birth and care, or placement for adoption or foster care must conclude within 12 months of the birth or placement.

4. What If An Employee Requests Intermittent Leave?

Under some circumstances, employees may take FMLA leave intermittently — which means taking leave in blocks of time, or by reducing their normal weekly or daily work schedule.

- If FMLA leave is for birth and care or placement for adoption or foster care, use of intermittent leave is subject to the employer's approval.

- FMLA leave may be taken intermittently whenever medically necessary to care for a seriously ill family member, or because the employee is seriously ill and unable to work.

F. WILL HEALTH BENEFITS BE MAINTAINED DURING FMLA LEAVE?

IF	THEN
a covered employer provided group health insurance coverage for an employee before the employee takes FMLA leave	the employer must maintain coverage on the same terms as if the employee continued to work.*

* If applicable, arrangements will need to be made for employees to pay their share of health insurance premiums while on leave.

In some instances, the employer may recover premiums it paid to maintain health coverage for an employee who fails to return to work from FMLA leave.

G. WHAT POSITION MUST AN EMPLOYEE BE RESTORED TO UPON RETURN FROM FMLA LEAVE?

Upon return from FMLA leave, an employee must be restored to:

- the employee's original job, OR
- an equivalent job with equivalent pay, benefits, and other terms and conditions of employment.

In addition, an employee's use of FMLA leave cannot:

- result in the loss of any employment benefit that the employee earned or was entitled to before using FMLA leave, OR
- be counted against the employee under a "no fault" attendance policy.

H. WHAT ARE THE NOTICE AND CERTIFICATION REQUIREMENTS?

1. What Are The Employee's Responsibilities?

EMPLOYEES MUST PROVIDE	EMPLOYEES MAY HAVE TO PROVIDE*
30-day advance notice of the need to take FMLA leave: • when the need is foreseeable, AND • when such notice is practicable	medical certification supporting the need for leave due to a serious health condition affecting the employee or an immediate family member
notice as soon as practicable when the need for leave is not foreseeable	• second or third medical opinions (at the employer's expense) and periodic recertification, AND • periodic reports during FMLA leave regarding the employee's status and intent to return to work

* If an employer requires the information.

2. What Are The Employer's Responsibilities?

COVERED EMPLOYERS MUST	THAT INCLUDES
post a notice approved by the Secretary of Labor*	an explanation of the rights and responsibilities under FMLA
inform employees of their rights and responsibilities under FMLA	giving specific written information on: • what is required of the employee • what might happen in certain circumstances (i.e. the employee fails to return to work after FMLA leave)

* An employer that willfully violates this posting requirement may be subject to a fine of up to $100 for each separate offense.

3. What About Scheduling Intermittent Leave?

If intermittent leave:

IS	THEN
• needed to care for an immediate family member or the employee's own illness, AND • for **planned** medical treatment	the employee must try to schedule treatment so as not to unduly disrupt the employer's operation

A more detailed explanation of specific notice and certification requirements is outlined in the "A Closer Look" section of this manual.

I. WHAT ACTS ARE UNLAWFUL UNDER THE FMLA?

It is unlawful for any employer to:

- interfere with, restrain, or deny the exercise of any right provided by FMLA
- discharge or discriminate against any individual
  - for opposing any practice related to FMLA, **OR**
  - because of involvement in any proceeding related to FMLA.

J. WHO ENFORCES THE FMLA?

The Wage and Hour Division investigates complaints. If violations cannot be satisfactorily resolved, the U.S. Department of Labor may bring action in court to compel compliance. Individuals may also bring a private civil action against an employer for violations.

K. DOES THE FMLA SUPERCEDE OTHER LAWS?

IF	THEN
you are an employee who meets the Fair Labor Standards (FLSA) criteria for exemption from minimum wage and overtime regulations*	you do not lose your FLSA-exempt status by using any unpaid FMLA leave.**

* 29 CFR Part 541

** Extends only to "eligible" employees' use of leave required by FMLA

The FMLA does not affect any other federal or state law that prohibits discrimination, nor supersede any state or local law that provides greater family or medical leave protection. Nor does it affect an employer's obligation to provide greater leave rights under a collective bargaining agreement or employment benefit plan.

L. WHERE CAN I GET ADDITIONAL INFORMATION?

For more information, please contact the nearest office of the Department of Labor, Employment Standards Administration, Wage and Hour Division.

Columbus area:	(614) 469-5677 or 5678
Cleveland area:	(216) 522-3892
Cincinnati area:	(513) 684-2908

The Department of Labor (DOL) has a very helpful webpage at http://dol.gov. We recommend trying the “elaws” link, which may be accessed directly at http://www.gov/elaws/fmla.htm.

III. A CLOSER LOOK

A. NOTIFICATION REQUIREMENTS

1. Employer Notice Requirements

Check to assure your agency has copies of the "Your Rights Under the Family and Medical Leave Act of 1993" poster displayed in prominent locations.

Posted Notice

[See §825.300]

Employers must post a notice explaining:

- the provisions of the FMLA
- the procedures for filing a complaint with the Wage and Hour Division of the Department of Labor (DOL)

NOTICES MUST BE	OR EMPLOYER IS
• posted in a conspicuous place, readily seen by employees and applicants, whether or not the employer has any "eligible" employees, AND • at least 8 1/2 by 11 inches in size	• required to pay $100 civil penalty per offense • prohibited from taking adverse action against employees (i.e. cannot deny requested leave)

A copy of the notice is included in the appendices of this manual for reference. Additional copies can be obtained by contacting the DOL at:

- Columbus area: (614) 469-5677 or 5678
- Cleveland area: (216) 522-3892
- Cincinnati area: (513) 684-2908

The notice may also be accessed through the DOL's Web page at http://dol.gov/.

Written Leave Policies [See §825.301]

IF	THEN
an employer has written benefit/leave policies (i.e. employee handbooks)	information on FMLA entitlements and employee obligations must be incorporated (the FMLA Fact Sheet is included in the appendices of this manual for reference)

- An employee must at least be given **verbal notice** that his or her leave is being counted toward the 12-week FMLA entitlement **within two days** from the date your agency became aware of the employee's need for FMLA leave or from the date your agency starts capturing FMLA leave.
- An employee must be sent **written notification** of his or her rights under the FMLA **by the next payday**, unless the payday is less than one week from the date oral notice is provided, then written notification can be provided by the subsequent payday.

You could kill two birds with one stone by notifying the employee of his or her FMLA rights in the letter you use to send the medical certification form. The letter should state that the leave is being considered FMLA leave pending the receipt of sufficient medical documentation. A sample letter you can use for this purpose is provided in the appendices.

Remember, the sooner an employee is notified of his or her rights under the FMLA, the sooner the agency can start counting time toward the employee's 12-week FMLA entitlement!

Request for FMLA Leave

[See §825.301]

Employers must furnish written notice to employees detailing:

- the employer's expectations,
- the obligations of the employee, AND
- consequences for failure to fulfill those obligations.

a. CONTENTS OF NOTICE

EMPLOYERS ARE REQUIRED TO PROVIDE THE FOLLOWING INFORMATION TO EMPLOYEES REQUESTING FMLA LEAVE*
• that the leave will be counted toward the 12 week entitlement *(excluding compensatory time)*;
• any medical certification requirements and the consequences for failing to provide these requirements;
• the employee's right to substitute paid leave, and whether the employer will require substitution**;
• whether the employee will be required to make any health insurance premium payments and the procedure for making such payments;
• any requirement that the employee must present a fitness-for-duty certificate prior to being restored for employment;
• the employee's right to restoration to the same or equivalent job upon return from leave; **AND**
• the employee's potential liability for health insurance premiums paid by the employer if the employee fails to return.

* The notice may include whether the employer will require periodic status reports, recertification, etc., but is not required to do so.

** Employers are prohibited from denying employees the right to substitute paid leave, but can require that paid leave be used.

b. WHEN NOTICE MUST BE PROVIDED

Written notice, including the above information, must be provided the first time in each six-month period that an employee gives notice for and takes FMLA leave, and can be provided more frequently if desired.

IF	THEN WRITTEN NOTICE SHOULD BE
employee declares the need for FMLA leave	given within a reasonable time of the employee's request*
leave has already begun	mailed to the employee
any information provided by the notice changes	provided to the employee requesting leave, referencing the prior notice and setting forth the changed information*

* Notice should be provided within one or two business days of the employee's notice of the need for leave.

c. SPECIAL NOTICE REQUIREMENTS IF A MEDICAL CERTIFICATION WILL BE REQUIRED

IF	THEN
a medical certification and/or fitness-for-duty report will be required by the employer	written notice of the requirement must be given with each request for leave, except in the circumstances described in the block below
the initial six month written notice was provided **AND** the employer's handbook and written policies clearly provide when certification and/or fitness-for-duty reports are required	oral notice is sufficient

Employer Responsibility

Employers are required to responsively answer employees' questions concerning rights and responsibilities under the FMLA.

2. Employee Notice Requirements

Foreseeable Absences

[See §825.302(a)]
(e.g. birth, placement for adoption, planned medical treatment)

Employees must give notice of the need for leave **30 days** in advance of a foreseeable absence. Whether the leave is to be continuous or intermittent, notice need only be given one time.

Unforeseeable Absences

[See §825.302(b), 825.303]
(e.g. medical emergency, change in circumstances for adoption placement)

WHEN EMPLOYEES MUST GIVE NOTICE*	**HOW EMPLOYEES CAN GIVE NOTICE**
as soon as practicable, which ordinarily means at least verbal notice to the employer within one or two business days of when the need for leave is known	By the employee or the employee's representative: • in person, OR • by fax, phone, telegraph, or other electronic means

* Employers cannot require advance written notice for FMLA leave where there is a medical emergency involved.

If an employer needs additional information about the requested leave, the employer should gather additional information informally; employees should provide additional information as practical.

Contents of Notice

[See §825.302(c)]

- The employee's notice of the need for FMLA leave must be sufficient to make the employer aware of:
  —the need for FMLA-qualifying leave
  —the anticipated duration of leave, AND
  —the anticipated timing of leave.

- The employee is NOT required to specifically mention the FMLA.

- It is the employer's responsibility to inquire for further information (e.g. obtain medical certification) if desired.

Scheduling Medical Treatment

[See § 825.302(e)]

Employees are to consult with the employer and schedule medical treatment at a time that will not unreasonably disrupt the employer's operation. If the employee fails to do so, the employer may require the employee to attempt to have the treatment rescheduled, subject to the approval of the health care provider.

Intermittent/ Reduced Leave

[See §825.302(f)]

- Upon the employer's request, employees must provide reasons why an intermittent/reduced leave schedule is necessary.
- The employer and employee are required to work out a mutually agreeable schedule.

Miscellaneous

[§825.302 (d), (g)]

Employers may not require stricter notice requirements when an applicable collective bargaining agreement, state law, or leave plan allows less advance notice.

Example: If no advance notice is required by the employer's policy for use of personal leave, and the employee elects to use paid personal leave for an FMLA-qualifying absence, no notice can be required by the employer in this instance.

Employers may require employees to comply with usual and customary procedures for requesting leave without pay, but failure to do so does not permit the employer to disallow FMLA leave, provided notice was given in accordance with sections above. [See §825.302(d)]

Ramifications [See §825.304(b)]

If the employee has no reasonable excuse for delay, leave may be delayed for 30 days from when the employee actually gave notice, provided that:

- the employee had actual notice of the notice requirement through a properly posted notice; AND
- the need for and timing of leave was actually foreseeable 30 days in advance.

B. MEDICAL CERTIFICATIONS

(See notification and certification timeline that follows for illustration of the certification process)

An employer has the right to require that an employee's request for leave to care for a seriously-ill spouse, child or parent or due to the employee's own serious health condition be supported by a certification from the employee's health care provider. [§825.305(a)]

1. Employer Responsibilities

Prior Notice Prerequisite see [§825.30]

Employers **must** have provided prior written notice of the requirement for a medical certification. [see Notification Requirements section].

Requesting Certification

See [§825.305(a)]

IF	THEN
a medical certification will be required by the employer	**written** notice of the requirement must be given with **each** request for leave except under circumstances described in the box below
the initial six month notice **AND** the employer's handbook and written policies clearly provide when certification and/or fitness-for-duty reports are required	**oral** notice is sufficient

EMPLOYER SHOULD:	EMPLOYER MAY:	EMPLOYER MUST:
request the certification at the time the employee gives notice of the need for leave, *or within two business days*	request certification even after leave has commenced if the employer has reason to question the legitimacy of the need for leave	at the time the employer makes the request for certification, advise the employee of consequences of failing to provide the notice (that the leave will not be counted as FMLA)
request the certification *within two business days* if the leave is for unforeseeable reasons		

If the employer's policies impose less stringent certification requirements, and the employee or employer elects to substitute paid leave for unpaid FMLA leave, the less stringent requirements shall apply.

2. Employee Responsibilities

Time to Respond See [§825.305(b)]

IF	THEN
• leave is foreseeable, **AND** • at least 30 days notice has been provided	the employee should provide the certification before leave begins.
• leave is not foreseeable, **AND/OR** • at least 30 days notice has not been provided	the employee must provide the certification within **15 calendar days** after the employer requests it*

* Unless the employer permits a longer time or it is impractical to provide the certification within that time despite diligent efforts.

Time to Cure Deficiency See [§825.305(c)]

If the employer finds that the certification is deficient, the employee will have a reasonable time to cure the deficiency.

Failure to Provide Certification see [§825.311]

	IF	THEN
Foreseeable Absence	the employee does not satisfy the certification requirements within the time specified by the employer*	FMLA leave may be denied until the certification is supplied
Unforeseeable Absence	the employee does not satisfy the certification requirements within the time specified by the employer**	All leave taken as FMLA leave while the employer waited to receive the certification may not be counted as FMLA leave and continuance of FMLA leave may be denied.

* No less than 15 calendar days from when requested.

** No less than 15 calendar days from when requested, or as soon as reasonably possible.

When requested by the employer pursuant to a uniformly applied policy, the employee must provide medical certification that the employee is fit for duty.

3. Contents of Medical Certification [§825.306]

State Form - ADM 4260

1) Employees should be provided with and use form ADM 4260, which may be obtained from State Printing.

2) No more information than what is contained on the form may be required. [§825.307(a)]

Deficient Certification

Where the requested medical certification fails to include any of the following, it is considered deficient and the employer may request that the employee obtain the missing information:

IF	THE CERTIFICATION MUST INCLUDE
the absence is due to the employee's own serious health condition	a statement that the employee is unable to perform: • any work, OR • the essential functions of the job* as described by information provided by the employer or as discussed with the employee [§825.306(b), §825.115]
the absence is due to a seriously-ill family member	• a statement that the patient requires assistance from the employee for basic needs or psychological comfort • the care which will be provided by the employee • the estimated time required [§825.306(c), 825.116]
leave is necessary on an intermittent or reduced schedule	• a statement that the leave is medically necessary and is necessary to care for a child, parent, or spouse to assist in the patient's recovery • the duration and schedule required for the reduced leave

* Employers are permitted to submit a description of the essential functions of the employee's job to the health care provider, assuming that the essential functions were previously identified.

You should generally provide the employee 15 days to cure any deficiency. **Caution:** The regulations specifically prohibit you from directly contacting the employee's health care provider. Let the employee know which specific areas on the form you need the health care provider to address.

SPECIAL CIRCUMSTANCES

When the employee submits a complete, signed certification, the employer is not permitted to request additional information from the employee's health care provider. However, a health care provider representing the employer may contact the employee's health care provider, **with the employee's permission**, for purposes of clarification and verifying the authenticity of the medical certification.

If an employee is on workers' compensation **AND** FMLA leave and the workers' compensation statute permits the employer to contact the employee's workers' compensation health care provider, the employer may follow the workers' compensation provisions.

4. Second and Third Medical Opinions [§825.307]

Second Opinion

If the employer questions the adequacy and/or validity of a medical certification, the employer may require the employee to obtain a second medical opinion. If the second opinion is the same as the first, the certification is confirmed.

THE EMPLOYER	BUT
may designate the health care provider	the provider may not be: • someone employed on a regular basis by the employer, **OR** • someone whose services are regularly utilized by the employer, unless the provider is in an isolated rural area.
must pay for the second opinion	

Third Opinion

If the second opinion differs from the first, the employer may get a third opinion.

The health care provider must be mutually agreed upon. The employer pays for the third opinion. The third opinion is final and binding.

IF THE EMPLOYER DOES NOT ACT IN GOOD FAITH TO SELECT THE HEALTH CARE PROVIDER	IF THE EMPLOYEE DOES NOT ACT IN GOOD FAITH TO SELECT THE HEALTH CARE PROVIDER
the certification by the ***employee's*** health care provider is binding	the certification by the ***employer's*** health care provider is binding

Miscellaneous Employer Requirements

The employer is required to provide the employee with a copy of the 2nd and 3rd medical opinions upon request by the employee within two business days (unless extenuating circumstances prevent it). Pending receipt of the 2nd or 3rd opinion, the employee is provisionally entitled to the benefits of the Act.

THE EMPLOYER MUST	THE EMPLOYER MAY NOT
reimburse the employee or family member for any reasonable out-of-pocket travel expenses if a second or third medical opinion is required.	require the employee or family member to travel outside normal commuting distance for the second or third medical opinion (except in very unusual circumstances)

5. Recertification [§825.308]

IF	THE EMPLOYER MAY
the employee is pregnant or has a chronic or permanent/long term condition *	**not** request recertification more often than every 30 days, and only in connection with an absence by the employee**
the minimum duration of the period of incapacitation is more than 30 days	**not** request certification until the minimum duration has passed (this includes FMLA leave taken on an intermittent or reduced leave schedule)**
circumstances are other than listed above	request recertification at any reasonable interval **(not more often than every 30 days)**, unless any of the following three circumstances occur, in which case the employer may require recertification: 1. the employee requests an extension of leave; 2. circumstances in the original certification have changed significantly; **OR** 3. the employer receives information that casts doubt upon the continuing validity of the certification.

* Under §825.114(a)(2)(ii)(iii)(iv)

** UNLESS circumstances of previous certification have changed, OR the employer receives information that casts doubt upon the employee's stated reason for the absence.

The employee must provide the recertification in the time frame requested by the employer (employer must allow 15 calendar days after its request) unless it is not practicable despite the employee's diligent, good faith efforts.

Recertification is at the employee's expense, unless the employer provides otherwise. No second or third opinion on recertification can be required.

6. Notification and Certification Timeline

DATE	EMPLOYEE ACTION:	EMPLOYER ACTION:
1/1	Employee gives notice of need for FMLA-qualifying leave for 6 weeks beginning immediately.	
1/3		Within two business days, employer provides notice to employee of rights and responsibilities (e.g., certification).
1/5	Employee submits medical certification to employer.	
1/6		Employer returns certification to employee because it is incomplete (e.g., unsigned).
1/8	Employee returns completed certification form to employer.	
1/9		Employer asks for employee's consent to have employer's health care provider (hcp) verify the authenticity of the medical certification.
	Employee consents; preliminarily entitled to FMLA protection.	
1/12		Employer doubts the validity of the certification and orders the employee to go for 2nd opinion by a hcp selected by the employer.
1/15	Employee goes for 2nd opinion. Opinion is favorable to employer.	
1/16		Employer elects to get a 3rd opinion. Employee and employer mutually agree to a hcp.
1/19	3rd opinion is favorable to employee; employee remains on leave.	
1/31		30 days passed since leave began, but employer cannot yet request recertification because original leave period specified on certification form was 42 days.
2/4	Employee requests extension to 8 weeks of leave.	
2/6		Employer requests recertification.
2/7	Employee obtains and pays for recertification.	Employer cannot get a 2nd opinion on a recertification. 29 CFR 825.308(e)
7/1	Employee provides notice of need for FMLA-qualifying leave.	
7/3		Employer must provide **written** notice of employee's rights and obligations (6 months have passed since last request)

C. CALL-OFF PROCEDURES

The statewide FMLA committee concluded that it is advisable for agencies to develop a policy on call-off procedures, consistent with applicable collective bargaining agreements.

In the appendices there is a model form that should be modified in accordance with the particular policy of each agency.

D. INTERPLAY WITH AMERICANS WITH DISABILITIES ACT (ADA)

1. General

[See 29 CFR §825.702(a)]

According to the FMLA regulations:

- nothing in the FMLA modifies or affects any federal or state law prohibiting discrimination on the basis of disability;
- therefore, the Americans with Disabilities Act ("ADA") and the regulations thereunder are not modified or affected by the FMLA.

Thus, the leave provisions of the FMLA are wholly distinct from the reasonable accommodation obligations of employers covered under the ADA. ***An employer must provide leave under whichever statute provides the greater rights to employees.***

2. ADA or FMLA?

[See 29 CFR 825.702(b)]

If a “qualifying individual with a disability” protected by the ADA also is an “eligible employee” entitled to FMLA leave, an employer has multiple compliance obligations:

- **under the ADA**, with regard to a qualified individual with a disability, the employer is required to make reasonable accommodation, barring undue hardship, AND
- **under the FMLA**, the employer is required to afford the employee his or her rights, including leave because of a serious health condition which renders the employee unable to perform the functions of the employee’s job.

However, "disability" under the ADA and "serious health condition" under the FMLA are different concepts, which must be analyzed separately.

See the comparison chart on which follows for further information on major distinctions between the two laws.

3. Employer Restrictions

[See 29 CFR 825.702(d)(1)]

An employer may not:

- require an employee to accept a reasonable accommodation in lieu of the employee’s **FMLA** leave entitlement (*but the **ADA** may require that the employer offer the employee an opportunity to take such a position*)
- change the essential functions of the job in order to deny **FMLA** leave (*Employers may consider past FMLA leave when deciding whether accommodating the employee by permitting leave exceeding 12 weeks would pose an undue hardship, but such leave is not automatically an undue hardship under the **ADA***)

4. Records Requirements

[See §825.500(g)]

Recordkeeping requirements differ under the FMLA and ADA. However, maintaining one confidential file for medical records required for both laws would satisfy both laws as long as ADA requirements for maintaining confidentiality are met, since these are more inclusive.

ADA	FMLA
protects all "information regarding medical condition or history of any employee," including all *employee medical information* regardless of how it is provided	is limited to records and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members

5. Medical Certification

[See 29 CFR 825.702(e)]

An employer is permitted by the FMLA to require certifications of an employee's fitness for duty to return to work. However, the employer also must comply with the ADA requirement that a fitness for duty physical be job-related and consistent with business necessity.

6. Comparison Chart

Americans with Disabilities Act
and
Family and Medical Leave Act

	ADA	FMLA
Covered Employer	15 employees (private sector) State	50 employees (private sector) State
Covered Employee	Broader coverage: • applies to applicants and • all current employees	Narrower coverage: • 12 months prior service • 1250 hours in past 12 mos.
Conditions Covered	Qualified individual with a **disability** Example: a paraplegic may have a disability, but not require treatment, and therefore not have a serious medical condition Covers individual employee only, not family members	**serious medical condition** Example: an employee who has minor surgery in the hospital has a serious medical condition but not a disability Covers serious medical condition of parent, child or spouse
Drug/Alcohol Abuse	Covers recovering alcohol and drug abusers, not current users	Leave for treatment may be covered even for current users
Leave Past 12 weeks	Leave beyond 12 weeks may be necessary as a reasonable accommodation	12 week limit
Return to Work from Leave	Leave and position are generally covered as long as leave is for a reasonable accommodation and not an undue hardship	Leave period and right to reinstatement after leave are generally covered

*Where the laws overlap, whichever law provides greater protection applies.

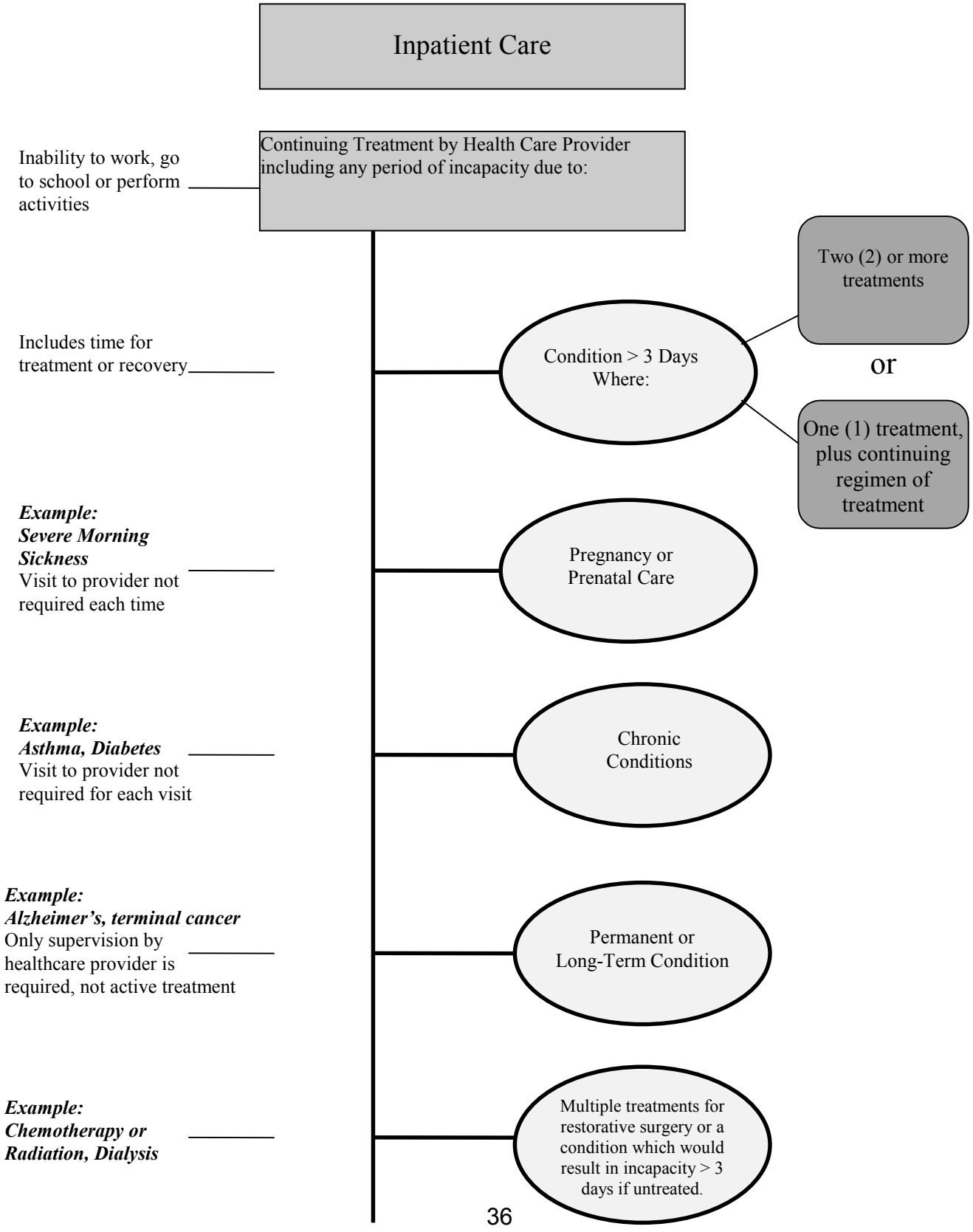
E. Serious Health Condition

1. Chart 1 – Is this a Serious Health Condition?

YES	NO*
asthma	common cold
diabetes	flu
radiation treatment for cancer if employee is unable to work	ear aches
heart attack	upset stomach
pneumonia	minor ulcers
severe arthritis	routine dental work
migraine headaches	non-migraine headaches
substance abuse treatment	substance abuse
post-accident restorative surgery	cosmetic surgery
mental illness	stress not rising to level of mental illness

*Not ordinarily a serious health condition, but may be if otherwise meets the regulatory definition

2. Chart 2 – *Flowchart of Regulatory Definition of "Serious Health Condition"*



F. Use of Paid Leave

1. Use of Leave

Most agency policies require employees on FMLA leave to exhaust all paid leave balances prior to the employee going on unpaid leave, with the following exception: when FMLA is taken concurrently with disability, workers' compensation or adoption/childbirth leave, employees may choose, but are not required, to use paid leave during the waiting periods or to supplement these leave programs.

2. Order of Leave

An appointing authority may specify the order in which paid leave may be used for FMLA-qualifying absences. For example, an appointing authority may require that sick leave be used first, then personal, then vacation, in that order.

3. Compensatory Time

See [825.207(i)]

An employer cannot require an employee to use compensatory time as a substitute for unpaid FMLA leave. If an employee requests to use compensatory time for an FMLA-qualifying absence and the employer permits the use of compensatory time, that time cannot be counted toward the employee's twelve-week leave entitlement.

IV. DEFINITIONS [Code of Federal Regulations 825.800]

Act or FMLA

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

ADA

means the Americans with Disabilities Act (42 USC 12101 *et seq.*).

Administrator

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

COBRA

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

Commerce and industry or activity affecting commerce

means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include ``commerce'' and any ``industry affecting commerce'' as defined in sections

501(1) and 501(3) of the Labor Management Relations Act of 1947, [29 U.S.C. 142 (1) and (3)].

Continuing treatment by a health care provider

means one or more of the following:

(1) A period of *incapacity* (*i.e.,* inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(i) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral by, a health care provider; or

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

(2) Any period of incapacity due to pregnancy, or for prenatal care.

(3) Any period of incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(i) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

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

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

(4) A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal states of a disease.

(5) Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, *etc.*), severe arthritis (physical therapy), kidney disease (dialysis).

Eligible employee

means:

(1) An employee who has been employed for a total of at least 12 months by the employer on the date on which any FMLA leave is to commence; and

(2) Who, on the date on which any FMLA leave is to commence, has been employed for at least 1,250 hours of service with such employer during the previous 12-month period; and

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

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

(5) Excludes any employee of the U.S. Senate or the U.S. House of Representatives covered under title V of the FMLA; and

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

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

Employ

means to suffer or permit to work.

Employee

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

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

(2) In the case of an individual employed by a public agency, ``employee'' means
(i) Any individual employed by the Government of the United States

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

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

(C) In any unit of the legislative or judicial branch of the Government which has positions in the competitive service, excluding any employee of the U.S. Senate or U.S. House of Representatives who is covered under title V of FMLA,

(D) In a non-appropriated fund instrumentality under the jurisdiction of the Armed Forces, or

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

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

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

(B) who

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

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

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

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

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

Employee employed in an instructional capacity: See **Teacher**.

Employer

means any person engaged in commerce or in an industry or activity affecting commerce who employs 50 or more employees for each working day during

each of 20 or more calendar workweeks in the current or preceding calendar year, and includes:

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

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

(3) Any public agency.

Employment benefits

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

FLSA

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

Group health plan

means any plan of, or contributed to by, an employer (including a self-insured plan) to provide health care (directly or otherwise) to the employer's employees, former employees, or the families of such employees or former employees.

Health care provider

means:

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

(2) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a

subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law; and

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

(4) Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts.

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

(6) A health care provider as defined above who practices in a country other than the United States, who is licensed to practice in accordance with the laws and regulations of that country.

Incapable of self-care

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

Instructional employee: See **Teacher**.

Intermittent leave

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

Mental disability: See **Physical or mental disability**.

Needed to care for

means that the employee can use FMLA leave to care for a family member, because of a serious health condition, in the following situations:

- if the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor, etc
- providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care
- if the employee may be needed to fill in for others who are caring for the family member, or to make arrangements for changes in care, such as transfer to a nursing home.

Parent

means the biological parent of an employee or an individual who stands or stood *in loco parentis* to an employee when the employee was a child.

Person

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

Physical or mental disability

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

Public agency

means the government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the

United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State, or any interstate governmental agency. Under section 101(5)(B) of the Act, a public agency is considered to be a ``person'' engaged in commerce or in an industry or activity affecting commerce within the meaning of the Act.

Reduced leave schedule

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

Secretary

means the Secretary of Labor or authorized representative.

Serious health condition

means:

(1) An illness, injury, impairment, or physical or mental condition that involves:

(i) ***Inpatient care*** (*i.e.*, an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of *incapacity* (for purposes of this section, defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom), or any subsequent treatment in connection with such inpatient care; or

(ii) ***Continuing treatment*** by a health care provider. A serious health condition involving continuing treatment by a health care provider includes:

(A) A period of *incapacity* (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, including any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(1) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral by, a health care provider; or

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

(B) Any period of incapacity due to pregnancy, or for prenatal care.

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

(1) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

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

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

(D) A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(E) Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, *etc.*), severe arthritis (physical therapy), kidney disease (dialysis).

(2) Treatment for purposes of paragraph (1) of this definition includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. Under paragraph (1)(ii)(A)(2) of this definition, a regimen of continuing treatment includes, for example, a course of prescription medication (*e.g.*, an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (*e.g.*, oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(3) Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not "serious health conditions" unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, earaches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness from stress or allergies may be serious health conditions, but only if all the conditions of this section are met.

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

(5) Absences attributable to incapacity under paragraphs (1)(ii)(B) or (C) of this definition qualify for FMLA leave even though the employee or the immediate family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

Son or daughter

means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is under 18 years of age or 18 years of age or older and incapable of self-care because of a mental or physical disability.

Spouse

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

State

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

Teacher

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

V. QUESTIONS AND ANSWERS

Q: One of our employees will be giving birth to her child within the next two weeks and has not requested FMLA leave. Can we count her six to eight week disability period as FMLA leave?

A: Yes. As long as this is consistent with your agency's policy and you have sufficient information from the employee regarding the reason the employee is on disability, the employee's disability period can be counted as FMLA leave. In fact, if the agency does not count this period as FMLA leave, the employee would still be entitled to up to twelve weeks of FMLA leave after the disability leave period.

Q: Can an agency count an employee's paid leave as part of an employee's FMLA leave entitlement?

A: Yes. Assuming the paid leave is being taken for an FMLA-qualifying event and the employee provided adequate documentation explaining the need for leave, an agency may designate the appropriate portion of leave as FMLA leave. The agency must inform the employee that the leave period will be counted as part of the employee's twelve week FMLA leave entitlement as soon as possible, and in no case shall the employee be notified upon or after returning from leave. One caution - compensatory time cannot be counted toward the twelve-week leave entitlement.

Q: One of our new employees has three years of previous state service. Does this employee's previous state employment count as part of the twelve-month employment requirement?

A: Yes. Previous state service counts toward the twelve-month employment requirement; however, the employee is still required to meet additional FMLA eligibility criteria. Once the employee has been in active pay status 1,250 hours in the prior twelve months, he or she would become eligible for FMLA leave. The 1,250 hours need not have been worked consecutively.

Q: One of our employees just went out on Adoption/Childbirth leave, but is not eligible for FMLA leave. Do we still count the employee's Adoption/Childbirth leave as FMLA leave?

A: No. Although employees may be eligible for Adoption/Childbirth leave, they still need to meet the FMLA eligibility criteria (twelve months of state service, 1,250 hours in an active pay status in the twelve months preceding need for FMLA leave) to have any FMLA leave counted against them.

Q: One of our employees has requested Adoption/Childbirth leave and is eligible for FMLA leave. Our FMLA policy requires employees to use all but 40 hours of leave prior to going on unpaid leave. Can we require the employee to use leave pursuant to our FMLA policy during the waiting period and supplement her Adoption/Childbirth leave period?

A: No. If the employee requests Adoption/Childbirth leave, the policy governing Adoption/Childbirth leave will supersede your agency's FMLA policy. Agencies must be careful not to impose more stringent requirements on employees who are requesting leave through a state program in administering their FMLA policies. Employees requesting

Employees using Adoption/Childbirth leave or Disability leave may use, but are not required to use, leave to supplement these leave periods. An employee using Adoption/Childbirth leave may choose to save his or her leave during this period and use leave after the six-week benefit period. Agencies should count the entire Adoption/Childbirth leave as FMLA leave, as appropriate, and apply the leave usage requirements of their FMLA leave policies once the Adoption/Childbirth leave period has ended.

Q: Where does sick leave stop and FMLA begin?

A: There is no distinguishable beginning and ending point for sick leave and FMLA leave. If an employee uses sick leave that is for an FMLA-qualifying purpose, and the agency appropriately designates the leave as FMLA leave and notifies the employee of this designation and their FMLA rights, the sick leave and FMLA leave would be used concurrently.

TOPICAL INDEX

The next three sections are arranged by topical index. First are the citations to the Code of Federal Regulations, second are summaries of relevant case law, and third are summaries of the Department of Labor's opinion letters. This master index is provided to assist you in cross-referencing the regulations, case law and opinion letters on a given topic.

REFERENCES TO THE FEDERAL REGULATIONS

The citations listed in this index are to 29 CFR Part 825. The annotated regulations can be found in the appendices.

CASE LAW SUMMARY

Following are summaries of some of the recent cases involving interpretation of the FMLA.

1,250 hours (active pay status)

Rich v. Delta Airlines, Inc., 921 F.Supp. 767 (N.D. Ga. 1996) Calculation of hours of service, for purposes of determining if an employee is an "eligible employee" under the FMLA, is based on whether the time is spent predominantly for the employer's benefit or the employee's benefit (same as FLSA). Time spent by flight attendant on layovers did not constitute hours of service. Off-duty, free-time was predominantly for employee's benefit. If accurate record of hours worked is not kept, the employer has the burden to show that the employee did not work 1250 hours.

Robbins v. Bureau of Nat. Affairs, Inc. 896 F.Supp. 18 (D.D.C. 1995) "Hours of service" is determined in the same manner as under the FLSA, i.e. determine if an employee actually worked the hours in question; unpaid leave, vacation, holiday and sick leave do not count toward hours of service.

12 workweeks of leave

McKiernan v. Smith-Edwards-Dunlap Co., 1995 WL 311393 (E.D.Pa.) Leave taken prior to the effective date of the FMLA could not be counted toward 12 weeks. Because the employer did not notify the employee as to which twelve month period it was using (i.e. calendar or fiscal year, anniversary date, etc.) the employee was entitled to the most favorable period, and could be entitled to back-to-back twelve week periods. In this case, the employee may have been entitled to a new 12-month period of leave because a portion of the leave taken was prior to the employee's employment anniversary date.

12-month period

McKiernan v. Smith-Edwards-Dunlap Co., 1995 WL 311393 (E.D.Pa.) Leave taken prior to the effective date of the FMLA could not be counted toward 12

weeks. Because the employer did not notify the employee as to which twelve month period it was using (i.e. calendar or fiscal year, anniversary date, etc.) the employee was entitled to the most favorable period, and could be entitled to back-to-back twelve week periods. In this case, the employee may have been entitled to a new 12 month period of leave because a portion of the leave taken was prior to the employee's employment anniversary date.

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50 or more employees

McLeod v. City of Newton, 1996 WL 405738 (M.D.Ala.) Case involved determination of whether the employer employed the requisite number of employees to be considered an "employer" under Title VII. The court referenced a Senate report, issued to clarify the definition of "employer" under the FMLA, which stated that the FMLA language "employs ... employees for each working day " parallels Title VII, and means employees maintained on the payroll.

Certification requirements

George v. Associated Stationers, et al., 1996 WL 406169 (N.D. Ohio) Employee was not required to have already received treatment when he gave notice of need for leave; if the employer desired medical certification the employer was required to request certification.

Sieger v. Wisconsin Personnel Commission, 181 Wis.2d 845, 512 N.W.2d 220, (Wis.App. 1994) Wisconsin statute. Employee's bureau and section chief urged employee to seek care from her doctor for depression. The doctor prescribed that the employee take a leave of absence. The prescription did not indicate the dates of the recommended leave or the reason. The employee brought the note to her immediate supervisor and told the supervisor about the employee's medical problems and that she desired to go on leave. The supervisor forwarded the request for leave to the bureau chief's assistant. The assistant met with both the employee and the supervisor and indicated his belief that the leave appeared appropriate. However, the assistant stated that he desired more information from the employee's doctor. The assistant failed to request any of the following: that the employee present a written statement that he had a serious health condition; the probable duration of the condition; when the condition started; the extent to which the condition affected the employee's ability to perform job duties; or that the employee submit to an examination or obtain a second opinion. The doctor refused to talk to the bureau chief's assistant. The immediate supervisor said she would talk to the assistant and advised the

employee not to go on leave until she had talked to the assistant. The assistant failed to approve or disapprove the leave. The employee went on leave.

Under the state statute, the court held that a request for leave need only be reasonably calculated to advise the employer that the employee is requesting leave under the FMLA. The employee was not required to demonstrate, at the time of the initial request for medical leave, the existence of a serious health condition or the medical necessity of the request. The employer has three choices of action when an employee requests medical leave: (1) approve the leave, (2) disapprove the leave, or (3) request more information through the certification process.

Collective bargaining agreements

Hoffman v. Kamhi, 927 F.Supp. 640 (D.N.Y. 1996) Case dealt with an ambiguous arbitration clause in a collective bargaining agreement. The language in the agreement did not specifically mandate that discrimination claims be arbitrated. Further, the agreement was enacted prior to the ADA and FMLA. Therefore, the court held that employees could not have expressed an intent to waive their right to litigate under those statutes.

Smith v. CPC Foodservice, 3 WH Cases2d 1480 (DC NIll 1997). In this case a collective bargaining agreement contained a contract grievance arbitration provision that extended to any conflicts over the meaning, interpretation or application of the agreement's provisions. Court held that when an employee alleges that his discharge violated the FMLA then he must arbitrate his claim pursuant to the collective bargaining contract.

Thankachen v. Cardone Industries, 1995 WL 580342 (E.D.Pa.) The FMLA was not yet in effect at the time in question. The collective bargaining agreement in effect when the FMLA was enacted had not yet expired.

Discriminating

Dodgens v. Kent, 3 WH Cases2d 1424 (DC SC 1997). The court assumes that the analysis used in Title VII retaliatory discharge claims also applies to FMLA claims. Mainly, the employee must produce evidence that: (1) he or she is protected under the FMLA, (2) that he or she suffered an adverse employment decision, (3) and either that the employee was treated less favorably than an employee who had not requested leave under the FMLA or (4) that the adverse decision was made because of the plaintiff's request for the leave.

Florida Department of Labor v. Jones, 660 So.2d 282 (Fla.App. 1995) FMLA prohibited employer from disciplining employee who called in sick each morning of covered absence. FMLA protection was invoked.

George v. Associated Stationers, et al., 1996 WL 406169 (N.D. Ohio) Employer had no-fault attendance policy. Employer was prohibited from counting an FMLA absence as an "occurrence".

Peters v. Community Action Committee, Inc of Chanbers-Tallapoosa-Coosa, 4 WH Cases2d 267 (DC MAla 1997). Under the FMLA an employee may prove discrimination and retaliation through either direct or circumstantial evidence. An employee has the initial burden of establishing by a preponderance of the evidence a prima-facie case, which, if established, raises a presumption that the employer is liable to the employee under the FMLA. Under this approach, the burden then shifts to the employer to rebut the presumption by producing sufficient evidence to raise a genuine issue of fact as to whether the employer violated the FMLA. The employer can meet this burden of production by articulating a legitimate, nondiscriminatory and nonretaliatory reason for the employment decision. Once the employer satisfies this burden of production, the focus shifts to the employee's ultimate burden of proving that the employer's proffered reason for its employment decision is a pretext for discrimination or retaliation in violation of the FMLA.

Eligible employee

Edwards v. Unimin Corp., 1995 WL 681305 (Conn.Super.) Employee was permitted to bring action for wrongful termination based on public policy (derived from FMLA and state FMLA statute) where employee was terminated just one day before she would have been employed one year and thus entitled to FMLA protection. Court found that the employee was fired expressly for purposes of keeping her from having standing needed to pursue her statutory rights.

Jessie v. Carter Health Care Center, Inc. 926 F.Supp. 613 (E.D.Ky. 1996) Employee's doctor placed lifting restrictions on employee, who was pregnant. The employer refused to put the employee on light duty work. Employee claimed this constituted a forced leave of absence. Court held that the employee had not been employed for 12 months at this point in time and was, therefore, not an "eligible employee". The fact that the employee was employed for 12 months when she was terminated was irrelevant. The eligibility status of the employee at the time of the alleged violations is what mattered for purposes of determining whether she was entitled to protection under the FMLA.

Marsdem v. Review Board of Indiana, 654 N.E.2d 907 (Ind.App. 1995) Supervisor told employee that she would have to obtain approval of her request for FMLA leave from the personnel manager; employee did not obtain the personnel manager's approval, but went on leave. Employee was terminated for unapproved absence. The employee had not yet been employed by the employer for one year at the time of the FMLA leave request. The court held that the employee was not approved for FMLA leave and rejected the employee's claim that FMLA approval for her absence was implied by the fact that she was previously given permission to work a reduced schedule. The court refused to hold that this employer granted extended leave under the FMLA to an employee who was not otherwise covered under the Act.

Muller v. Hotsy Corp., 917 F.Supp. 1389 (N.D. Iowa 1996) Employer did not have 50 employees within 75 miles of the employee's worksite; therefore, employee was not an "eligible employee". Employer did not waive defense to claim that employee was not an "eligible employee" by admitting that it was an employer under the FMLA.

Wolke v. Dreadnought Marine, 3 WH Cases2d 1377 (DC EVa 1997). Employee files FMLA charge relying on Department of Labor regulations, specifically 29 C.F.R. Section 825.110. The regulations state that if an employee notifies the employer of need for FMLA before the employee meets these eligibility criteria, the employer must either confirm the employee's eligibility based upon a projection that the employee will be eligible on the date leave would commence or must advise that employee when the eligibility requirement is met. If the employer confirms eligibility at the time the notice for leave is received, the employer may not subsequently challenge the employee's eligibility. Court held that 29 C.F.R. 825.110 is invalid because it purports to transform employees who are ineligible under the FMLA statute into eligible employees. Any regulatory exceptions which purport to shorten the twelve-month eligibility period are impermissible creations of the Department of Labor.

Employer

1. Requisite number of employees

Astrowsky v. First Portland Mortgage Corporation, Inc., et al., 887 F.Supp. 332 (D.Me. 1995) State statute. No "joint employer" relationship existed between a mortgage corporation and the employee of a leasing company for purposes of satisfying definition of "employer" as a person who has 15 or more employees. The court looked to Title VII for guidance on definition of employer. Leasing company processed employee's checks and withheld taxes, but it did not exercise any control over the employee; employee was leased to mortgage

corporation for the long term and was, in essence, a permanent employee of the mortgage company.

E.E.O.C. v. Metropolitan Educational Enterprises, Inc., 60 F.3d 1225 (7th Cir. 1995) To determine whether a company has the requisite number of employees to be considered an "employer", all salaried employees are counted toward the minimum, but hourly and part-time workers are considered employees only on days when they are physically present at work or on paid leave. The jurisdictional minimum of employees must be at the workplace or on paid leave for each day of the work week, or the week will not be counted. This case rejects the "payroll method" endorsed by the EEOC and other courts, of counting the number of employees maintained on an employer's payroll within a given week, i.e. the jurisdictional minimum is satisfied regardless of whether or not every employee on the payroll shows up for work every day of the calendar week.

McLeod v. City of Newton, 1996 WL 405738 (M.D.Ala.) Case involved determination of whether the employer employed the requisite number of employees to be considered an "employer" under Title VII. The court referenced a Senate report, issued to clarify the definition of "employer" under the FMLA, which stated that the FMLA language "employs ... employees for each working day " parallels Title VII, and means maintain on the payroll.

Muller v. Hotsy Corp., 917 F.Supp. 1389 (N.D. Iowa 1996) Employer did not have 50 employees within 75 miles of the employee's worksite; employee was not "eligible employee". Employer did not waive defense to claim that employee was not an "eligible employee" by admitting that it was an employer under the FMLA.

2. Individual liability.

Freemon v. Foley, 911 F.Supp. 326 (N.D.Ill. 1995) Court looks to FLSA for guidance on definition of "employer", rather than Title VII, because definition in FMLA tracks FLSA. Definition of "employer" includes individuals who have control over the aspect of employment violated, i.e. control, in whole or in part, over the employee's ability to take leave or not; Employee was a nutritionist at a hospital in the Women with Infants and Children ("WIC") program. Court permitted suit against the W.I.C. program supervisors in their individual capacities, even though they did not have an ownership interest in the hospital.

Frizzell v. Southwest Motor Freight, Inc., 906 F.Supp. 441 (E.D.Tenn. 1995) Court held that "employer" should be construed in same manner as Title VII, and therefore denies claims against individuals (case seems to be a minority view).

Johnson v. A.P. Products, Ltd., 1996 WL 459931 (S.D.N.Y.) Court looks to FLSA for guidance on who is an "employer". Court holds that individuals acting in the interest of an employer are individually liable for FMLA violations; key issue is whether the individual has control over the terms and conditions of employment: ability to hire/fire, supervises and controls the employee's work schedules, determines the employee's rate of pay, maintains employment records, and controls, in whole or in part, the employee's ability to take a leave of absence and return.

Knussman v. State of Maryland, 1996 WL 444136 (D.Md.) Court looked to the FLSA for a definition of "employer" and whether the individual defendants could be sued in their individual capacities. The court held that the individuals could be sued.

McKiernan v. Smith-Edwards-Dunlap Co., 1995 WL 311393 (E.D.Pa.) Court looked to the FLSA for guidance as to who is an "employer". Court held that individual defendants may be liable as "employers" if they are persons with the authority to hire or fire.

Norris v. North American Publishing, 3 WH Cases2d 1479 (DC EPa 1997). Employee sued individuals acting on behalf of employer for violating FMLA rights. Court held that persons acting directly or indirectly in the interest of an employer can be held liable under the FMLA, 29 U.S.C., Section 2611(4)(A).

Waters v. Baldwin County, 1996 WL 494391 (S.D.Ala.) Supervisors can be held individually liable. Follows the *McKiernon* case. This case rejects Title VII definition of "employer" and looks to FLSA cases, which define "employer" broadly. An "employer" is any person who acts directly or indirectly in the interest of the employer.

Equivalent benefits

Rich v. Delta Airlines, Inc., 921 F.Supp. 767 (N.D. Ga. 1996) FMLA regulation (825.700) which requires an employer to observe any employment benefit program or plan that provides greater family or medical leave rights to employees than rights established under the FMLA, does not mean that an employer's policy of offering certain benefits to employees who worked 588 hours entitles employees to FMLA protection after working 588 hours; 1250 hours still applies.

Equivalent position

Lempres v. CBS Inc., 916 F.Supp. 15 (D.D.C. 1996) Employee was told prior to taking leave that her position was "as permanent as anything in the news business." Employee was offered her old position upon return from leave; individual replacing her in interim was on an interim contract. Employee did not show that she should have been restored to a more permanent position. FMLA does not require employers to provide greater job security than prior to leave.

Patterson v. Alltel Information Services, Inc., 919 F.Supp. 500 (D.Me. 1996) Employer made decision to demote employee from account manager position prior to employee's FMLA leave. Employee went on FMLA leave. Employee was restored to the same "position of employment" he had when leave commenced, i.e. he was required to search for and find another job within the company. Employee was subsequently laid off. Employee argued that he would not have been affected by the layoff had he been restored to the position he had prior to leave because that position was unaffected by the layoff. Court found that employee was not entitled to be restored to the account manager position because it was not one to which he would have been entitled had he never taken leave; the fact that the employer implemented its decision during the employee's leave was irrelevant since only the timing of the final decision to replace him was relevant. FMLA does not guarantee employees that they will receive similarly strong support from their managers before and after leave or that they will receive similarly strong performance evaluations before and after leave.

Fitness for duty

McGinnis v. Wonder Chemical Company. 1995 WL 756590 (E.D.Pa.) "Fit for duty" means that the employee is able to perform the essential functions of the job. The employee was effectively working at the job with the restrictions required by his doctor (not lifting heavy objects) prior to going on leave; thus there was a question as to what the essential functions of the job were.

Porter v. United States Alumoweld Company, Inc., 4 WH Cases2d 297 (CA 4 1997). Court held that an employee with a history of back injuries who underwent surgery had no claim under the FMLA arising from his employer's request that he undergo a functional capacity evaluation to determine if he was physically able to return to work. The Department of Labor only requires that a fitness for duty certificate under the FMLA be a simple statement of the employee's ability to return to work. However, the employer had grounds under

the Americans with Disabilities Act to require the examination and the FMLA implies that an employee may be required to meet fitness standards of both acts.

Health plan premiums

Barry-Chamberlain v. Department of Industry, 549 N.W.2d, 1996 WL 138664 (Wis.App.) Wisconsin state statute. Where employee on family or medical leave continues making required contributions for participation in group insurance, state statute required employer to continue making group health insurance premium contributions as if the employee had not taken family leave. Employee manual required the employee to pay premiums during an employer-paid leave of absence on the first of the month after a full month's leave of absence. The employee took an employer-paid leave of absence following FMLA leave. The employer claimed that the employee had to pay for her own insurance during her first month of her leave of absence, counting her FMLA leave as a leave of absence. The Court found that the employee was discriminated against because of taking FMLA leave. The employer was required to treat the employee during her employer-paid leave just as it would have treated any other employee taking such a leave.

Joint employment

Astrowsky v. First Portland Mortgage Corporation, Inc., et al., 887 F.Supp. 332 (D.Me. 1995) State statute. No "joint employer" relationship existed between a mortgage corporation and the employee of a leasing company for purposes of satisfying definition of "employer" as a person who has 15 or more employees. The court looked to Title VII for guidance on definition of employer. Leasing company processed employee's checks and withheld taxes, but it did not exercise any control over the employee; employee was leased to mortgage corporation for the long term and was, in essence, a permanent employee of the mortgage company.

Freemon v. Foley, 911 F.Supp. 326 (N.D.Ill. 1995) Court looks to FLSA for guidance on definition of "employer", rather than Title VII, because definition in FMLA tracks FLSA. Definition of "employer" includes individuals who have control over the aspect of employment violated, i.e. control, in whole or in part, over the employee's ability to take leave or not. Employee was a nutritionist at a hospital in the Women with Infants and Children ("WIC") program. Court permitted suit against the W.I.C. program supervisors in their individual capacities, even though they did not have an ownership interest in the hospital.

Medical certification

Gudenkauf v. Stauffer Communications, Inc., 992 F.Supp. 465 (D.Kan. 1996) Pregnancy entitles employee to FMLA leave only if prenatal care is needed or the condition makes her unable to perform her work; a request for leave is not protected unless pregnancy and related conditions keep the employee from performing her job; opinion of employee alone is insufficient; neither obstetrician or nurse practitioner authorized or supported absence from work.

Not foreseeable

Brannon v. Oshkosh B'Gosh, Inc., 897 F.Supp. 1028 (M.D. Tenn. 1995) Child's illness was unforeseeable. (Fever, sore throat, runny nose and vomiting).

Notice requirements

1. Employer requirements.

Fry v. First Fidelity Bancorporation., 1996 WL 36910 (E.D.Pa.) Employer's published policy allowed 16 weeks of leave. Employer counted the first 12 weeks as FMLA leave. Employer's failure to notify employees that the first 12 weeks would be counted as FMLA leave, and that rights to reinstatement would expire after those twelve weeks, interfered with employees exercising rights granted under the FMLA. Employees were deprived of the opportunity to remain within FMLA protection because of the employer's misleading policy. Court held that the employer was required to specifically notify employees that rights would be forfeited past the twelfth week. Employer's handbook addressing FMLA leave did not clarify the employer's position; the inadequacy of the handbook could be cured by providing employees complete notice of rights when leave is requested.

2. Employee requirements.

Brannon v. Oshkosh B'Gosh, Inc., 897 F.Supp. 1028 (M.D. Tenn. 1995) FMLA regulations require that for unforeseeable conditions, notice be provided as soon as practicable; employee gave proper notice for child's unforeseeable illness by calling employer on the mornings of her absences and upon the day of return. Duty is on employer to inquire further if it needs more information.

Carter v. Ford Motor Co., 3 WH Cases2d 1828 (CA 8 1997). The FMLA allows covered employees to take medical leave for serious health conditions and protects their right, on their return, to be placed in the same or an equivalent position. FMLA regulations require employees to provide adequate notice to their employees of the need to take leave. In cases where the need for leave unexpectedly arises, the employee is to give notice as soon as practicable. Generally, this means no more than two days after learning of the need for the leave. In this case, employer's spouse called in for him on his first day of absence and said they would both be out of work for awhile. Employee, five days later, informed labor relations that he would be out but offered no other information and stated he was not sure when he would return.

Gay v. Gilman Paper Co., 4 WH Cases2d 289 (CA 11 1997). On first day of employee's absence her husband called employer to say that she was having tests run. He deliberately withheld information concerning the true nature of his wife's condition. Subsequently, employee was admitted to a psychiatric hospital to receive treatment for a nervous breakdown. The FMLA requires that when such leave is foreseeable, based on planned medical treatment, the employee provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under the act. Husband's initial phone call did not provide sufficient notice to put employer on notice that employee's condition potentially qualified under the FMLA. As such, the burden did not shift to the employer to inquire further as to whether her absence qualified under the act.

Johnson v. Primerica, 1996 WL 34148 (S.D.N.Y.) Employee said he needed time off for a matter of significant financial importance to his family. Employee had, in the past, mentioned that his son suffered from acute asthma. Mere reference by employee in the past to son's illness is not sufficient notice to the employer of the employee's need for FMLA leave unless the employee shows that the employer understood the need for leave. An employer's duty to inquire is not triggered solely by the employer's knowledge of past medical events.

Jessie v. Carter Health Care Center, Inc. 926 F.Supp. 613 (E.D.Ky. 1996) Employee's discussion with her employer's assistant director for nursing of the need for weight and time restrictions and the need for light duty work did not constitute sufficient notice that the employee was requesting FMLA leave.

Manuel v. Westlake Polymers Corp., 66 F.3d 758 (5th Cir. 1995) Employee need not expressly mention that leave is requested pursuant to FMLA to invoke the statute's protection, even for unforeseeable medical reasons.

McGinnis v. Wonder Chemical Company, 1995 WL 756590 (E.D.Pa.) Employee provided sufficient notice, telling supervisor that "he had back pain so bad that he could not work"; if the employer desired more information it was the employer's duty to inquire further.

Paasch v. City of Safety Harbor, 915 F.Supp. 315 (M.D.Fla. 1995) Court found that note from physician asking that employee be excused from work until employee was examined did not constitute request for extended leave.

Price v. City of Fort Wayne, 3 WH Cases2d 1729 (CA 7 1997). The Court found that FMLA does not require that an employee give notice of a desire to invoke the FMLA. Instead, it requires that the employee give notice of a need for FMLA leave. This kind of notice is given when the employee requests leave for a covered reason. After a general notice of this sort, it is the employer's responsibility to inquire further to determine if the FMLA applies.

Reich v. Midwest Plastic Engineering, Inc., 1995 WL 514851(W.D.Mich.) Employee was hospitalized for chicken pox while pregnant. The court concluded that her condition was a serious health condition. She was treated on at least two occasions and underwent inpatient care at a hospital. Because the employee's absence was for an unforeseeable illness, the employee was required to notify her employer of her condition, as soon as practicable, with sufficient detail to make it evident that the requested leave was protected as FMLA-qualifying leave. The employee called in to work and left a message that she had been to the emergency room of a hospital, that she believed she had contracted chicken pox and that she would be going to her doctor that day. The employee did go to the doctor and was prescribed medication for her condition. The next day, the employee called in to work and spoke to a foreman, explaining that she had chicken pox. Her condition worsened and she was admitted to the hospital, but she did not call work for three days. On the fourth day, the employee's husband went to the employee's work facility, picked up her pay check and spoke with her supervisor. The supervisor testified that the employee's husband told him that the employee had an appointment to see her doctor in a few days, but did not tell him that the employee had been admitted to the hospital. The supervisor told the husband to have the employee bring in a doctor's slip verifying her condition the following Monday. The employee did not bring in the doctor's slip, nor did she call in to explain her absences the following week. The employee was, however, well enough to go to the bank to cash her check. The court found that the employee did not communicate sufficiently that she was under continuing treatment or that she had received inpatient care at a hospital as a result of her chicken pox.

Robbins v. Bureau of Nat. Affairs, Inc. 896 F.Supp. 18 (D.D.C. 1995) Current regulation requiring the employer to notify the employee whether the employee is eligible to take leave prior to commencement of leave was not in effect during the time at issue and the regulation would not be applied retroactively.

Sakellarion v. Judge & Dolph, Ltd., 893 F.Supp. 800 (N.D. Ill. 1995) Employee's assertion that his daughter needed to stay in bed, without more, was insufficient to support the employee's claim that his daughter had a serious medical condition.

Paid leave

Haggard v. Farmers Insurance Exchange, 1996 WL 146048 (D.Or.) State law permitted an employee to utilize any available sick pay during a parental leave, but first required the employee to use available vacation pay before applying sick pay toward parental leave. Thus, employer was entitled to apply vacation time to employee's FMLA leave time even though employee had requested it to be charged to her accrued sick leave.

Harrison v. Children's Medical Center, 1993 WL 170160 (D.C. Super.) D.C. statute. Paid leave counts toward total leave time allowed.

Richland School District v. Department of Industry, 174 Wis.2d 878, 498 N.W.2d 826, (Sup.Ct. Wis. 1993) Wisconsin statute. Employee may substitute paid leave for unpaid FMLA leave.

Posting requirement

Hendry v. GTE North, Inc., 896 F.Supp. 816 (N.D.Ind.) 1995 If an employer fails to post the required notice, the employer cannot take adverse action against the employee who fails to furnish advance notice of the need for FMLA leave.

In-Sink-Erator, Division of Emerson Electric Co. v. Department of Industry, 547 N.W.2d 792 (Wis.App 1996) FMLA notice was posted in a lobby through which employees did not generally enter or leave. Court found that this posting did not satisfy the law. There were other bulletin boards in the plant area, but no government notices. Beyond the plant area the FMLA notice was posted, but employees had no reason to know that there were important notices on that bulletin board. The notice must be "conspicuous", where important notices are "customarily posted", i.e. a place where employees could reasonable expect the notice to be posted.

Jessie v. Carter Health Care Center, Inc. 926 F.Supp. 613 (E.D.Ky. 1996) No private right of action exists for failure of an employer to post the required notice; a civil penalty exists for a willful violation, but no cause of action.

Restoration

Paasch v. City of Safety Harbor, 915 F.Supp. 315 (M.D.Fla. 1995) Employee voluntarily resigned and was therefore not entitled to restoration of his job.

Tuberville v. Personal Finance Corporation, 1996 WL 407571 (N.D.Miss.) Court stated that to make a *prima facie* (basic) case for a violation of the FMLA, the employee must show: 1) the employee was treated less favorably than employees not requesting leave and 2) that an adverse employment decision resulted from the employee's request for leave. In this case, the employee could not make a *prima facie* case because a co-worker not requesting leave was also fired for poor performance and even though the employee was fired while on leave, the employee's leave had no effect on the decision to fire her. The "wheels were in motion" for the employee's termination prior to her request for leave. Therefore, the restoration protection provided by the FMLA did not apply.

Right to reinstatement

Barker v. St. Mary's Regional Medical Center, 663 A.2d 44 (Sup. Ct. Me, 1995) State FMLA statute. The employee's position was reclassified from an LPN to an RN due to the employer's concerns for accreditation. The court held that the change in her position was unrelated to her medical condition or medical leave. A significant number of other LPN positions were also reclassified.

Beherns v. Board of Education of Colonial School District, 1995 WL 653516 (Del. Super.) Employer claimed to have fired the employee because her teaching certificate was no longer valid. Testimony that employer had business justification and did not terminate employee because she took FMLA leave was credible and termination was upheld.

Brown v. J.C.Penney Corporation, 924 F.Supp. 1158, (S.D. Fla 1996) Employee was on FMLA leave to care for terminally ill father; employee failed to return to work upon father's death, claiming that FMLA encompassed time needed to deal with father's estate matters. Employee was offered a different position at employee's former rate of pay. Court held that FMLA applies to medical conditions affecting the living and that time needed to deal with father's affairs was not protected. Court did not address whether associate position to which

employee was restored, when he was formerly a sales supervisor, was equivalent position, because employee's protection under FMLA was relinquished when he failed to return to work upon his father's death. Court did state that FMLA does not require an employer to restore an employee to the exact position held prior to FMLA leave. Substitution of another employee in that position, even if permanent is not necessarily a violation of the FMLA.

Maxwell v. American Red Cross Blood Services, 1996 WL 437456 (N.D.Ala.) Employee's FMLA claim failed because employee presented no evidence in response to employer's claim of business justification (layoff) for employee's termination.

Niemiec v. H&K Inc. et al., 1995 WL 465683 (E.D.Wis.) Employee was fired while on FMLA leave. Employee failed to provided evidence that the employer would not have fired her for backlogs and inaccuracies in her work had she not taken leave; the employer had planned to fire her prior to her taking leave and thus employee had no rights to reinstatement.

Serious health condition

Bauer v. Dayton Walther Corp., 910 F.Supp. 306 (E.D.Ky. 1996) Rectal bleeding was not a "serious health condition"; it did not last greater than one day, or prevent the employee from doing his job and no treatment was administered. The fact that the condition could turn out to be serious is speculative and irrelevant; the condition must be taken for what it is at the time, not for what it potentially could become.

Brannon v. Oshkosh B'Gosh, Inc., 897 F.Supp. 1028 (M.D. Tenn. 1995) Employee's upper respiratory infection and gastroenteritis were not "serious health conditions" because there was no proof employee was incapacitated for greater than three days; employee's belief that she was too sick to go to work was not enough; doctor never advised employee to stay home, but merely speculated that it was reasonable for someone with employee's illness to be off work for three or four days. However, employee's child's throat and upper respiratory infection were considered to constitute a serious health condition because 1) the child was incapacitated for greater than three days (told by the doctor to stay home from day care), 2) the child was seen once by a doctor and 3) the doctor prescribed a course of medication.

Brown v. J.C.Penney Corporation, 924 F.Supp. 1158, (S.D. Fla 1996) Employee was on FMLA leave to care for terminally ill father; employee failed to return to work upon father's death, claiming that FMLA encompassed time needed to deal

with father's estate matters. Employee was offered a different position at employee's former rate of pay. Court held that FMLA applies to medical conditions affecting the living and that time needed to deal with father's affairs was not protected.

George v. Associated Stationers, et al., 1996 WL 406169 (N.D. Ohio) Chicken pox, which involved continuing treatment, incapacity of more than three consecutive days, two examinations and contagion for six days constituted a serious health condition. The court rejected the employer's argument that ailments requiring only home care, rest and over the counter drugs are not serious health conditions.

Gudenkauf v. Stauffer Communications, Inc., 992 F.Supp. 465 (D.Kan. 1996) Pregnancy entitles employee to FMLA leave only if prenatal care is needed or the condition makes the employee unable to perform her work; a request for leave is not protected unless pregnancy and related conditions keep the employee from performing her job; opinion of employee alone is insufficient; neither obstetrician or nurse practitioner authorized or supported absence from work.

Hendry v. GTE North, Inc., 896 F.Supp. 816 (N.D.Ind. 1995) Migraines may be a serious health condition.

Hott v. VDO Yazaki Corp., 922 F.Supp. 1114 (W.D.Va. 1996) Employee failed to show that sinobronchitis is an illness that, if not treated, would result in an incapacity for greater than three days.

Johnson v. Primerica, 1996 WL 34148 (S.D.N.Y.) Employee's son suffered from acute asthma, but offered no evidence to the court to corroborate his son's condition. No doctor said that the child needed special care, and there was no evidence that, during the time in question, the child was acutely ill.

Kindlesparker v. Metropolitan Life Ins. Company, 1995 WL 275576 (N.D.Ill.) Pregnancy-related conditions occurring prior to the child's birth are not protected by the FMLA unless they constitute a "serious health condition" which prevents the employee from performing the functions of her job.

Martyszenko v. Safeway, Inc., 3 WH Cases2d 1793 (CA 8 1997) Court concluded that the FMLA requires some incapacity to prove a serious health condition. The Act was designed to permit a parent to tend to her child where the child is unable to participate in school or in his or her regular daily activities. Here the claim was that employee's child had been sexually molested. However, the alleged molestation in this case did not create a mental condition that

hindered the child's ability to participate in any activity at all. The employer met its obligation to the employee by releasing the employee from her work for an extended period up through her child's first psychological examination and by offering to schedule her to work around the two subsequent examinations.

Murray v. Red Kap Industries, Inc., 4 WH Cases2d 233 (CA 5 1997). Under the FMLA, where an employee alleges that he has a serious health condition involving continuing treatment by a health care provider, he must first demonstrate a period of incapacity for at least four consecutive days. Next, he must show that he received subsequent treatment or had a period of incapacity, in which he was either seen at least two times by a heath care provider or obtained a regimen of continuing treatment under the supervision of a health care provider. Employee had period of incapacity within meaning of the act for first workweek of her absence, but could not prove it for the second week in which she missed work. Employer did not violate FMLA when it discharged employee for missing these additional days of work.

Oswalt v. Sara Lee Corp., 74 F.3d 91 (5th Cir. 1996), *affirming* 889 F.Supp. 253 (N.D. Miss. 1995) Food poisoning which required one visit to a physician, but did not require inpatient care or continued medical treatment,did not constitute a serious health condition; high blood pressure involving continuing treatment would be considered a "serious health condition", but period of work at issue in this case was prior to effective date of FMLA.

Price v. City of Fort Wayne, 3 WH Cases2d 1729 (CA 7 1997). Court concluded that multiple diagnoses can, together, give rise to a serious health condition if they have a serious impact upon the employee. The court noted that in making this decision it will be important to consider, among other things, the specific guidelines provided by the Department of Labor regulations.

Rhoads v. FDIC, 3 WH Cases2d 1381 (DC Md 1997). The court held that 'disability' under Americans with Disabilities Act (ADA) and 'serious health condition' under FMLA were different concepts and must be analyzed separately; employee may have serious health condition under FMLA even though she is not disabled under ADA.

Sakellarion v. Judge & Dolph, Ltd., 893 F.Supp. 800 (N.D. Ill. 1995) Evidence presented was insufficient to support a claim of serious medical condition of daughter. Employee's assertion that daughter needed to stay in bed, without more, is insufficient.

Seidle V. Provident Mut. Life Ins. Co., 871 F.Supp. 238 (E.D.Pa. 1994) Employee's child's ear infection (otitis media) was not a serious health condition like those listed by Congress in the FMLA. The child's fever was only for 24 hours, treatment was a one-time, 20 minute exam with a prescription of 10 days of antibiotics. The child was absent four days from day care, but was only required to be absent for three days. The regulations require an incapacity of greater than three days. The day care's policy of not allowing children with runny noses did not constitute an incapacity.

Sheppard v. Diversified Foods and Seasonings, Inc., 1996 WL 54440 (E.D.La.) Court found that employee was not "disabled" under the Americans with Disabilities Act (ADA) and dismissed the employee's ADA claim. However, a serious health condition is not synonymous with an ADA disability, and for purposes of FMLA protection, treatment of employee's condition, keloids, may be protected.

Victorelli v. Shadyside Hospital, 4 WH Cases2d 321 (CA 3 1997) Employee was discharged because of a history of tardiness and absences due to a peptic ulcer. Court concluded she suffered from a serious health condition under FMLA. Employee's condition satisfied the requirements of the interim final rule in that employee had (1) been treated for illness two or more times by a health care provider, (2) been treated for a condition on at least one occasion and was subject to continuing treatment by a health care provider, or (3) been under continuing supervision of a health care provider for a long-term chronic condition. The court added that a regimen of continuing treatment includes the taking of prescribed medication. Further, it is only necessary that the patient be under the supervision of a health care provider, rather than receiving active treatment.

Miscellaneous

Burke v. Nalco Chemical Company, 1996 WL 411456 (N.D.Ill.) Employee's complaint failed to contain allegations that the employer was an "employer" within the meaning of the FMLA. Additionally, the employee alleged a violation of the FMLA for actions of the employer that took place in January 1993, prior to the effective date of the FMLA. The employee was also barred by the statute of limitations, which requires that suit be brought within two years after the date of the last event constituting the alleged violation for which the action is brought. The employee alleged that the employer violated the FMLA when it transferred her to a new position upon her return from leave on August 9, 1993. The employee was terminated on February 22, 1994 for poor performance. The employee filed her complaint on February 21, 1996, more than two years after the violation for which the lawsuit was brought, as alleged in the employee's

complaint, the transfer on August 9, 1993. The court held that the employee failed to demonstrate that there was a connection between the employer's decision to transfer the employee and the employer's decision to terminate the employee. Therefore, the employee was unable to successfully argue that the statute of limitations began to run on February 22, 1994, the date of termination, because she could not prove that the employer committed a "continuing violation" of the FMLA, which would have linked the August 1993 transfer and the February 1994 termination. The statute of limitations began to run in August of 1993 and the employee filed suit too late.

Day v. Excel Corporation, 1996 WL 294341 (D.Kan.) Employee was discharged when his department was cutback; employee failed to prove the discharge was motivated by the time he took off for surgery.

Diaz v. Fort Wayne Foundry Corporation, 4 WH Cases2d 417 (CA 7 1997) Standard of proof in an FMLA case is that employee must prove by a preponderance of the evidence that he is entitled to benefits. An employer who doubts the sufficiency or veracity of the certification may require another opinion (from a physician that the employer does not employ on a regular basis). An employee who fails to cooperate with the second-opinion process loses the benefit of leave under the Act. After missing the appointment for the second opinion, the employee was AWOL and could not invoke the FMLA to avoid discharge.

Goodman v. Heitman Financial Services, 894 F.Supp. 1166 (N.D.Ill. 1995) Court would not permit a retaliatory discharge tort claim to include claims based on exercise of FMLA.

Hamros v. Bethany Homes and Methodist Hospital of Chicago, 894 F.Supp. 1176 (N.D.Ill. 1995) Employee brought tort claim of retaliatory discharge based on public policy as expressed in the FMLA. Court held that state supreme court would not expand the common law tort of retaliatory discharge to include claims based on the exercise of rights under the FMLA. The FMLA provides a right of action against employers who have allegedly violated the act.

Harris v. Union Pacific R.R., 3 WH Cases2d 1333 (DC NIll 1997) Employee sued under FMLA after her application for a separation program was denied because she was on maternity leave. Court concluded that a carrier was exempt from all laws as necessary to carry out an Interstate Commerce Commission (ICC) approved transaction. Therefore, it would be exempt from the provisions of the FMLA. However, the exemption applies only when necessary to carry out an approved transaction. The determination of what was necessary to carry out

the approved merger resides within the exclusive jurisdiction of the ICC and the court lacks jurisdiction to resolve this dispute.

Kariotis v. Navistar Intl. Transportation, 3 WH Cases2d 1291 (DC NIll 1997). Employee who was discharged while on disability leave for knee replacement surgery has no claim under FMLA, despite her contention that at time of discharge she had 12 weeks of FMLA leave remaining and that employer unlawfully failed to restore her to her former position at end of 12th week, where employee was discharged based on employer's belief that she had committed disability fraud.

Kindlesparker v. Metropolitan Life Ins. Company, 1995 WL 275576 (N.D.Ill.) The FMLA cannot be applied retroactively to conduct which occurred prior to the effective date of the Act.

Knussman v. State of Maryland, 1996 WL 444136 (D.Md.) Individuals can sue the state in federal court for FMLA violations. Only the employee has standing to sue; not the spouse or child. The court held that the following injunctive relief sought by the plaintiff was available under the FMLA: (1) employer was required to make known to employees that all leave policies apply to men and women equally, (2) employer was required to post information on FMLA rights, (3) employer was required to refrain from retaliation against the employee, and (4) the employee was granted 12 weeks of leave and allowed to substitute sick leave.

Ladner v. Alexander & Alexander, Inc., 879 F.Supp. 598 (W.D.La. 1995) FMLA case filed in state court was permitted to be removed to federal court.

Mann v. Haigh, 891 F.Supp. 256 (E.D.N.C. 1995) Federal employers are covered by Title II of the FMLA.

McAnnally v. Wyn South Molded Inc., 912 F.Supp. 512 (N.D.Ala. 1996) Employee's claim for damages arising from loss of job security and resulting mental distress is not recoverable as "other compensation denied or lost to such employee" as defined in the FMLA. The statutory language refers to wages, salaries and employment benefits lost by an employee. The language does not imply a reimbursement formula for "mental distress" stemming from loss of job security.

McCown v. UOP, Inc., 1995 WL 519818 (N.D.Ill.) Memo that it was "doubly important for the employee to be at work," which was sent two days after the employee requested FMLA leave and comment by supervisor that he did not object to leave, but would rather have had the employee at work did not

constitute direct evidence of discriminatory intent. In this case, the employee could not make a *prima facie case*, prove the basic elements, because she was not meeting the employer's legitimate expectations due to excessive absenteeism. The FMLA is not a shield to protect against legitimate discipline.

Reese v. Commercial Credit Corporation, 3 WH Cases2d 1428 (DC SC 1997) Employee must arbitrate his FMLA claim pursuant to employer policy that makes arbitration required forum for resolution of all employment disputes, where (1) valid arbitration agreement existed, inasmuch as employer mailed arbitration policy to employee with letter that explained policy and employee's continued employment bound parties to agreement, and (2) scope of policy is very broad, encompassing employee's FMLA claim.

Reich v. Midwest Plastic Engineering, Inc., 1996 WL 407845 (W.D.Mich.) Motion for attorney fees. The Department of Labor brought suit and lost. However, the court held that DOL was "substantially justified" in bringing suit because it was a "close case". The case turned on the fact that the employee failed to provide notice of the need for leave and his health status as requested.

Reid v. Citizens Sav. Bank/Citizens Trust Co., 887 F.Supp. 43 (D.R.I. 1995) Employee returning from FMLA leave may sue for "hostile environment" existing after returning from leave. Case also involved state law and whether monetary damages can be collected.

Schwedt v. Department of Industry, 188 Wis.2d 500, 525 N.W.2d 130, (Wis.App.1994) Wisconsin statute. State statute required that leave must begin within 16 weeks of a child's birth. Court concluded that even if the leave were taken intermittently, it would still have to be taken within the first 16 weeks of birth.

Sutherland v. Bowles, 1995 WL 367937 (E.D.Mich.) Federal employees, who are covered by Title II of the FMLA, have no private right of action.

Cases citing FMLA, but not instructive

There are many additional cases which discuss FMLA issues, but which were not relevant to State employees.

DEPARTMENT OF LABOR OPINION LETTERS

Following are summaries of the Department of Labor, Wage and Hour Division, Opinion Letters, referenced as **[FMLA -1], [FMLA - 2],** etc.)

1,250 hours (active pay status)

Time spent on paid or unpaid leave is not included in the definition of "hours worked", and consequently those hours are not counted in determining the 1,250 hour eligibility test for an employee. **[FMLA - 18] [FMLA - 46] Note:** *For ease of administration, agencies may still elect to calculate hours worked based on "active pay status", which would include time spent on unpaid leave as hours worked.*

The time an employee was employed by a temporary help agency counts towards the 1,250 hours worked test and the 12-months of service test. the temporary agency and the employer are considered joint employers. **[FMLA - 37]**

There is no difference between overtime and non-overtime hours for purposes of determining whether the employee meets the 1,250 hours worked eligibility test. **[FMLA - 40]**

Full-time FLSA-exempt employees for whom no hours-worked records have been kept and who have worked for the employer for at least 12 months are presumed to have met the 1,250 hours of service requirement for purposes of eligibility for FMLA leave. For example, in consideration of the time spent at home reviewing homework and tests, full-time teachers in an elementary or secondary school system, or institution of higher education, or other educational establishment or institution are deemed to meet the 1,250 hour test. It should be noted that an employee would not have to be paid for the time in order for such time to be included as part of "hours of service." **[FMLA - 79]**

12-month period

It is up to the employer to choose the applicable 12-month period. The regulations provide several options: the calendar year; any fixed 12-month period, such as the fiscal year; the 12-month period measured forward from the date leave begins; and, a rolling 12-month period measured backward from the

day an employee uses FMLA leave. **[FMLA - 74] [FMLA - 88] Note:** *The State has chosen a rolling 12-month period measured backward from the day an employee requests FMLA leave.*

Americans with Disabilities Act

The FMLA was not intended to modify or affect the ADA. **[FMLA - 27] [FMLA - 29]**

An employer's obligation to maintain health insurance coverage ceases if an employee's portion of the premium payment is more than 30 days late. All other obligations under the FMLA would continue. The employer may pay and then recover from the employee the employee's share of the premium payments missed. **[FMLA - 42]**

An employer is prohibited from requiring an employee to accept a "light duty" position in lieu of FMLA leave. In the case of an employee with a serious health condition under FMLA who is also a qualified individual with a disability under ADA, requirements of both laws must be observed and applied in a manner that assures the most beneficial rights and protection. For example, a reasonable accommodation under the ADA might be accomplished by providing an individual with a disability with a part-time job which does not ordinarily provide health benefits. Under FMLA, an eligible employee would be permitted to work a reduced leave schedule for up to 12 workweeks of leave in any 12-month period with group health benefits maintained during this time. Once the FMLA leave had been exhausted, the employer would have no further obligations under FMLA and would follow the requirements of the ADA. **[FMLA - 55] [FMLA - 82]**

Birth of a child

Any period before and after the birth of the child where a mother is not able to work for medical reasons may be considered FMLA leave for a serious health condition, despite the fact that the period after birth is also FMLA leave to care for the newborn child. **[FMLA - 32]**

Paid maternity leave is considered leave for purposes of FMLA and would be counted in the 12 weeks of leave permitted under the FMLA. **[FMLA - 32]**

An eligible employee is entitled to a total of 12 workweeks of FMLA leave during any 12-month period for the birth and care of a newborn child. An employee's

entitlement to leave to care for the newborn child, however, expires at the end of the 12-month period beginning on the date of the birth. **[FMLA - 32]**

Multiple births do not entitle the employee to additional FMLA leave. Employees who have exhausted their 12-weeks of FMLA leave are not eligible for additional leave in the same 12-month period. **[FMLA - 45]**

The FMLA recognizes childbirth and recovery from childbirth as a "serious health condition." The legislative history lists "...ongoing pregnancy, miscarriages, complications or illnesses related to pregnancy, such as severe morning sickness, the need for prenatal care, childbirth and recovery as examples of "serious health conditions." The Pregnancy Discrimination Act established the medical recovery period for a normal childbirth is 4 to 8 weeks, with a longer period where surgery is necessary or other complications develop. An FMLA-eligible employee would, therefore, be entitled to substitute paid sick or medical leave benefits, where such paid benefits have been accrued or earned by the employee and available to use, for unpaid FMLA leave for the employee's own serious health condition due to childbirth. Any FMLA leave taken following the "medical recovery period from childbirth" to care for the newborn, however, would be treated the same as leave taken to care for the newly-placed adopted child with respect to the type of paid leave (vacation, personal or family) that may be substituted for unpaid FMLA leave. **[FMLA - 85]**

Certification requirements

The fact that the immediate family member is in a foreign country does not prohibit second and third opinions. Not only must the doctor certify that a serious health condition exists, but must provide an estimate of the duration of the serious health condition to insure the employee does not take more leave than necessary. **[FMLA - 16]**

A medical certification from the treating health care provider can only be required when the employee or the employee's family member has a serious health condition, not when leave is to care for a newborn child. **FMLA - 53]**

Employers may require a medical certification from the employee's, or the employee's immediate family member's treating physician that provides medical facts about the condition and the duration of treatment and recovery. The employer may request certification at some later date if the employer has reason to question the appropriateness of the leave or its duration. If the employer questions the validity of the initial medical certification, the employer may require the employee to obtain a second medical opinion, and possibly a

third if necessary, at the employer's expense. Employers also have the right to request recertification in the case of pregnancy, chronic conditions, or permanent/long-term conditions under the supervision of a health care provider every 30 days or at any reasonable interval based on the circumstances of the case. If the employee fails to provide, in a timely manner, a requested medical certification to substantiate the need for FMLA leave for a serious health condition, the employer may delay FMLA leave until the employee submits the certificate. If the employee is unable to produce the medical certification, the leave is not FMLA leave and the employee is not protected by the FMLA. **[FMLA - 60]**

Where an employee submitted a completed certification form indicating that the condition in question qualified as a serious health condition for purposes of FMLA, the employer should not reject the certification unilaterally. If the employer disputed the certification, it should have sought a second opinion, or with the employee's permission, contacted the employee's health care provider to clarify any information, or return the form to the employee if the form is not properly completed. **[FMLA - 77]**

Collective bargaining agreements

The FMLA provides that if the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied, unless the CBA diminishes rights granted by the FMLA (i.e., because of seniority, the employee would not be entitled to an equivalent position), then the FMLA supersedes the CBA. **[FMLA - 58]**

Discriminating

Employee who has a guaranteed number of hours he works each month (in a CBA) requests and is granted intermittent FMLA leave. The employer may not discriminate against the employee using FMLA leave and can only deduct the FMLA leave hours from the pay/hour guarantee if all employees who request leave have such hours deducted. **[FMLA - 42]**

If an employee was eligible for a perfect attendance reward/bonus prior to taking FMLA leave, the employee would be eligible for the bonus upon returning to work because the taking of FMLA leave may not be used as a negative factor in employment actions. For a production award program, an employee may be awarded a reduced bonus or deemed ineligible as a result of having been on

FMLA leave and not having had the opportunity to continue to produce during the award period. **[FMLA - 79]**

Eligible employee

Volunteers do not meet the definition of an "employee". **[FMLA - 7]**

An employee employed by a State, who is not subject to the civil service laws of the state and who is an employee in the legislative branch or legislative body of that State and is not employed by the legislative library of such State is excluded from the definition of "employee" and therefore, not subject to the FMLA. **[FMLA - 28]**

Medical residents (doctors) who are generally employed under successive one-year contracts for a total of two to six years are employees for purposes of the FMLA. The hospital would have to show that the employee's contract would not have been renewed for some reason other than the taking of FMLA leave. The employee must also be given an opportunity to make up any loss in qualifications resulting from the taking of FMLA leave. **[FMLA - 41]**

Equivalent benefits

An employee is not entitled to accrue benefits or seniority during periods of unpaid FMLA leave. Consequently, there would be no accrual of vacation pay during a period of unpaid FMLA leave. **[FMLA -2]**

An employer offered employees the option of retaining full medical coverage during leave or accepting 50% of the cost in lieu of, in the form of deferred compensation. The FMLA requires group health insurance be maintained, but it is within the employer's discretion whether or not to offer the deferred compensation option. **[FMLA - 13]**

Employer offered a cash supplement in lieu of insurance, but was not required to continue the supplement during a period of leave, only to maintain a group health insurance benefit. **[FMLA - 19]**

Employees may, but are not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. Benefits accrued at the time leave began (i.e., paid vacation, sick or personal leave to the extent not substituted for FMLA leave) must be available to an employee upon return from leave. If an employee is on unpaid FMLA leave, the employee is not eligible to accumulate sick leave, unless

employees on leave without pay are otherwise entitled to accrue benefits. **[FMLA - 24]**

An employee who is on a leave of absence pending a disability retirement who otherwise meets FMLA's eligibility criteria and who has a serious health condition that makes the employee unable to perform his or her job is eligible for FMLA's leave entitlements, including having their group health benefits maintained under the same terms and conditions as if the employee continued to work for the duration of the protected leave period. If the employee fails to return to work at the end of the employee's FMLA leave entitlement because of the continuation, recurrence, or onset of a serious health condition (or other circumstance beyond the employee's control), the employer cannot recover the premium paid (employer portion) for maintaining the employee's group health coverage during the FMLA leave. A decision subsequent to the granting of an FMLA leave request to grant pension benefits with a retroactive effective date for purposes of receiving pension benefits does not, in the DOL's view, "preempt", or extinguish an employee's statutory rights under the FMLA. **[FMLA - 26]**

If a bonus is calculated based on hours worked or yearly or monthly earnings, the FMLA leave taker would naturally receive a lesser amount. Conversely, any methodology for calculating bonuses that are not based on worktime or accrued earnings cannot be reduced at all for FMLA leave takers who qualified for the bonus before they started FMLA leave and return to work and continue an otherwise perfect record for the remainder of the bonus period. **[FMLA - 31]**

An employee covered by a collective bargaining agreement who has requested intermittent FMLA leave is transferred to a non-contract position to accommodate the FMLA leave. The employer must retain the same level of union benefits during the transfer period. **[FMLA - 42]**

An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. Benefits accrued at the time leave began, however, must be available to the employee upon return from leave. As long as any employee on a leave without pay status, regardless of whether it is FMLA leave or otherwise does not accrue any additional benefits or seniority, the employer is in compliance. **[FMLA - 42]**

Any period of leave will be treated as continued service (i.e., no break in service) for purposes of vesting and eligibility to participate in pension and other retirement plans. An employee may, but is not entitled to accrue benefits during unpaid FMLA leave and thus is not necessarily entitled to pension plan credit for time on FMLA leave. **[FMLA - 54] Note:** *It is the State's policy that*

employees do receive service credit for time in unpaid leave status, provided the employee returns from leave.

Employer had a policy under which employees accrued a weekly bonus if they worked each day in the workweek. Failure to work the entire week caused forfeiture of the bonus, except where the absence was for vacation or an FMLA-qualifying event. These employees were entitled to a pro-rata share of the bonus based on the number of days worked. Policy was in compliance with the FMLA because FMLA leave is not a disqualifying event under the policy and bonus amounts accrued prior to FMLA leave are not forfeited. **[FMLA - 56]**

Equivalent position

An equivalent position must involve the same or substantially similar duties and responsibilities, equivalent pay, benefits, and working conditions. Furthermore, an employee is ordinarily entitled to return to the same shift or the same or an equivalent schedule. An employee may request a different shift schedule, or position which better suits the employee's personal needs; however, an employee cannot be required to accept a position against his or her wishes. **[FMLA - 3]**

If an employee is entitled to FMLA leave, an employer may not, in lieu of the FMLA leave entitlement, require the employee to take a job with a reasonable accommodation. Thus, an employer could not require an employee to work in a restructured job instead of granting the employee's FMLA leave request. The FMLA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, or position which better suits the employee's personal needs on return from leave, but the employee cannot be induced by the employer to accept a different position against the employee's wishes. **[FMLA - 17]**

Illinois state law requires teachers to complete a two year probationary period consecutively. The collective bargaining agreement provides that should a teacher experience a "break in service", the teacher will return to work the following year as a first year probationary teacher and be required to complete two years of uninterrupted service. Requiring a probationary teacher who takes FMLA-qualifying leave that would otherwise be considered a break in service as defined in the applicable collective bargaining agreement, to return to work as a first year probationary teacher violates the FMLA. Prior to beginning leave, the employee had accrued at least one year of service toward the completion of the two-year probationary period. Returning to a position as a first-year probationary employee constitutes a loss of benefit. **[FMLA - 80]**

Fitness for duty

If an employer has properly advised an employee in advance of the requirement to submit a fitness-for-duty report and the employee requests to be restored without furnishing the requested report, the employer may delay job restoration until the requested report is furnished. If however, the employee furnishes the report (which may be a simple note from the employee's doctor), and with the employee's permission, the employer has a health care provider, who is employed by the employer, contact the employee's health care provider for clarification, the employer must immediately restore the employee and may not delay restoration while the contact is being made. **[FMLA - 58]**

The FMLA provides that if the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied, unless the CBA diminishes rights granted by the FMLA (i.e., because of seniority, the employee would not be entitled to an equivalent position), then the FMLA supersedes the CBA. **[FMLA - 58]**

Foster care

Leave taken for foster care placement or to care for the child after placement must be concluded within 12 months of the placement. There is no minimum period of time or permanency in connection with a foster care placement for FMLA leave purposes. As long as the placement is the result of a foster care agreement between the foster parents and the State, leave to care for the newly placed foster child would be considered FMLA leave. The placement with an employee of each child for foster care would be considered a separate FMLA-qualifying event, and therefore not subject to the general restrictions on intermittent leave for adoption or foster care, i.e. that such leave is subject to the employer's approval. Each new placement is a separate event, not an intermittent event, and the employer does not have discretion to deny leave time. **[FMLA - 84]**

Employers are permitted to require reasonable documentation from the employee for confirmation of "family relationships." Examples: a simple statement from the employee, a child's birth certificate, a court document, etc. The employer is permitted to examine such documents, but must return them to the employee. **[FMLA - 84]**

Group health plan

An employer is required to maintain coverage under any group health plan for the duration of the FMLA leave and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave. If a contractor is paying cash in lieu of health and welfare benefits required by the wage determination in the contract, the employer has no obligation to continue cash payments during any period of FMLA leave. **[FMLA - 1]**

Where an employee's premium payment is late, the group health plan coverage may be dropped or canceled only when the employer has provided at least a 15 day written notice to the employee that the payment is late and, unless received, coverage will cease in 15 days, or where the employee voluntarily elects to withdraw from coverage during FMLA leave. However, the employee must be restored to the same coverage and benefits that the employee would have had if leave had not been taken and the premium payments had not been missed. The employee may not be required to meet any qualification requirements imposed by the plan, including any new preexisting condition waiting period, to wait for open-enrollment, or to pass a medical exam. Thus, to fulfill its responsibilities, an employer may need to pay the employee's premiums to avoid a lapse in coverage, and recover the costs from the employee when the employee returns. **[FMLA - 64]**

Health care provider

Chiropractor's are included in the DOL's definition of "health care provider" (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the state and performing within the scope of their practice as defined under state law. **[FMLA - 63]**

The FMLA final rule recognizes any health care provider accepted by the employer's group health (or equivalent) plan, and adds clinical social workers to the extent authorized under state law. Failure of the rule to list physician assistants as health care providers does not preclude such individuals from being health care providers to the extent employers or their group health plans recognize physician assistants for certification of the existence of a serious health condition to substantiate a claim for health care and related services provided, they would be accepted as "health care providers" under FMLA. For example, physician assistants would be considered health care providers under

FMLA if an employer's group health plan or program recognized physician assistants as "primary care givers" for dispensing medical treatment and paid claims for such services. Any medical services recognized by an employer's group health plan or equivalent program which are furnished by a physician assistant as a result of a referral while under the continuing supervision of a health care provider would also qualify as medical treatment under FMLA. FMLA would recognize medical treatment by a physician assistant where an employee receives treatment by the physician assistant under the supervision of a healthcare provider without first seeing the health care provider and obtaining a referral. **[FMLA - 72]**

Health plan premiums

If an employer normally pays a portion of an employee's group health plan premiums prior to the employee taking FMLA leave, the employer must continue to pay the employer's share of the premiums during the FMLA leave at the same rate, i.e. if the employee continued to work instead of taking the leave. The employer cannot require an employee who takes FMLA leave to pay more for maintaining group health insurance during the FMLA leave than the employee normally pays when working. **[FMLA - 23]**

An employee is granted 12 weeks of unpaid FMLA leave to take care of an adopted child, returns for only four days and informs the employer he is quitting. 30 days is the minimum amount of time an employee must return to work so as not to be responsible for the cost of health insurance paid for by the employer during the FMLA leave, except that if the employee fails to return because of the continuation, recurrence, or onset of a serious health condition that would entitle the employee to FMLA leave, or other circumstances beyond the employee's control, the employee is not responsible. **[FMLA - 42]**

An employer's obligation to maintain health insurance coverage ceases if an employee's portion of the premium payment is more than 30 days late. All other obligations under the FMLA would continue. The employer may pay and then recover from the employee the employee's share of the premium payments missed. **[FMLA - 42]**

The regulations do not contain guidelines with respect to those situations where the employer and employee are unable to resolve differences with respect to the repayment of the employee's share of group health benefit premiums. It is the Department of Labor's view that such arrangements should be reasonable and shall not impose unreasonable hardships or difficulties on either party. For example, the employer would not attempt to recover payments all at once by

deducting the entire amount due from the employee's first paycheck. On the other hand, the employee should not attempt to stretch the payments out over an unreasonably long time. DOL views additional deductions equal to a regular group health plan premium as reasonable. **[FMLA - 65]**

Husband and wife

The combined total of workweeks of FMLA leave to which husband and wife employed by the same employer and eligible for FMLA leave are entitled to is limited to 12 workweeks during any 12-month period for the following reasons:

- for the birth and care of a newborn child
- for placement of a child for adoption or foster care
- to care for a parent with a serious health condition

The combined 12-week limitation does not apply when leave is taken for the following reasons:

- to care for the employee's spouse or child who has a serious medical condition
- for a serious health condition that makes the employee unable to perform the employee's job.

For example: During a 12-month designated period, the married couple took 12 weeks combined (mother took 10 weeks, father took 2 weeks) for the birth and care of a newborn. The mother would have two workweeks of FMLA leave to care for her own serious health condition or that of her child or spouse. The father would have 10 weeks of leave remaining to care for his own serious health condition or that of his spouse or child. Since this married couple used 12 workweeks of FMLA leave for the birth and care of the newborn, no additional FMLA leave may be taken to care for the parent with a serious health condition by either spouse in the remaining 12-months. **[FMLA - 42] [FMLA - 43]**

As the FMLA is currently written, the restriction on married couples who work for the same employer to a total of 12 weeks of leave for the birth of a child, placement for adoption or foster care or to care for a parent with a serious health condition, does not apply to unmarried couples working for the same employer. **[FMLA - 66]**

FMLA does not cover time off to care for a significant partner (unmarried). **[FMLA - 83]**

Question: If an employee has a complicated pregnancy or other condition, can that employee use the maximum amount of leave allowed by the FMLA, followed by the partner using the same amount of time through their employer (same or different employer)? Example: John and Jane work for the same employer. Jane has a complicated pregnancy and is on bed rest for her maximum leave time. She has the baby and must return to work. The baby is ill and must be cared for by John. Can he take his FMLA leave? What if John and Jane work for different employers?

Answer: A husband and wife who are eligible for FMLA leave and are employed by the same 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 birth of the employees' child or to care for the child after birth, for placement of a child with the employees for adoption or foster care, or to care for the child after placement, or to care for one of the employee's sick parent with a serious health condition. These limitations do not apply where the reason for the leave is the serious health condition of either the husband or wife or serious health condition of a child. The limitations also do not apply to employees who are not husband and wife. In the example, it must first be determined whether John and Jane were "partners" or husband and wife. If they are husband and wife and John took no FMLA leave to care for Jane during her difficult pregnancy, John could take up to 12 weeks for any FMLA-qualifying reason. Jane's leave was due to her own serious health condition and therefore not for one of the reasons for which the leave of a husband and wife working for the same employer may be limited. If Jane and John work for different employers, no restrictions apply. **[FMLA - 83]**

Intermittent leave

A full-time employee is diagnosed with a kidney disease. All health care providers determine that the employee needs dialysis treatments each Monday and Friday afternoon, which cannot be rescheduled. Attending the dialysis treatments would make the employee unable to perform an essential job function (e.g., serve as security guard; take a machine reading; etc.), which duties also cannot be rescheduled or reassigned. The employer has no alternative job in which to place this employee that would better accommodate the employee's need for intermittent leave. If the employee is eligible for leave and cannot reschedule the leave because of medical necessity, and the employer has no alternative position available, the employee is entitled to take job-protected leave on an intermittent basis under FMLA until 12 workweeks of leave have been used in a 12-month period. **[FMLA - 29]**

An employee covered by a collective bargaining agreement who has requested intermittent FMLA leave is transferred to a non-contract position to accommodate the FMLA leave. The employer must retain the same level of union benefits during the transfer period. **[FMLA - 42]**

A flight attendant requests intermittent FMLA leave three hours off every Friday for two months to care for her sick mother. Due to the unique working environment of a flight attendant, granting such request means that the employee will not be able to work her flight assignment on Friday for two months. The employee would be charged for three hours of FMLA leave, not her ten hour entire work period. While only three hours may be charged to FMLA, the remainder of the time may be charged to some other form of paid or unpaid leave. **[FMLA - 42]**

An employee requests intermittent leave two hours every day for a month to take care of a sick child. The employee's job is not one that can allow such leave each day, so the employer wants to transfer the employee to another location. The employee may only refuse the transfer where it would adversely affect the employee, i.e. commuting distance time, employee rides the bus and the new position is not accessible by public transportation. **[FMLA - 42]**

An employee may be encouraged to take FMLA leave in a block of time as opposed to intermittently, but the time other than the time actually needed for leave could not be counted against the employee's 12-week entitlement. **[FMLA - 44]**

FMLA leave may be taken intermittently or on a reduced leave schedule under certain circumstances. Where leave is taken to care for the newborn child or placement for adoption or foster care, an employee may take intermittent or reduced leave only if the employer agrees. Employee returned on November 4 from FMLA leave taken for the birth of a child. Employee requested additional FMLA leave in two separate blocks of time, November 6 through 18 and December 1 through 5. The employer need not have approved the requests. **[FMLA - 53]**

When an employer and employee have agreed that the employee would continue to work out of the office between time spent caring for a seriously ill child, the hours the employee worked when on leave should not be counted toward the 12 week maximum. Only the amount of leave actually taken may be charged as FMLA leave. The amount of time the employee is working must be counted as hours worked pursuant to the Fair Labor Standards Act. **[FMLA - 67]**

Joint employment

Where two or more businesses exercise some control over the work or working conditions of an employee, the businesses may be considered "joint employers" for purposes of complying with the FMLA. Employees jointly employed by two employers must be counted by both employers in determining employer coverage and employee eligibility. Discussion of responsibilities of "primary" and "secondary" employers. **[FMLA - 4] [FMLA - 8]**

Medical certification

University faculty medical doctors could not be exempted from the prohibition against having doctors who are regularly employed by the employer from giving second medical opinions. **[FMLA - 48]**

An employer may require a medical certification from a health care provider (as defined under the FMLA) for leave due to a serious health condition, and may require a second if the employer has some reason to doubt the accuracy of the first medical certification. If the first and second opinions disagree, the employer may require a third opinion (at the employer's expense) and a fitness for duty report to return to work. **[FMLA - 50]**

The FMLA does not require health care providers to complete medical certificates. Failure of an employee to provide a medical certificate to substantiate the need for FMLA leave for a serious health condition may, however, jeopardize the employee's job and group health insurance coverage as FMLA benefits and protection cannot apply to a leave of absence where the employee is unable to provide the requested certificate. How a health care provider would obtain compensation for completing this medical certification would be between the provider and the customer. **[FMLA - 71]**

Due to the need to protect the privacy interests of the employee, contact with the employee's health care provider may only be done with the employee's permission. **[FMLA - 75]**

Needed to care for

It is not required that the doctor certify that the employee is the only person that can provide the third party care for an immediate family member; only that third party care is required. It is anticipated that in many instances, the employee's

decision would be a financial one. The choice would be the ability to pay for professional medical care (e.g., a home health nurse) round the clock, or in those instances where there is no requirement to administer medication, the employee must provide the care. **[FMLA - 16]**

Notice

An employer may classify a medical leave as FMLA leave at the time an employee gives at least verbal notice sufficient to make the employer aware of the employee's condition that qualifies as FMLA leave. The employee need not request and cannot refuse that the leave be designated as FMLA leave. **[FMLA - 42] [FMLA - 68]**

When employees are absent without advance notice for rehabilitation treatment for substance abuse and the conditions of the FMLA regulations are met, such absences may be counted against the employee's FMLA leave from the first date of the absence if the employer promptly, within two business days of learning of the reason for the absence, notifies the employee that the absence is designated as and will be counted as FMLA leave. **[FMLA - 69]**

Notice requirements

While the regulations do not specifically permit the employer to contact the employee during FMLA leave to inquire regarding work related matters, there also is no specific prohibition regarding such contact. Where an employee needed emergency leave immediately, with no time to exchange information regarding that employee's project assignments, it would be entirely appropriate to grant the emergency leave and request the employee to contact the supervisor as soon as convenient to discuss the status of the employee's work while on FMLA leave. **[FMLA - 11]**

An employer's designation of leave as FMLA leave should be made before the leave is taken or before an extension of leave is granted, unless the employer does not have sufficient information as to the reason for the leave until after the leave commences. Under no circumstances may the leave be designated after the leave has been completed. **[FMLA - 12] [FMLA - 43]**

All covered employers are required to post in a conspicuous place a notice of the Act's provisions, regardless of whether the employer has any eligible employees. **[FMLA - 62]**

An employee need not expressly refer to the FMLA when indicating a need for leave. **[FMLA - 75]**

In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA qualifying, and to give notice of the designation to the employee. An employee may request FMLA leave although it is not necessary for the employee to expressly assert rights under FMLA or even mention the FMLA to meet his or her obligation to provide notice. The employee may not, however, bar the employer from designating any qualifying absence as FMLA leave. **[FMLA - 83]**

Paid leave

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal or family leave, or medical or sick leave for any of the 12-week leave period under certain conditions. Paid vacation leave, personal leave, or family leave may be substituted for all or part of any unpaid leave for the birth and care of the employee's child after birth, or placement for adoption or foster care, or for the care of the seriously ill family member. Paid vacation leave, personal leave, or medical or sick leave may be used and counted as FMLA leave for the employee's own serious health condition. Paid medical or sick leave may be substituted for FMLA leave for the care of a seriously ill family member only to the extent that the employer's leave plan allows paid leave to be used for that purpose. The use of paid family leave as FMLA leave is also limited by the normal use of the employer's plan. **[FMLA - 33] [FMLA - 43] [FMLA - 76] [FMLA - 85]**

Compensatory time off accrued in lieu of the payment in cash of FLSA required statutory overtime pay is not a form of accrued personal leave nor is it identified in the FMLA as an accrual that may be substituted for unpaid FMLA leave. A public employee may elect, subject to employer approval, to use accrued compensatory time off for an absence that would otherwise qualify as a reason for taking FMLA leave. If the employee does so, the employer may not designate the absence as FMLA leave and thereby reduce the employee's FMLA leave entitlement. **[FMLA - 34][FMLA - 83]**

The United States Postal Service would be correct to deny an employee's request to substitute accrued paid sick leave for unpaid FMLA leave to care for a new born child. The employee may substitute accrued paid vacation leave or take an unpaid FMLA leave of absence to care for the newborn. **[FMLA - 36]**
Note: *The State's Adoption/Childbirth policy provides that employees may use*

accrued sick leave during the waiting period and to supplement the 70% benefit received.

An employee's receipt of temporary disability payments precludes the employee from electing and prohibits the employer from requiring the substitution of any form or accrued paid leave for any part of the absence covered by such payments. **[FMLA - 52] Note:** *It is the State's policy that employee's may, but are not required to supplement disability, Adoption/Childbirth and workers' compensation payments with paid leave.*

Under an employer's vacation leave plan, an employee who has worked 800 hours in the current vacation year earns paid vacation that may not be used until the next vacation year. An employer could not require the employee to substitute leave that is not yet available to the employee to use under the terms of the employer's leave plan, but could voluntarily advance paid leave to the employee. **[FMLA - 61]**

The Department of Labor's position with respect to accrued leave for purposes of substitution under FMLA means leave that is both earned and available for use by the employee. An employee could not elect nor could the employer require the substitution of paid vacation leave that is not available to the employee until the following year. (Although the employer could voluntarily advance paid leave). **[FMLA - 81]**

A public employer could deny the use of compensatory time if such an employer could show that the time off would "unduly disrupt" operations. The employer cannot, however, deny a request for FMLA qualifying leave. **[FMLA - 83]**

Parent

FMLA does not cover employees who wish to care for grandparents. **[FMLA - 21]**

The FMLA does not extend to employee absences to provide care to siblings. **[FMLA - 73]**

Policies of employer

An employee who complies with an employer's less stringent leave plan requirements may not be denied leave for an FMLA purpose on the grounds that the stricter requirements of the FMLA have not been met. **[FMLA - 68]**

Premium payments

An employer may recover any payments made on behalf of an employee during a period of unpaid leave to cover the employee's share of the premiums. The regulations do not provide specific guidance regarding the recovery by the employer of the employee's share of premiums, but it is intended the employer and employee make arrangements for repayment that do not unduly impact the employee's financial condition such as periodic payroll deductions. **[FMLA - 11]**

Public agency

Public agencies are covered employers regardless of the number of employees employed. **[FMLA - 62]**

Recertification

With respect to medical recertifications, the statute states that an employer may require subsequent recertifications only "on a reasonable basis." An employer may request recertification for a chronic serious health condition at any time if the circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of absences, the severity of the condition, complications) or the employee's stated reason for the absence.

Restoration

An employer's obligation to maintain health insurance coverage ceases if an employee's portion of the premium payment is more than 30 days late. All other obligations under the FMLA would continue. The employer may pay and then recover from the employee the employee's share of the premium payments missed. **[FMLA - 42]**

An employee does not have FMLA job protection if the total amount of leave exceeds the 12-week maximum. **[FMLA - 67]**

Returning to work

If an employee is ready to be reinstated after an FMLA leave, the employer cannot require the employee to take additional FMLA leave on an intermittent or reduced leave schedule basis instead of being restored to equivalent

employment. Sending the individual on the next available interview similarly would not comply with FMLA, unless the employer can show that the employee would not otherwise have been employed when reinstatement is requested (i.e. that the employee would have been laid off if the employee had continued to work instead of taking FMLA leave). **[FMLA - 8]**

Right to reinstatement

An employee who fraudulently obtains FMLA leave from an employer is not protected by FMLA's job restoration or maintenance of health benefits provisions. **[FMLA - 16]**

An employer may transfer an employee who was out on FMLA leave to another location where the position which the employee held had been eliminated in a corporate restructuring. The employee has no greater right to reinstatement or to other benefits than if the employee had been continuously employed during the FMLA period. **[FMLA - 42]**

Serious health condition

The employee's own serious health condition requiring a "greater than three day" absence need not be limited to workdays only, but may also include non workdays such as the weekend when the employee is unable to carry out regular daily activities. **[FMLA - 43]**

Certain chronic conditions, such as asthma and diabetes, that continue over extended periods of time, often without affecting day-to-day ability to work or perform other activities, may cause episodic periods of incapacity of less than three days. Although persons with such underlying conditions generally visit a health care provider periodically, when subject to a flare-up or other incapacitating episode, the appropriate and effective course of action may be to stay home and to self-treat. Chronic conditions are included as serious health conditions under the FMLA, even when the individual episodes of incapacity are not of more than three days duration. **[FMLA - 60]**

Once it has been determined that a serious health condition, as defined in the FMLA and the regulations exists, it must be determined that such a condition prevents the employee from performing any one or more of the essential functions of the job. An employee whose illness does not meet the statutory and regulatory definitions of a serious health condition will not be entitled to take

FMLA leave even if the employee cannot perform any of the essential functions. An employee whose illness does meet such definitions but who may still perform all of the essential functions of the job will also not be entitled to take FMLA leave. **[FMLA - 77]**

Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc. would not meet the regulatory definition of a serious health condition as they would not be expected to last for more than three consecutive calendar days and require continuing treatment by a health care provider as defined in the regulations. If, however, any of these conditions met the regulatory criteria for a serious health condition, e.g., an incapacity of more than three consecutive calendar days that also involves qualifying treatment, then the absence would be protected by the FMLA. Complications, per se, need not be present to qualify as a serious health condition if the regulatory "more than three consecutive calendar days" period of incapacity and "regimen of continuing treatment by a health care provider" tests are otherwise met. **[FMLA - 86]**

If an individual with the flu is incapacitated for more than three consecutive calendar days and receives continuing treatment, e.g., a visit to a health care provider followed by a regimen of care such as prescription drugs like antibiotics, the individual has a qualifying "serious health condition" for purposes of FMLA. If an employee who has the flu only telephones the doctor but is not seen or examined by the doctor, those circumstances would not qualify as "treatment" under the regulations. A telephone conversation is not an examination. An examination or treatment requires a visit to the health care provider to qualify under FMLA. **[FMLA - 87]**

A prescription that is given "in case your cold develops into something serious" raises the question of whether the existent condition is a serious health condition for purposes of FMLA. In all likelihood, the employee has not yet suffered the "complications" that would qualify the illness as a serious health condition for FMLA leave purposes. An employee who does not follow the doctor's instructions and have the prescription filled or follow the doctor's orders is probably not under a "regimen of continuing treatment by or under the supervision of the health care provider". **[FMLA - 87]**

Where the doctor advises the employee to stay at home, drink plenty of fluids, and stay in bed for a few days, these activities could be initiated without a visit to a health care provider and do not constitute "continuing treatment" under the regulations. **[FMLA - 87]**

If strep throat or an ear infection result in an incapacity of more than three consecutive calendar days and involve continuing treatment (which could include a course of prescription medication like an antibiotic) the illness would be considered a serious health condition. **[FMLA - 87]**

Bronchitis may itself be a serious health condition if it meets one of the regulatory definitions. Ordinarily it is not a serious health condition because typically it does not involve an incapacity of more than three consecutive calendar days and continuing treatment. In the case where the doctor does not prescribe any course of medication to resolve or alleviate the health condition, it would not qualify as "a regimen of continuing treatment" within the meaning of the regulations. **[FMLA - 87]**

The complications of an illness that is not itself ordinarily a serious health condition, may convert a routine illness into a serious health condition (e.g., when bronchitis turns into bronchial pneumonia). In such a situation it may be difficult to determine when the initial illness became a serious health condition for FMLA leave purposes as a result of complications. Any question regarding the onset of a serious health condition may be resolved by obtaining a medical certification. **[FMLA - 87]**

Son or daughter

The age at which the child became disabled is not a factor for determining an eligible employee's entitlement to FMLA leave under the regulations. **[FMLA - 51]**

A parent may be entitled to FMLA leave to care for an adult child with a serious health condition if the child has a physical or mental disability within the meaning of the ADA regulations, 29 CFR Part 1630. A parent is not entitled to FMLA leave to care for a child over age 18 who is not disabled within the meaning of those regulations, including a daughter over 18 years who has a serious health condition because of pregnancy or is recovering from childbirth because "disability" under the ADA does not include pregnancy. **[FMLA - 51]**

State laws

The FMLA was not intended to modify or affect state antidiscrimination or workers' compensation laws. **[FMLA - 27]**

Under a state workers' compensation program, an employer may be required to offer an employee a light duty assignment when the appropriate medical authority has indicated that the person is able to return to work on a limited basis. Such an employee could elect to exercise the remainder of his or her FMLA leave rather than accept the light duty assignment. This does not mean, however, that the employee would be entitled to continue to receive benefits under the workers' compensation program if that program is structured in such a way as to end benefits at the point at which the employee is deemed medically able to accept a light duty assignment and one is offered by the employer. **[FMLA - 35] [FMLA - 38] [FMLA - 55][FMLA - 75]**

If an employee on FMLA leave voluntarily accepts a light duty assignment, the employee retains rights under the FMLA to job restoration to the same or an equivalent position held prior to the start of the leave for a cumulative period of up to 12 workweeks. This "cumulative period" would be measured by the time designated as FMLA leave for the workers' compensation leave and the time employed in the light duty assignment. The period of time employed in a light duty assignment cannot count, however, against the 12 weeks of FMLA leave. **[FMLA - 55]**

The FMLA does not supersede any provision of state or local law that provides greater family or medical leave rights than those established under the FMLA. **[FMLA - 36] [FMLA - 37]**

If an employee's absence from work pursuant to a workers' compensation claim also meets FMLA's definition of a "serious health condition," the employer may count this time as FMLA leave. **[FMLA - 42]**

Substance Abuse

FMLA leave is available for treatment for substance abuse provided the conditions meet the definition of a "serious health condition". Such treatment, however, does not prevent an employer taking employment action against the employee if the employer has an established policy applied in a non-discriminatory manner which has been communicated to all employees. The FMLA does not require the employer to allow an employee who tests positive for illegal narcotics the opportunity to seek treatment and be reinstated where the policy provides for termination. **[FMLA - 59] [FMLA - 69]**

Where an employer did not have an established policy regarding leaves for substance abuse or treatment for substance abuse, the employee would be

entitled to intermittent leave for such absences while enrolled in in-patient rehabilitation programs at local hospitals. **[FMLA - 69]**

A termination based on the employee's absence due to substance abuse which absence occurred prior to the employee's entry into a substance abuse program would be valid. The employer would not be required to reinstate the employee and provide FMLA leave. **[FMLA - 69]**

Unpaid leave

An employer may require an eligible employee to use all accrued paid vacation or sick leave before making unpaid leave available. **[FMLA - 33[**

Waive rights

Employee's may not waive their FMLA rights. **[FMLA - 49]**

VII. APPENDICES

A. Forms

1. Employee Notification Checklist
2. Employee Call-off Form
3. Medical Certification Form

B. Model Policy

FAMILY AND MEDICAL LEAVE ACT
EMPLOYEE NOTIFICATION CHECKLIST

Agency officials are required to inform employees requesting FMLA leave (or having leave designated as FMLA leave) of the following information as consistent with the agency's policy:

- ❒ 1. Leave will be counted against the employee's FMLA leave entitlement.

- ❒ 2. Specific requirements for the employee to provide medical certification for a serious illness and consequences of failing to do so.

- ❒ 3. The employee's right to use paid leave, or the agency's requirement for an employee to use all or certain portions of accrued paid leave prior to going on unpaid leave.

- ❒ 4. The employee's obligation to make any payment to maintain health benefits and the process for making such payments.

- ❒ 5. Specific requirements for the employee to provide a fitness-for-duty certificate upon returning to work.

- ❒ 6. The employee's right to restoration to the same or equivalent position upon returning from FMLA leave.

- ❒ 7. Employee's potential liability for payment of health insurance premiums paid by the employer during the employee's FMLA leave if the employee does not return to work after taking leave, unless the reason for not returning was due to circumstances beyond the employee's control.

- ❒ 8. Employee's status as a "key employee" (if applicable), potential consequences for denial of restoration following FMLA leave, and conditions required for such denial.

EMPLOYEE CALL/REPORT-OFF FORM

PART 1

Questions and Statements Must Be Read As Written

Employee Name and Department: _____

Time of Call: _____ Date of Absence: _____

Work Schedule: _____

Phone Number: _____
(This should be a number where the employee can be reached today for follow-up purposes as necessary)

REASONS FOR ABSENCE:

- ❒ Illness
- ❒ Vacation
- ❒ Personal
- ❒ Bereavement
- ❒ Accident
- ❒ Other (Specify)

IF SICK LEAVE, IS REASON FOR:

- ❒ Self
- ❒ Spouse
- ❒ Parent
- ❒ Son/Daughter
- ❒ Other: _____ (Specify)

Comments: _____

_____

_____

If absence is for an illness for you or your family member, do you have a Medical Certification form for Excused Sick Leave Occasion or FMLA (ADM 4260) for this condition? ❒ Yes ❒ No

PART 2

Part 2 is completed if the employee is using sick leave and does not have a certified ADM 4260 form for this condition. The questions under Part 2 are asked and the form is completed by the employee's supervisor or designee.

How long are you going to be absent? _____

Will you or your family member be hospitalized? ❒ Yes (In-patient) ❒ No (Out-patient)

Will you be applying for disability benefits? ❒ Yes ❒ No

Will you be applying for Worker's Compensation? ❒ Yes ❒ No

Will you or your family member see a medical professional for this absence? ❒ Yes ❒ No

Are you under continuing care or treatment for this condition? ❒ Yes ❒ No

If any of the questions were answered YES, please immediately forward this form to the Human Resources office.

Call taken by: _____

(Supervisor or Designee Department) Date Phone #

_____

Supervisor's Signature Date Phone #

NOTE: The employee should not be asked to disclose confidential medical information (i.e., diagnosis or prognosis). Human Resources may follow-up to determine whether the absence is due to an FMLA-qualifying event.

STATE OF OHIO
PHYSICIAN OR HEALTH CARE PROVIDER CERTIFICATION FOR THE FAMILY & MEDICAL LEAVE ACT

CONFIDENTIAL

(Please Print)

Employee's Name (First/Middle/Last) Social Security Number	
Employee's Job Title	
Address Street City State Zip	
Telephone Home / Work ( ) ( )	Agency & Employee Location
Patient's Name (if different from employee):	Relationship to Employee:

1. This information is being provided by:
   a) Physician ☐ **Yes** ☐ **No**
   b) Practitioner ☐ **Yes** ☐ **No**
   c) Another provider of health services (if referred by Physician or Practitioner) ☐ **Yes** ☐ **No**.

2. Medical facts or other information which would support your certification, and allow the Employer to make a prudent decision in this matter:

   _____

   _____

   _____

   _____

3. Date condition commenced: _____ 4. Probable duration of condition: _____

5. Is this a chronic condition? ☐**Yes** ☐**No** Explain as necessary: _____

   _____

6. When the condition is present, does it prevent the employee from performing the essential functions of the employee's position? ☐**Yes** ☐**No**

   Please explain: _____

   _____

   _____

   a) Is this response based upon a review of the employee's written position description? ☐**Yes** ☐**No**
   b) Is this response based solely upon the employee's description of his/her duties? ☐**Yes** ☐**No**

7. Regimen of prescribed treatment. Indicate the number of visits, general nature and duration of treatment, including referral to other provider of health services (OR ATTACH THE REGIMEN OF PRESCRIBED TREATMENT TO THIS FORM):

   _____

   _____

8. If it is necessary for the employee to be off work on an intermittent basis, or to work less than the employee's normal schedule of hours per day or days per week, include schedule of visits or treatment.

Hospital Care, complete Section I.	**Permanent/Long-Term, complete Section IV.**
Absence plus Treatment, complete Section II.	**Pregnancy Related, complete Section V.**
Chronic Condition, complete Section III.	**Care of Family Member, complete Section VI.**
UPON COMPLETION OF SECTION RELATED TO MEDICAL. CONDITION, PLEASE COMPLETE AND SIGN SECTIONS VII & VIII.	

SECTION I - Hospital Care

Does this condition require inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity or subsequent treatment in connection with or consequent to such inpatient care?

☐ **Yes** ☐ **No**

Date(s) of confinement: IN ____/____/____ OUT ____/____/____

SECTION II - Absence Plus Treatment*

A period of incapacity of **more than three** consecutive **calendar days**, or would result in such if left untreated (including any subsequent treatment or period of incapacity relating to the same condition that also involves the following:

☐ **Yes** ☐ **No** Will the individual require **treatment two or more times** by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care service (e.g., physical therapist) under orders of, or on referral by a health care provider; or

☐ **Yes** ☐ **No** Will the individual require **treatment** by a health care provider on **at least one occasion** which results in a **regimen of** continuing **treatment** under the supervision of the health care provider.

***NOTE:** A regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition. A regimen of treatment does not include the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bedrest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider.

SECTION III - Chronic Conditions Requiring Treatment**

Does this condition:

☐ **Yes** ☐ **No** require **periodic** visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

☐ **Yes** ☐ **No** continue over an **extended period of time** (including recurring episodes of a single underlying condition); and

☐ **Yes** ☐ **No** may possibly cause **episodic** rather than continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

Treatment includes examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does **not include routine physical examinations, eye examinations, or dental examinations.

SECTION IV - Permanent / Long-term Conditions Requiring Supervision

Does this condition require a period of **incapacity*** which is **permanent** or **long-term** due to a condition for which treatment may not be effective?

(The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by a health care provider. Examples include Alzheimer's, a severe stroke or the terminal stages of a disease.)

☐ **Yes** ☐ **No**

Does (or will) the patient require assistance for basic medical, hygiene, nutritional needs, safety or transportation?

☐ **Yes** ☐ **No**

***Incapacity,** for the purposes of FMLA, is defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment thereof, or recovery therefrom.

SECTION V - Pregnancy Related

Any period of incapacity due to pregnancy, or for prenatal care.

If condition is due to pregnancy, what was/is the expected delivery date? Month_____ Day_____ Year_____

Give dates and fully describe any complications prior to delivery.

_____

_____

SECTION VI - Care of a Family Member

After review of the medical condition, is the employee's presence necessary or would it be beneficial for the care of the patient (this may include psychological comfort)?
☐ Yes ☐ No

When Family and Medical Leave is needed to care for a seriously-ill family member, state the care he/she will provide and an estimate of the time period during which this care will be provided, including a schedule if leave is to be taken intermittently or on a reduced work schedule (you may attach additional sheets if necessary):

Estimate the period of time care is needed or the employee's presence is necessary: _____

SECTION VII - Attending Physician(s) / Health Care Provider(s)

Name(s), specialty, address(es), and telephone number(s) of all providers treating this condition:

NAME	SPECIALTY	ADDRESS	TELEPHONE

I certify that the information contained in this form is true to the best of my knowledge.

Date	Attending Physician's / Health Care Provider's Signature
	X

SECTION VIII - Certification / Authorization

I voluntarily authorize the Employer's Health Care Provider to contact my Health Care Provider for clarification of the information contained in this certification. Initial here:

I certify that the information contained in this form is true to the best of my knowledge and understand any misrepresentation on my part may result in denial of leave and/or discipline.

Date	Employee's Signature
	X

ATTENTION SUPERVISORS: Completed form shall be placed in the confidential section of employee personnel file. This form is for official use only. The information contained herein should **not** be shared with other employees except to the extent needed to make appropriate administrative decisions. Failure to maintain confidentiality of the information reported on this form may be grounds for appropriate corrective action.

PHYSICIAN'S NOTE: The Employer will not be responsible for additional billing charges resulting from a review of the employee's written position description to complete the above information.

Model Policy

Model Policy

STATE OF OHIO
FAMILY AND MEDICAL LEAVE
MODEL POLICY

The following is the Family and Medical Leave Act (FMLA) model policy. All state of Ohio Agencies, Boards, Commissions, and Institutions that have not formally adopted an internal FMLA policy are highly encouraged to do so and this model is provided to assist you. There are two areas where the appointing authority has discretion to vary from this model: 1) spouses who both work for the state may be limited to a combined total of twelve weeks of leave when leave is for the birth of a child, placement for adoption/foster care or to care for a parent with a serious health condition (the second bulleted item under EMPLOYEE ELIGIBILITY) and 2) agencies have discretion whether or not to require employees to use paid leave in conjunction with FMLA leave (the first bulleted item under USE OF PAID LEAVE).

The Family and Medical Leave Act (FMLA) allows eligible state employees to take up to twelve weeks of leave *(i.e. up to 480 hours for employees working 40-hour weeks, up to 360 hours for employees working 30-hour weeks, etc.)* per rolling twelve-month period for the following qualifying events:

- The birth of a child;
- placement with an employee of a child for adoption or foster care;
- caring for a spouse, child, or parent with a serious health condition; or
- the serious health condition of the employee.

EMPLOYEE ELIGIBILITY

Employees who have been employed by the state for at least twelve months and have been in "active pay status" at least 1,250 hours during the past twelve months are entitled to FMLA leave regardless of gender. Previous employment with the state in which the employee was paid directly by warrant of the Auditor of State shall count toward meeting the twelve-month employment requirement. The 1,250 hours need not be consecutive.

Eligible employees are entitled to a full twelve weeks of FMLA leave even if their spouse has already exhausted leave for a qualifying event.

REQUESTS FOR FMLA LEAVE

If the need for leave is foreseeable, employee requests must be submitted at least thirty days prior to taking leave or, if this is not possible, as soon as practicable.

Requests must be submitted on a standard leave form (ADM 4258). Employees who know the requested leave is for a FMLA-qualifying event may specify that the leave is requested pursuant to the FMLA by checking the appropriate box.

Leave must be taken in increments of no less than 1/10 hour.

Requests must include a completed *State of Ohio Physician or Health Care Provider Certification for the Family & Medical Leave Act* (form ADM 4260); or equivalent documentation in the case of an adoption/foster care. The certification form shall be maintained separately in a confidential manner.

Leave taken for the birth or placement of a child must be taken within one year of the date of birth or placement.

USE OF PAID LEAVE

Employees shall exhaust all accrued sick, vacation, and personal leave balances, as appropriate, prior to going on unpaid leave.

Pursuant to 29 CFR Part 825, Section 207 (i):

- Employers may not require employees to use compensatory time as a substitute for unpaid FMLA leave.
- Employees may request to use compensatory time for a FMLA-qualifying illness. If the employer permits the use of compensatory time (in compliance with 29 CFR Section 553.25), it shall not be counted toward the employees' twelve-week FMLA leave entitlement.

When FMLA leave is used concurrently with Disability Leave, Workers' Compensation, or Adoption/Childbirth Leave, the leave policies for those programs shall override the requirement of this policy for employees to exhaust all of their accrued leave.

Whether leave is paid, unpaid, or a combination, the employee is entitled to only twelve weeks of FMLA leave within a rolling twelve-month period.

Agencies may designate paid or unpaid leave as FMLA leave, whether the employee designates it as such or not if all of the following apply:

- The agency has compelling information based on information provided by the employee that leave was taken for an FMLA-qualifying event; and
- The employee is properly notified of his or her FMLA rights.

Within two business days of learning of the employee's need for FMLA-qualifying leave, the agency shall notify the employee:

- that paid leave will be designated and that it will count as FMLA leave; (The notice may be given orally, but must be confirmed in writing by the payday following the date leave is designated as FMLA leave. If the following payday is less than one week from the date leave is designated as FMLA leave, agencies shall provide written notice to the employee by the next payday.)
- Agencies shall at a minimum provide written notice to employees the first time they are granted FMLA leave in each six-month period of the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations (i.e., whether a medical or fitness-for-duty certification will be required.

If leave has already begun, the notice should be mailed to the employee's address of record.

WORKERS' COMPENSATION, OCCUPATIONAL INJURY LEAVE, AND DISABILITY LEAVE

Employees requesting Workers' Compensation, Occupational Injury Leave, or Disability Leave who are also eligible for FMLA leave shall have up to twelve weeks of the non-working portion of the approved benefit period, including any required waiting period, count concurrently as FMLA leave. Agencies may also grant FMLA leave to employees while their request is being reviewed. The granting of FMLA leave shall have no bearing on the approval or disapproval of employees' requests.

ADOPTION/CHILDBIRTH LEAVE

Employees requesting Adoption/Childbirth leave benefits who are also eligible for FMLA leave shall have the entire non-working portion of Adoption/Childbirth leave, including the

required waiting period, count concurrently as FMLA leave. An employee who is not eligible for FMLA leave *(e.g., the employee has not been in active pay status 1,250 hours during the previous twelve months or has already used his or her twelve weeks of FMLA leave)* shall

retain his or her right to Adoption/Childbirth leave upon meeting the Adoption/Childbirth leave eligibility requirements.

INTERMITTENT FMLA LEAVE

Employees are entitled to take intermittent leave for the employee's serious health condition or due to the serious health condition of a parent, spouse, son or daughter.

To be entitled to intermittent leave, the employee must submit certification to establish the medical necessity of the leave *(e.g., periodic testing and treatments).* In reviewing the request, the Human Resources office shall determine whether or not an acceptable leave schedule can be arranged and may consider a temporary transfer to an alternative, comparable position.

Agencies may require employees to provide recertification of the medical necessity for intermittent leave no more than once every thirty days in conjunction with an employee's absence, and where the minimum period specified on the medical certification is more than 30 days, not until that minimum period has passed unless:

- the employee requests an extension of leave;
- circumstances described by the previous certification have changed significantly *(e.g., the duration of the illness, the nature of the illness, complications)*; or
- the agency receives information that casts doubt upon the continuing validity of the certification.

Agencies may grant employees intermittent leave for the birth or placement of a child. Intermittent leave for the birth or placement of a child shall be upon approval of the employee's supervisor and the Human Resources office. Employees should request such leave from their supervisors and may request a review from their Human Resources office of any decision made.

EMPLOYEE BENEFITS

Agencies are required to continue paying the employer's portion of health insurance premiums during approved FMLA leave.

Employees are required to continue paying the employees' portion of health insurance premiums. Information on how health insurance premiums are to be paid while on FMLA leave may be obtained from the Human Resources or Payroll office.

Employees shall be given a thirty-day grace period from the due date of their health insurance premium. Employees who fail to pay their portion of the health insurance premium within this grace period may, with fifteen days notice from their agency Human Resources or Payroll office, be removed from their respective health insurance plan. Agencies that cancel an employee's health insurance without giving fifteen days notice become liable for the employee's health care costs.

If an employee chooses not to continue health care coverage during FMLA leave, the employee will be entitled to reinstatement into the benefit plan upon return to work.

Agencies may seek reimbursement for any health insurance premiums paid on behalf of the employee if the employee fails to return to work from FMLA leave. Agencies may not seek reimbursement if the reason for the employee failing to return to work is due to the continuation or recurrence of the serious health condition or is otherwise beyond the employee's control as defined in the FMLA.

Employees who are reinstated will not lose any service credit and FMLA leave will be treated as continuous service for the purpose of calculating any benefits which are based on length of service.

MEDICAL CERTIFICATION

In addition to the certification required with a request for leave that qualifies as a serious health condition, agencies may require a second opinion from a second health care provider designated by and paid for by the agency.

If the first and second opinions conflict, agencies may require the employee to submit to a third examination at the agency's expense by a health care provider chosen jointly by the employee and the agency. In choosing the third health care provider, both the employee and the agency must be reasonable and act in good faith. The opinion of the third health care provider is final and binding.

Under this policy, agencies may require the employee to report their health status and intent to report to work no more than once every thirty days. If agency officials have reason to believe that the employee's health status has changed such that the employee may no longer be eligible for FMLA leave, they may require the employee to get a second or third opinion as outlined.

REINSTATEMENT

Employees are entitled to reinstatement to the same or similar position upon return from leave.

If the same job is not available, the agency's Human Resources office will determine in which similar position the employee should be placed, making sure that the position has equivalent pay, benefits and conditions of employment.

Employees who take leave due to their own serious health condition may be required to provide certification from a health care provider that they are able to perform the essential functions of their position.

RECORDKEEPING

Agency Human Resources or Payroll offices will maintain records of leave balances and FMLA leave usage.

Medical records accompanying FMLA requests will be kept separate from personnel files in a confidential manner.

Questions or requests for assistance should be addressed to each agency Human Resources Office.