RECONCILING UNIVERSITY LEAVE POLICIES WITH THE FAMILY MEDICAL ACT OF 1993

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RECONCILING UNIVERSITY LEAVE POLICIES
WITH THE FAMILY MEDICAL LEAVE ACT OF 1993
by
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INTRODUCTION

On February 5, 1993, President Clinton signed the Family and Medical Leave Act of 1993 ("FMLA"). Many difficult issues of interpretation and implementation of the FMLA were left unresolved by Congress. The Department of Labor ("DOL") was directed to issue regulations within 120 days. On June 4, 1993, DOL published an Interim Final Rule. This contained the regulations to implement the FMLA when it took effect on August 5, 1993. Nevertheless, certain issues were still unresolved and the DOL solicited further public comment. The Interim Final Rule, after two years of questions and comments, was replaced by the Final Rule. The DOL issued the Final Rule on January 6, 1995, to be effective thirty days later. On February 6, 1995, due to a significant public response, the DOL postponed the effective date of the Final Rule until April 6, 1995.

Now that we have had over a year to review, digest, and apply the Final Rule, we thought this would be an appropriate time to revisit the elements of FMLA and discuss some of the issues and problems that have been raised during the last few years.

PURPOSE AND REQUIREMENTS OF FMLA

Purpose

The DOL has stated that the purpose of the FMLA is "...to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity."  

Basic Requirements

The FMLA entitles qualified employees up to 12 weeks of unpaid leave in any 12 month period for:

The birth and first year care of a child;

Adoption or foster placement of a child in the employee's home (use of a licensed adoption agency is not required, but foster placement requires State


action rather than merely an informal arrangement to care for another person’s child);

The care of a spouse, child or parent with a serious health condition; or

The serious health condition of the employee.\(^7\)

Employees covered by the FMLA are entitled to maintain health insurance during the leave (the employer must continue to pay its share of premiums) and, with some conditions and exceptions, to be reinstated to the same or an equivalent position once the leave period has concluded.\(^8\)

**COMPLIANCE STRATEGIES**

It has been suggested that the FMLA presents opportunities to employees who wish to practice "excessive absenteeism" under a federal guarantee of continued employment.\(^9\) However, the FMLA has a number of features that permit the employer to simplify compliance and minimize abuse. These features are not self-executing; they require the employer to take affirmative steps. Among the steps each employer should consider are the following.

**FMLA Poster**

Employers subject to the FMLA are required to post and keep posted in conspicuous places on their premises a notice explaining FMLA provisions and providing information about filing complaints of alleged FMLA violations.\(^10\) If the employer fails to display the FMLA poster, fines of $100 for "each separate offense" may be imposed by DOL and the employer cannot deny FMLA to any employee for failure to give advance notice.\(^11\) If a "significant portion" of the workforce is not literate in English, the notice must be provided in a language in which they are literate.\(^12\) The DOL's FMLA poster was published as Appendix C to the Final Rule,\(^13\) (January 6, 1995). A copy is attached hereto as Appendix A.

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\(^7\) 29 U.S.C. §2612.

\(^8\) 29 U.S.C. §2614(a)(1);(c)(1).


\(^10\) 29 C.F.R. §825.300(a).

\(^11\) 29 C.F.R. §825.300(b).


\(^13\) 29 C.F.R. §825.800.
FMLA Policy

Although there is no specific legal requirement to adopt an FMLA policy, this is a very sound approach to FMLA compliance. There may be some legal restrictions on the ability of the employer to impose an FMLA policy on unionized employees. See Section IV.A. of this outline. One of the critical issues to address in such a policy is whether or not employees will be required to "substitute" various forms of paid leave for FMLA unpaid leave. See Section XIII of this outline. The principal reason that many employers require such substitution is to limit the amount of time that an employee is out of the workplace on leave. If substitution of paid leave for unpaid FMLA leave is not required, then employees could take the various forms of their paid leave without using any of the 12 weeks of unpaid FMLA leave. The "substitution," which the FMLA permits employers to require or employees to request, solves this problem by ensuring that various forms of paid leave run concurrently with unpaid FMLA leave. An FMLA policy is also helpful in addressing a number of other critical issues in administering the leave provisions. (A sample FMLA policy is attached as Appendix B. Other critical issues to be covered in an FMLA policy are the following:

1. Whether medical certification will be required for FMLA leave.  

2. Whether second and third medical opinions will be sought.  

3. Whether "recertification" of medical conditions will be required while the employee is on FMLA leave.  

4. How the term "any 12 month period" will be defined for the purpose of determining FMLA leave eligibility.  

5. Whether "intermittent or reduced leave schedule" will be permitted for first year child care, or adoption/foster placement.  

6. What the minimum leave increment will be for FMLA leave taken on an intermittent or reduced schedule basis.  

7. Whether an employee taking FMLA leave on an intermittent or reduced schedule basis will be transferred to an "alternative position."  

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14 29 C.F.R. §825.305(a).  
15 29 C.F.R. §825.307(c).  
16 29 C.F.R. §825.308.  
17 29 C.F.R. §825.200(b).  
18 29 C.F.R. §825.203(b).  
19 29 C.F.R. §825.203(d).
8. How the employee’s share of premiums for health insurance and other benefits will be collected during FMLA leave.\textsuperscript{21}

9. Whether periodic notices of intent to return to work will be required of employees on FMLA leave.\textsuperscript{22}

10. Whether "fitness-for-duty" certification will be required before an employee is reinstated.\textsuperscript{23}

11. Whether the "key employee" exception will be utilized.\textsuperscript{24}

**FMLA Handbook Statement**

If the employer has an employee handbook which describes the employer's policies regarding leave, wages, and similar matters, the handbook must incorporate information on FMLA rights and responsibilities as well as the employer's policies regarding the FMLA.\textsuperscript{25} A sample is attached as Appendix C.

**Leave Request Forms**

In order to reconcile paid leave with FMLA requirements, it is advisable to develop forms which require employees requesting leave to identify the reason for the request. This is important because unless the employer knows that the employee is requesting paid leave for an FMLA purpose, it cannot implement the substitution provisions. This is discussed in greater detail below. A sample is attached as Appendix D.

**Notice to Employees Requesting Leave for an FMLA Purpose**

Even if the employer has written policies or a handbook, when an employee requests FMLA leave (or when the employer determines that paid leave is being requested for an FMLA purpose), the employer must provide the employee with a written notice designating the leave as FMLA leave, spelling out the specific expectations and obligations of the employee, and explaining any consequences of a failure to meet those

\textsuperscript{20} 29 C.F.R. §825.204.

\textsuperscript{21} 29 C.F.R. §825.210(c).

\textsuperscript{22} 29 C.F.R. §825.309.

\textsuperscript{23} 29 C.F.R. §825.310.

\textsuperscript{24} 29 C.F.R. §825.216(c).

\textsuperscript{25} 29 C.F.R. §825.301(a)(1).
obligations. A detailed list of the information to be required in such a notice is set forth in the statute.26 A sample is attached as Appendix E.

**Medical Insurance Election Form**

As discussed later, there are a number of pitfalls regarding the maintenance of health insurance during an unpaid FMLA leave. One way of minimizing the risk to the employer is to require the employee to make a clear election on whether or not to continue health insurance and, if insurance is to be continued, to agree to a method of payment. The form also makes it clear what happens if the employee fails to pay his or her share of the premium while on unpaid FMLA leave or fails to return to work after the leave. A sample medical insurance election form is attached as Appendix F.

**Recordkeeping Requirements**

The 1995 Final Rule provides a substantial list of records that must be created and preserved under the FMLA.27 These requirements should be carefully reviewed to determine whether the employer is maintaining all required records.

**EMPLOYER LEAVE POLICIES AND COLLECTIVE BARGAINING AGREEMENTS**

Reconciling the FMLA with existing leave provisions, whether they exist in policy manuals or collective bargaining agreements, is a major challenge. This section offers comments and suggestions about administering employer leave provisions in a manner that preserves appropriate management controls while complying with the FMLA.

**Collective Bargaining Agreements**

Reconciling leave provisions in collective bargaining agreements (CBA's) with the employer's FMLA policy might be a troublesome problem. The FMLA had a delayed effective date for employees subject to CBA's.28 According to the DOL's 1993 Interim Final Rule, this was because it was "contemplated that collective bargaining agreements will be amended to conform to FMLA during the extended effective date."29 If a CBA has not been "amended to conform to FMLA," this leaves a question about whether the employee's subject to that CBA can be required to substitute paid leave provided by the CBA (e.g., vacation, sick leave, earned time, etc.) for FMLA leave. Failure to

26 29 C.F.R. §825.301; See also: *Fry v. First Fidelity Bancorporation*, 1996 U.S. Dist. LEXIS 875 (E.D. Pa. 1996) (finding employer interfered with employee's FMLA rights because employer provided inadequate notice of FMLA and other leave policies causing employee to forfeit FMLA leave).

27 29 C.F.R. §825.500.


29 29 C.F.R. §825.700(c) of Interim Final Rule. This language did not appear in the 1995 Final Rule presumably because the effective dates had long since passed.
incorporate the employer's FMLA policy into the CBA may also raise questions about the employer's ability unilaterally to determine such FMLA matters as defining "any 12-month period." The issue of whether unilateral implementation of an FMLA policy with respect to unionized employees is an unfair labor practice would be resolved by the National Labor Relations Board (for private employers) and state public sector labor boards (for public employers).

**Vacation, Personal Leave and Earned Time**

The employer may require the employee to substitute vacation, personal leave, or "paid time off" for any type of FMLA leave. Likewise, the employee may request the use of these forms of paid leave for FMLA purposes and the employer may not impose any limitations on such requests. The difficult part of implementing the lawful substitution requirements for vacation, personal leave, or earned time is finding out if the paid leave is being taken for an FMLA purpose. In this regard, two FMLA rules are important: (a) it is the employer's responsibility to designate the paid leave as FMLA-qualifying and to give notice of such designation to the employees; and (b) the designation "must be based only on information received from the employee or the employee's spokesperson." One way of finding out whether the employee is requesting paid leave for an FMLA purpose is to use an all-purpose leave request form such as provided in Appendix D. This may run counter to the philosophy of an employer's paid leave programs, particularly earned time.

The rules on when an employer must designate paid leave as FMLA leave are very strict and complicated.

**Family Leave**

If the employer has a policy permitting employees to take paid leave following the birth of a child or to care for a sick family member, the employee may be required to substitute that paid leave for FMLA leave provided it is being used for an FMLA purpose. For example, if the employer grants paid leave to an employee to care for a sick child, then the employer may require that such paid leave be substituted for an equivalent portion of that employee's unpaid FMLA leave entitlement. The employer may require this substitution because caring for a sick child is one of the FMLA purposes. An example to the contrary would be an employer's paid family leave policy permitting an employee to care for a sick parent-in-law or grandparent. The employer could not require an employee taking paid family leave for such purposes to substitute

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31 29 C.F.R. §825.208(a).

32 29 C.F.R. §825.208(b)-(d).

33 29 C.F.R. §207(b).

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that leave for an equivalent portion of the unpaid FMLA leave entitlement because caring
for a parent-in-law or grandparent is not covered by the FMLA. Stated briefly, to the
extent that an employee requests paid family leave for an FMLA purpose pursuant to a
policy of the employer substitution may be required; if such leave is taken for a non-
FMLA purpose, substitution cannot be required. Likewise, of course, the FMLA does not
require an employer to grant paid leave for family purposes not covered under the
employer's family leave policy.

Sick Leave

If paid sick or medical leave is requested for an FMLA purpose (presumably the
serious health condition of the employee), the employer may require that such paid leave
be substituted for the employee's FMLA leave entitlement. Designating paid sick leave
as FMLA leave should be simpler than making such a designation with respect to
vacation or earned time because most employers require some form of written request
and/or documentation to support a request for sick leave. It is important that the
employer complete such a designation by transmitting a notice to the employee (Similar
to Appendix E) of rights and obligations under the employer's FMLA policy. The FMLA
does not require an employer to permit the use of paid sick leave for any purpose not
covered by the employer's uniform policy.\footnote{29 C.F.R. §207(c).} For example, if the employer's paid sick
leave policy does not cover the illness of a family member, then the FMLA does not
require an employer to grant paid leave for that purpose.\footnote{Id.}

Disability Leave

Many employers have some form of a short-term disability (STD) plan, whereby
compensation and benefits are continued on a full or partial basis during the absence
causd by the disability. Most disabilities qualifying under an STD benefit plan would
constitute a "serious health condition" under the FMLA. Consequently, although
substitution of paid leave for unpaid FMLA leave is not permitted, "the employer may
designate the leave as FMLA leave and count the leave as running concurrently for the
purposes of both the benefit plan and the FMLA leave entitlement."\footnote{Id.} Again, the
important point here is for the employer to make the designation of the STD absence as
FMLA leave. This may be accomplished by utilizing the employer's standard FMLA
notice (Similar to Appendix E). Absences under long-term disability (LTD) plans would
presumably also run concurrently with FMLA leave, but in most cases employees would
have exhausted all FMLA leave entitlement during the LTD elimination period.\footnote{Id.}

Maternity Leave

\footnote{29 C.F.R. §825.207(d)(1).}

\footnote{Id.}

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When an employee is disabled from working due to pregnancy or the birth of a child, this meets the definition of a "serious health condition" under the FMLA.\(^{38}\)

Accordingly, any paid leave that is available for such an absence may be substituted for the 12 weeks of FMLA entitlement. The key, as always, to accomplishing this substitution is to notify the employee that the employer has designated the maternity leave as FMLA leave. When the employee is no longer disabled and has exhausted eligibility for all forms of paid leave, she may still be entitled to a period of unpaid FMLA leave to care for the child. If the employer has failed to designate the period of paid leave as FMLA leave, then the employee would be entitled to a full 12 weeks of unpaid FMLA leave after the paid leave has been exhausted.

The New Hampshire law on maternity leave requires an employer of 6 or more to permit a female employee to take a leave of absence for the period of temporary disability resulting from pregnancy, childbirth or related medical conditions and, when she is physically able to return to work, her original job or a comparable position must be made available to her unless business necessity makes this impossible or unreasonable.\(^{39}\) A pregnant employee in New Hampshire is entitled to the best features of both the state law and the FMLA. In some instances, an employee may be entitled to a disability leave as a result of pregnancy or childbirth that is longer than the 12 weeks of FMLA Leave. Conversely, if the period of disability under the state law is shorter than 12 weeks, the woman could take more time off under the FMLA for child care leave. The state law, unlike the FMLA, does not require health insurance coverage during the period of leave. Accordingly, if an employee is on maternity leave for longer than 12 weeks, she could be required to pay the full cost of health insurance.

**Workers Compensation**

The 1993 *Interim Final Rule* failed to mention how workers' compensation absences would be treated under the FMLA. This has been corrected in the 1995 *Final Rule*.\(^{40}\) If the workers' compensation injury or illness meets the criteria for a serious health condition, then both the employee and the employer have the option to run the workers' compensation absence concurrently with the employee's FMLA leave entitlement. An employee might benefit from such an election because of the continuation of health insurance under FMLA. The employer would normally benefit by designating the workers' compensation absence as FMLA leave because this would limit the amount of time that the employee could potentially spend out-of-work. In an

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\(^{39}\) *N.H. RSA 354-A:7, IV(b).*

\(^{40}\) 29 C.F.R. §825.207(d)(2); §825.210(f); §825.216(d); §825.307(a)(1); and §825.720(d)(1). *See also: U.S. Dept. of Labor Opinion FMLA-40 (July 1994), BNA Labor Relations Reporter, Wage and Hour Manual, 99:3033.*
interesting twist, however, if the employee out on workers' compensation still has FMLA leave available, that employee does not have to accept a light duty assignment. The employee may then lose workers' compensation benefits, but if he or she is still suffering from a serious health condition, there is no requirement to return to work for a light duty assignment.\footnote{29 C.F.R. §825.207(d)(2); \textit{See also}: U.S. Dept. of Labor Opinion FMLA-55 (Mar. 1995) and Opinion FMLA-17 (Nov. 1993), \textit{BNA Labor Relations Reporter, Wage and Hour Manual}, 99:3052 and 99:3013.} The FMLA does not prevent an employee's "voluntary and uncoerced acceptance" of a light duty assignment while recovering from a serious health condition. When this happens, it appears that the time that the employee is on light duty counts against the FMLA leave entitlement.\footnote{29 C.F.R. §825.220(d).}

The normal FMLA rule against direct contact between the employer and the employee's health care provider is waived if state law permits the employer to have direct contact with the employee's workers' compensation health care provider.\footnote{29 C.F.R. §825.307(a)(1).}

Many state workers' compensation laws provide reinstatement rights that differ from the FMLA. The 1994 amendments to New Hampshire's workers compensation law require an employer of 5 or more to reestablish an employee who is able to return to his or her original position within 18 months of a compensable injury.\footnote{N.H. RSA 281-A:25-a.} Unlike the FMLA, however, this state law does not require that health insurance coverage be continued for the full 18 month period.\footnote{Id.}

In addition, the Americans with Disabilities Act ("ADA") might be interpreted to permit an employee with a serious health condition to have a period of unpaid leave following the exhaustion of FMLA rights.\footnote{29 C.F.R. §825.702(b).} Each employer should carefully consider the implications of the FMLA, the ADA, and the state workers' compensation law while handling issues of benefits and reinstatement for employees on workers' compensation absences.

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FMLA Leave for College and University Faculty

Universities typically do not have formal paid vacation or sick leave policies for faculty. This may make the implementation of the FMLA with respect to faculty members somewhat difficult.47

Faculty members are usually permitted to take brief leaves for illnesses, personal reasons, and other purposes without loss of salary, provided the faculty member meets all regular obligations or makes other informal arrangements. Records of such paid absences are rarely maintained and therefore would not normally count against the faculty member's FMLA leave entitlement even if the absence were for an FMLA purpose. Unless the university wants to begin keeping strict records on brief paid absences by faculty members, it is virtually impossible to require that those paid absences count against the faculty member's 12 weeks of FMLA leave entitlement. Accordingly, most university administrators must accept the reality that faculty members will continue to take brief paid absences for FMLA purposes that will not be counted to exhaust the faculty member's FMLA leave entitlement.

Longer absences for faculty, however, might more easily be coordinated with the employer's FMLA policy. For example, if the faculty member requests an unpaid leave of absences for a semester, the employer could surely inquire if the leave is requested for an FMLA purpose and, if so, designate the leave as FMLA by sending the faculty member its standard FMLA notice (See Appendix E). Remember, however, that such designation would require the employer to provide health insurance for 12 weeks even if health insurance were not otherwise extended under the employer's unpaid leave policy. If the faculty member requests an extensive leave for his or her own serious health condition and the employer has a STD policy under which salary and benefits continue, the university could require that this type of leave run concurrently with the faculty member's FMLA leave entitlement.

Several FMLA issues may arise for faculty members who work only during the academic year. One is whether faculty members on an academic year schedule actually work 1,250 hours as required to be eligible for FMLA leave. The DOL has determined that full-time faculty members at employers of higher education "are deemed" to meet this requirement unless the university can "clearly demonstrate" that the faculty member did not work 1,250 hours during the prior 12 months.48

Another issue involving faculty working on an academic year schedule is whether weeks during a university break (including the summer) count against the 12 weeks of FMLA leave if the leave began prior to the break. This was clarified to some extent in

47 For a discussion of issues involved in a faculty member requesting FMLA leave, see Thomas J.
48 29 C.F.R. §825.110(c).

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the 1995 Final Rule, which indicated that when the employer's business activity has temporarily ceased and employees generally are not expected to report for work for one or more weeks, the days the employer's activities have ceased do not count against the employee's FMLA leave entitlement. 49 In other words, time devoted to FMLA-qualifying events during a part of the year that the faculty member is not otherwise scheduled to work would not count against the 12 weeks of FMLA entitlement. For example, if a faculty member requested unpaid leave to commence on December 1 to care for a new-born child, the weeks that the university is on holiday/semester break would not count against the 12 weeks of FMLA entitlement. The same rule would presumably apply to FMLA leaves that commence just prior to the summer break, but the length of FMLA leave in that case would depend upon whether the university defined "any 12-month period" as the academic year calendar (for example, July 1-June 30) or used some other definition.

**Impact of FMLA Leave on Tenure Decisions**

If a probationary faculty member takes one or more periods of FMLA leave prior to the year in which he or she is to be considered for tenure, is the faculty member entitled to an extension of the tenure consideration date to compensate for the FMLA leaves? One consideration is that the 1995 Final Rule makes it clear that "employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions...." 50 In addition, after an FMLA leave, an employee is entitled to reinstatement to a position "that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, prerequisites and status." 51 In balancing these considerations, a university may want to discuss the possibility of offering a faculty member who has taken FMLA leave an opportunity to extend the tenure consideration date. The faculty member's decision on this should be carefully documented to protect both parties.

**EFFECTIVE DATES**

**General Effective Date**

Unless otherwise indicated, the effective date for the FMLA was August 5, 1993. 52

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49 29 C.F.R. §825.200(f).
50 29 C.F.R. §825.220(c).
51 29 C.F.R. §825.215(a).
52 29 C.F.R. §825.102(a).

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Collective Bargaining Agreements

Where a collective bargaining agreement was in effect, the FMLA took effect on the date of the termination date of the agreement or on February 5, 1994, whichever was earlier.53

Pre-FMLA Time Counted in Determining Eligibility

Both in determining whether an employee has worked for an employer long enough to be covered by the Act and in determining whether an employer has enough employees to be covered, the DOL will "look back" prior to the FMLA's effective date.54

Leave in Progress on Effective Dates

If an employee was on leave when the FMLA went into effect, only that portion of the leave starting on and after the effective date would be considered FMLA leave to be counted against the employee's 12-week entitlement.55

COVERED EMPLOYERS

Basic Requirement

In order to be covered by the FMLA, an employer must have employed 50 or more employees for each working day during each of 20 or more calendar work weeks in the current or preceding calendar year.56 This does not mean that every employee must actually perform work on each working day to be counted for this purpose. Rather, the DOL states that any employee whose name appears on the payroll will be considered employed each working day of the calendar week and must be counted towards the 50 employees even if no compensation is received for the week. Employees on paid or unpaid leave and disciplinary suspension, as well as part-time employees are counted.57 However, employees on temporary, indefinite or long-term layoff are not counted. Drawing a line between unpaid leave and temporary layoff may be difficult for many employers.58

Dropping Below the 50 Employees/20 Work Weeks Requirement

53 29 C.F.R. §825.700(c).
54 29 C.F.R. §825.102(b).
55 29 C.F.R. §825.103.
56 29 C.F.R. §825.104.
57 29 C.F.R. §825.105(b).
58 29 C.F.R. §825.105(a)-(d).

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An employer who meets the 50 employees/20 work weeks test for a calendar year, but subsequently drops below 50 employees, will continue to be covered by the FMLA throughout the following calendar year because it met the coverage test for 20 work weeks of the preceding calendar year.59

**Integrated Employer and Joint Employment**

There may be circumstances where two or more businesses are sufficiently integrated in terms of management or ownership or are exercising sufficient joint control over the working conditions of certain employees to be counted together in determining the 50 employees/20 work weeks test. The DOL regulation contains a number of criteria for determining whether the "integrated employer" or "joint employment" may exist.60

**Successor in Interest**

The FMLA requires a "successor in interest" to assume FMLA obligations of the previous employer. Again, the DOL regulations contain a list of criteria for determining whether a particular employer is a "successor in interest" to a previous employer.61

**Public Agency**

The DOL will consider each level of government to be a single public agency, such as state government, county government, or city government. Individual departments within each level of government would not be broken out for determining whether the 50-employee test has been met.62

**ELIGIBLE EMPLOYEES**

**General Definition**

To be eligible for FMLA leave, an employee must have:

Worked for the employer for at least 12 months (this does not need to be consecutive);

Worked for at least 1,250 hours during the year preceding the start of the leave; and

59 29 C.F.R. §825.105(f).

60 29 C.F.R. §825.104(c)(2) and §825.106; See also: U.S. Dept. of Labor Opinion FMLA-8 (Oct. 1993), BNA Labor Relations Reporter, Wage and Hour Manual, 99:3005.


62 29 C.F.R. §825.108.

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Be employed at a worksite where the employer employs at least 50 employees within a 75 mile radius.63

**Applying the 50 Employee/75 Mile Test**

In measuring the 75 mile radius in which there must be 50 employees working for the employer, the DOL rejected the "as the crow flies" test, and instead stated that the 75 miles will be measured based upon surface miles on public roads. In general, this creates a smaller circle and in some rare instances might render an employee ineligible for FMLA leave because the DOL decided not to measure the radius by "aerial" miles.64

Because the size of a workforce fluctuates, there is the question of when the 50 employee/75 mile test is applied. The DOL explored a number of options and concluded that it was in the "mutual interests" of both the employee and employer "to make this determination when the employee requests leave."65

**Applying the 1250 Hours Test**

For employees covered by the overtime requirements of the Fair Labor Standards Act ("FLSA"), usually called "hourly" or "FLSA non-exempt" employees, the principles utilized in counting working hours under the FLSA would apply. For example, in calculating working hours for on-call time or travel time, the FLSA regulations should be consulted.66

Salaried or FLSA-exempt employees, for whom no timecards are kept, provide a more difficult problem. The DOL has determined that all full-time salaried employees who have worked for the employer for at least 12 months are presumed to have met the 1,250 hours of service requirement for FMLA eligibility.67

An important example of the application of this presumption are full-time teachers in elementary or secondary schools or employers of higher education or other educational establishments or employers. The DOL states that "in consideration of the time spent at home reviewing homework and tests...", such employees will be "deemed to meet the 1,250 hour test".68

63 29 C.F.R. §825.110(a) and (b).
64 29 C.F.R. §825.111(b).
65 29 C.F.R. §825.111(d).
66 29 C.F.R. §825.110(e); See also: Rich v. Delta Air Lines, 1996 U.S. Dist. LEXIS 3750 (N.D. Ga. 1996) (finding flight attendant's time spent on layovers is not hours of service under the FMLA, because, even though restricted in travel, time spent predominantly for employee's benefit); and U.S. Dept. of Labor Opinion FLMA-18 (Nov. 95), BNA Labor Relations Reporter, Wage and Hour Manual, 99:3014.
67 29 C.F.R. §825.110(c).
68 Id.
FAMILY MEMBERS

Because the FMLA allows employees to take leave to care for family members with serious health conditions, considerable debate occurred in Congress relative to the definition of certain family relationships.69

**Spouses**

A "spouse" is defined in accordance with the law of each State, including common law marriages where recognized by the State. There was much politically-motivated discussion in Congress making clear that the term "spouse" did not include an unmarried domestic partner. This was aimed at gay and lesbian relationships, as well as at heterosexual domestic partnerships which are not "consecrated by ceremony" or otherwise recognized under State law.70

**Parent**

A parent is a biological parent or an individual who stands or stood in loco parentis to an employee when the employee was a child. The term does not include "parents in law." That is, an employee is not entitled to FMLA leave to care for a seriously ill parent of a spouse. A person who would qualify as a parent of the employee under the concept of "in loco parentis" would include one who had day-to-day responsibilities to care for and financially support the employee when the employee was a child. A biological or legal relationship is not necessary.71

**Son or Daughter**

A son or daughter is defined as a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or 18 or older and incapable of self-care because of a mental or physical disability.72 As in the definition of a parent, a person may be considered a son or daughter of an employee under the concept of "in loco parentis" if the employee has day-to-day responsibilities to care for and financially support the child. No biological or legal relationship is necessary. In determining whether a child age 18 or older is "incapable of self-care" the DOL will

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70 29 C.F.R. §825.113(a); See also: U.S. Dept. of Labor Opinion FMLA-66 (July 1995), BNA Labor Relations Reporter, Wage and Hour Manual, 99:3064.

71 29 C.F.R. §825.113(b).

72 29 C.F.R. §825.113(c); See also: U.S. Dept. of Labor Opinion FMLA-51 (Nov. 1994), BNA Labor Relations Reporter, Wage and Hour Manual, 99:3048.
ask whether the person requires active assistance or supervision to provide daily self-care in several of the activities of daily living, such as caring appropriately for grooming and hygiene, bathing, dressing, eating, cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, and using a post office. In determining whether the child age 18 or older is incapable of self-care because of a mental or physical disability, the term "physical or mental disability" will be defined as a physical or mental impairment that substantially limits one or more of the major life activities of an individual.73

Equal Coverage

The right to take a leave under the FMLA applies equally to male and female employees. That is, a father as well as a mother can take family leave for the birth, placement for adoption or foster care of a child.74

EMPLOYEE FMLA LEAVE REQUEST

Foreseeable Leave

Employees must give 30 days advance notice to employers of the need to take unpaid FMLA leave, when it is foreseeable, for the birth or placement of a child for adoption or for planned medical treatment. When it is not feasible to provide such advance notice, for example in the case of a premature birth, such notice be given "as soon as practicable," ordinarily within one or two business days of when the employee learns of the need for leave. Oral notice satisfies the FMLA notice requirement. When planning medical treatments, employees are encouraged by the DOL regulations to consult with employers and make reasonable efforts to schedule the leave so as not to unduly disrupt the employer's operations, subject to the approval of the health care provider.75

Unforeseeable Leave

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73 29 C.F.R. §§825.113(c); The regulations under the Americans with Disabilities Act, 29 C.F.R. Part 1630, will be used in applying this term.

74 29 C.F.R. §825.112(b).

75 29 C.F.R. §825.302; See also: McGinnis v. Wonder Chemical Co., 1995 U.S. Dist. LEXIS 18909 (E.D.Pa. 1995) (employee raised a genuine issue of material fact as to whether he provided employer sufficient notice that he was requesting FMLA leave, despite employer's contention that employer was only absent from work due to vacation days and unpaid leave, where employee mentioned to his supervisor on several occasions and informed him that his back pain had increased to point where he could no longer work); compare Johnson v. Prmerica, 1996 U.S. Dist. LEXIS 869 (S.D.N.Y. 1996) (upholding employee's discharge for unexcused absences upheld where he requested "time off to attend to another family matter," and holding that "intimations are not enough and even if they were, the FMLA would not be triggered unless the employer understood the employee's evasive references.").
When unforeseen events require FMLA leave, employees must give notice as soon as practicable, ordinarily within one or two working days. Notice should be given either in person or by phone when medical emergencies are involved, and may be given orally by the employee’s spouse or other family member. Even though the employer may have a requirement of written notice, this cannot be used to block FMLA leave.\(^{76}\)

If an Employee Fails to Give Proper Advance Notice to the Employer

In cases where the leave is foreseeable and where the employer has posted the proper FMLA notice at the worksite, the employer may deny leave until 30 days after the notice is provided. The employer's policies in this regard must be uniformly applied, although the DOL will permit variations because of differing circumstances.\(^{77}\)

MEDICAL JUSTIFICATION FOR FMLA LEAVE

An eligible employee may take FMLA leave when needed to care for a spouse, son, daughter, or parent with a serious health condition, or because of the employee's own serious health condition.

Serious Health Condition

The FMLA defines "serious health condition" as one which requires either "inpatient care" or "continuing treatment by a health care provider." The legislative history indicated that the FMLA was not intended to cover short-term conditions for which treatment and recovery are very brief, since such conditions would generally be covered by sick leave policies. The DOL's Interim Final Rule was widely criticized because it expanded the definition to those under the "supervision" but not necessarily the "treatment" of a health care provider. The 1995 Final Rule continues this interpretation but provides greater clarity in certain areas. One method of meeting the test of a "serious health condition" is to have an overnight stay in a hospital, hospice, or residential medical care facility accompanied by either "any period of incapacity" or "any subsequent treatment in connection with such inpatient care."\(^{78}\) Thus, the period of incapacity does

\(^{76}\) 29 C.F.R. §825.303; See also: Reich v. Midwest Plastic Engineering, Inc., (1996 U.S. Dist. LEXIS 12130 (W.D. MI. 1996) (finding that although employee had a serious health condition (chicken pox requiring hospitalization) and employees only need to notify employers "as soon as practicable" when leave is not foreseeable, employer failed to relay "sufficient information" to make it evident that her leave was the result of a serious health condition justifying FMLA protection).

\(^{77}\) 29 C.F.R. §825.304.

not need to last 3 calendar days if an overnight stay at an inpatient care facility was required.\(^79\)

The second method for meeting the test of a "serious health condition" is to be under the "continuing treatment" of a health care provider. This requires a period of incapacity of more than 3 consecutive calendar days that also involves either: (a) two or more treatments by a health care provider or by a provider under orders of or on referral of a health care provider; or (b) one treatment by a health care provider resulting in "a regimen of continuing treatment" under the health care provider's supervision.\(^80\)

Other situations where the treatment by a health care provider is less active are also within the definition of a "serious health condition." One such circumstance is a period of incapacity due to pregnancy. Another is a period of incapacity due to a chronic serious health condition, such as one which requires periodic visits to a health care provider, continues over an extended period of time, and may cause episodic rather than continuing periods of incapacity. Examples of this would include asthma, diabetes, and epilepsy.\(^81\) Another situation qualifying as a "serious health condition" is where a period of incapacity is permanent or long-term due to a condition for which treatment may not be effective. Examples would include Alzheimer's, severe stroke, or terminal cancer.\(^82\) Another condition qualifying as a "serious health condition" is one where restorative surgery after an accident or injury is required or for a condition that would likely result in a period of incapacity of more than 3 consecutive calendar days in the absence of medical intervention or treatment, such as chemotherapy, physical therapy, or kidney dialysis.\(^83\)

The Final Rule also makes clear that there may be situations which qualify under the definition of "serious health condition" even if no treatment from a health care provider is received during the absence from work and even if the absence does not last more than 3 days. An example given in the final rule is "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

\(^79\) 29 C.F.R. §825.114; See also: Oswald v. Sara Lee Corp., 889 F. Supp. 253 (N.D. Miss. 1995) (employee's food poisoning, which only required one visit to family doctor and there was no inpatient care or continuing treatment was not considered a serious health condition under FMLA.)

\(^80\) 29 C.F.R. §825.114(a)(2); See also: Bauer v. Dayton-Walther Corp., 910 F.Supp. 306 (E.D.Ky. 1996). (upholding employee's discharge for excessive absenteeism where absences never lasted more than 3 days, he sought medical attention only once and no treatment was administered, noting further that the fact the condition could have turned out to be serious is "speculative and irrelevant").


\(^82\) 29 C.F.R. §825.114(a)(2)(iii)(c)(iv).

\(^83\) 29 C.F.R. §825.114(a)(2)(iii)(c)(v).
count exceeds a certain level." Another example is a pregnant employee temporarily incapacitated due to severe morning sickness.84

Although examinations to determine if a serious health condition exists would qualify as "treatment" for purposes of this definition, routine physical exams, eye examinations, and dental examinations would not qualify. In addition, taking over-the-counter medications, drinking fluids, engaging in bed-rest or exercise, and other similar self-help activities that can be initiated without a visit to a health care provider are not, by themselves, sufficient to constitute "continuing treatment" for FMLA purposes.85

Other examples of situations which do not meet the definition of "serious health condition" include cosmetic surgery (unless inpatient hospital care is required or complications develop), the common cold, the flu, earaches, upset stomach, minor ulcers, minor headaches, routine dental or orthodontal problems, and periodontal diseases. Mental illness resulting from stress or allergies would qualify but only if all the conditions of the definition of "serious health condition" are met.86

An employee's absence due to substance abuse does not qualify as a "serious health condition" unless the employee is receiving treatment for substance abuse by a health care provider or by a provider of health care services on referral from a health care provider and if all other conditions of the definition are fulfilled.87

Employee's Illness

84 29 C.F.R. §825.114(e); See: Sakellarion v. Judge & Dolph LTD., 893 F.Supp. 800 (N.D. Ill. 1995) (employee's adult daughter's asthma was not a serious health condition under the FMLA because it did not require continuing treatment after a brief hospital visit and daughter could have taken care of herself); compare: Shepard v. Diversified Foods and Seasons, Inc., (E.D. La. 1996) (Cit. No. A-95-2235) (skin condition, although not a disability under the ADA, presented a factual question as to whether it constituted a serious health condition under FMLA); Hendry v. GTE North, Inc., 896 F.Supp. 816 (N.D.Ill. 1995) (denying employer's summary judgment motion because this was a genuine issue of fact whether migraine headaches constitute a serious health condition under the FMLA; See also: U.S. Dept. of Labor Opinion FMLA-60 (May 1995), BNA Labor Relations Reporter, Wage and Hour Manual, 99:3058.


86 29 C.F.R. §825.114(a)(2)(ii)(c)(v)(c); See also: Seidle v. Provident Life Insurance Co., 871 F.Supp. 238 (E.D. Pa. 1994) (employee's child's ear infection did not qualify as serious health condition); compare: Manuel v. Westlake Polymers Corp., 66 F.3d 758 (5th Cir. 1995) (reversing Nation's first FMLA ruling in which District Court granted employer's motion for summary judgment, and finding employee's absences because of two surgeries for an ingrown toenail and complications from those surgeries qualified as a serious health condition under FMLA.).

One test of whether an employee is entitled to FMLA leave for his or her own serious health condition is whether the employee is unable to perform the functions of the position. The DOL, at the urging of employers' groups, has interpreted this requirement to mean that the employee must be incapacitated from performing "any one of the essential functions" of his or her position. That is, inability to perform some minor or marginal aspect of the job would not be sufficient to justify FMLA leave. Accordingly, the employer has the option, in requiring certification from a health care provider, to provide a statement of the essential functions of the position, so that the health care provider can render a decision relative to whether the employee is unable to perform those functions. 88

Caring for a Family Member

The DOL takes a very broad view of when an employee is "needed to care for" a family member. It encompasses both physical and psychological care and includes situations where 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. It also includes providing "psychological comfort and reassurance" to a family member receiving inpatient care, filling in for others caring for the family member, or making arrangements relative to care of the seriously ill family member, such as transfer to a nursing home. An employee may also take intermittent FMLA leave either when the family member's serious health condition itself is intermittent or when the employee is only needed intermittently to care for the family member, such as when another family member is sharing the responsibilities for such care. 89

Medical Certification

When an employee notifies the employer of the need for FMLA leave, one of several types of information that the employer must provide is any requirements for the employee to furnish medical certification of a serious health condition. An oral request of this nature is sufficient. The employer must allow the employee at least 15 calendar days to obtain the medical certification, unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts. The DOL has provided a form in the regulations for use by the health care provider in providing the medical certification for the FMLA leave. 90 Appendix B to the Final Rule, 60 F.R. 2271-74 (January 6, 1995). This form contains all of the required elements depending on whether the FMLA leave is requested for the employee's own serious health condition, or to care for a seriously-ill family member. It also allows the health care provider to

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88 29 C.F.R. §825.115.
89 29 C.F.R. §825.116.
indicate the "expected duration and schedule" of any intermittent or reduced leave schedule.\textsuperscript{91}

**Health Care Providers**

The FMLA defined "health care provider" as any licensed MD or DO and any other person "determined by the Secretary [of Labor] to be capable of providing health care services." In developing this regulation, the DOL was the object of a great deal of lobbying from groups representing various health care practitioners. Accordingly, other practitioners deemed by the Secretary as capable of providing health care services under FMLA are:

Podiatrists, dentists, clinical psychologists, and optometrists authorized to practice without medical supervision in the State and performing within the scope of their practice as defined under State law;\textsuperscript{92}

Chiropractors, but limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist;\textsuperscript{93}

Nurse practitioners and nurse-midwives authorized to practice under State law and performing within the scope of their practice as defined by State law; and\textsuperscript{94}

Christian Science Practitioners listed with the First Church of Christ Scientists in Boston, Massachusetts, provided that the employer may require a second or third opinion from a health care provider other than a Christian Science Practitioner.\textsuperscript{95}

In a new provision added by the 1995 Final Rule, employers must accept certifications, as well as second and third opinions, from health care providers in foreign nations when the employee or family member is visiting or residing in the foreign country.\textsuperscript{96}

**Second Opinion**

An employer who has reason to doubt the validity of a medical certification may not request additional information from the employee's health care provider. In such a

\textsuperscript{91} 29 C.F.R. §825.305-06 and 311.
\textsuperscript{92} 29 C.F.R. §825.118(b)(1).
\textsuperscript{93} Id; See also U.S. Dept. of Labor Opinion FMLA-63 (June 95), BNA Labor Relations Reporter, Wage and Hour Manual, 99:3061.
\textsuperscript{94} 29 C.F.R. §825.118(b)(2); See also: U.S. Dept. of Labor Opinion FMLA-72 (Sept. 95), BNA Labor Relations Reporter, Wage and Hour Manual, 99:3071.
\textsuperscript{95} 29 C.F.R. §825.118.
\textsuperscript{96} 29 C.F.R. §825.118(b)(5) and 307(f).
situation, the employer may request a second opinion at the employer's expense from a health care provider who is not employed on a regular basis by the employer. Moreover, the employer may not regularly contract with or otherwise regularly utilize the services of the health care provider furnishing the second opinion, unless it is in an area where access to health care is extremely limited.97

**Third Opinion**

If the opinions of the health care providers furnishing the first and second opinions differ, the employer may request the employee to obtain a final and binding third opinion, again at the employer's expense. The FMLA requires that the selection of the health care provider furnishing the third opinion must be approved jointly by the employee and the employer. In the Notice of Proposed Rulemaking on March 10, 1993, one of the issues upon which the DOL solicited public comment was what procedures should be followed in selecting the health care provider furnishing the third opinion.98 The DOL received many comments on this issue, but was unable to resolve it in either the 1993 Interim Final Rule or the 1995 Final Rule. The employer and employee "must each act in good faith to attempt to reach agreement on whom to select for the third opinion provider."99 The regulations go on to indicate that if the employer fails to exercise good faith, then the opinion of the employee's health care provider will prevail. If the employee fails to exercise good faith, then the opinion of the second health care provider will prevail. An example of the former would be an employee who refuses to agree to see a specialist in the particular type of medical condition for which the FMLA leave has been requested.100

**Recertification**

The FMLA permits the employer to request recertification "on a reasonable basis" of the serious health condition of the employee or the employee's family member.101 The DOL regulations state that the employer may not request such recertification more often than every 30 days unless:

The employee requests an extension of FMLA leave;

Changed circumstances occur during the illness or injury; or

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99 29 C.F.R. §825.307(c).

100 29 C.F.R. §825.307.

101 29 C.F.R. §825.308.
The employer receives information that casts doubt upon the continuing validity of the most recent certification.102

Contacting the Employee's Healthcare Provider

Once the employee has submitted a complete medical certification signed by a healthcare provider, the employer may not request additional information from the employee's healthcare provider. However, according to language added by the 1995 Final Rule, the employer's healthcare provider may contact the employee's healthcare provider, with the employee's permission, for purposes of clarification and authenticity of the medical certification.103 The 1995 Final Rule also states that the restrictions on contacting the employee's health care provider are waived if the employee is on workers' compensation and the state law permits such contact.104

DEFINING THE LENGTH OF FMLA LEAVE

Twelve Weeks in "Any 12-Month Period"

The FMLA stated that an employee is entitled to take up to 12 weeks of leave in "any 12-month period," but this term was not further defined. In its Notice of Proposed Rulemaking, the DOL requested public comment on whether this should be defined by regulation as a calendar year, fiscal year, employer-designated leave year, or some form of "rolling" 12-month period.105

In the regulations, the DOL reviewed all of the alternatives suggested, but concluded that "maximum employer flexibility should be accommodated." Accordingly, employers will be allowed to choose a uniform method to compute the 12-month period from various alternatives, including a fixed 12-month period for all employees, 12 months measured forward from the first date leave is used, or a rolling 12-month period measured backward from the date leave is used.106 Although unions and other employee groups opposed this last option, the DOL stated that "this method is the only one which clearly would not allow 'stacking' of back-to-back leave entitlements, and seems clearly to be permissible under the plain meaning of the statutory language." Thus, many employers may adopt this particular definition of "any 12-month period." That is, if an employee requests leave, the employer may deny or limit the amount of leave taken depending on how much FMLA leave the employee has taken in the 12 months immediately preceding the requested FMLA leave.

102 29 C.F.R. §825.308(a)(2).
104 29 C.F.R. §825.307(a)(1).
105 29 C.F.R. §825.200.
106 29 C.F.R §825.200(b).
Whatever method is chosen for computing the 12-month period must be applied consistently and uniformly to all employees. An employer wishing to change to another method of computing the 12-month period must give at least 60 days notice to all employees. During the transition from one method of computation to another, employees must retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the employee.

In a new provision added by the 1995 Final Rule, if an employer fails to select one of the optional methods for measuring the 12-month period, then the option that provides the most beneficial outcome for the employee will be used. The employer may thereafter select one of the optional methods only by providing the 60-day notice to all employees as described in the preceding paragraph. During this transition, any employee who requests FMLA leave may use the option providing the most beneficial outcome to that employee. In another new provision in the 1995 Final Rule, if a holiday occurs during FMLA leave, then the week in which the holiday falls will still be considered a full week for FMLA purposes. However, if the employer temporarily ceases operations and other employees generally are not expected to report to work for one or more weeks, such as during a school vacation, then the days that the employer's activities have ceased do no count against the employees FMLA leave entitlement.

**Prenatal Care**

An expectant mother is not required to wait until the actual birth of the child to qualify for FMLA leave. Circumstances may require that FMLA leave begin before the actual date of birth of the child, such as for prenatal care or if her condition makes her unable to work.

**Care of Child**

Any FMLA leave for a birth or adoption/foster care placement in the employee's home must be concluded within the 12-month period beginning on the date of the birth or placement, unless State law or employer practice permits leave to be taken for a longer period.

**Foster Placement or Adoption**

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107 29 C.F.R. §825.200(e).
108 29 C.F.R. §825.200(f).
109 29 C.F.R. §825.112(c).
FMLA leave may begin before the actual placement of an adopted or foster care child in the home of the employee. For example, the employee may be required to attend counselling session, appear in court, consult with an attorney or doctor, or submit to a physical examination. There is no maximum age limit on a child being adopted or placed for foster care for purposes of determining eligibility for leave.111

**Husband and Wife Working for the Same Employer**

If both the husband and wife work for the same employer, the employer is permitted but not required to limit the combined total of FMLA leave for first-year child care or adoption/foster placement to 12 weeks during any 12-month period.112 This limitation may not apply, however, to leave taken by either spouse for their own serious health condition or to care for the other or for a child. Nor does the limitation apply to unmarried domestic partners. This creates the interesting anomaly that unmarried domestic partners working for the same employer may each take 12 weeks of FMLA leave in the case of child birth or adoption/foster care placement, but a married couple working for the same employer are limited to a combined total of 12 weeks for such purposes. Congress was apparently aware of this outcome, but preferred it to taking any action which might lend any legitimacy to unmarried domestic partnerships, particularly gays and lesbians.113 In states, such as New Hampshire, that prohibit discrimination on the basis of marital status, however, the option of limiting a husband and a wife to a total of 12 weeks of FMLA leave is probably unlawful.114 Because this FMLA provision is optional and not mandatory, the state law on employment discrimination probably is not superseded.

**INTERMITTENT AND REDUCED SCHEDULE LEAVE**

One of the most controversial and difficult provisions of the FMLA relates to the ability of employees to take FMLA leave on an intermittent or reduced schedule basis. The regulations governing this are somewhat complicated and will probably result in further DOL clarification.

"Intermittent Leave" is defined by the regulations as leave taken in separate blocks 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 to more than several weeks. Medical

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111 29 C.F.R. §825.112(d).
112 29 C.F.R. §825.202(c).
114 See N.H. RSA 354-A.

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appointments and chemotherapy are listed as examples of the need for intermittent leave.115

"Reduced leave schedule" is defined as a leave schedule that reduces an employee's usual number of working hours per week, or hours per work day. This is normally a reduction from full-time to part-time employment. An employee recovering from a serious health condition, who is not strong enough to work a full-time schedule, would be entitled reduced leave schedule.116

Intermittent or reduced leave schedule may also be taken to care for a family member in a situation where the family member's serious medical condition itself is intermittent or a situation where, although the family member's medical condition is constantly serious, the employee is needed only intermittently to care for that family member (e.g., where other family members are available to provide care).117

Medical Justification

Just prior to the passage of the FMLA in the Senate, a technical amendment was added requiring medical necessity for intermittent leave or reduced leave schedule. DOL has interpreted this to permit the employer to request from the employee's health care provider a certification that intermittent or reduced leave schedule is medically necessary and a description of the expected duration and schedule of such leave. A specific description of the treatment regimen would normally satisfy this requirement. It is also important to note that the FMLA contains a provision that employees needing intermittent FMLA leave or leave on a reduced leave schedule must attempt to schedule their leaves so as not to disrupt the employer's operations.118

Child Care and Adoption/Foster Placement

Where leave is taken for first-year care of the employee's child or placement of a child for adoption or foster care in the employee's home, an employee may take leave intermittently or on a reduced leave schedule only if the employer agrees.119 This is unlike leave to care for a sick family member or for an employee's own serious health conditions (including for a serious health condition in connection with child birth); employees are entitled to take these types of FMLA leave on an intermittent or reduced leave schedule whenever "medically necessary."120

115 29 C.F.R. §825.800.
116 29 C.F.R. §825.203(c)(1)-(2).
117 29 C.F.R. §825.116(c).
118 29 C.F.R. §825.117.
119 29 C.F.R. §825.203(b).
120 29 C.F.R. §825.203(c).
Minimum Leave Increment

Although many employer groups lobbied the DOL to impose a minimum 4-hour leave requirement on all intermittent leave or leave taken on a reduced leave schedule, the DOL concluded that no minimum limitation should be imposed. However, the regulations do permit the employer to limit leave increments to the shortest period of time (1 hour or less) that the employer's payroll system uses to account for absences or use of leave. In other words, employers may not impose minimum leave requirements of longer than one hour. In new language added by the 1995 Final Rule, employees "may not be required to take more FMLA leave than necessary to address the circumstance that precipitated the need for the leave."\(^\text{122}\)

Alternative Position

If an employee requests foreseeable intermittent leave or a reduced work schedule for planned medical treatment for the employee or a family member, the employer may temporarily transfer the employee to an available alternative position with equivalent pay and benefits. The employee must be qualified for this alternative position and the position must better accommodate the recurring periods of leave than the employee's regular job. There is no FMLA provision allowing the employee to veto the transfer to the alternative position, although collective bargaining agreements or employer policies regarding employer-initiated transfers might require the employee's approval of such a change. There may also be a question under the ADA whether allowing the employee to remain in his or her regular position is a "reasonable accommodation" or an "undue hardship," at least as it relates to the employee's own serious health condition.\(^\text{123}\) The ADA issue would not arise if the intermittent leave or reduced work schedule had been requested to care for a family member. The DOL regulations also provide that when the employee has requested a reduced work schedule, the employee could be transferred to a part-time job. However, the employee must receive equivalent pay and benefits in the new position, even if the part-time position would not otherwise provide benefits. Benefits which are earned such as vacation and sick leave, for example, may be proportionately reduced to reflect the employee's reduced working time.\(^\text{124}\) The 1995 Final Rule adds a provision prohibiting the employer from transferring the employee to an alternate position "to discourage the employee from taking leave or otherwise work a hardship on the employee."\(^\text{125}\)

Calculating FMLA Leave Time on Intermittent or Reduced Leave Schedule

\(^{121}\) 29 C.F.R. §825.203(d).

\(^{122}\) Id.

\(^{123}\) 29 C.F.R. §825.702 (c)(1) and (2).

\(^{124}\) 29 C.F.R. §825.117 and 204.

\(^{125}\) 29 C.F.R. §825.204(d).
Only the time actually taken as FMLA leave may be charged against the employee's entitlement when leave is taken intermittently or on a reduced leave schedule. For example, if an employee takes FMLA leave intermittently one day per week, that employee would use one-fifth of a week of FMLA leave each work week. Such an employee could follow this schedule (if medically necessary) for an entire year, and still not exhaust all of the FMLA leave entitlement. Another example would be an employee who normally works 8 hour days is given a reduced leave schedule of 4 hours of work per day. This employee would exhaust one-half week of FMLA leave each work week, and would be entitled (if medically necessary) to a total of 24 weeks of half-time employment. Where an employee normally works a part-time schedule or variable hours, the amount of leave to which that employee is entitled is determined on a pro-rata or proportional basis by comparing the new schedule with the employee's normal schedule. For example, a normal 30-hour per week employee who takes 10 hours of FMLA leave each week would utilize one-third week of FMLA leave entitlement each work week. Such an employee could continue this schedule (if medically necessary) for 36 weeks before exhausting FMLA leave.

Salary Reductions for Intermittent Leave or Reduced Leave Schedule

When enacting the FMLA, Congress was alert to a potential problem if a salaried (FLSA-exempt) employee took unpaid FMLA leave on an intermittent or reduced leave schedule. Salary reduction for the unpaid FMLA leave taken on an intermittent or reduced schedule basis might jeopardize that employee's exemption from the overtime compensation provisions of the FLSA. This is because the FLSA requires exempt employees to be paid "on a salary basis" and severely limits deductions from that salary. However, the FMLA specifically states that providing unpaid FMLA-required leave to a salaried employee will not cause the employee to lose the FLSA exemption.

Accordingly, the employer may make deductions from the employee's salary for any hours taken as intermittent or reduced FMLA leave within a work week. Employers should be aware that this provision applies only to leave "required" by the FMLA. Leave to employees who are not otherwise eligible for FMLA leave or who work for employers who are not covered by the FMLA should not suffer salary reductions unless such reductions are specifically permitted by FLSA regulations. Moreover, because the FMLA does not supersede state laws which are more generous to employees, salary reductions for FMLA leave taken on an intermittent or reduced leave schedule basis would not be permitted in those states where deductions from the compensation of salaried employees are not permitted.

The 1995 Final Rule adds a provision

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127 29 C.F.R. §825.205.

128 29 C.F.R. §825.206(a).

129 29 C.F.R. §825.206.

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permitting an employer paying an employee a salary for a fluctuating workweek in accordance with 29 C.F.R. Section 778.114 of the FLSA regulations to pay that employee on an hourly basis during the period in which intermittent or reduced schedule FMLA leave is scheduled to be taken.\textsuperscript{130}

RELATIONSHIP OF PAID AND UNPAID LEAVE

Substituting Paid Leave for Unpaid FMLA Leave

Sponsors of the FMLA have made a major point that the leave required by FMLA is generally unpaid. However, the FMLA permits an employee to elect or an employer to require that accrued paid leave be substituted for unpaid FMLA leave under certain circumstances.\textsuperscript{131}

Where an employee has accrued paid vacation, personal or family leave, the employer may require the employee to substitute such accrued leave for all or part of any FMLA leave related to birth, adoption/foster care placement, or care for a seriously ill family member. An employee may elect to substitute accrued paid family leave (without the employer's specific approval) only under circumstances permitted by the employer's family leave plan. An example is if the employer's leave plan permits accrued family leave to care for a child but not for a parent then the employer is not forced by the FMLA to allow the employee to take paid family leave to care for a seriously ill parent, but of course the employee may use unpaid FMLA leave for this purpose.\textsuperscript{132} Likewise, an employee has the right to substitute paid medical/sick leave to care for a seriously ill family member only if the employer's policies permits paid medical/sick leave to be used for that purpose.\textsuperscript{133} An employee may substitute paid medical/sick leave for his or her serious health condition only if the employer's policies permit paid medical/sick leave for that particular condition.\textsuperscript{134} An employer may also designate leave taken pursuant to a temporary disability benefit plan as FMLA leave and count the leave as running concurrently for purposes of both the benefit plan and the FMLA leave entitlement.\textsuperscript{135} Either the employee or the employer may choose to have the employee's FMLA 12-week leave entitlement run concurrently with a workers' compensation absence where the injury is one that meets the criteria for a serious health condition. The employee is not required to accept a "light duty" assignment and, as a consequence, may lose workers'

\textsuperscript{130} 29 C.F.R. §825.206(b).
\textsuperscript{131} 29 C.F.R. §825.207.
\textsuperscript{132} 29 C.F.R. §825.205(b); See also: U.S. Dept. of Labor Opinion FMLA-52 (dec. 1994), BNA Labor Relations Reporter, Wage and Hour Manual, 99:3049.
\textsuperscript{133} 29 C.F.R. §825.207(c).
\textsuperscript{134} Id.
\textsuperscript{135} 29 C.F.R. §825.207(d)(1).
compensation benefits. At that point, the FMLA leave becomes unpaid or the rules of "substitution" discussed above become applicable.\footnote{29 C.F.R. §825.207(2).}

Paid vacation, personal, or earned time leave may be substituted at the election of either the employee or employer for any qualified FMLA leave and no limitation may be placed by the employer on such substitution.\footnote{29 C.F.R. §825.207(e).} If any form of paid leave is not substituted for otherwise unpaid FMLA Leave, either because the employer does not require such substitution or the employee does not elect it, the employee will remain entitled to all of the paid leave which is earned and accrued under the terms of the employer's policies.\footnote{29 C.F.R. §825.207(f).} If an employee uses paid leave under circumstances that do not qualify as FMLA leave such time-off would not count against the 12 weeks of FMLA leave entitlement.\footnote{29 C.F.R. §825.207(g).} For example, paid jury duty, paid military leave, or paid sick leave used for purely cosmetic surgery would not count against the 12 weeks of FMLA leave entitlement. If paid leave is substituted for unpaid FMLA leave, the employee is required to satisfy only the employer's regular qualifications to take such leave and not the stricter FMLA requirements such as the 30 day notice and medical justification unless such requirements are otherwise a part of the employer's policy for paid leave.\footnote{29 C.F.R. §825.207(h).} However, where accrued paid vacation or personal leave is substituted for unpaid FMLA leave for a serious health condition, an employee may be required to comply with any less stringent medical certification requirements of the employer's sick leave program.\footnote{Id.}

In a clarification in the 1995 Final Rule, "Comp time" accrued in lieu of overtime compensation by hourly employees of public agencies is not a form of accrued paid leave that an employer may require the employee to substitute for unpaid FMLA leave. However, if the employee requests, and the employer permits, use of accrued comp time for an FMLA reason, then the absence paid from the employee's comp time accrual may not be counted against the employee's FMLA leave entitlement.\footnote{29 C.F.R. §825.207(i); See also: U.S. Dept. of Labor Opinion FMLA-34 (Apr. 1994) BNA Labor Relations Reporter, Wage and Hour Manual, 99:3028.}

\textbf{Responsibilities for Designating FMLA Leave}

The regulations pertaining to designation of FMLA leave seem to have become unduly complicated. This apparently happened because DOL did not want the FMLA requirements for unpaid leave (notice and medical justification) to become the norm.
when employees are simply using accrued paid leave, such as vacation or sick days, on a routine basis.

It is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, based solely on information provided by the employee or the employee's spokesperson.\(^{143}\) For example, if an employee requests one week of paid vacation, but does not inform the employer that this will be used to care for a seriously-ill parent, this week off will not be counted against the 12 weeks of FMLA leave entitlement. However, if in this example the week of vacation were denied by the employer, then the employee would have to specify the need to care for the seriously-ill parent as the basis for the request. If sufficient notice (was the need for such leave foreseen or unforeseen?) and medical justification is given, the employer could not then deny the request for the leave. The employer could require, or the employee could elect, to substitute one week of paid vacation for one week of unpaid FMLA leave. Similarly, an employee out on paid vacation who requests an extension of unpaid leave for an FMLA-qualifying purpose (such as illness of a spouse, child, or parent) will need to state the reason. If it is due to an event which occurred during the period of paid leave, the employer may count the leave used after the FMLA-qualifying event against the employee's 12 week FMLA entitlement provided the proper notice has been given by the employer. If there is a dispute between an employer and an employee as to whether paid leave qualifies as FMLA leave, it should be resolved through documented discussions between the employee and employer.\(^{144}\)

The 1995 Final Rule imposes some new requirements on employers for designating FMLA leave and for mandating the substitution for accrued paid leave for unpaid FMLA leave. Once the employer determines that leave is being taken for an FMLA reason, the employer has two days (except in extenuating circumstances) to notify the employee that the leave will be counted as FMLA leave.\(^{145}\) This notice may be oral, but it must be confirmed in writing no later than the following payday, or if the next payday is less than 1 week after the oral notice then the written notice must be provided no later than the subsequent payday. The written notice may be a notation on the employee's paystub. If the employer had enough knowledge to determine that the leave was for an FMLA purpose, but failed to give the required notice, the employer may not designate leave as

\(^{143}\) 29 C.F.R. §825.208(a); See also: Fry v. First Fidelity Bancorporation, supra., (employer's failure to give notice of the effects of its FMLA policy could trigger liability under the FMLA if inadequate notice "effectively interferes" with individuals FMLA rights); see: Manual v. Westlake Polymers Corp., supra., (finding no need for employee to expressly mention FMLA by name when notifying employer of need for FMLA leave); See also: U.S. Dept. of Labor Opinion FMLA-75 (Nov. 1995), BNA Labor Relations Reporter, Wage and Hour Manual, 99:3076, (Division finding consistent with Court's decision in Westlake Polymers Corp., supra.) and U.S. Dept. of Labor Opinions FMLA-68 (July 95), and FMLA-12 (Nov. 1993), Id., 99:3067 and 99:3009 (employer designation as FMLA leave).

\(^{144}\) 29 C.F.R. §825.208(b)(1).

\(^{145}\) Id.
FMLA leave retroactively, but only prospectively as of the date of notification to the employee.\textsuperscript{146}

The 1995 Final Rule also states that the employer may not designate leave as FMLA leave after the employee has returned to work except in two situations. The first is when the employee was absent for an FMLA purpose and the employer did not learn of the reason for the absence until the employee's return to work. The second is when the employer knows the reason for the leave but has been unable to confirm that the leave qualifies under the FMLA.\textsuperscript{147} This will normally occur when the employer is waiting for a requested medical certification or for a second or third opinion. In such a case, the employer should preliminarily designate the absence as FMLA leave. This designation will become final when the appropriate certification arrives.

**BENEFITS DURING FMLA LEAVE**

An employer must maintain the employee's coverage under any group health plan on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period. This requirement created a number of difficult issues involving the method for collecting any employee-paid portion of the group health plan premium, as well as recovery of the employer-paid portion if the employee does not return to work after FMLA leave.\textsuperscript{148}

**Continuation of Group Health Benefits**

The employer must maintain the employee's group health benefits (including coverage for the employee's family) during FMLA leave, provided that the employee pays his or her regular portion of the premium. This includes dental, vision, mental health, and substance abuse care if those were provided prior to FMLA leave but excludes certain programs where employers merely facilitate employees' purchase of individual health insurance policies.\textsuperscript{149}

An employee on FMLA leave is subject to any changes the employer makes in the group health plan or to any changes that the employee would be entitled to elect if the employee were still on active employment (e.g. changing from 2 person to family coverage upon the birth of a child during FMLA leave).\textsuperscript{150} An employee may elect not to retain health plan coverage during FMLA leave. For example, where the employer's group health plan requires large employee contributions to the premiums, the employee

\textsuperscript{146} 29 C.F.R. §825.208(b)(2).
\textsuperscript{147} 29 C.F.R. §825.208(e)(1),(2).
\textsuperscript{148} 29 C.F.R. §825.209(a).
\textsuperscript{149} 29 C.F.R. §825.209(b); U.S. Dept. of Labor Opinion FMLA-64 (June 1995), BNA Labor Relations Reporter, Wage and Hour Manual, 99:3062.
\textsuperscript{150} 29 C.F.R. §825.209(c).
may feel that this is too much of a financial burden during an unpaid FMLA leave. In such circumstances, the employer can drop the group health plan for that employee. However, the regulations state that when the employee returns from FMLA leave, the employee is entitled to be reinstated to the group health plan "on the same terms as prior to taking the leave, without any qualifying period, physical examination, exclusion of pre-existing conditions, etc."151 If the employer's group plan does not permit such unconditional reinstatement, then the employer may have no alternative but to pay the employee's share of the premium during the FMLA leave. It does not appear that the FMLA would permit the employer to recover such payments after the employee returns to work.

The employer's obligation to maintain health benefits under FMLA (and to restore the employee to employment) ceases when the employee provides notice of intent not to return to work from the leave or fails to return from leave as scheduled. This would be a "qualifying event" under COBRA, and obligations relative to allowing the employee to continue health benefits at the employee's own expense must be met. In a clarification provided by the 1995 Final Rule, the employer's obligations to maintain health benefits during FMLA leave and to restore the employee to work at the end of the leave cease "if and when the employment relationship would have terminated if the employee had not taken FMLA leave (e.g., if the employee's position is eliminated as a part of a nondiscriminatory reduction-in-force and the employee would not have been transferred to another position)."

The 1995 Final Rule also makes it clear that the employee's entitlement to benefits other than group health benefits during a period of FMLA leave is to be determined by the employer's established policies for providing such benefits when the employee is on other forms of leave.153

Methods for Employees to Pay Their Share of Group Health Plan Premiums

The employer may require that any share of group health plan premiums paid by the employee prior to FMLA leave must be paid by the employee during the FMLA leave period including any workers' compensation absence designated as FMLA leave.154 If premiums are increased or decreased, the employee would be required to pay the new

151 29 C.F.R. §825.215(d)(1).
152 29 C.F.R. §825.209(f).
153 29 C.F.R. §825.209(h). This is an apparent reference to an opinion letter by the U.S. DOL Wage-Hour Administrator (December 7, 1993) indicating that holiday pay would be required during unpaid FMLA leave only if the employer grants holiday pay during other periods of unpaid leave. Likewise, if the employee is substituting paid leave (such as sick leave or vacation) for unpaid FMLA leave, the question of whether the employee is entitled to holiday pay would depend upon the employer’s normal policies for paid leave.
154 29 C.F.R. §825.210(a); See also: U.S. Dept. of Labor Opinion FMLA-64 (July 95), BNA Labor Relations Reporter, Wage and Hour Manual, 99:3063.
premium rates.\textsuperscript{155} If the FMLA leave is substituted paid leave, then the employee's share of premiums would be paid by the method normally used during any paid leave. If the FMLA leave is unpaid, the DOL regulations provide a number of options for obtaining payment from the employee. However, unlike COBRA, no additional charge or administrative fee may be added to the employee's premium payment. Any of the following options are available to the employer for obtaining the employee's premium payment:

Payment due at the same time as it would be made through payroll deduction;

Payment due on the same schedule as payments are made under COBRA;

Payment could be prepaid pursuant to a cafeteria plan at the employee's option;

The employer's existing rules for payment of premiums by employees on "leave without pay" could be followed, provided that prepayment is not required; or

Another system voluntarily agreed upon between the employer and the employee, which may include prepayment of premiums such as through increased payroll deductions prior to the commencement of the FMLA leave.

The employee is entitled to advance written notice of the terms and conditions under which premium payments are to be made. An employee utilizing FMLA leave may not be required to pay more towards group health plan premiums than employees on other leave without pay.\textsuperscript{156}

**Failure of Employee to make Timely Health Plan Premium Payments**

The employer's obligation to continue group health benefits ceases if an employee's premium payment is more than 30 days late, provided a 15 day written notice is given to the employee. However, the employee is still entitled to unconditional reinstatement of the group health plan benefits upon returning to work. If the employer pays the employee's share of the premium, this cost may be recovered from the employee. Accordingly, the employer may wish to pay the employee's share of the premium and recover those payments from the employee. (Contrast this with the situation where the employee declines medical benefits during FMLA leave.)\textsuperscript{157}

**Recovering the Employer's Premiums for Maintaining the Group Health Plan During FMLA Leave**

\textsuperscript{155} Id.

\textsuperscript{156} 29 C.F.R. §825.210(c); See: 60 Fed. Reg. 66, 229 (Dec. 21, 1995) for regulations proposed by IRS which address treatment of cafeteria plans (including health flexible spending accounts) under FMLA. See also: DOL comments on regulations found at 26 C.F.R. 1.125-3, Q&A-8(b).

\textsuperscript{157} 29 C.F.R. §825.212.
If the employee returns to work following FMLA leave and stays for at least 30 calendar days, the employer may not recover from that employee the employer's share of the premiums paid during the FMLA leave. However, if the employee fails to return to work after the FMLA leave or returns but fails to stay 30 calendar days, the employer may recover the employer's share of the group health plan premiums paid out during the FMLA leave unless the reason the employee does not return to work is due to:

The continuation, recurrence or onset of a serious health condition which would entitle the employee to leave under FMLA; OR

Other circumstances beyond the employee's control, such as the unexpected transfer of the employee's spouse to a job location more than 75 miles from the employee's worksite or the lay-off of the employee while on leave.

If the employee fails to return to work because of a serious health condition, the employer may require medical certification of the employee's or the family member's serious health condition. In a clarification provided by the 1995 Final Rule, the employer may not recover its share of health insurance premiums paid during paid disability or workers' compensation leave designated as FMLA leave.158

Other Benefits

The FMLA said nothing about the continuation of benefits other than group health insurance. Because the FMLA does not require non-health benefits to be provided during FMLA leave, presumably the employer may cancel such benefits. However, this may not be feasible because of the requirement that such benefits be reinstated unconditionally when the employee returns to work. That is, a lapse in coverage may make it extremely difficult to re-enroll the employee unconditionally and immediately upon returning to work. Accordingly, the regulations say that under such circumstances the employer "may elect" to pay "the employee's (share of) premiums during periods of unpaid FMLA leave." The regulations go on to indicate that the employer may recover "any premium payments made on the employee's behalf to maintain coverage of benefits during unpaid FMLA leave...whether or not the employee returns from FMLA leave." The upshot seems to be that if non-health benefits are 100% paid by the employer, then the employer will probably have to maintain those benefits during the FMLA leave (to ensure unconditional reinstatement of the coverage upon the employee's return to work) and will not be able to recover the cost of any of the employer's share of the premium from the employee. It is only the employee's share of such premiums which may be recovered. Other types of benefits, such as an employee assistance plan, tuition reimbursement, stock purchase plans, etc. where there are usually no issues involving unconditional

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158 29 C.F.R. §825.213 and 310(h).
reinstatement of the benefit upon return to work, could presumably be suspended during the unpaid FMLA leave.\textsuperscript{159}

\textbf{RETURNING TO WORK AFTER FMLA LEAVE}

An employee is entitled to reinstatement to the same position or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment when returning from FMLA leave. There is no right to return to the same position, only a right to have an equivalent position.\textsuperscript{160}

\textbf{Employee's Notice of Intent to Return to Work}

An employer may require periodic reports from an employee on FMLA leave regarding the employee's status and intent to return to return to work. For example, the employee retains all FMLA rights even after indicating that return to work is unlikely but still desired. If the employee provides a statement of intent to work, even if the statement is qualified, entitlement to leave and maintenance of health benefits must continue. If, however, the employee gives an "unequivocal" notice of intent not to return to work, the employer's obligations to maintain health benefits (except for COBRA) and to restore the employee to an equivalent position cease.\textsuperscript{161}

\textbf{Medical Certification of "Fitness for Duty"}

An employer may deny restoration to employment until the employee has submitted a fitness-for-duty certification, provided that:

The employer has a uniformly-applied policy or practice requiring all similarly-situated employees (same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the health care provider that the employee is able to resume work;

The fitness-for-duty certification is required only with regard to the particular health condition that caused the employee's need for FMLA leave and complies with ADA requirements of being job-related and consistent with business necessity;

The employer fulfills all of the notice and handbook requirements with regard to establishing a policy on fitness-for-duty certification; and

\textsuperscript{159} 29 C.F.R. §825.213(b) and 215(d).
\textsuperscript{160} 29 C.F.R. §825.214(a),(b); See also: the impact of the ADA on this issue as described in the 1995 Final Rule at 29 C.F.R. §825.702(c)(2).
\textsuperscript{161} 29 C.F.R. §825.309(b).
The employee received specific notice at the time leave was requested or immediately after leave began that a fitness-for-duty certification would be required.\textsuperscript{162}

The employee is responsible for the cost of the certification and is not entitled to compensation for time or travels costs for obtaining the certification. No second or third fitness-for-duty certification may be required.\textsuperscript{163}

**Defining an "Equivalent Position"

The eligible employee who takes FMLA leave is entitled to be restored to the same position or to an equivalent position "that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, prerequisites and status.\textsuperscript{164} The duties and the responsibilities must be the same or substantially similar and the job "must entail substantially equivalent skill, effort, responsibility and authority." If the employee's special qualification for the same or an equivalent position have lapsed during FMLA leave, the employee must be given a reasonable opportunity to fulfill the requirements after returning to work.\textsuperscript{165} The employee is also entitled to an unconditional reinstatement of all fringe benefits upon return to work. Employer policies will determine whether an employee is allowed to accrue any additional benefits or seniority such as paid vacation, sick leave, or earned time, during unpaid FMLA leave.\textsuperscript{166}

**Limits on Employers' Reinstatement Obligations

In addition to the employer's ability not to reinstate an employee who fails to provide a fitness-for-duty certificate, as described above, and not to reinstate certain "key employees" as described below, there are several other limitations upon the employer's obligation to reinstate employees following FMLA leave.\textsuperscript{167}

An employee is not entitled to reinstatement if the employer is able to show that the employee would not otherwise have been employed at the time reinstatement is requested. For example, if the employer can prove that the employee would have been


\textsuperscript{163} 29 C.F.R. §825.310 and 312(c).


\textsuperscript{165} 29 C.F.R. §825.215(b).


\textsuperscript{167} 29 C.F.R. §825.216.

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laid off due to a reduction-in-force during the FMLA leave, then there is no duty of reinstatement.\textsuperscript{168}

An employee is also not entitled to reinstatement if the employer can establish that the employee had been hired for a specific term or only to perform work on a defined project and that term or project is over and the employer would not otherwise have continued to employ that employee.

**INSTRUCTIONAL EMPLOYEES OF LOCAL ELEMENTARY AND SECONDARY EDUCATIONAL AGENCIES**

Special rules apply to the instructional personnel of public and private elementary and secondary schools. These rules do not apply to other kinds of educational institutions, such as colleges and universities, trade schools, nurseries, and pre-schools. Instructional employees are those whose principal function is to teach and instruct students in a class, a small group, or an individual setting. This term includes not only teachers, but also athletic coaches, driving instructors, and special educational assistants such as signers for the hearing impaired. The term does not include teacher assistants or aides who do not have as their principal job responsibility actual teaching or instructing, nor does it include auxiliary personnel, such as counselors, psychologists, or curriculum specialists. Cafeteria workers, maintenance workers, and bus drivers are also excluded.\textsuperscript{169}

**Intermittent Leave or Leave on a Reduced Leave Schedule by Instructional Employees**

If an eligible instructional employee requests intermittent leave or leave on a reduced leave schedule to care for a family member or for the employee's own serious health condition and the employee would be on leave for more than 20% of the total number of working days over the period the leave would extend, the employer may require the employee to elect either to transfer to another position which better accommodates the recurring periods of leave or to take leave for a period or periods of a particular duration not greater than the duration of the planned treatment. "Periods of a particular duration" is defined to mean a block, or blocks, of time beginning no earlier than the first day for which leave is needed and ending no later than the last day on which leave is needed and may include one uninterrupted period of leave. If the instructional employee does not give the proper notice of the need for intermittent or reduced leave schedule, the employer may deny the taking of leave until thirty days after the notice was provided, or may require the employee to take leave for either a "period of particular duration" (presumably without regard to whether the 20% test is met) or accept an alternative position.\textsuperscript{170}

\textsuperscript{168} 29 C.F.R. §825.216(a)(1).
\textsuperscript{169} 29 C.F.R. §825.600.
\textsuperscript{170} 29 C.F.R. §825.601.
Taking of Leave Near the End of an Academic Term

Special rules apply to instructional employees who begin leave near the end of an academic term. A school may not have more than 2 academic terms each year for purposes of the FMLA. Thus, for all practical purposes, these rules are applicable to leave taken near the end of either the first or second "semester" of the year. Quarters, trimesters, or marking periods will not qualify as "academic terms" because these would normally exceed the 2-per-year limitation.¹⁷¹ When an instructional employee begins leave more than 5 weeks before the end of a term, the employer may require the employee to continue taking leave until the end of the term if the leave will last at least 3 weeks, and the employee would return to work during the 3-week period before the end of the term. If the employee begins leave for a purpose other than the employee's own serious health condition during the five-week period before the end of a term, the employer may require the employee to continue taking leave until the end of the term if the leave will last more than 2 weeks and the employee would return to work during the 2-week period before the end of the term. If the employee begins leave for a purpose other than the employee's own serious health condition during the 3-week period before the end of a term, and the leave will last more than five working days, the employer may require the employee to continue taking leave until the end of a term.¹⁷²

Calculating Leave for Instructional Employees

In the event that an instructional employee is required to take leave for "periods of a particular duration" in the case of intermittent or reduced schedule leave, or is required to continue taking leave until the end of an academic term, the entire period of leave taken will count as FMLA leave. Similarly, if an employee is required to take leave until the end of an academic term, and that employee's FMLA leave entitlement expires before the involuntary leave period is completed, the employer is required to maintain health benefits and must restore the employee and provide other FMLA entitlements when the period of leave ends.¹⁷³

Special Rule Regarding Restoration to an Equivalent Position

All employees, not just instructional employees, of local educational agencies are subject to a special rule regarding restoration. The determination of how an employee is to be restored to "an equivalent position" upon return from FMLA leave will be made on the basis of established school board policies and practices, private school policies and practices, and collective bargaining agreements. These must be in writing, must be made known to the employee prior to the taking of FMLA leave, and must clearly explain the employee's restoration rights. Further, any such established policy used as the basis for

¹⁷¹ 29 C.F.R. §825.602.
¹⁷² Id.
¹⁷³ 29 C.F.R. §825.603.
restoration of an employee to an equivalent position must provide substantially the same restoration protections as provided in the FMLA.\textsuperscript{174}

\textbf{DENYING REINSTATEMENT TO KEY EMPLOYEES}

There is a special provision of the FMLA which permits an employer to deny job restoration to a "key employee" if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer. However, the specific procedural requirements are so complex and the standard for denying reinstatement so strict that it appears unlikely that this exception will be used frequently by employers.\textsuperscript{175}

\textbf{Definition of "Key Employee"}

A "key employee" for the purpose of this exception is a salaried FMLA-eligible employee who is among the highest paid 10% of all the employees employed by the employer within 75 miles of the employee's worksite. This determination is made at the time of the request for FMLA leave, and is calculated by year-to-date earnings divided by the weeks worked by the employee. Earnings include wages, premium pay, incentive pay, but bonuses, stock options, other benefits, and "perks" are not included in the calculation.\textsuperscript{176}

\textbf{Definition of "Substantial and Grievous Economic Injury"}

The regulations emphasize that this test requires the employer to establish that the restoration of the key employee (not his or her absence during FMLA leave) will cause "substantial and grievous economic injury." The regulations decline to articulate a "precise test" for the level of hardship or injury to the employer in deciding whether this exception applies. If the reinstatement of a key employee threatens the economic viability of the firm, then the test would be met. However, minor inconveniences and costs that the employer would experience in the normal course of doing business would not constitute "substantial and grievous economic injury." In a clarification added by the 1995 Final Rule, the DOL noted that FMLA's test of substantial and grievous economic injury was "different from and more stringent than the 'undue hardship' test under the ADA."\textsuperscript{177}

\textbf{Rights of Key Employees}

As soon as the employer makes the determination that restoration of the key employee would cause substantial and grievance economic injury to the company, the

\begin{footnotes}
\item[174] 29 C.F.R. \textsuperscript{\textsection}825.604.
\item[175] 29 C.F.R. \textsuperscript{\textsection}825.216(c).
\item[176] 29 C.F.R. \textsuperscript{\textsection}825.217.
\item[177] 29 C.F.R. \textsuperscript{\textsection}825.218.
\end{footnotes}
key employee must be notified and given the opportunity to discontinue the FMLA leave and return to work. It appears that job restoration may be denied only in those situations where the key employee fails to return to work within "a reasonable time" after being so notified.\textsuperscript{178}

In order to be in a position to exercise this exception to the general reinstatement obligation, the employer must give written notice to the employee at the time FMLA leave is requested, (or when the leave commenced if that is earlier) that the employee qualifies as a "key employee." The employer must also simultaneously inform the employee fully of the potential consequences with respect to reinstatement and maintenance of health benefits if the employer should determine that substantial and grievous economic injury will result if the employee is reinstated after FMLA leave. An employer who fails to provide such timely notice will lose its right to deny restoration even if substantial and grievous economic injury would result from reinstatement.\textsuperscript{179}

Immediately upon making a "good faith determination" that substantial and grievous economic injury would result if the key employee is reinstated to the same or an equivalent position, the employer must so notify the key employee in writing. This notice must be served in person or by certified mail. The key employee must be given "a reasonable time in which to return to work..."\textsuperscript{180} If a key employee does not return to work after being notified of the employer's intent to deny job restoration, the employee is still entitled to maintenance of health benefits and the employer may not recover its costs of health benefit premiums. These rights continue until the employee either gives notice that he or she no longer wishes to return to work or the employer actually denies reinstatement at the conclusion of the FMLA leave.\textsuperscript{181} Even if a key employee does not return to work within a reasonable time after receiving notice of the employer's intent to deny job restoration, the employee is still entitled to request reinstatement at the end of the FMLA leave. The employer must then make a new determination whether there will be substantial and grievous economic injury if the key employee is reinstated, based upon the facts at that time.\textsuperscript{182}

**RELATIONSHIP OF FMLA TO OTHER FEDERAL AND STATE LAWS**

In general, the FMLA does not supersede or discourage more generous family leave provisions, whether they flow from other federal laws, state laws, employer policies, or collective bargaining agreements.

**Other Federal Laws**

\textsuperscript{178} 29 C.F.R. \textsection 825.219.

\textsuperscript{179} 29 C.F.R. \textsection 825.219(a).

\textsuperscript{180} 29 C.F.R. \textsection 825.219(b).

\textsuperscript{181} 29 C.F.R. \textsection 825.219(c).

\textsuperscript{182} 29 C.F.R. \textsection 825.219(d).
Although the FMLA does not supersede employee rights under any federal nondiscrimination law, the principal area of intersection is with the ADA. This subject was treated at great length in the 1995 Final Rule.\footnote{29 C.F.R. §825.702.} The concept of "disability" under the ADA is different from a "serious health condition" under the FMLA, but many employees who qualify for FMLA leave will also be considered to be a "qualified person with a disability."\footnote{Id.; See also: Peggy R. Mastroianni and David K. Fram, The Family and Medical Leave Act and the Americans with Disabilities Act, 9 LAB. LAW. 553 (1993)} When this occurs, the following are some examples of overlap and conflict between the FMLA and the ADA.

**Using the ADA to extend an FMLA leave.** What happens when an employee is out of work due to his or her serious health condition and is unable to return to work at the end of the 12 weeks of FMLA entitlement? Assuming that there are no employer policies to the contrary, one might assume that such an employee could be discharged for failure to perform the "essential functions" of the job. (The ADA protects only persons with disabilities who, with or without reasonable accommodation, can perform the essential functions of their position). However, the EEOC's Technical Assistance Manual lists "use of accrued paid leave or unpaid leave" as an example of a possible reasonable accommodation. Also the 1995 Final Rule under the FMLA states, without citing any authority, that the ADA "allows an indeterminate amount of leave, barring undue hardship, as a reasonable accommodation".\footnote{29 C.F.R. §825.702(b); But see: Carr v. Reno, 23 F.3d 825 (D.C. Cir. 1994).} Accordingly, it could be argued that an employer is required to extend a period of unpaid leave beyond the 12 weeks of FMLA entitlement unless it can be established that doing so would be an "undue hardship" for the employer.

**Obtaining part-time leave or light duty assignments.** Another situation which will probably occur frequently is when an employee has exhausted FMLA leave and is able to return to work, but only on a part-time or light duty basis. Again, unless the employer can establish that a part-time schedule or a light duty assignment is an "undue hardship" under the ADA, such an accommodation must be extended. Is there a limit as to how long an employer must provide such an accommodation? Again, the answer must be located, if at all, in the ADA "undue hardship" analysis.\footnote{29 C.F.R. §825.702(c)(3). See also: U.S. Dept. of Labor Opinion FMLA-34 (Apr. 1994), BNA Labor Relations Reporter, Wage and Hour Manual, 99:3029 (reasonable accommodation under FMLA).}

**Strengthening FMLA reinstatement rights.** Under the FMLA, the employee has no right to reinstatement to the same job, only to an "equivalent" job.\footnote{29 C.F.R. §825.702(c)(4); See also: U.S. Dept. of Labor Opinion FMLA-55 (March 1995), BNA Labor Relations Reporter, Wage and Hour Manual, 99:3052.} However, if the employee is returning from an FMLA leave for a "serious health condition" which would
also be considered a "disability" under the ADA, the employer would be required to show an "undue hardship" to assign the returning employee to an equivalent rather than to the same position that was held before leave. The 1995 Final Rule discusses this problem. Of course, such an argument could not be made if the FMLA leave was due to a reason other than the employee's serious health condition.

**Blocking transfer to an alternative position during intermittent FMLA leave.** The FMLA permits an employer to transfer an employee taking intermittent FMLA leave to an "alternative position" which is better suited to the nature of such leave and less disruptive to the employer's operations. Again, if the purpose of the intermittent FMLA leave is the employee's own serious health condition that might also amount to a disability under the ADA, the employer would have to show that leaving the employee in his or her same position while taking the intermittent leave would be an undue hardship.

**Using the FMLA to obtain leave which would not be available under the ADA.** Prior to the effective date of the FMLA, an employer could deny leave to an employee with a disability if it could show that such a leave would be an undue hardship to the employer. However, under the FMLA, the undue hardship defense cannot be used to block a leave request. Stated differently, if an employee with a disability is also FMLA-eligible, such an employee has nearly an absolute entitlement to leave even if it would cause an undue hardship to the employer.

**Questioning FMLA medical certification under the ADA.** The ADA permits an employer to ask employees disability-related questions or require employee medical examinations only if they are "job related" and "consistent with business necessity." Some might question, therefore, whether it is lawful to require an employee to obtain medical certification when requesting FMLA leave. This issue may arise in future litigation, but it should be noted that the ADA does not pre-empt laws providing "greater or equal protection" for individuals with disabilities. Further, in most if not all instances, the request for medical certification of an employee's serious health condition would be "job-related" because the employee has requested FMLA leave due to an inability to work.

**ADA's confidentiality requirements.** All medically-related information obtained by an employer must be kept confidential. Specifically, such information must be collected on separate forms and maintained in separate confidential medical files. Access to such files is strictly limited. Although implementation of the FMLA would necessarily

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188 29 C.F.R. §825.702(c)(2).
189 29 C.F.R. §825.702(c)(1) and (3).
190 29 C.F.R. §825.702(e).
191 Id.
192 29 C.F.R. §825.500(g).

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require the handling of a great deal of medical information about an employee or members of the employee's family, there are no specific confidentiality requirements in the FMLA. Likewise, there are no provisions in the FMLA which require the disclosure of medical information to persons who are not eligible to see the confidential medical files under the ADA. Accordingly, the sound approach to the gathering and maintenance of FMLA medical information would be to follow the ADA confidentiality procedures.

**State Leave Laws**

The Bureau of National Affairs reported in September of 1994 that all states except Arkansas, Michigan, Mississippi, Ohio, Virginia, and Wyoming have some type of state law for regulation for maternity, parental, or family leave (in many of these states only public employees are covered). If an employee qualifies for leave both under the FMLA and under state law, employees are not required to designated whether the leave they are taking is FMLA leave or leave under state law. The employer must comply with the applicable provisions of both laws, but the leave used counts against the employee's entitlement under both laws. The FMLA regulations describe several examples of interaction between the FMLA and state leave laws.

- If a state law provided for 16 weeks of family leave over two years, an employee could take 16 weeks one year under state law and 12 weeks the next year under the FMLA, but the FMLA requirement to maintain health insurance would be applicable only to the first 12 weeks of leave over year.

- In the same state providing for 16 weeks of family leave each two years, if an employee took 12 weeks of leave in the first year, only 12 more weeks (not 16) would be available in the second year. Under no circumstances, would an employee be entitled to 28 weeks of leave in one year.

- If a state law provided for 6 weeks of half pay for employees temporarily disabled because of pregnancy, the employee would be entitled to an additional 6 weeks of unpaid FMLA leave or could substitute accrued paid leave.

**ENFORCEMENT**

Eligible employees who are denied FMLA leave or who are denied reinstatement at the end of the leave in violation of the FMLA may file a complaint with the Department of Labor or file a private lawsuit against the employer to obtain damages and other relief. Damages may include lost wages, interest, liquidated damages equalling lost wages.

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193 29 C.F.R. §825.400; See also: Freeman v. Foley, 911 F.Supp. 326 (N.D. Ill. 1995) (supervisors who deny or impede an employee's ability to exercise rights under FMLA may be liable as "employer"); but see: Frizzell v. Southwest Motor Freight, ______ (E.D.Tenn. 1996) (finding term "employer" as used in the FMLA should be construed, as it is under Title VII of Civil Rights Act of 1964, as not allowing liability to be imposed on individuals who are not otherwise employers); and Ladner v. Alexander & Alexander, Inc., 879 F. Supp. 598 (W.D.La. 1995) (finding FMLA action, which may be
and interest, reinstatement and reasonable attorneys' fees. 194 Through September 30, 1995, DOL received 2,179 FMLA complaints. This was an increase from 1,422 complaints in 1994. Of the cases investigated in 1995, violations were found in 1,242 cases, which constituted a marked increase from the 871 violations found a year earlier. According to DOL statistics, the most common violation was failure to reinstate, followed by failure to grant leave. 195

CONCLUSION

The Final Rule has addressed many problem areas under the FMLA and serves as a useful guide to employers working with the FMLA. However, given that an employee's circumstances can control the type and extent of an employer's response to a FMLA leave request and not all circumstances or possible scenarios could be addressed by the statute, the regulations or DOL opinion letters, employers must pay attention to their obligations under the FMLA and should seek advice of legal counsel when questions or problems arise.

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194 29 C.F.R. §825.400-04; See also: McAnnally v. Wyn South Molded Products, Inc., (912 F.Supp. 512 (N.D.Ala. 1996) (finding that plaintiffs are not entitled to punitive damages or mental distress damages under the FMLA).

195 BNA Labor Relations Reporter, 150 LRR 405 (11/27/95).
APPENDIX A

FMLA POSTER

[NOTE: This appendix is a photocopy of the FMLA Poster published as Appendix C to the Final Rule under the FMLA published by the U.S. Department of Labor, 29 C.F.R. §825, 60 F.R. 2180, 2275 (January 6, 1995).]
APPENDIX B

FAMILY AND MEDICAL LEAVE ACT (FMLA) LEAVE POLICY

1. An employee is eligible to request an FMLA leave if he/she has been an employee of the Employer for at least twelve (12) months and has worked at least 1,250 hours during the twelve (12) month period immediately preceding the leave.  

2. Subject to the requirements described in this policy, an eligible employee may request and will be granted up to twelve (12) workweeks of unpaid FMLA leave during any twelve (12) month period for one or more of the following events:
   a. the birth and first year care of a child;
   b. the placement of a child for adoption or foster care in the employee's home;
   c. the care of the employee's spouse, child or parent with a serious health condition; or
   d. the employee's serious health condition which renders him/her unable to perform the functions of the employee's position.

3. For purposes of calculating the amount of FMLA leave an eligible employee may request, the term "during any twelve (12) month period" means a rolling twelve (12) month period measured backward from the date requested leave will be used.

4. The taking of a FMLA leave shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced; provided, however, that nothing in this policy shall entitle any employee who returns from leave to the accrual of any seniority or additional employment benefits during the period of the leave.

5. Unless one of the exceptions in the law applies, an employee who takes an FMLA leave for the intended purpose of the leave shall be entitled, on timely return from the leave and completion of all required documentation, to be restored to the position of

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196Note that this policy does not exclude FMLA coverage for employees at small branch offices or other remote operations more than 75 miles from the main business. Such an exclusion is permitted by the FMLA.

197This policy uses the definition of "any twelve-month period" generally deemed the most advantageous to management because it prevents the "stacking" of leave entitlements. However, some companies prefer to use a calendar or fiscal year and some colleges and school systems prefer the academic year.
employment held when the leave commenced or to an equivalent position with equivalent employment benefits, pay and other terms and conditions of employment.198

6. At the election of the eligible employee, any group health plan as defined by the FMLA will be maintained for the duration of an FMLA leave and at the level and under the conditions coverage would have been provided if the employee had continued in employment for the duration of the leave. The employee will be responsible for paying his/her share of the premium. While on an unpaid FMLA leave, the employee will be responsible for paying this part of the premium by submitting payment to the Human Resources Office on or before each regular payday. The Employer may recover its share of the premiums for maintaining coverage for the employee under such group health plan during the period of an FMLA leave if the employee fails to return to work (or returns but fails to stay 30 calendar days) for reasons other than the continuation or onset of a serious health condition entitling the employee to leave under paragraphs 2.c. or 2.d. above, or other circumstances beyond the employee's control. Certification of inability to return to work as specified and allowed by the FMLA may be required.

7. An employee must substitute any accrued paid leave for any unpaid FMLA leave, as permitted by the FMLA regulations. Upon exhaustion of any accrued paid leave, the remainder of any FMLA leave will be unpaid. In no case will the combination of paid and unpaid leave used for an FMLA purpose exceed twelve (12) workweeks in any twelve (12) month period as defined herein.

8. FMLA leave for the birth/care of a child or for the placement of a child for adoption or foster care must be taken within the twelve (12) month period which starts on the date of such birth or placement. Regardless of when such leave begins, it will end no later than the end of the twelve (12) month period. Unless specifically permitted, FMLA leave for these purposes cannot be taken on an intermittent or reduced leave schedule.

9. If both spouses are employed by the Employer, they are limited to a combined total of twelve (12) workweeks of FMLA leave during any twelve (12) month period for purposes described in paragraphs 2.a or 2.b above.199 However, each employee may use up to twelve (12) workweeks of FMLA leave during any twelve (12) month period if the leave is for purposes described in paragraphs 2.c and 2.d above.

10. An eligible employee who foresees that she/he will require a leave for the birth/care of a child, or for adoption or foster care placement, must notify the Human Resource Office in writing not less than thirty (30) calendar days in advance of the start date of the leave. If not foreseeable, the employee must provide as much written notice as is practicable under the circumstances, generally within two (2) working days of learning of the need for leave.

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198This policy contains no exception for "key employees". Such an exception is permitted by the FMLA.

199Note that this limitation may be unlawful in states prohibiting discrimination on the basis of marital status.
11. An employee who foresees the need for a leave of absence due to planned medical treatment for herself/himself or for her/his spouse, child or parent, should notify the Human Resource Office in writing as early as possible so that the absence can be scheduled at a time least disruptive to the Employer's operations. Such notice should be at least thirty (30) calendar days in advance of the start of leave, unless impracticable, in which case the employee must provide the written notice as early as circumstances permit, generally within two (2) working days of learning of the need for leave.

12. If the requested leave is to care for a spouse, child or parent who has a serious health condition, the employee will be required to file with the Human Resource Office in a timely manner a health care provider's statement that the employee is needed to care for the son, daughter, spouse, or parent and an estimate of the amount of time that the employee is needed for such care.

13. If the requested leave is because of a serious health condition of the employee which renders her/him unable to perform the functions of her/his position, the employee may be required to file with the Human Resource Office a health care provider's statement as allowed by the FMLA.

14. Subject to the limitations and certifications allowed by the FMLA, leaves taken under paragraphs 2.c. or 2.d. above may be taken intermittently or on a reduced leave schedule when medically necessary, provided a health care provider certifies the expected duration and schedule of such leave and provided further that where such leave is foreseeable based upon planned medical treatment. The employee may be required or may elect to transfer temporarily to an available alternative position for which the employee is qualified and that has equivalent pay and benefits and better accommodates recurring periods of leave than the employee's regular position.

15. An employee on an approved leave under this policy must inform the Human Resource Office every thirty (30) days regarding her/his status and intent to return to work upon conclusion of the leave. An employee may also be required to submit a fitness-for-duty certification before returning to work.

16. In any case where there is reason to doubt the validity of the health care provider's statement or certification for leaves taken under sections 2.c or 2.d. above, the Employer may, at its expense, require second and third opinions, as specified by the FMLA, to resolve the issue.

17. The provisions of this policy are intended to comply with the Family and Medical Leave Act of 1993, and any terms used from the FMLA will be as defined in the Act or the U.S. Department of Labor ("DOL") regulations. To the extent that this policy is ambiguous or contradicts the Act or DOL regulations, the language of the Act or regulations will prevail.
APPENDIX C

EMPLOYEE HANDBOOK FMLA STATEMENT

Subject to the definitions and requirements provided in the Family and Medical Leave Act (FMLA) Policy, an eligible employee may request and will be granted up to twelve (12) workweeks of unpaid family or medical leave during any twelve (12) month period for one or more of the following events:

a. the birth and first year care of a child;

b. the placement of a child for adoption or foster care in the employee's home;

c. the care of the employee's spouse, child or parent with a serious health condition; or

d. the employee's serious health condition which renders him/her unable to perform the functions of the employee's position.

The employee must request leave by contacting the Human Resource Office thirty (30) days in advance when the leave is foreseeable. If the leave was not foreseeable, the employee must provide as much notice as practicable. When permitted by law, the employee shall substitute paid leave for unpaid FMLA leave.

The employee may elect to continue health insurance during the period of such leave and, with some exceptions, is entitled to return to the same or equivalent position upon completion of the leave.
APPENDIX D

REQUEST FOR LEAVE OF ABSENCE

* * *
* Name __________________________ Date of Application ____________ *
* * *
* * *

Type of Leave Requested (Check each that applies.)

[ ] Vacation  [ ] Medical  [ ] Educational
[ ] Sick Leave  [ ] Family  [ ] Workers Compensation
[ ] Disability  [ ] Military  [ ] Other _______________

Start Date (first day of leave) __________ Return Date (date of return to work) ___________

Reason for Requested Leave (Explain why leave is necessary.)

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

* * *
* A certification from a physician or qualified health care *
* provider may be required for leaves due to the serious *
* health of the employee or the employee's spouse, child or *
* parent. The certification form is available from the Human *
* Resource Office.  *
* * *

Employee's Signature ______________________ Date ________________
I understand that if I do not return from my leave of absence at the expiration of this leave, unless a written extension has been granted in advance, my employment may be terminated.

Supervisor's Signature ______________________  Date ________________
APPENDIX E

NOTICE TO EMPLOYEES REQUESTING
FOR AN FMLA PURPOSE LEAVE

The Family and Medical Leave Act of 1993 (FMLA) requires covered employers to provide employees who request certain forms of leave with a written notice spelling out the employee's specific expectations and obligations and explaining the consequences of failure to meet these obligations. Attached for additional information is a copy of the FMLA policy and the U.S. Department of Labor's FMLA Fact Sheet.

1. If the requested leave is for any of the purposes described in paragraph 2 of the attached Policy, the leave taken will be counted against the entitlement of up to twelve (12) work weeks of FMLA leave during any twelve (12) month period.

2. If the requested leave is for purposes described in paragraph 2.c. or 2.d. of the attached Policy, the employee must submit to the Human Resource Office a certification from a qualified health care provider containing the information described in either paragraph 12 or 13 of the attached Policy.

3. The employee is required to substitute paid leave for FMLA leave under conditions described in paragraph 7 of the attached Policy.

4. If the employee elects to continue health benefits during the period of FMLA leave, the employee must continue to pay his/her share of the premiums. The requirements for the payment of such premiums are described in paragraph 6 of the attached Policy.

5. If the leave is for the employee's own serious health condition, the employee may be required to submit a fitness-for-duty certification before returning to work.

6. Upon returning from an FMLA leave, unless one of the exceptions in the law applies, an employee will be restored to the position of employment held when the leave commenced or an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

7. If the employee fails to return to work following FMLA leave (or returns to work but fails to stay 30 calendar days) for reasons other than the commencement or continuation of a serious health condition entitling the employee to leave under paragraphs 2.c. or 2.d. of the attached Policy, or for other circumstances beyond the employee's control (as described in FMLA regulations), the Employer may recover the premiums it paid for maintaining health benefits coverage for the employee during the leave period. If the employee elects to continue health benefits during FMLA leave but fails to pay his/her share of the premiums, the Employer may at its discretion either cancel the health benefits or pay the employee's share of the premium and recover such premium payments from the employee.
APPENDIX F

FAMILY AND MEDICAL LEAVE ACT

MEDICAL INSURANCE ELECTION

[Sign 1 OR 2 Below.]

1. While I am on unpaid Family and Medical Leave, I wish to continue my health insurance. I agree to pay my share of the premium to the Human Resource Office on each regular payday ($____ per pay period).

   (a) I understand that if I fail to pay my share of the health insurance premium within 30 days of when due the Employer may (a) cancel my health insurance for the remainder of the leave provided I have received 15 days notice; or (b) pay my share of the premium and collect such amounts from me. If the Employer pays my share of the premiums, I hereby authorize the Employer to deduct such amounts from my paychecks when I return to work.

   (b) I also understand that if I fail to return to work at the conclusion of the leave (or return to work but fail to stay 30 calendar days) unless caused by my serious health condition or that of my child, spouse, or parent, or by other circumstances beyond my control, the Employer may collect from me all premiums it paid for my health insurance during the period of the leave.

WARNING: READ BEFORE SIGNING. THIS DOCUMENT CONTAINS AN AUTHORIZATION TO MAKE DEDUCTIONS FROM YOUR PAYCHECK FOR HEALTH INSURANCE PREMIUMS.

________________________  ______________________  ______________________
Employee's Signature          Date          Witness

________________________
Employee's Name (Print)

2. While I am on unpaid Family and Medical Leave, I do not wish to continue my health insurance.

________________________  ______________________  ______________________
Employee's Signature          Date          Witness

________________________
Employee's Name (Print)