THE UNITED STATES FAMILY AND MEDICAL LEAVE ACT

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1. Introduction

The United States Family and Medical Leave Act ("FMLA") is a federal law that became effective in 1993. The FMLA entitles eligible employees to take up to twelve weeks of unpaid, job-protected leave each year for specified family and medical reasons. As discussed below, the FMLA contains provisions on employer coverage, employee eligibility for the Act's benefits, entitlement to leave, maintenance of health benefits during leave, entitlement to job restoration after leave, notice and certification of the need for FMLA leave, protections for employees who request to take FMLA leave, and employee recordkeeeping.

2. Covered Employers

The FMLA covers private employers employing fifty or more employees for each working day during each of twenty or more calendar workweeks in the current or preceding calendar year.

3. Eligible Employees

To be eligible for family and medical leave, an employee must have worked for the employer for at least twelve months (the months need not be continuous), for at least 1,250 hours in the twelve months prior to the first day of leave, and there must be fifty or more employees employed at or within seventy-five miles (measured by surface road miles) of the employee's work site. Eligibility for FMLA coverage is measured from the date the leave is taken.

4. Qualifying Reasons for Taking Leave

Family and medical leave may be taken by an employee for any of the following reasons: (1) the birth of a son or daughter of the employee; (2) the placement of a son or daughter with the employee for adoption or foster care; (3) to provide care for the employee's son, daughter, spouse, or parent who has a serious health condition; or (4) due to a serious health condition of the employee that prevents the employee from working.

Fathers, as well as mothers, are entitled to FMLA leave to bond with a newborn child, a newly adopted child, or a child placed in the employee's foster care. The FMLA defines *son or daughter* broadly 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 eighteen years of age or is eighteen years of age or older and incapable of self-care because of mental or physical disability.

The FMLA permits an employee to take leave in order to provide care for a son, daughter, spouse, or parent with a serious health condition. The Act does *not* require an employee to demonstrate that no other caretakers are available before obtaining leave.

5. What Qualifies as a Serious Health Condition?

The definition of a *serious health condition* is very broad. In short, just about any medical condition can be a serious health condition as defined by the FMLA. As a result, employers are forced to determine whether an employee or an employee's spouse, child, or parent has a serious health condition on a case-by-case basis. Employers can make this determination by requiring a certification from a healthcare provider that an employee or an employee's spouse, child, or parent has a serious health condition. Medical certification forms are discussed later in this article.

By definition, a *serious health condition* is an illness, injury, impairment, or physical or mental condition that involves: (1) inpatient care (*i.e.*, an overnight stay) in a hospital, hospice, or residential medical-care facility; or (2) continuing treatment by (or under the supervision of) a healthcare provider.

A serious health condition involving *continuing treatment* by a healthcare provider is defined by the FMLA regulations as including any *one* or more of the following:

- A period of incapacity (*i.e.*, inability to work, attend school, or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of *more than three* consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition that also involves treatment two or more times by a healthcare provider, or treatment by a healthcare provider on at least one occasion that results in a regimen of continuing treatment under the supervision of the healthcare provider.

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

- Any period of incapacity or treatment for such incapacity due to a chronic serious health condition (*e.g.*, asthma, diabetes, epilepsy).

- A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (*e.g.*, Alzheimer's disease, a severe stroke, or the terminal stages of a disease).

- Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a healthcare provider (*e.g.*, for restorative surgery after an accident or other injury), or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical treatment, such as chemotherapy or radiation treatments for cancer, physical therapy for severe arthritis, or kidney dialysis.

Family and medical leave may also be taken to receive treatment for substance abuse. However, an absence due to an employee's *use* of an illegal substance is not covered. Moreover, an employee's absence from work to receive treatment from a healthcare provider for his or her substance abuse is not covered if the treatment was precipitated by the employee's recent use of the substance. Absences due to mental illness or allergies "may be serious health conditions, but only if all the conditions of [the definition of a serious health condition] are met."

6. Serious Health Condition Defined

The regulations state that unless complications arise, the common cold, the flu, earaches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, and periodontal disease are examples of conditions that do *not* meet the definition of a serious health condition and do *not* qualify for FMLA leave.

7. Period of Incapacity

In order for an employee to satisfy the period-of-incapacity requirement, the employee must demonstrate that he or she was incapacitated, *i.e.*, that he or she was *required* to remain off work. To prove that he or she was required to miss

work for more than three days, an employee must show that he or she was prevented from working because of the injury or illness *based on a medical provider's assessment of the claimed condition.* This does not mean that, in the employee's own judgment, he or she should not work, or even that it was uncomfortable or inconvenient for the employee to have to work. Rather, it means that a healthcare provider has determined that, in his or her professional medical judgment, the employee cannot work (or could not have worked), because of the illness

8. Pregnancy

The FMLA recognizes pregnancy as a special case that is treated differently from other serious health conditions. For example, the FMLA's implementing regulations expressly provides that certain pregnancy-related conditions, "specifically including those by a pregnant employee unable to report to work because of severe morning sickness, qualify for FMLA leave 'even though the employee . . . does not receive treatment from a healthcare provider during the absence, and even if the absence does not last more than three days.' However, pregnancy-related problems must still be sufficiently serious to trigger the FMLA).

9. Healthcare Provider's Certification

When leave is taken for medical reasons, an employer may require a certification from the healthcare provider of the person requiring care, whether it be the employee or the employee's spouse, child, or parent.. Employers may request certification of the following: (1) that the employee or the family member has a serious health condition; (2) the date on which the serious health condition commenced; (3) the probable duration of the condition; (4) a statement that the eligible employee is needed to care for the spouse, child, or parent, and an estimate of the amount of time that the employee is needed to care for the spouse, child, or parent; or (5) a statement that the employee is unable to perform the functions of his position. Where a serious health condition is foreseeable, the employer must give the employee at least 15 calendar days in which to submit a certification. Regulations also require the employee be advised of the anticipated consequences for failing to meet the certification requirements. Failure to do so renders the consequences unenforceable.

For intermittent leave or leave on a reduced leave schedule, the certification also can require the following: (1) for planned medical treatment, the dates on which such treatment is expected to be given and the duration of such treatment; (2) for leave due to an employee's own serious health condition, a statement of the medical necessity for the intermittent leave or leave on a reduced leave schedule and the expected duration of the intermittent leave or reduced leave schedule; or (3) for leave due to a family member's serious health condition, a statement that the employee's intermittent leave or leave on a reduced leave schedule is necessary for the care of the child, parent, or spouse who has a serious health condition, or will assist in their recovery, and the expected duration and schedule of the intermittent leave or reduced leave schedule.

DOL has given "healthcare provider" a very broad definition. In addition to including a doctor of medicine who is authorized to practice medicine or surgery, the regulations define a *healthcare provider* to include podiatrists, dentists, clinical psychologists, optometrists, and chiropractors.

If an employer doubts the validity of the certification for leave due to a serious health condition, the employer may require a second opinion from a healthcare provider designated or approved by the employer. The employer may require subsequent recertifications during a leave on a reasonable basis.

Additionally, the FMLA provides that an employer may require an employee to submit a medical certification that the employee is able to return to work as a condition of reinstating an employee whose leave was occasioned by the employee's own serious health condition. The regulations provide that such a fitness-for-duty certification may be sought only with regard to the particular health condition that caused the employee's need for FMLA leave and may be required only if the employer has a uniformly applied policy or practice requiring all employees who take leave for such conditions to obtain a certification from a healthcare provider that the employee is able to resume work.

10. Leave Available

Eligible employees are entitled to up to a total of twelve workweeks of FMLA leave per twelve-month period. Leave due to the birth of a child or placement of a child with the employee for adoption or foster care must be *concluded* prior to the end of the twelve-month period after the birth or placement, unless state law requires, or the employer permits, leave to be taken for a longer period.

11. Measuring the Twelve-Month Period

The regulations provide employers a choice of methods for determining the twelve-month period in which employees may take up to twelve workweeks of leave. Employers may utilize: (1) the calendar year; (2) any fixed twelve-month leave year, such as a fiscal year or a year starting on an employee's anniversary day; (3) the twelve-month period measured forward from the date an employee first takes FMLA leave; or (4) a rolling twelve-month period measured backward from the date an employee uses any FMLA leave. Employers may implement any of the above methods, provided that the method chosen is applied consistently and the employees are provided with written notice. If an employer does not select any particular method, it must use the one most favorable to the employee requesting leave.

12. Intermittent Leave & Reduced Schedule

Intermittent leave is leave taken in separate blocks of time for a serious health condition that requires treatment periodically, rather than for one continuous period of time, and may include leave of an hour or more to several weeks. Intermittent leave includes leave taken on an occasional basis over a period of months to undergo chemotherapy treatments or for prenatal treatments or severe morning sickness. When planning medical treatment requiring intermittent leave, the FMLA and DOL regulations require the employee to consult with the employer. Additionally, the employee must make a reasonable effort to reschedule when an appointment may unduly disrupt the employer's operations, subject to the approval of the healthcare provider.

A *reduced leave schedule* is a leave schedule that reduces an employee's usual number of hours per workweek or per workday. For example, an employee recovering from a serious health condition may only work part-time because he or she is not yet strong enough to return to a full-time schedule.

Leave due to the serious health condition of an employee or family member may be taken intermittently or on a reduced schedule only when *medically necessary*. However, leave due to the birth or placement of a child with an employee may *not* be taken intermittently or on a reduced schedule unless the employee and the employer agree to such a schedule.

An employee who is eligible for intermittent leave need only establish his or her eligibility on the occasion of the first absence and not on the occasion of each subsequent absence. A series of absences, separated by days during which the employee is at work, but all of which are taken for the same medical reason, subject to the same notice, and taken during the same twelve-month period, comprises one period of intermittent leave.

13. Employer Notice Requirements

If an employer gives written guidance to employees concerning employee benefits or leave rights in an employee handbook, then the handbook must clearly incorporate information on FMLA rights and responsibilities and the employer's policies regarding the FMLA. If an employer does not have such written policies, the employer must provide written guidance to an employee concerning all of the employee's rights and obligations under the FMLA whenever an employee requests FMLA-qualifying leave.

Additionally, an employer has an obligation to provide notice to an employee detailing specific expectations and obligations of the employee and explaining any consequences of the failure to meet the obligations at the time an employee requests FMLA leave. The regulations state that such specific notices must include, as appropriate: (1) that the leave will be counted against the employee's annual FMLA leave entitlement; (2) any requirements for the employee to furnish medical certification (both prior to the leave and prior to reinstatement) and the consequences of failing to do so; (3) the employee's right to substitute paid leave and whether the employer will require the substitution of paid leave; (4) any requirement that the employee make premium payments to maintain health benefits and the arrangements for making such premium payments; (5) any requirement that the employee present a fitness-for-duty certificate to be restored to employment; (6) the employee's status as a key employee, and the possibility that restoration may be denied following FMLA leave, explaining the conditions of such denial; (7) the employee's right to restoration to the same or an equivalent job upon return from leave; and (8) the employee's potential liability for payment of health insurance premiums paid by the employer during the employee's FMLA leave, if the employee fails to return to work.

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Failure to properly notify an employee of his or her rights under the FMLA can amount to interference. However, where an employee enjoyed the full benefits conveyed by the FMLA, an employer will not be found to have interfered with that employee's rights by failing to provide proper information to the employee as to what his rights were under the FMLA.

An employer must also post a notice in a conspicuous location setting forth pertinent provisions of the FMLA and information about filing charges. An employer who violates the posting requirement may be assessed a penalty of not more than one hundred dollars for each separate offense.

14. Employee Notice & Request for Leave Requirements

An employee requesting leave need not expressly assert rights under the FMLA or even mention the FMLA in order to be eligible for such leave. An employee is only obligated to provide enough information for the employer to be able to determine that the employee's need for time off qualifies as FMLA leave.

15. Employee Obligated To Give Employer Some Notice That Leave May Be FMLA-Qualifying

While an employee requesting leave need not expressly assert rights under the FMLA or even mention the FMLA in order to be eligible for such leave, *some* notice is required. Although employees need not specifically invoke rights under the FMLA, it is the employee's obligation to give the employer sufficient notice that his leave request may be qualified under the FMLA.

16. Employer has a duty to designate leave as FMLA-qualifying

An employee giving notice of a need to take *unpaid* FMLA leave must explain the reasons for the leave so as to allow the employer to determine whether or not the leave qualifies under the FMLA. In any circumstance where the employer does not have sufficient information about the reasons for an employee's use of *paid* leave, the employer may inquire further of the employee or the employee's spokesperson to ascertain whether the paid leave is potentially FMLA-qualifying.

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Generally, where an employer has sufficient notice to determine that the employee's need for time off qualifies as FMLA leave, the employer has a duty to designate the leave as FMLA-qualifying, and to inform the employee of this designation.

17. When Foreseeable, Employee Obligated To Provide Adequate Notice To Employer Of Need For Leave

Where the necessity for leave is foreseeable, the employee is required to provide the employer with at least thirty days' notice. When leave is foreseeable, an employer has wide latitude to delay or deny medical leave without proper certification. If leave is required in less than thirty days due to a change in circumstances or a medical emergency, or if the need for leave was not foreseeable, the notice must be provided as soon as practicable. The FMLA does not prohibit an employer from requiring its employees to give notice to specific company supervisors on the day the employee is going to be absent in a non emergency situation.

Foreseeable FMLA leave may be taken in less than thirty days if there is a *change in circumstances.* If an employee fails to give thirty days' notice for foreseeable leave without a reasonable excuse for the delay, the employer may delay the taking of FMLA leave until at least thirty days after the date the employee provides notice of the need for the leave. However, if an employee's leave is to be delayed due to lack of required notice, it *must* be clear that the employee had actual notice of the FMLA notice requirements.

18. Designation of Leave & Notice to Employee

It is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying. The employer must give notice of the designation to the employee within *two business days* from the time the employee gives notice of the need for the leave, or, where the employer does not initially have sufficient information to make a determination, notice must be given within two business days from the time the employer determines that the leave qualifies as FMLA leave. Although oral notice is sufficient to comply with the two-business-day requirement, "it [must] be confirmed in *writing* no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be

no later than the subsequent payday). The written notice may be in any form, including a notation on the employee's pay stub."

19. Compensation during Leave

FMLA leave is unpaid. However, an eligible employee may elect, or an employer may require, the substitution of any accrued paid vacation leave, personal leave, or family leave (if the employer provides paid family leave) for any part of the twelve-workweek period of leave due to the birth or placement of a child or to care for the employee's child, spouse, or parent who has a serious health condition. The paid leave and the FMLA leave can be charged concurrently. An employer may not unilaterally substitute an employee's accrued paid vacation for any part of the employee's FMLA leave without giving the employee notice of this substitution. An employer may either permit the employee to use his FMLA leave and paid sick leave sequentially, or may require the employee to use his FMLA entitlement and his paid sick leave concurrently. However, an employer cannot avoid the FMLA's reinstatement requirements by providing employees paid sick leave benefits, instead of unpaid FMLA leave.

An employer also can force an employee to substitute accrued sick leave for any part of the twelve-workweek period if the employee is out due to his own serious health condition.

20. Reinstatement

The FMLA requires that an employer restore an employee to his or her same position or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. The regulations provide that an "equivalent position" must have the same pay, benefits, and working conditions, including privileges, perquisites, and status. It must involve the same or substantially similar duties and responsibilities which entail equivalent skills, effort, responsibility, and authority.

Where the employee is qualified to return to his or her original position, the employee must be reinstated to the same geographically approximate work site where the employee had previously been employed. Moreover, the employee is ordinarily entitled to return to the same shift or the same or equivalent work schedule.

An employer may lawfully deny reinstatement to certain highly compensated employees (key employees) if the following conditions are met: (1) the employer determines that denying restoration is necessary to prevent substantial and grievous economic injury to the operations of the employer; (2) the employer notifies the employee of its intent to deny restoration at the time the employer determines that substantial and grievous economic injury would occur; and (3) in any situation in which leave has commenced, the employee elects not to return to employment after receiving such notice. This exemption applies only to salaried employees who are among the highest paid ten percent of employees employed by the employer within seventy-five miles of the facility at which the employee works. Employees must be notified in writing of their status as key employees and the consequences with respect to reinstatement at the time the leave is requested.

21. Benefits

Perhaps the greatest impact of the FMLA relates to health benefits. During any period an eligible employee takes leave, the employer is required to maintain coverage under any group health plan for the duration of the leave at the level and under the conditions which coverage would have provided if the employee had not taken leave. The employer must continue to pay premiums as though the employee had continued working. For example, if an employer pays seventy-five percent of an active employee's group health insurance premiums, then the employer must continue to pay seventy-five percent of that premium during a family and medical leave up to a maximum of twelve workweeks per twelve-month period.

Additionally, if an employee chooses not to retain health coverage during FMLA leave, benefits must be resumed in the same manner and at the same level as provided when the leave began, without any qualifying period, physical examination, exclusion of preexisting conditions, and the like, immediately upon the employee's return to work.

A family and medical leave must not result in a loss of any employment benefit accrued prior to the date on which the leave commenced. However, employees are not entitled to the accrual of seniority or employment benefits during the period of FMLA leave or to any rights other than those rights, benefits, or positions of employment which they would have been entitled to had they not taken the leave.

If an employee desires to continue life insurance, disability insurance, accident insurance, or other types of benefits during family and medical leave, the employer is required to follow the same policies for continuing such benefits as are provided for other types of unpaid leave. If the employer has no policy with regard to continuation of benefits, the employer and employee may agree on an arrangement.

The employer may recover the premium the employer paid for any coverage for the employee if the employee fails to return from leave at the expiration of the leave for reasons other than the continuation, recurrence, or onset of a serious health condition, or other circumstances beyond the control of the employee. If the employee claims that he or she is unable to return to work because of the continuation, recurrence, or onset of a serious health condition, the employer may require a medical certification to that effect.

With respect to pensions and other retirement plans, any period of family and medical leave must be treated as continued service for purposes of vesting and eligibility to participate.

Employees on family or medical leave are entitled to any changes in benefit plans, except those which may be dependent upon seniority or accrual during any period of leave, immediately upon returning from leave, to the same extent as if no leave had been taken.

22. Non-Discrimination Obligations

Employers may not interfere with, restrain, or deny employees the right to exercise or attempt to exercise any rights provided by the FMLA. Employers may not discriminate against or discharge any individual for opposing any practice which is made unlawful by the FMLA. It is unlawful to discharge or otherwise discriminate against an individual for instituting proceedings, giving any information, or testifying with regard to any inquiry or proceeding related to any right provided by the FMLA.

The regulations provide examples of employer actions that would constitute interfering with an employee's rights under the FMLA. Such examples include refusing to authorize FMLA leave, discouraging an employee from using such leave, and transferring employees from one work site to another in order to keep

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work sites below the fifty-employee threshold for employee eligibility under the FMLA.

The above provisions and cases notwithstanding, employers still may take adverse employment actions, such as termination and discipline, against employees who take FMLA leave as long as the adverse action is unrelated to the leave and is based solely on legitimate, nondiscriminatory business factors.

23. Enforcement

Individuals may seek enforcement of the FMLA by filing a complaint with the DOL or by filing a private civil action in the appropriate court. The statute of limitations is two years, three years for willful violations.

Violators of the FMLA may be liable for damages equal to the amount of any wages, benefits, or other compensation denied or lost. Willful violations can be costly. A finding that an employer willfully violated the FMLA could double the damages.

The FMLA provides that courts "shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee . . . to be paid by the defendant."

24. Individual liability

Supervisors may also be subject to individual liability for FMLA violations. The regulations state that individuals such as corporate officers "acting in the interest of an employer" are individually liable for any violations of the requirements of the FMLA.

25. Recordkeeping

An employer must make and preserve records concerning compliance with the FMLA. For example, employers should preserve payroll records for at least three years from the last date of entry. The regulations require employers to keep the following records: (1) basic payroll and any identifying data including rate or basis of pay in terms of compensation, daily and weekly hours worked per pay period, and additions to or deductions from wages; (2) dates FMLA leave is taken by the employee; (3) if leave is taken in increments of less than one full day, the hours of leave; (4) copies of the employee notices of leave furnished to the employer under the FMLA and copies of notices given to employees by the

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employer; (5) documents describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leave; (6) premium payments of employee benefits; and (7) records of any dispute between the employer and employee regarding designation of leave as FMLA leave.

The regulations also provide that records and documents relating to medical certifications and recertification, or medical histories of employees or employees' family members, be maintained in separate files and be treated as confidential medical records.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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