Your Rights to Family and Medical Leave

A Worker's Guide to the Family and Medical Leave Act of 1993 and the 2008 Revised Department of Labor Regulations

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Note on citations and abbreviations

FMLA Law
The Family and Medical Leave Act of 1993 (29 USC 2601-2654) is cited throughout as "FMLA."
The 2008 National Defense Authorization Act, which amended the FMLA, is cited as "NDAA."

FMLA Regulations and Preambles
Department of Labor FMLA regulations, first issued in 1995 and revised in 2008, are cited as "825" (the section of the Code of Federal Regulations assigned to FMLA) followed by relevant section numbers (for example: "825.114"). The preambles published with both the 1995 FMLA regulations and the 2008 revisions also cast light on how the law is to be applied; they are cited as "Preamble 1995" or "Preamble 2008" followed by the relevant section of the regulations (for example: "Preamble 1995 @ .114.")

FMLA Opinion Letters
The Department of Labor regularly issues Opinion Letters answering specific inquiries on aspects of the regulations; these are cited as "Opinion Letter" and identified either by the dates issued or numbers assigned by the Department of Labor.

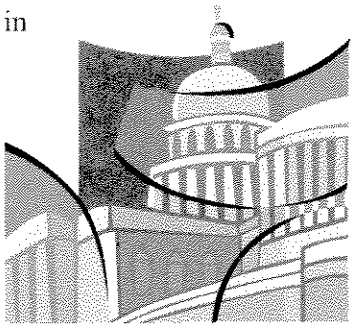
Court rulings on FMLA
Court cases are cited in the footnotes. For Iowa, only 8th Circuit Federal Court, Iowa Supreme Court, or U.S. Supreme Court decisions are precedent-setting in interpreting the law, but cases from outside the 8th Circuit are sometimes also noted to illustrate trends in case law from around the country.

Accessing the FMLA law and regulations:
Family & Medical Leave Act law and regulations: http://www.dol.gov/esa/whd/fmla/
Department of Labor FMLA Opinion Letters: http://www.dol.gov/esa/whd/opinion/fmla.htm

Request free copies of the FMLA law and regulations from:
Des Moines District Office, US Dept. of Labor ESA Wage & Hour Division
Federal Building, 210 Walnut Street, Room 643
Des Moines, IA 50309-2407
(515) 289-4625

Recommended book on FMLA for unions:
Robert M. Schwartz, *The FMLA Handbook: A Practical Guide to the Family and Medical Leave Act for Union Members and Stewards*, Fourth Edition (2008). $15 plus $4 shipping. Order from Work Rights Press, 678 Massachusetts Ave., Box 391887, Cambridge, MA 02139-0008 (www.workrightspress.com).

FMLA Legislation and the Legal Status of the FMLA Regulations



The 1993 Family and Medical Leave Act (FMLA), for the first time in U.S. history, provided eligible employees with the right to up to 12 weeks of unpaid leave annually for certain family care and personal medical reasons. Prior to the passage of this law, there was no federal statute protecting U.S. workers from discipline or job loss due to absences for serious medical or family medical problems.

The FMLA was amended for the first time in January, 2008, when the Military Expansion for Injured Servicemembers Act was signed into law as part of the 2008 National Defense Authorization Act (NDAA). The NDAA expanded FMLA by guaranteeing eligible employees up to 26 weeks of unpaid leave in any 12-month period to care for eligible injured servicemembers and allowing eligible family members of servicemembers to use their existing 12 weeks of FMLA leave to deal with "qualifying exigencies" arising from a family member's deployment.

In both the 1993 FMLA and 2008 amendments, Congress instructed the U.S. Department of Labor (DOL) to issue regulations to carry out the law: *"The Secretary of Labor shall prescribe such regulations as are necessary to carry out title I and this title . . ."*

These DOL regulations have the force of law, unless overturned by court decision. Such regulations are intended to "flesh out" the law and are given "controlling weight" by the courts as long as they are not "arbitrary, capricious, or manifestly contrary to the statute"—a standard known as the "Chevron test" (established by a 1984 Supreme Court case, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*). *Chevron* established that if a court finds the intent of a statute to be clear, then it must adhere to the statute and may overturn interpretations issued in regulations. However, if the court finds statutory language ambiguous and the legislative history does not clarify Congressional intent, then the court must defer to and uphold the regulations.

Legal challenges to FMLA regulations

The FMLA regulations first issued by the DOL in 1995 have undergone many legal challenges, some of which have eroded certain sections of the regulations. In the most well-known of these challenges, the Eighth Circuit Court of Appeals decided in the employer's favor in a case questioning employer duties to notify employees that paid leave has been "designated" as FMLA leave. The 1995 FMLA regulations stated that a period of paid leave could not be counted against an employee's 12-week leave allotment until the employer notifies the employee that it will be designated as FMLA leave. The court ruled that the DOL regulation allowing additional FMLA leave to an employee who had not been notified that her paid leave was designated as FMLA was too "expansive," and that "The DOL regulations create rights which the statute

clearly does not confer."[1] The Supreme Court ultimately agreed. This and other court decisions have in turn been reflected in the 2008 DOL revisions to the FMLA regulations.

2008 Department of Labor revisions to FMLA regulations

Starting in 1995, the Society for Human Resource Management (SHRM) and other management and business groups have pressured the DOL to modify the FMLA regulations.[2] In response to this pressure, in December, 2006, the DOL issued a request for public comments on the FMLA.[3]

During the 60-day comment period, the DOL received over 15,000 comments. In June, 2007, the DOL reported on the comments, but issued "*no proposals to change FMLA* regulations at this time."[4] Instead, the DOL reported "Commenters consistently stated that the FMLA is generally working well." The "overwhelming majority" of comments received addressed three topics:

1. gratitude from employees who have used family and medical leave
2. desire for expanded benefits (more leave, paid leave, leave for more family members)
3. employer frustration with staffing levels and attendance problems related to unscheduled intermittent leave for chronic health conditions.[5]

Less than a year later, however (February 11, 2008), the DOL proposed a number of changes to the FMLA regulations.[6] Following a required 60-day comment period, the DOL drafted final regulations, which were published November 17, 2008 and took effect January 16, 2009.[7] **These revised regulations supersede the original 1995 regulations and now have the force of law.**

While the 2008 DOL revisions did not go as far as many employer groups had hoped (e.g., they do not change the definition of a serious health condition), they did make several significant changes to the FMLA regulations. The complete set of changes has been incorporated into the discussion of the regulations throughout the rest of this booklet. Just a few of the significant changes included:

- requiring that visits to health care providers necessary to certify some serious health conditions must now occur within specific timelines.
- requiring that workers with chronic conditions see a health care provider at least twice each year to certify such conditions as FMLA-eligible.
- allowing employers to require workers to follow all "normal policies and procedures for taking paid leave" whenever they seek to use paid leave along with FMLA.

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[1] *Ragsdale v. Wolverine Worldwide Inc.*, 218 F.3d 933 (8th Cir. 2000). Note that this decision did not invalidate the regulations requiring the employer to notify employees when designating paid leave as FMLA leave, but it did make it impossible for the DOL to enforce this regulation by eliminating the penalty of allowing an employee more leave if the employer failed to notify them. Likewise, the 2008 FMLA regulations continue to require employers to notify employees when designating FMLA leaves, but allow no penalty for an employer's failure to notify *unless the employee can show specific harm.* This change is discussed more fully in the section below on designation of leave.

[2] SHRM Home 8/18/04 9:30 AM. "FMLA in need of an overhaul, business groups say"

[3] See Federal Register Vol. 71, No. 231, Friday, December 1, 2006.

[4] See Federal Register Vol. 72, No. 124, Thursday, June 28, 2007.

[5] "Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information," Federal Register Vol. 72, No. 124, Thursday, June 28, 2007, 35551.

[6] See Federal Register Vol. 73, No. 28, Monday, February 11, 2008.

[7] See Federal Register Vol.73, No. 222, Monday, November 17, 2008.

- allowing employers to deny attendance or production bonuses to workers who have been absent only for FMLA-qualifying reasons.
- extending employer deadlines for giving workers required FMLA notices and/or requesting FMLA certification.
- requiring workers to provide specific information when first giving notice of the need for FMLA leave.
- allowing employers to directly contact a worker's health care provider to "clarify or authenticate" a medical certificate, without the worker's permission.
- allowing employers to request fitness-for-duty certifications from workers using intermittent or reduced schedule leave.

Legislative efforts to strengthen or expand on FMLA

While court challenges and recent revisions have eroded some aspects of the FMLA regulations, efforts to improve public policies on sick and family leave have continued in the political arena. Many states have passed laws that exceed the leave provisions of the FMLA, for example by granting additional time off or guaranteeing some *paid* leave for medical and family care purposes.

On the federal level, legislators have introduced several bills seeking to expand leave rights. Many of these bills have been introduced multiple times and may be introduced again in upcoming sessions of Congress:

Family Leave Insurance Act: Would expand on the FMLA to provide paid leave for at least 8 of the 12 weeks of leave provided by the FMLA. The Act would create a new "Family Leave Insurance Fund" to finance benefit payments through small, shared employee/employer premiums.

Healthy Families Act: Would require certain employers, who employ 15 or more employees for each working day during 20 or more workweeks a year, to provide a minimum paid sick leave of: (1) seven days annually for those who work at least 30 hours per week; and (2) a prorated annual amount for those who work 20-30 hours a week, or 1,000-1,500 hours per year. The bill would allow employees to use such leave for their own medical needs or to care for certain family members.

Family Fairness Act: Would eliminate the FMLA's current "hours of service" requirement (which requires workers to have worked at least 1,250 hours during the previous 12 months to qualify for FMLA leave). The bill would extend FMLA rights to millions of part-time workers who are currently disqualified by this threshold.

Basic FMLA rights

12 work weeks of job-protected unpaid leave during any 12-month period for:

- any serious health condition that renders a worker unable to perform the essential functions of his or her job;
- birth and care of a newborn child or placement and care of an adopted or foster child;
- caring for a spouse, child, or parent who has a serious health condition;
- any "qualifying exigency" arising out of a covered spouse, child, or parent's deployment to active military duty.

26 work weeks of job-protected unpaid leave during a "single 12-month period" for:

- caring for a spouse, child, parent, or next of kin who is a covered military servicemember recovering from a serious illness or injury sustained in the line of duty.

The FMLA was passed in part to protect workers from being fired for absences caused by serious illnesses or seriously ill family members. An eligible worker's absence due to a medical condition that qualifies as "serious" under FMLA cannot be counted in an attendance plan as an unexcused absence.[8] [825.220(c)]

Who is covered by FMLA?

Available estimates suggest that only about half of all workers in the U.S. are covered by FMLA.[9] FMLA applies only to employees who:

- **work for a covered employer** (private employers with 50 or more employees and all public employers)
- are **eligible employees** (with at least 12 months of service and 1250 hours worked during prior 12 months)

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[8] Attendance policies which do not excuse FMLA-covered absences violate the law. *Bauer v. Varity Dayton-Walther Corp.*, 118 F.3d 1109 (6th Cir. 1997); *George v. Associated Stationers*, 932 F.Supp. 1012 (6th Cir. 1996).

[9] 2000 Westat employee survey.

■ Which Employers are Covered? [825.104 -.109]

Private employers
FMLA applies to any private employer "engaged in commerce or any activity affecting commerce who employs **50 or more employees** for each working day **during each of 20 or more calendar workweeks** in the current or preceding calendar year."[10] [FMLA, Sec. 101 (4)]

- Part-time employees and employees on leaves of absence are counted as "on the payroll" as long as they are on the payroll each day of the workweek. Employees on disability leave are counted if they have a "reasonable expectation of returning to work." Workers on temporary layoff and employees permanently disabled from work are not counted. [Preamble 1995 @ .105; 825.105(b) and (c)]
- In "joint employment" situations (e.g., where a business hires workers through a temp agency), *both* employers must count all employees in determining FMLA coverage. For example, an employer with 40 permanent workers along with 15 workers from a temp agency *is* covered by the FMLA. [825.106(d)]
- In "joint employment" situations, both employers have specific legal obligations. Primary employers (e.g., temp agencies) are responsible for furnishing eligible employees with all FMLA notices, providing leave, maintaining health benefits and restoring employees to employment upon return from leave.[11] Secondary or client employers have the responsibility to restore employees to employment and to refrain from discriminating against employees taking or wishing to take leave. [825.106; Preamble 1995 @ .106]

Public employers
FMLA applies to **all public agencies** including the US government, the US Postal Service, states and subdivisions of states such as counties and cities,[12] and all public elementary and secondary schools. [825.108-.109]

- Some **special rules apply to teachers** (instructional employees at elementary and secondary schools) affecting their rights to take leave near the end of an academic term, to take intermittent or reduced schedule leave, and to be restored to the same position when returning to work. If you are a teacher, consult with your union about these rules before taking leave.
- Most federal government employees (excluding employees of the postal service) are covered under Title II of the FMLA which is administered through separate regulations issued by the Office of Personnel Management (OPM) rather than the Department of Labor regulations discussed here.[13]

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[11] Note that unlike temp agencies, "Professional Employee Organizations" (PEOs) that provide payroll and administrative services but do not hire, fire, or assign workers are *not* considered employers for the purposes of FMLA [825.106(b)(2)].

[12] City governments are fully covered by the FMLA and can be sued for remedies, according to a 2002 8th Circuit Court of Appeals case, which also affirmed that claims can be brought against individual public sector supervisors for their liability for FMLA violations. *Darby v. Bratch et al.*, (8th Cir., April 11, 2002).

[13] See 5 CFR Part 630, Subpart L.

■ Which Workers Are Eligible for FMLA? [825.110-.111]

FMLA applies to workers who

- are employed by a covered employer (see above) [FMLA, Sec. 101 (2)]
- are employed at worksites where the employer employs **50 or more employees within a 75-mile radius.**[14] The worksite is the site the employee reports to or, if none, from which the employee's work is assigned. [825.111 (a)] The 75 miles is measured in surface miles of public roads (not a straight line).[15] [825.110 and .111(b)]
- have been employed for a total of at least **12 months**.[16] The 12 months of service do not have to be consecutive or continuous; however, employers do not have to count employment periods prior to a break in service of seven years or more (unless the break in service was due to a National Guard or Reserve military service obligation or a written agreement [e.g., a union contract] exists concerning the employer's intent to rehire the employee after the break in service).[17] [825.110(b)]
- have worked at least **1,250 hours**[18] **within the 12 month period prior** to the beginning of the leave.[19] "Hours worked" do include overtime hours worked, but not vacation, sick leave, FMLA leave, etc. (unless the union contract says otherwise).[20] For employees

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[14] In an Iowa case tried shortly after FMLA was implemented, Hotsy Corporation successfully challenged an employee's claim of eligibility based on this threshold. Because the company had only 11 employees at its Humboldt site and 21 at its Estherville site—its only plants within 75 miles of each other—the employee was ruled ineligible, although the company admitted it was a "covered" employer. *Muller v Hotsy Corp.*, N D Ia (8th Cir., 1996).

[15] See *Bellum v. PCE Constructors Inc.* (cert cen USSCt 2006) and *Hackworth v. Progressive Casualty Insurance Co.* (10th Cir. 2006).

[16] Time an employee is maintained on the payroll, even if on leave, counts toward the 12 months of employment. See *Rollins v Wilson County Government*, M D Tenn (6th Cir., 1997).

[17] 2008 DOL revisions to the FMLA regulations adopted the standard of a seven-year cap on breaks in service. A 1st Circuit court ruled that even a five-year break in service did not make an employee ineligible since he had 12 total months of service with the employer (during two separate tenures) and had worked over 1250 hours in a 7 ½-month period before becoming injured and requiring leave. *Rucker v. Lee Holding Co.* (1st Cir., 2006).

[18] In an 8th Circuit case, an employer who had already issued a letter granting an employee eligibility for leave could not later use time cards to argue that the employee was not eligible for leave under the "1250 hour" rule. *Duty v. Norton-Alcoa Proppants*, 293 F.3d 481 (8th Cir., 2002). On the other hand, in a 2001 case, the 8th Circuit invalidated a section of the original 1995 regulations at 825.110. That section had declared that "*If the employer fails to advise the employee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible. The employer may not, then, deny the leave.*" The court held that "the plain language of the statute defines an eligible employee as one who has worked at least 1,250 hours during the previous twelve months" and invalidated the older language "insofar as it purports to extend FMLA's eligibility provision to otherwise ineligible employee; where it was undisputed that at time of FMLA request employee had not worked 1,250 hours in prior twelve months...." (*Evanoff v. Minneapolis Public Schools*, 11 Fed. Appx. 670 (8th Cir. 2001). This regulation was then struck down by the Supreme Court's 2002 decision in *Ragsdale v. Wolverine*. 2008 DOL revisions to the regulations accordingly deleted this section.

[19] See *Harris v. Emergency Providers, Inc.* (8th Cir. Aug 28, 2002), confirming this for the 8th Circuit.

[20] The 10th Circuit Court of Appeals has ruled that on-call time does not count toward FMLA eligibility since it is not considered "compensable hours of work" under the Fair Labor Standards Act, especially where the employee is able to effectively use on-call time for his or her own personal purposes. The test is whether the on-call time is spent primarily for the employer's or the employee's benefit. *Knapp v. America West Airlines*, (10th Cir. 2006)

returning to work from National Guard or Reserve military obligations, employers must credit hours of work that would have been performed *but for* the active duty time. Hours spent away from work on a disciplinary layoff *may* count if the discipline was successfully grieved and the worker was "made whole."[21] [825.110(a) and (c)]

If an employee has not yet worked 12 months/1,250 hours at the beginning of a leave, but meets that threshold and **becomes eligible while on leave**, any portion of the leave taken after eligibility is met can qualify as FMLA leave. [825.110(d)]

Employees on **lay-off** are not eligible for leave until they return to work. [825.112(c)]

What is a "Serious Health Condition"?

The term "serious health condition" is one of the most important in the FMLA. It applies both to the condition of family members and to employees seeking leave for their own conditions.

The law [FMLA, Sec. 101 (11)] defines a serious health condition simply as an **"illness, injury, impairment, or physical or mental condition that involves--inpatient care in a hospital, hospice, or residential medical care facility; or continuing treatment by a health care provider."**

The Department of Labor regulations [825.113-.115] clarify this definition by **applying the criteria listed on the following pages.**[22]

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[21] Regulations do not address whether time spent on disciplinary layoff counts if the employee was later put back to work and "made whole," and two separate circuit courts have rendered conflicting decisions on this question. In *Plumley v. Southern Container, Inc.* (1st Cir. 2002) the courts held "that hours of service, as those words are used in the FMLA, include only those hours actually worked in the service and at the gain of the employer. It follows inexorably that compensation resulting from an arbitral award, in the nature of back pay for wrongful discharge, falls outside the statutory ambit." On the other hand, the 6th Circuit has held that "make-whole relief awarded to an unlawfully terminated employee may include credit towards the hours-of-service requirement contained in the FMLA's definition of 'eligible employee'" (*Ricco v. Potter*, 6th Cir., 2004). In *Pirant v. U.S. Postal Service* (542 F.3d 202, 7th Cir., 2008), however, an employee just two hours shy of the 1250 hour eligibility threshold was unsuccessful in trying to retroactively claim two additional hours that had been spent on a disciplinary suspension because he had not grieved the earlier suspension in a timely manner.

[22] The courts have consistently affirmed the Department of Labor's use of an objective set of criteria for defining "serious health condition" rather than trying to establish which health conditions do or don't qualify. One revealing case found that chicken pox was a serious health condition in a mother, but not in her daughters, given how each met, or failed to meet, these criteria. *Reich v. Midwest Plastic Engineering, Inc.*, 934 F.Supp. 266 (6th Cir. 1996).

■ A Serious Health Condition Is Any Physical or Mental Condition that Meets Any **ONE** of the Following Criteria:

1. Inpatient care [825.114]

Includes any overnight stay in a hospital, hospice or residential medical care facility, and any period of incapacity or subsequent treatment related to such a stay.

2. Continuing treatment by a health care provider [825.115]

Continuing treatment is defined as:

→ incapacity for more than three consecutive calendar days[23]
→ plus two or more in-person visits to a health care provider within 30 days of the first day of incapacity.[24]

-OR-

→ incapacity for more than three consecutive calendar days,
→ plus one in-person visit to a health care provider within seven days of the first day of incapacity,[25]
→ plus a "regimen of continuing treatment."

Timeline for visits
2008 revised DOL regulations require that the **first (or only) visit** to a health care provider must take place **within seven days** of the first day of incapacity. The **second visit** to a health care provider must take place **within thirty days** of the first day of incapacity, unless extenuating circumstances apply. Extenuating circumstances are defined as "circumstances beyond the employee's control that prevent the follow-up visit from occurring as planned." [825.115]

"Health care provider" means a licensed doctor, osteopath, podiatrist, dentist, clinical psychologist, optometrist, or chiropractor (limited to treatment consisting of manual

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[23] In the first case to be brought to court under FMLA, the court found that a child "was not absent from his day-care center for more than 3 days because of an incapacity." His mother kept him out four days, 2 days longer than the physician recommended, because the center would not accept children with running noses. *Seidle v. Provident Mutual Life Insurance Co.*, 871 F.Supp. 238 (3rd Cir. 1994).

[24] The DOL's original 1995 regulations did not specify a period of time during which the two visits to a health care provider must occur. In one early court case, three weeks was judged not too long an interval (*George v. Associated Stationers*, 932 F.Supp. 1012, 6th Cir. 1996). 2008 DOL revisions to FMLA regulations first initiated the requirement that the first visit must occur within seven days and the two visits must occur within 30 days.

[25] Note, however, that in a 2005 case (*Jones v. Denver Pub. Schs.*, 10th Cir., Nov. 2, 2005), one circuit court ruled that a serious health condition required 2 visits during the period of incapacity. This ruling is *not* binding on the 8th Circuit and this standard was not adopted in the DOL 2008 revisions to the regulations.

manipulation of the spine to correct a subluxation as demonstrated by X-ray);[26] a nurse practitioner, nurse-midwife, clinical social worker, or physician assistant performing within the scope of their practice as defined under State law; or a Christian Science practitioner; or any health care provider from whom the group health plan will accept claims for benefits. [825.125]

"Incapacity" means the inability to work, attend school, or perform other regular daily activities due to the health condition, treatment, or recovery. [825.113(b)]

"Regimen of continuing treatment" means a prescription medication such as an antibiotic or therapy requiring special equipment such as oxygen. It *does not* include taking over-the counter medications, bed rest, exercise, or drinking fluids. [825.113(c)]

3. Pregnancy or prenatal care [825.115(b) and 825.120]

Pregnancy is considered a serious health condition. FMLA leave may be used for routine prenatal care appointments as well as any period of pregnancy-related incapacity, including brief periods of incapacity that do not include a visit to a health care provider (brief absences for morning sickness, for example). [825.115(f)]

4. Chronic serious health conditions [825.115(c)]

A chronic condition is one which:
➔**requires periodic visits (at least twice a year)** to a health care provider
➔**and** continues over an **extended period of time**
➔**and** causes **episodic periods of incapacity** rather than a continuing period of incapacity.

Examples are asthma, diabetes, epilepsy. The ill person need not be absent over three days, nor is it necessary that s/he receive treatment or see a health care provider during an absence for bouts of incapacity. Examples would be an asthma sufferer whose doctor has ordered her to stay home when the pollen count exceeds a certain level, or to self-treat the condition without a doctor visit.[27] [825.115(f)]

5. Permanent or long-term conditions [825.115(d)]

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[26] *Olsen v Ohio Edison Co.*, N D Ohio (6th Circuit), 1997 affirmed this limitation on chiropractic treatment. See also *Sievers vs. Iowa Mutual Insurance Co.*, a 1998Iowa Supreme Court case affirming the requirements for FMLA leave for chiropractic treatment.

[27] The 3rd Circuit Court of Appeals ruled that an employee fired for missing one day of work owing to a flare up of a peptic ulcer was in fact protected by the standard for a chronic condition under the regulations. The employer had argued the ulcer was too minor to meet the definition. *Victorelli v. Shadyside Hospital*, 128 F.3d 184 (3rd Cir. 1997). But an Iowa district court judge ruled that absences owing to eczema flare-ups were not FMLA-protected because the employee was only once incapacitated for more than 24 hours, and never missed work more than 2 days, "thus she does not meet the requisite 3 day incapacity." Additionally, eczema was held to be much less "serious" than the diabetes and epilepsy contemplated by FMLA. *Beal v. Rubbermaid*, 972 F.Supp. 1216 (8th Cir. 1998). It is difficult to reconcile this opinion with the regulations at 825.114(a)(2)(iii) or with the *Victorelli* Circuit Court opinion.

These include incapacitating conditions for which treatment may not be effective. Continuing medical supervision is required, but need not consist of active treatment. Examples include Alzheimer's, a severe stroke or the terminal stages of a disease.

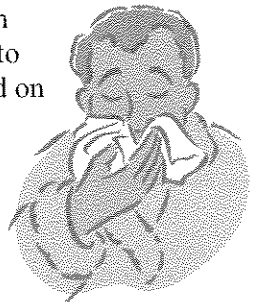
6. Multiple treatments from a health care provider for a condition which, if left untreated, would result in incapacity of more than three calendar days [825.115(e)]

This would include restorative surgery after an accident, or ongoing treatments for a serious health condition (e.g. physical therapy, prenatal care, chemotherapy, radiation, kidney dialysis.) While in treatment, you are considered to be incapacitated.

7. Examinations by a health care provider to determine whether a serious health condition exists. [825.113(c)]

Includes examinations to evaluate a serious health condition, but does not include routine physical examinations.

■ Examples of Serious Health Conditions: *DON'T Use This List!*



There is no definitive list of illnesses that do or do not count as serious health conditions under the FMLA. Instead, FMLA regulations require employers to accept a health care provider's assessment, using the regulatory criteria listed on the previous pages, of what constitutes a serious health condition. The Department of Labor has consistently refused to provide a "laundry list" of serious health conditions since such a list could "lead employers to recognize only conditions on the list or to second-guess whether a condition is equally 'serious' rather than apply the regulatory standard." [Preamble 1995 @ .114]

Lists and examples that are provided throughout the regulations have nonetheless caused much debate and confusion. But in cases involving conditions like flu, earaches, and headaches, courts have consistently looked to the regulatory criteria as the crucial standard rather than such very limited and subjective lists, affirming that the law is designed to have medical determinations made by health care providers rather than courts. And the DOL reiterated in its 2008 revisions that a list of "ordinarily" non-serious illnesses included in the regulations "does not categorically exclude the listed conditions" and "does not create its own definition separate and apart from the objective regulatory definition of serious health condition." [Preamble 2008 @ .113]

The conditions listed below thus represent examples provided in the FMLA regulations, but these lists are NOT intended to be used to determine what constitutes a serious health

condition.[28] Any of the conditions in a particular person may or may not be deemed "serious" depending on whether they meet one of the FMLA regulatory criteria listed on previous pages. The lists are included here only to provide general awareness of the examples presented in the regulations.

Likely to be serious health conditions (if regulatory criteria above are met):

- Heart attacks; heart bypass or valve operations
- Strokes
- Most cancers
- Kidney disease
- Back conditions requiring extensive therapy or surgical procedures; spinal injuries; other injuries[29]
- Severe respiratory conditions; emphysema; asthma; pneumonia
- Appendicitis
- Severe arthritis
- Need for prenatal care; pregnancy, morning sickness; childbirth and recovery from childbirth
- Treatments for allergies (if other conditions met)
- Mental illness resulting from stress or allergies (if other conditions met); Severe nervous disorders
- Treatment for substance abuse (if other conditions are met; note that incapacity caused by substance abuse itself is *not* covered) [825.119]
- Migraine headaches
- Restorative dental or plastic surgery after an injury

Unlikely to be serious health conditions (unless complications arise and the regulatory criteria above are met) [825.113(d)]

- Conditions for which cosmetic treatments are administered
- Routine physical, eye, dental exams
- Common cold
- Flu
- Ear aches
- Upset stomach
- Minor ulcers[30]

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[28] For example, the 7th Circuit Court of Appeals found that a combination of illnesses (high blood pressure, hyperthyroidism, back pain, headaches, sinusitis, infected cyst, sore throat, cough, depression) could be considered a "serious health condition," even though each of the conditions on their own might not be. *Price v City of Ft. Wayne* (7th Circuit, 1997). See also *McClain v Southwest Steel Co.* ND Okla, (10th Circuit, 1996).

[29] Carpal tunnel syndrome may well be an FMLA qualifying condition. In *Price v Marathon Cheese* (1997) the 5th Circuit acknowledged "that carpal tunnel, if sufficiently severe, can be a serious health condition" even though in this case the employee's physician failed to describe her condition in terms which would raise it to that level.

[30] But see an Iowa case, *Thorsen v. Gemini*, N D IA (8th Circuit, 1998), where acute gastritis and peptic ulcer was ruled to constitute a serious health condition since the employee met the tests in the regulations (was incapacitated more than 3 consecutive calendar days, saw a physician twice, received medication and was ordered not to return to work). The professional opinion of the health care provider that the employee could not work because of her illness

- Headaches other than migraine
- Routine orthodontic problems
- Incapacity caused by substance abuse (although *treatment* for substance abuse may be covered) [825.119]

REMEMBER: If complications arise, **any of the above conditions *may* reach the level of "serious health condition"!**[31]

For what reasons can workers use FMLA leave?

FMLA leave may be used for

- the birth and care of a newborn or placement of an adopted or foster child.
- a worker's own serious health condition.
- caring for a family member with a serious health condition.
- a "qualifying exigency" arising out of a family member's call to active military duty.
- caring for a military family member with a serious injury or illness incurred in the line of duty.

Note that the regulations covering the use of FMLA for both types of military family leave purposes are discussed in a separate section at the end of this book.

■ Using FMLA for Pregnancy, Birth and/or Care of a Newborn or Placement of an Adopted or Foster Child [825.120-121]

The right to leave for the birth or care of a newborn applies to **both the mother and father** (regardless of marital status).[32] [825.120(a)]

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was sufficient to prove incapacity. In this case, a DOL Opinion Letter of April 7, 1995 had created confusion on the question of what constitutes a serious health condition. That letter was overruled by the DOL in a later Opinion Letter (#86, December 12, 1996.)

[31] The health care provider's certification of incapacity has been the key factor in several court rulings on whether these conditions rose to the level of a serious health condition for particular employees. In a District Court case in Virginia (*Miller v AT&T*; DC SWVa 1999), the flu qualified for FMLA where an employee's physician provided a valid medical certification showing that she was incapacitated for at least three days, and treated her twice, even though the regulations provide that the flu does not "ordinarily" qualify as a "serious health condition." On the other hand, in *Nawrocki v. United Methodist Retirement Home* (6th Cir. 2006), an employee whose doctor did not state on medical certification that an earache left the employee unable to work did not have serious health condition. In *Mell v.Weyburn-Bartel* (W.D. Mich. 1997), an employee with flu who did not receive continuing medical treatment and whose doctor did not certify incapacity to work was not entitled to FMLA leave. In *Sicoli v. Nabisco Biscuit Co.*, (1998 U.S. Dist.; E.D. Pa. 1998), an employee who complained of migraines, but whose doctor certified that, although he "might get sudden headaches" he "was able to perform the functions of his position," was ruled not eligible for FMLA leave.

[32] In one of the largest awards to date under FMLA, a jury awarded $375,000 to Kevin Knussman, who wanted to stay home with his newborn, but was told he couldn't substitute paid parental leave for FMLA leave because, as a

Leave may be used by **biological parents:**

- by the mother **before arrival of the child**, for routine prenatal care visits, childbirth classes, the mother's incapacity due to morning sickness or other pregnancy-related illness.[33] [825.120(a)(4)]
- by the **spouse to care for a mother** who is incapacitated, needs care during prenatal care, or has a serious health condition following birth. [825.120(a)(5)]
- for **birth** of the child.
- after the child's birth, for **bonding with and caring for a healthy newborn** (the child need not be ill).

Note that **pregnancy and recovery from pregnancy constitute a serious health condition for the mother.** Therefore a mother might invoke her entitlement to FMLA leave for her own serious health condition and then later invoke a separate entitlement to leave to care for her healthy newborn. The regulations note that "many State pregnancy disability laws specify a period of disability either before or after the birth of a child; such periods would also be considered FMLA leave for a serious health condition of the mother, and would not be subject to the combined limit [of 12 weeks of newborn bonding leave for spouses who work for the same employer]." [825.120(3)] Iowa's pregnancy disability law, for example, provides up to eight weeks of unpaid leave for a mother in connection with pregnancy and childbirth.[34]

Leave may be used by **adoptive or foster parents**

- **before the placement** or adoption of a child to make required arrangements (e.g., attend counseling sessions, appear in court, consult with attorneys or doctors representing birth parent, or travel to complete adoption). [825.121(a)(1)]
- for **placement** of the child.
- after placement to **care for and bond with the child**.

Leave for **adoption or foster care** qualifies for FMLA only if some form of **legal or State action** is involved. Informal arrangements to care for children are not covered. For example, an employee who marries and wants to take FMLA leave to bond with new step-children is not covered unless the children are being formally adopted. [825.122(e),(f)]. A qualifying adoptive or foster child must be under 18 unless incapable of self care because of a physical or mental disability.

Some special rules apply to the use of **leave for bonding** with a newborn child or newly placed adopted or foster child:

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male, he couldn't qualify as a "primary caregiver" under the state leave policy. *Knussman v. St. of Maryland*, 16 F.Supp. 2d 601 (4th Cir. 1998).

[33] Incapacity from morning sickness does not require medical evidence from a health care provider, according to a ruling in *Pendarvis v. Xerox Corp*, 3 F.Supp. 2d 53 (10th Cir. 1998). But see *Gudenkauf v. Stauffer Comm's, Inc.*, 922 F.Supp. 465 (10th Cir. 1996), an earlier case, where the employee's physician failed to corroborate her claim that her pregnancy-related symptoms rendered her unable to work.

[34] See Code of Iowa Chapter 601A.

- Bonding leave is limited to **12 weeks per birth or placement**. Entitlement to bonding leave **expires 12 months after the date of the birth or placement.** [825.120(a)(2) / 825.121(a)(2)]

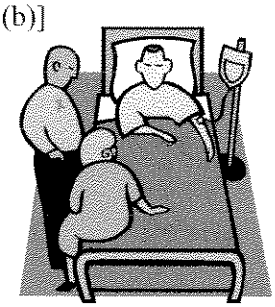
- **Leave for bonding with a new child may be limited to a single block.** An employee has an absolute right to take up to twelve weeks of bonding time in a single block; however after a single block is taken, additional periods of intermittent "bonding" leave or reduced schedule leave may be granted but only at the *employer's* discretion.[35] [825.120(b) / 825.121(b), 825.202(c)]

- **Spouses who work for the same employer may be limited to a combined total of 12 weeks** of leave for birth and care of a new child.[36] For example the husband and wife each may take 6 weeks for this purpose. Each parent would then still have 6 weeks available for other purposes, including the serious health condition of the mother or the child. [825.120(a)(3) / 825.121(a)(3)] Unmarried parents of a child are not subject to this limitation.

→**Check your contract!!** Union contracts may provide additional weeks of leave for birth, pregnancy, adoption, or foster care.

■ Using FMLA to Care for a Spouse, Child or Parent with a Serious Health Condition [FMLA, Sec. 102 (a) (1); 825.124]

"Care" encompasses both physical and psychological care. [825.124(a), (b)] Once established that a qualifying spouse, child, or parent has a serious health condition, eligible leave for family care may include:



- caring for the family member's **basic medical, hygienic, or nutritional needs** or safety,
- providing **transportation** to medical appointments,
- providing the family member with **psychological comfort and reassurance**,
- making arrangements for the family member's **change in care** (such as transfer to a nursing home).[37]

The worker **need not be the "primary care-giver"** or the only individual available to care for the family member. [825.124(b)]

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35 DOL Opinion Letter (OL7/23/02), opines that the length of such intermittent leave may be determined by the employer, when the leave is permitted.

36 This limitation applies only to spouses caring for a healthy child or taking leave for parental care. Spouses who work for the same employer may each take their full 12 weeks for a serious health condition either of them may have or for a serious health condition of a child.

37 A district court in the 8th Circuit has ruled that the FMLA "does not extend to obtaining child care." *Krohn v Forsting*, E D Missouri (8th Circuit), 1998.

Care for a spouse with a serious health condition
"Spouse" under the regulations is defined by applicable state law. It does not include unmarried domestic partners, but does include common law marriage where recognized by state law, as it is in Iowa. [825.122(a)] (In Iowa, common law marriage requires a preponderance of clear, consistent and convincing evidence of three elements: present intent and agreement to be married, continuous cohabitation, and general and substantial public declarations that parties are husband and wife.[38])

Care for a child with a serious health condition
"Child" is defined as a son or daughter **under the age of 18.** The child may be a biological, adopted, or foster child, a step-child, a legal ward, or the child of a person standing *in loco parentis* (in place of a parent) with responsibilities for day-to-day care and financial support.[39] Care for a **child 18 or over** is not covered *unless* the child is incapable of self-care because of a mental or physical disability as defined by the Americans with Disabilities Act (ADA). [40] "Incapable of self-care" means that the child needs assistance or supervision to help perform three or more of the "activities of daily living" such as grooming, hygiene, bathing, eating, dressing, or the "instrumental activities of daily living" (activities necessary to remain independent such as cooking, cleaning, shopping, using the telephone, going to the post office, etc.) [41] [825.122(c)(1)] This can include an adult child who is incapable of self care owing to the use of illegal drugs. [1995 Preamble @ .113].

Care for a parent with a serious health condition [825.201]
"Parent" means a biological parent or a person who acts (or acted) in the place of a biological parent (*in loco parentis*) with responsibilities for day-to-day care and financial support. The regulations do not include parents-in-law or grandparents.[42] [FMLA, Sec. 101 (7); 825.122(b),(c)(3)] **Spouses who work for the same employer are limited to a combined total**

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38 See *Iowa Annotated Code* 525.1 Note 72.

39 An 11th Circuit court has ruled that establishing an *in loco parentis* relationship requires demonstrating more than just having provided day care for short periods of time. Even though the worker in question provided substantial financial support (home, food, insurance, etc.) and played a significant role in caring for the baby in question (who was not his biological child) whenever the mother was not home, the court stated that without further evidence, it found it impossible to establish whether this constituted an *in loco parentis* relationship (*Martin v. Brevard County Schools*, U.S. App. LEXIS 20589, 11th Cir., 2008).

40 See Opinion Letter 2003-2 where DOL found that an adult sister qualified as her sister's "child" under FMLA where the sister acted as legal guardian (*in loco parentis*), since both of their parents were deceased.

41 In response to conflicting court decisions on the question of whether a child 18 or over must have a permanent disability in order to qualify, the 2008 DOL revisions to the regulations clarify that to be eligible, a child 18 or older must be incapable of self-care because of a mental or physical disability "at the time that FMLA leave is to commence." [825.122(c)] The DOL now states that "for example, if a 25-year-old son breaks a leg in a car accident and is expected to recover in a short period of time, he would not normally be incapable of self-care because of a physical or mental disability." [2008 Preamble @ .122] Some earlier court cases had suggested a broader definition of incapable of self-care that did not strictly follow the ADA definition; see for example, *Nararro v Pfizer Corp* (No.00-1856 (1st Cir. 2001)) where a daughter confined to bed rest in pregnancy was deemed an eligible "child" under FMLA. Here the court argued that "If a hard-and-fast durational requirement is enforced, an employee will be effectively prevented from taking family leave to care for an adult child until it can be established that the child's problem will have an adequate duration. By then, the crisis may well have passed."

42 Unless the grandparent stood *in loco parentis* to the employee. *Krohn v Forsting*, E D Missouri (8th Circuit), 1998.

of 12 weeks of leave for parental care. Siblings who work for the same employer, however, may each take their full 12 weeks for parental care. [825.201(b)]

Documentation of family relationships
Along with medical certification of a serious health condition, the employer may request "reasonable documentation" that verifies the legitimacy of an FMLA leave. This may be a simple written statement of the relationship of the employee to the family member in question. (This is designed particularly for cases of *in loco parentis*, where one is acting in the place of a parent.) [825.122(j); 1995 Preamble @ .112]

No bereavement leave
FMLA does not provide for bereavement leave. If a family member with a serious health condition for which an employee has taken FMLA leave dies, the right to leave expires.[43]

■Using FMLA for the Worker's Own Serious Health Condition

A worker who needs leave because of a serious health condition must be able to show that the condition has caused **incapacity,** meaning that the employee is unable to work at all or is **unable to perform any one or more of the essential functions of the job**.

It is **up to the health care provider** to determine whether the employee is incapacitated, and 2008 DOL revisions require that a sufficient medical certification **must specify what functions of the job the employee cannot perform.**[44] The employer may provide the health care provider with a statement of the essential functions of the job for review. [825.123(b)].

What are the essential functions of a job? The regulations adopt the definition of essential job functions from the Americans with Disabilities Act (ADA). The functions must be related to the position which the employee held at the time the need for the leave arose.[45] [FMLA Sec. 102

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[43] See *Beal v. Rubbermaid*, 972 F.Supp. 1216 (8th Cir. 1997).

[44] Several courts had already ruled that the health care provider's opinion is determinative in establishing whether the worker is "incapacitated" and that this opinion must be clear. Where physicians stated ambiguously that it would be "reasonable for someone to miss three or four days for her type of illness" (*Brannon v OshKosh B'Gosh*, M D Tenn (6th Cir., 1995), or testified that it was "not unreasonable" for an employee to stay home from work (*Hodgens v General Dynamics Corp*, D RI (1st Cir., 1997), courts did not find a clear case for a serious health condition. The 5th Circuit, for example, ruled in *Mauder v Metropolitan Transit Authority of Harris County*, 446 F3d 574 (5th Cir 2006) that an employee's need for frequent bathroom breaks (due to persistent diarrhea caused by diabetes medication) did not constitute an FMLA-protected incapacity because the condition did not disable the employee from physically going to work; therefore he was not protected from discipline related to the breaks.

[45] The fact that an employee claiming FMLA leave is able to work in another job does not invalidate a claim of incapacity. In *Stekloff v St. Johns Mercy* (July 2000) the 8th Circuit ruled that an employee with a mental condition was incapacitated for one job while able to work in another for the same employer. "...we hold that a demonstration that an employee is unable to work in his or her current job due to a serious health condition is enough to show that the employee is incapacitated... We think, in other words, contrary to the position of St. John's, that the concept of

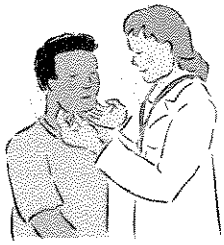
(A) (1) (d)] According to the ADA, essential functions are "fundamental job duties of the employment position. The term 'essential functions' does not include the marginal functions of the position."

A job function under the ADA may be considered essential for reasons including but not limited to the following:

- The function may be essential because the reason the position exists is to perform that function.
- The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or
- The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

Evidence of whether a particular function is essential includes, but is not limited to:

- The employer's judgment as to which functions are essential;
- Written job descriptions prepared before advertising or interviewing applicants for the job;
- The amount of time spent on the job performing the function;
- The consequences of not requiring the incumbent to perform the function;
- The terms of a collective bargaining agreement;
- The work experience of past incumbents in the job; and/or
- The current work experience of incumbents in similar jobs."



What if the worker can perform the job with accommodations or the employer changes the job or offers "light duty"? The employee is still eligible for leave, and cannot be forced to forego FMLA leave because he or she is able to perform the essential functions of a job with accommodation or assistive technology. The DOL has stated that "Reasonable accommodation is irrelevant for purposes of the FMLA." [1995 Preamble @ .115] Likewise, an employee who qualifies for FMLA leave may not be forced to return to work in a "light duty" position instead of continuing FMLA leave until the entitlement is exhausted. The employer is also prohibited from modifying the employee's job to eliminate essential job functions in an effort to deny an employee FMLA leave. [825.220]

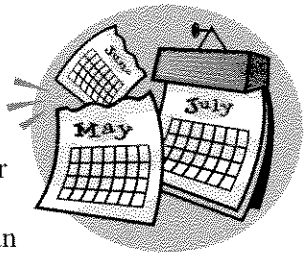
How much leave is available and in what increments can it be used?

■ Up to 12 Weeks of Unpaid Leave in Any 12-month Period [825.200]

Workers may use the available 12 weeks of FMLA leave either in a **single block or intermittently** in short segments (see below under intermittent and reduced schedule leave.)

'serious health condition' was meant to be 'broad,' and that the FMLA's provisions should be interpreted to effect its remedial purpose."

The 12 weeks of available leave are **calculated based on an employee's actual work week** at the time leave is taken. The employee's right is to 12 weeks (not 480 hours of leave, or 60 days of leave).[46] For employees whose schedule varies from week to week, a weekly average should be calculated based on the worker's scheduled hours over the **12 months** prior to the start of the leave. [825.205(b)(3)] For a given employee, total leave hours available over the twelve weeks may be either much less or more than 480 hours. [825.205(b)]



Employers have discretion in defining the (standard 12-month period) to use for calculating how much FMLA time an employee has used, but they must have a uniform employer policy. For example, an employer may adopt as its standard leave year:

- the calendar year (starting January 1)
- employees' anniversary dates
- a "rolling forward" year (12-month period measured forward from the first date of an individual employee's first use of FMLA leave)
- a "rolling backward" year (12-month period measured backward from the date of any given use of FMLA leave)

The employer's leave year policy can only be changed if at least 60 days notice is given to all employees. [825.200(d)(1)] If an employer fails to designate a leave year, employees will be allowed to calculate their leave entitlement under whichever method is most beneficial to them. Should the employer later decide to impose a leave year after all, it must comply with the 60 day notice requirement.[47] [825.200(e)]

Only days on which the employee would otherwise have worked and received pay can count against the 12-week leave entitlement (e.g., temporary **plant shut-downs** don't count against FMLA).[48] **Holidays** occurring during full weeks of FMLA leave are, however, counted as part of the FMLA leave (though they cannot be counted for workers taking only intermittent leave). [825.200(h)] **Unworked overtime** may not be deducted from the employee's 12-week FMLA entitlement unless the overtime was mandatory and "would have been required" as part of the employee's normal schedule. *Voluntary* overtime hours that an employee does not work due to

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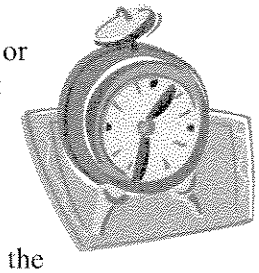
46 When calculating the amount of intermittent or reduced leave, if is best to think in terms of work weeks, not hours or days worked. In the case of an employee who, for example, works seven days and is then off seven days, and who takes one week of FMLA leave, only one week would be subtracted from his or her 12 week entitlement. Likewise, an employee who would otherwise work 30 hours per week, but works only 20 hours a week and uses 10 hours a week of FMLA reduced schedule leave has used one-third of a week of FMLA leave.

47 In *Dodaro v. Glendale Heights*, U.S. District Court for the Northern District of Illinois (N.D. Ill., No. 01 C 6396, March 28, 2003), found that an employer failed to properly elect the rolling 12-month period for determining its employees' FMLA leave entitlement based solely on the fact that the 12-month rolling period was not specifically referred to in its employee handbook. This finding was made despite the fact that the employer had posted a policy containing the rolling period as its designated period, distributed that policy to employees, and attached the policy to the handbook.

48 "An employee's FMLA leave entitlement may only be reduced for time which the employee would otherwise be required to report for duty, but for the taking of the leave. If the employee is not scheduled to report for work, the time period involved may not be counted as FMLA leave." [1995 Preamble @ .205]

an FMLA-related purpose may not be counted as FMLA leave.[49] [825.205(c), 2008 Preamble @.205)]

■ Intermittent or Reduced Schedule Leave [825.202-.205]



Intermittent leave refers to leave taken in separate blocks of time. For any qualifying reason (except leave to care for and bond with a healthy newborn or adopted or foster child), intermittent leave may be taken for periods **as short as one hour (or the smallest increment of time the employer uses to account for other types of leave) or for longer periods** of several days or weeks. [825.205(a)(1)] Only the amount of leave actually taken may be counted against the employee's leave entitlement. [825.205(b)] The employer may not force an employee to take leave in longer increments than the employee needs for the qualifying reason for the leave, except where it is "physically impossible" for the employee to leave or return to work mid-way through a shift.[50] [825.205(a)(2)]

A **reduced schedule** means a leave schedule that reduces an employee's usual number of hours per workweek, or hours per workday (i.e., temporarily changing from full-time to part-time work). The number of hours by which the schedule is reduced are counted as FMLA leave, so that FMLA leave is subtracted from the total 12-week entitlement in the same increments it is taken.

An employee may take intermittent or reduced schedule leave:

- for **treatment of his or her own serious health condition** or recovery from treatment
- due to **incapacity** or recovery from a serious health condition[51]
- to **care for a family member** whose serious health condition is intermittent, or where the employee is needed only intermittently for physical or psychological care and comfort.

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[49] Note also that employers may not discriminate in assigning mandatory overtime to employees who use FMLA leave and others. [2008 Preamble @ .205]

[50] The DOL added the exception for cases where it is "physically impossible" for an employee to work a partial shift to its 2008 regulatory revisions in response to employer requests. The DOL provides as examples of such possible exceptions, "a flight attendant or a railroad conductor scheduled to work aboard an airplane or train, or a laboratory employee unable to enter or leave a sealed 'clean room' during a certain period of time." Previously, a DOL Opinion Letter had stated that in such cases, only the hours used for FMLA leave could be counted against the employee's FMLA entitlement (Opinion Letter 42, 1994). The new regulations overrule this earlier opinion and allow employers to designate an entire unworked shift as FMLA in such cases, though the DOL states that it "intends the exception to be applied narrowly." [2008 Preamble @ .205]

[51] In 2001, the 8th Circuit addressed the issue of whether an employee, who is unable to perform the essential functions of a job, is entitled to intermittent or reduced schedule leave. The Court said no to an employee who wanted to "work harden" on a reduced schedule, gradually working up to full-time. The Court maintained that "the FMLA protects an employee who must leave work, or reduce his or her work schedule, for medical reasons, as long as that employee can perform the job while at work." The "medical reasons" the Court gave as examples involved treatment or medical supervision during the time off the job, not recuperation or rehabilitation at home. *Hatchett v Philander Smith College*, 251 F3d 670, 677 (8th Cir., 2001)

The **health care provider has the final say** on whether and when this type of leave is medically necessary. [825.202(b)]

Intermittent or reduced schedule leave is **not guaranteed to care for a healthy newborn, adopted, or foster child** but may be granted *with the employer's approval.* This means that once an employee has taken a single block of leave for this purpose, employers have the right to deny additional increments of bonding leave connected to the same birth or placement. (But note that an employer cannot deny intermittent or reduced schedule leave to a mother when recovering from childbirth, which is considered her own serious health condition). [825.202(c)]

An employee using intermittent or reduced schedule leave for the purposes of planned medical treatment **must make a "reasonable effort" to schedule the leave so as not to unduly disrupt the employer's operations.** [825.203]

The employer *may* temporarily assign an employee on intermittent or reduced schedule leave to an **alternative equivalent position** with different duties [825.204], but only if:

- the position has **equivalent pay**
- the employee retains the **full level of benefits** enjoyed before starting the FMLA leave (even though this may include benefits not ordinarily provided to part-time employees in the position).[52] [825.204(c)]
- the transfer is **not made in order to discourage the leave** (for example, transfer to a "graveyard" shift, or assigning an administrative employee to laborer's work).
- the transfer **does not pose a hardship** for the employee.

When the employee concludes intermittent or reduced schedule leave, s/he must be returned to the same or equivalent job s/he left when the leave began. [FMLA, Sec. 102 (b) (2); 825.204(e)]

When and how may other types of leave be used concurrently with FMLA leave?

■ Paid Leave May Be Used Along with Unpaid FMLA Leave [FMLA, Sec. 102 (d) (2); 825.207]

Accrued *paid* leave may be used concurrently with unpaid FMLA leave **at the option of either the employer or the employee**, depending on employer paid leave policies.

Employees may elect to use paid leave while on FMLA, but may be required to comply with normal employer leave policies in order to do so. Paid leave, including sick, annual/vacation, family or personal leave may be used along with FMLA leave, if the employee

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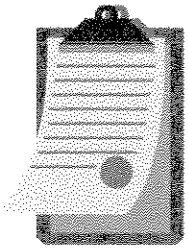
[52] The employer may however proportionately reduce benefits such as vacation leave if the normal practice is to base such benefits on the number of hours worked. [825.204(c)]

follows the **procedural requirements for taking that type of leave**, or if the employer agrees to allow the use.[53]



Examples of **procedural requirements and policies** that employees may be required to comply with when electing use paid leave with FMLA could include [2008 Preamble @ .207]:

- giving advance notice or adhering to a scheduling procedure if normally required for certain types of leave
- calling in or completing a leave request form if normally required for certain types of leave
- using leave in certain increments (e.g., a full day) if normally required for certain types of leave
- using leave only for the purpose(s) normally allowed for that type of leave (e.g., using paid sick leave only for one's own personal illness)

Employers may choose to waive any of these requirements or agree to allow the use of any type of accrued paid leave along with FMLA leave. [2008 Preamble @ .207] Employers may not discriminate against employees on FMLA leave in the administration of leave policies. [825.207(a)]

Employers may require employees to use accrued paid leave while on FMLA. In other words, employers may force workers to use up paid vacation or sick leave when on FMLA even against their wishes. [825.207]

→But check your contract! While FMLA allows employers to force the use of paid leave, the employer cannot force the use if such action violates language in a collective bargaining agreement (for example, language on employees' rights to schedule vacations). Forced uses of paid leave in violation of contract language can be grieved.

In cases where a worker chooses, or an employer requires, use of paid leave along with FMLA, the **employer must inform the worker that s/he must satisfy any procedural requirements of the employer's standard leave policy** for that type of paid leave. [825.207(a)] Such information may be included in or attached to the notice employers are required to issue to workers using FMLA leave, or the notice may include a reference to the information available in an employee handbook. [825.300(c)] The employer may also choose to waive any of these procedural requirements. [2008 Preamble @ .207]

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[53] This 2008 DOL revision is a significant change and allows employers to apply their normal leave policies whenever a worker used paid leave along with FMLA leave. Previously, employers were prohibited from imposing limits on the use of vacation or sick leave along with FMLA. Likewise, previously in cases where an employee used paid leave along with FMLA, the employee could only be required to meet the less stringent standards of the employer's normal leave policy (rather than any higher standards imposed under FMLA). This regulation was removed in the 2008 DOL revisions.

■ Employers May Designate Qualifying Leave as FMLA Leave

Only FMLA-qualifying leaves can be designated as FMLA. An employer may NOT count a leave as FMLA if it is taken for a reason that does not qualify under FMLA. For example, if an employee uses paid sick leave for an illness which is not a serious health condition, the leave does not count as FMLA. [825.207(c)] Note also that an employer decision to designate a leave as FMLA leave may be based on **information only from the employee or the employee's spokesperson**. [825.301(a)] Disputes over whether leave qualifies as FMLA leave "should be resolved through discussions between the employee and the employer and such discussions and decisions should be documented. [825.301(c)]

Use of compensatory time ("comp time") accrued by public employees *may* be designated as FMLA leave and counted against an employee's FMLA entitlement if it is used to take time off for an FMLA-qualifying reason. [825.207(f)][54]

Employers may **retroactively designate leave as FMLA** as long as the untimely designation does not cause "harm or injury" to the employee. [825.301(d)] Employers retroactively designating leave as FMLA must still follow standard notice requirements (see below under "Employer Notice Requirements," 825.300).

An employer's **failure to timely designate leave or give notice of the designation** may constitute interference with, restraint, or denial of an employee's rights **if it causes the employee to suffer harm**. Possible remedies for employer violations of the notice requirements include:

- compensation and benefits lost due to the violation
- actual monetary losses sustained as a result of the violation
- employment, reinstatement, promotion, or other relief appropriate to harm suffered.

Note that the 2008 DOL revisions bring the regulations in line with court decisions by limiting remedies for an employer's failure to timely designate leave as FMLA (or give notice of such a designation) to cases where an employee can show she or he suffered **"individualized harm."**[55] The regulations provide two contrasting examples to indicate what might constitute such "harm" [825.301(e)]:

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[54] This 2008 DOL revision to the regulations reverses earlier DOL policy, under which comp time could not be counted as FMLA leave (see 1995 regulations @ 825.207(i) and DOL Opinion Letters 34 and 85). The new regulation also runs counter to a 2000 Supreme Court decision, which concluded that compensatory time is a form of overtime pay rather than a form of accrued paid leave (*Christensen v. Harris County*).

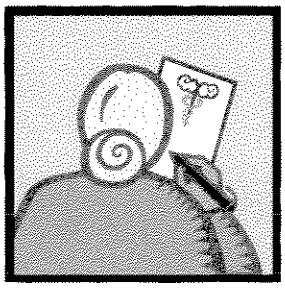
[55] Prior to the 2008 revisions, DOL regulations stated that if management failed to provide such notification, that the leave would not be considered to be FMLA leave. This regulation, however, had been undermined by a 2002 Supreme Court decision (*Ragsdale v. Wolverine World Wide, Inc.*, 122 S. Ct. 1155) which ruled that an employer who had failed to notify a worker of such a designation was not required to grant the employee additional leave. The 8th Circuit had also ruled on the issue, denying an employee additional time off when the employer failed to notify a firefighter that her earlier leave had already been counted as FMLA leave (*Harris v. Emergency Providers, Inc.*, 8th Cir., 2002). Accordingly, under the 2008 DOL revisions employers are still required to notify employers of such designations of paid leave as FMLA, but now require a worker to show "individualized harm" in order to pursue remedies for such a violation.

1. If an employer failed to designate a leave for an employee's own serious health condition (which would have prevented him or her from working during that time period regardless of whether the leave was designated as FMLA), the employee may not be able to show "harm" as a result of the employer's actions.

2. However, if an employee took leave to provide care for a son or daughter with a serious health condition believing the time off would not count toward his or her FMLA entitlement, and the employee planned to later use FMLA leave to provide care for a spouse who would need assistance when recovering from surgery planned for a later date, the employee may be able to show that harm has occurred as a result of the employer's failure to designate the first period of leave properly. The employee might establish this by showing that he or she would have arranged for an alternative caregiver for the seriously-ill son or daughter if the leave had been designated in a timely fashion.

Protection of benefits while on FMLA leave

■ Health Insurance Coverage [FMLA, Sec. 101 (5); 825.209-.213]



During a worker's FMLA leave, all benefits under the employer's group health plan must be maintained, including items such as dental care, eye care, mental health counseling, etc., if provided by the group plan. Any new health plan or changes in the plan must be made available to the employee as if he or she were not on leave. [825.209]

The **employer must continue to pay any employer share of health premiums**, and employees on leave must pay any premiums normally paid by employees. The employer may establish a method of payment under options outlined in the regulations. [825.210]

If an employee fails to pay his/her share of premiums, the employer must provide written notice that the payment has not been received 15 days before coverage will cease, and coverage must continue until the end of a 30-day grace period after the employee's payment was due. The employer may pay the employee's share during this period, but has a right to recover the payments. [825.212]

Even if health insurance coverage lapses during the FMLA leave because of non-payment by the employee, the **employee must be reinstated to full benefit coverage,** including dependent coverage, upon return to work. Neither the employee nor covered dependents shall be required to meet any qualification requirements. [825.209; 212] If a benefit is established or changed during the leave, the change applies to an employee on FMLA leave just as if the employee were still on the job. [825.209]

If the employee does not return to work at the end of an FMLA leave, or returns to work for less than 30 days, benefits cease at the point the employer is notified; and the **employer may**

then recover health benefit premiums paid during the leave *unless* the employee's failure to return to work is due to a serious health condition of the employee or the family member or for another reason beyond the employee's control. The employer may require medical certification to substantiate such a claim. [825.213]

■ Pension and Other Retirement Plans

Any period of FMLA leave will "not be treated as or counted toward a break in service for purposes of vesting and eligibility to participate." Unpaid FMLA leave need not be counted as continued service for pension benefits accrual, however. [825.215(d)(4)]

■ Paid Leave, Seniority, and Bonuses

Any benefits accrued prior to the leave (**paid vacation, sick or personal leave**) must be available to an employee upon return from work. [825.215] An employer may, however, require an employee to use accrued paid leave during FMLA leave; likewise an employee may choose to use such leave for FMLA leave if employer requirements are met (see above). [825.207]

Seniority does not accrue while an employee is on FMLA leave unless negotiated, but the employee must retain all seniority accrued before the leave when they return to work. [825.215(d)(2)]

Employers **may deny bonus payments** if such payments are based on achieving a specific goal (e.g., bonuses for **perfect attendance or production goals**) if the employee has not met the goal due to FMLA leave (unless the bonus is also paid to employees on an equivalent non-FMLA leave). [56] Other types of bonuses may not be denied. [825.215(c)(2)]

Employer duties of notice

The employer has fundamental primary duties to notify employees of their rights under the FMLA. Failure to notify employees of their rights may deprive the employer of the ability to delay or deny certain types of leave.

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[56] This 2008 DOL revision reverses earlier DOL policy. A 2005 8th Circuit Court decision had already upheld the employer's right to refuse an award of an annual leave "bonus" to an employee who used FMLA and substituted paid sick leave for the unpaid FMLA leave. In this case, an employer policy awarded police officers, who had at least 1000 hours of accrued sick leave used fewer than 40 hours of sick leave in a year, with 2 hours of additional annual leave for each pay period. An employee who met these standards except for having taken three weeks of FMLA leave (concurrently with paid sick leave) for a surgery was deemed by the court ineligible for the "bonus" annual leave since his paid sick leave use exceeded 40 hours. (*Chubb v.City of Omaha Nebraska*, 8th Cir., 2005).

■ Employers Must Notify Employees of FMLA Rights, Eligibility, and Designation of Leave as FMLA [825.300-301]

General notice

To fulfill **general notice** duties, employers must:

- **post a notice explaining FMLA** in conspicuous places where employees are employed (failure to post carries a $110 fine per offense). An employer that fails to post the notice cannot take any adverse action against an employee for failing to furnish advance notice of leave. [825.300(a)(1)]
- **include information concerning FMLA in any employee handbook.** If there is no handbook, employers must provide a written notice of FMLA rights to employees upon hiring. [825.300(a)(3)]
- provide FMLA information **in a language in which the workers are literate** (where a significant portion of workers read a language other than English). [825.300(a)(4)]

These general notices may be distributed on paper **or electronically**, if all employees have access to the information by these means. [2008 Preamble @ .300]

Employer communication duties

Once a worker gives notice of the need for a leave which may be FMLA-qualifying (see next section), the burden of determining whether the leave is FMLA-qualifying shifts to the employer.[57] The employer **should inquire further to find out whether the leave is FMLA covered.** [825.301(a)]

Employers are also **expected to responsively answer questions from employees concerning their rights and responsibilities** under FMLA. [825.300(c)(5)]

Eligibility notice

Employers must also **notify individual employees** of **eligibility** to use FMLA leave in response to a request to use FMLA (or to knowledge of an FMLA-qualifying absence). To fulfill these **eligibility notice** requirements, employers must:

- notify the employee of eligibility to take FMLA leave **within five business days** of the employee's request (or the FMLA-qualifying absence), absent extenuating circumstances [825.300(b)(1)]
- clearly indicate whether the employee is eligible for FMLA leave; or, if the employee is not eligible, indicate at least one reason why not [825.300(b)(2)]
- notify an employee of any **change in eligibility** status if a subsequent need for FMLA leave arises later in the same 12-month period (again **within five business days** of the request) [825.300(b)(3)]

This notification of eligibility **may be oral or in writing** and must be provided **in a language which the employee understands.** [825.300(b)(2)]

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[57] For example, in *Williams v. Shenango, Inc.*, W D Pa (3rd Cir., 1997), the fact that an employee informed his employer 3 months in advance that he would need leave during his wife's surgery placed the burden on the employer to seek more details.

Rights and responsibilities notice

Along with the eligibility notice (and also within five business days of an FMLA request or absence, absent extenuating circumstances), the employer must **provide individual written notices of rights and responsibilities** to employees using FMLA leave.[58] [825.300(c)] This written notice must detail specific expectations and obligations, including:

- that the leave may be designated and counted against the employee's FMLA entitlement
- the applicable 12-month period ("leave year") for the employee's FMLA entitlement
- any requirements for the employee to provide certification of the need for the leave and the consequences of failing to do so
- rights to use paid leave along with FMLA and the conditions (normal leave policies and procedures) the employer will require the employee to follow to use paid leave
- notice of whether the employer will require the use of paid leave along with FMLA
- any requirements for the employee to make health insurance premium payments, arrangements for making such payments, and the consequences for failing to make payments
- employee's right to maintain benefits during the leave and to return to the same or equivalent job following the leave

This written notice must be provided **in a language which the employee understands**. [825.300(c)(1)] The written notice may include other information and may be accompanied by any required certification form, but this is not required. [825.300(c)(2),(3)] If information provided in this notice **changes**, the employer must provide a new notice of the changes within five business days of a subsequent request for leave following any change. [825.300(c)(4)] The notice may be distributed **electronically**. [825.300(c)(6)]

Designation notice and notice of amount of leave used

Once the employer has enough information to determine that a leave is being taken for a FMLA-qualifying reason (e.g., after receiving certification), the employer must provide **individual written notice of whether or not a particular leave will be designated and counted as FMLA leave.** [825.300(d)] This notice must be provided **within five business days**, absent extenuating circumstances, and must include notice of:

- whether the employer will **require the use of paid leave** along with the FMLA leave
- whether an employee's **paid leave is being designated as FMLA** leave [825.300(d)(1)]
- whether the employer will require a **fitness-for-duty certification** when the employee returns to work (if such certification will be required and will address job functions, the notice must include a list of the essential functions of the employee's job). If this information is already included in an employee handbook, then the fitness-for-duty notice may be given orally [825.300(d)(3)]

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[58] In *Henderson v Whirlpool Corp.*, N D Okla (10th Cir., 1998), an employer argued that the reference to certification in its employee manual was sufficient and rendered unnecessary separate written notices each time certification was required. The court disagreed. Written notices must be given employees each time certification is required.

Only one such notice is required for each FMLA-qualifying reason in a given leave year. If information provided in this notice **changes**, the employer must provide a new notice of the changes within five business days of a subsequent request for leave following any change. [825.300(d)(5)]

When designating leave as FMLA, the employer must **keep employees informed of the amount of FMLA leave counted** against the employee's FMLA leave entitlement. [825.300(d)(6)] This notice can be provided:

- at the time of the leave, if the amount of FMLA leave needed is known
- if not known at the time of leave, then **at the employee's request** (but no more than **once every 30 days** and only if leave was taken during those 30 days)
- orally or in writing, but if oral it must be confirmed in writing no later than the next payday (unless payday less than a week away; then must be confirmed at subsequent payday). Written confirmation can be in any form, including a pay stub notation.

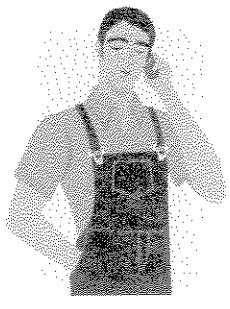
An employer's **failure to comply with the notice requirements** detailed above may constitute interference with, restraint, or denial of an employee's rights **if it causes the employee to suffer harm**. Possible remedies for employer violations of the notice requirements include:

- compensation and benefits lost due to the violation
- actual monetary losses sustained as a result of the violation
- employment, reinstatement, promotion, or other equitable relief appropriate to harm suffered. Though not specifically listed in the regulations, such "other relief" may include additional leave. [2008 Preamble @ .300]

Note that the 2008 DOL revisions bring the regulations in line with court decisions by limiting remedies for an employer's failure to timely designate leave as FMLA (or give notice of such a designation) to cases where an employee can show she or he suffered "individualized harm." (See discussion above in the section "Employers May Designate Leaves as FMLA Leave").

Worker notice requirements

■ Workers Must Give Notice of Intent to Take Leave



Employees must give notice of the need for leave. This notice:

- may be **verbal** [825.302(c)]
- must state **time and duration** of expected leave
- may be delivered by a family member or other personal representative if the leave was unforeseeable [825.303(a)][59]
- need only be given **one time**, whether for continuous or intermittent or

[59] Vague calls from family members to the employer have not stood up well in court, however. In *Gay v. Gilman Paper Co.*, 125 F.3d 1432, 1434-35 (11th Cir. 1997) a husband calling in to indicate his wife was in the hospital having tests run was not sufficient notice. In *Carter v. Ford Motor Co.* 121 F.3d 1146, 1148-49 (8th Cir. 1997) an employee's wife calling and indicating he would be out due to family problems was not sufficient notice.

reduced schedule leave, however, the employee must advise the employer as soon as practicable if dates or scheduling change. [825.302]

When **requesting leave for the first time**, an employee **need not mention FMLA** by name, but must provide **"sufficient" information** to make the employer aware of the need for FMLA-qualifying leave.[60] [825.302(c) / 825.303(b)] **Calling in "sick" without providing more information will not be considered sufficient notice.** [825.303(b)] **Sufficient information** may include indications that:

- a medical condition has rendered a family member or the worker incapacitated (e.g., unable to perform job functions)
- the worker or family member is pregnant
- the worker or family member has been hospitalized overnight
- the worker or family member is or will be under care of health care provider
- a covered military member is on or has been called to active duty
- a covered servicemember in the worker's family has a serious injury or illness

The types of information listed are intended as examples and may not be required in all situations. [2008 Preamble @ .302-.303]

After receiving notice, the employer:

- may make more detailed inquiries to determine if leave is FMLA qualifying
- may request medical certification. [825.305]

Employees are "obligated" to respond to employer questions designed to determine whether an absence is FMLA-qualifying, and failure to respond to "reasonable" questions may result in denial of FMLA leave. [825.302(c) / 825.303(b)]

When requesting **subsequent leaves** for the same qualifying reason, the worker **must specifically reference the reason for leave or the need for FMLA.** [825.302(c) / 825.303(b)]

For foreseeable leaves employees must give notice **at least 30 days in advance or as soon as practicable.** Examples of foreseeable leaves include "an expected birth, placement for adoption or foster care [or] planned medical treatment." In cases where leave was foreseeable but employee did not provide 30-day notice, the employer may require that the employee explain

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60 The revised 2008 DOL clarifications of what constitutes "sufficient information" may pose a higher standard for employee notice than the one most courts had assumed under prior regulations. Under earlier regulations, courts had consistently ruled that employees must at least ask for leave, though FMLA need not be mentioned, and that mentioning or exhibiting a medical problem was often enough to constitute sufficient notice. *Beal v Rubbermaid Commercial Products*, S D IA, (8th Cir. 1997). An employee with depression who left a voice mail on her supervisor's phone saying she needed time off for "depression again," provided sufficient notice when the employer already knew of her condition. *Spangler v. Federal Home Loan Bank of Des Moines*, 278 F.3d 847 (8th Cir. 2002). Even sleeping on the job (by an otherwise responsible, "model" employee), may be construed as adequate notice of the need for FMLA. See *Byrne v. Avon Products, Inc.*, 328 F.3d 379 (7th Cir. 2003). An employee with chronic heart problems who informed employer of a need for continuing medical care and possible surgery provided sufficient notice in *Sarnowski v. Air Brook Limousine, Inc.* F.3d, 2007 WL 4323259 (3rd Cir. 2007). An employee on FMLA leave to care for her husband and who asked for additional leave to "take care of things" after her husband died was deemed to have provided sufficient notice of a possible need for leave for her own emotional distress in *Murphy v. FedEx National LTL, Inc.* U.S. Dist. LEXIS 79147 (E.D. Mo., 2008). On the other hand, the 8th Circuit has ruled that an employee's request for leave due to "depression" did *not* constitute adequate notice. *Rask v. Fresenius Medical Care North American*, 06-3923, 2007 U.S. app. LEXIS 28198 (8th Cir. 2007).

reasons why such notice was not practicable. [825.302(a)] **As soon as practicable** means "as soon as both possible and practical." The regulations state that "it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day" but that "the determination of when an employee could practicably provide notice must take into account the individual facts and circumstances."[61] [825.302(b)]

For unforeseeable leaves employees must give notice **as soon as practicable** under the facts and circumstances of the particular case, generally "within the time prescribed by the employer's usual and customary notice requirements." [825.303(a)]

An employer may require compliance with **usual and customary notice and procedural requirements** (e.g., calling in to a certain person, providing written notice, etc., if the employer requires that for other types of leave) unless **unusual circumstances** (e.g., emergency treatment) apply. Failure to comply may result in the delay or denial of FMLA leave. [825.302(d) / 825.303(c)]

Any of the above notice requirements, or the employer's usual leave notice policies, may be waived by the employer. [825.304(e)]

If an employee fails to give notice according the above rules:

- **If the leave was foreseeable at least 30 days in advance** and the employee failed to give 30 days notice with no reasonable excuse for the delay, the employer may delay, *but not deny*, the FMLA leave for 30 days after the date the employee provides notice. However, the employer must have clearly provided notice to the employee that notice was required. [825.304(b)]
- **If the leave was foreseeable less than 30 days in advance** and the employee failed to give notice "as soon as practicable," the employer may delay the leave according to the length of advance notice the employee should have provided based on when s/he knew of the need for leave. [825.304(c)]
- **If the leave was not foreseeable** and the employee failed to give notice "as soon as practicable" or failed to follow usual notice requirements, the employer may delay FMLA coverage for the leave depending on "the facts of the case." For example, if the employee provided notice two days after the leave began (but could have provided it at the start of the leave) then the employer may delay FMLA coverage for two days. [825.304(d)]

If an employee fails to follow employer's usual and customary notification rules, absent unusual circumstances, the employer may issue discipline as long as such action does not "discriminate against employees taking FMLA leave." [825.304(e)]

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[61] 2008 DOL revisions altered the definition of "as soon as practicable," which was previously defined as "ordinarily . . . at least verbal notification to the employer within one or two business days of when the need for leave becomes known to the employee."

Medical certification and recertification

■ Medical Certification [825.305-308]

Once notified of an employee's intent to take FMLA leave, the employer may request certification of the condition(s) giving rise to the need for leave.

The employer must issue its initial request for certification **in writing at the time the employee gives notice of need for leave, or within 5 business days** thereafter. If they have not already done so, an employer may request an initial certification at any time during a leave IF they have reason to question the duration or need for the leave. After an initial certification has been provided, subsequent requests for certification may be verbal. [825.305(a, b)] [62]

Employees must provide certification **within 15 calendar days of the request (unless not practicable despite diligent, good faith efforts)**. [825.305(b)][63]

A certification may be considered **incomplete or insufficient** if

- one or more of the applicable entries have not been completed.
- information is "vague, ambiguous, or non-responsive."[64]

If the employer finds a certification incomplete or insufficient, the employer must **state in writing what additional information is necessary** and allow the employee **seven calendar days** (unless not practicable despite diligent, good faith efforts) to cure the deficiency. [825.305(c)]

If the worker **fails to produce the certification** in a timely manner or fails to cure deficiencies in a certification:

- leave may be denied until the certification is produced.[65]

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[62] Note that previously, where paid leave (sick leave, vacation, etc.) was used along with FMLA leave, only the usual (less stringent) certification requirements under a contract or employer policy could be required, unless more stringent than FMLA. 2008 DOL revisions eliminated this rule, making it possible for employers to request certification for any and all FMLA leaves regardless of the use of paid leave.

[63] The employee must make, and should be able to document, good faith efforts to obtain the certification form from the health care provider. A district court judge in the 8th Circuit noted that "in the real world it is not to be supposed that doctors will always answer in full compliance with the statute on the first inquiry." *Morris v VCW, Inc.*, W D Missouri (8th Circuit), 1996. The DOL likewise states that "it is imperative that employees communicate to their employers the efforts they are making to secure the completed medical certification" but that "employers should be mindful that employees must rely on the cooperation of their health care providers . . . and should not be penalized for delays over which they have no control." [2008 Preamble @ .305]

[64] In response to concerns about the broad nature of this definition, which was added as part of the 2008 DOL revisions, the DOL writes that it is "aware that precise responses [from the health care provider] are not always possible, particularly regarding the frequency and duration of incapacity due to chronic conditions" but that "over time [in subsequent certifications for a chronic condition] health care providers should be able to provide more detailed responses based on their knowledge of the . . . condition" and "based on the employee's actual experience." [2008 Preamble @ .305]

- failure to provide the certification may be grounds to deny leave.
- if the employee never produces a certification, the leave will not qualify as FMLA leave. [825.305(c, d) / 825.313]

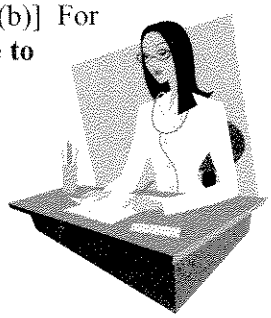
In cases where a condition extends beyond a single leave year, the employer may request a **new certification annually** (once per leave year).[66] [825.305(e)]

■ What Information Can Be Required on the Certification Form? [825.306]

Information on the certification is **to relate only to the serious health condition** in question, and the employer may not require personal or confidential information beyond what is listed below. The DOL provides two optional forms (revised in 2008) for obtaining medical certification:

- WH-380E for certifying an employee's own medical condition
- WH-380F for certifying a family member's medical condition

Employers may substitute their own forms, but if they do so, the forms must not require any medical information beyond what is requested on the DOL forms. [825.306(b)] For example, the employer **cannot *require* a diagnosis or require an employee to sign a blanket release of medical information**. [825.306(e)]



It is **up to the health care provider** to indicate on the certification form whether a condition rises to the level of a serious health condition. If a health care provider refuses to certify a condition as a "serious health condition" qualifying for FMLA, an employee may seek additional opinions from other health care providers.[67]

Required information on the FMLA certification form must be limited to: [825.306(a)]

1) name, address, phone, fax of health care provider and type of practice/specialization
2) date the condition started and the expected duration
3) if for employee's own condition, whether the employee is incapacitated (unable to perform one or more of the essential functions of the job) or needs to miss work for treatments

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65 Note that though the 2008 regulations now state that employers may "deny" rather than just "delay" granting FMLA leave when a certification is late, the DOL comments that "Employers always have the option of accepting an untimely certification and not denying FMLA protection to any absences that occurred during the period in which the certification was delayed." [2008 Preamble @ .313]

66 This 2008 DOL revision to the regulations codifies what had already been DOL policy as expressed in Opinion Letter 2005-2-A (Sept. 14, 2005).

67 An Iowa arbitration case subsequently appealed to U.S. district court affirmed the employee's right to take this action, finding that the FMLA does not prohibit employees from seeking additional opinions. An arbitrator had ruled that "While §2613(c)(1)[the law] clearly gives an employer the right to seek a second medical opinion, it contains no limitation or restriction on an employee obtaining a second medical opinion." The 8th Circuit upheld the arbitrator's decision, ruling that "The FMLA does not expressly prohibit an employee from tendering second opinions not requested by the employer. In fact, the FMLA is silent regarding an employee's ability to rely on such opinions." *Electrolux v. UAW Local 442*, 416 F.3d 848 (8th Cir., 2005).

4) if for care of a family member, whether family member needs care (e.g., requires physical care and assistance, transportation, or psychological comfort) and estimated time period(s) the employee will provide this care
5) if for intermittent or reduced schedule leave for planned medical treatments, medical necessity of the treatments and an estimate of dates and duration of treatments and/or recovery period(s)
6) if for intermittent or reduced schedule leave for chronic conditions or pregnancy, medical necessity for leave (e.g., patient's incapacity) and estimate of how long/how often incapacity is likely to occur
7) certification that the condition meets the definition of a "serious health condition" and **medical facts** which support this. Such facts **may** include:
   - information on symptoms
   - diagnosis
   - hospitalization
   - doctor visits
   - whether medication has been prescribed
   - any referrals for evaluation or treatment
   - any other regimen of continuing treatment

This list of possible medical facts was added to the regulations as part of the 2008 DOL revisions. Note that the items on this list are possible examples that are *not necessarily required* for inclusion on every certification. The inclusion of this list does not change the fact that certification information can be **limited to what is necessary to meet the criteria of a serious health condition** and that **"an employer *may not reject* a complete and sufficient certification because it lacks a diagnosis."** [68] [2008 Preamble @ .306]

Medical certifications or medical histories of workers and/or family members obtained by the employer for the purposes of FMLA must be maintained as **confidential records**, separate from personnel files. [825.500(g)]

If FMLA leave is used concurrently with **workers' compensation**, the employer may request any information allowed under the state's workers' compensation law. If FMLA leave is used concurrently with a **paid leave or disability leave plan** that requires greater information to qualify, the employer may seek such information. If an employee's condition may also be disability, the employer may seek medical information as allowed under the **Americans with Disabilities Act**. Any information received through these means may also be considered in determining an employee's eligibility for FMLA. [825.306(c, d)]

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[68] In response to concerns about the addition of this list of examples, and especially the reference to "diagnosis" (which had not previously appeared on the DOL certification form), the DOL further writes that the list should not be considered "mandatory" and that "it would not be appropriate to *require* a diagnosis as part of a complete and sufficient FMLA certification" (emphasis added). Whether the diagnosis is included is to be "left to the discretion of the health care provider." [2008 Preamble @ .306]

Note on Medical Privacy: FMLA, HIPAA, and Workers' Compensation

Privacy provisions of HIPAA (the Health Insurance Portability and Accountability Act)—which limit medical providers' release of patient information to third parties—have some implications for FMLA certification. Usually, an employee requesting FMLA leave will get the requested information from his or her provider and then return it to the employer. In such cases, a health care provider can disclose the patient's own personal health information to that patient without an authorization. HIPAA does not affect a patient's ability to provide this information to his or her employer (or any other outside party).

HIPAA may come into play if the employer desires to have direct contact with the employee's health care provider. **Under HIPAA, your health care provider should not give medical information directly to your employer without your permission.** Employees may consent to sign a waiver allowing the employer to receive medical information from the health care provider, but cannot be required to do so. [825.306(e)] To be valid under HIPAA, such a release must be a written document including the name of the health care provider, the information to be disclosed, to whom the disclosure may be made, the purpose of the request, and expiration date, and the patient's signature.[69]

The 2008 revised DOL FMLA regulations do provide that the employer's health care practitioner, human resources professional, leave administrator, or management official may contact the employee's health care provider to "authenticate" or "clarify" a certificate. This form of communication may only involve verifying that the health care provider signed the certificate, or reviewing the facts already included on the form, and **is *not* to include requests for additional medical information**. Divulging additional information would constitute a violation of HIPAA on the part of the health care provider. [825.307]

HIPAA may also apply when an employee seeks information from a family member's health care provider, and the patient will have to sign a HIPAA release form allowing her/his information to go to the family member and the employer. Note that the DOL's optional FMLA medical certification form does not include such a release, so a provider would need a separate HIPAA authorization before releasing information directly to any third party (whether the family member or the employer).

If an employee is on workers' compensation running concurrently with FMLA leave, then provisions of the state workers' compensation statute apply. Generally, an employer will be entitled to much more medical information regarding a workers' compensation injury than that which is allowed on the FMLA certification form.

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[69] See HIPAA, 45 CFR 164.508(c)(1).

■ Can the Employer Question the Certification or Ask for a Second Opinion? [825.307]

If the employer finds the certification incomplete or doubts the medical certificate, the employer may:

1) first give the employee "reasonable opportunity to cure any such deficiencies...." [825.305(c)]

2) **contact the employee's health care provider** to **clarify and authenticate** the certification form.[70]
   - **Authenticate** means to request verification that the information on the certification was completed and/or authorized by the health care provider who signed it.
   - **Clarify** means to understand the handwriting on the certification or to understand the meaning of a response.

   During such contact, the employer **may not request additional information from the health care provider,** and to comply with HIPAA any information discussed must be limited to what is already on the form (see box above). This contact may be made by **the employer's own health care practitioner (e.g., company nurse or doctor), human resources professional, leave administrator, or management official**, but not by the employee's direct supervisor. [825.307(a)]

3) request a **second opinion at the employer's expense** and from a health care provider of the employer's choosing. It may not be from a health care provider employed on a regular basis by the employer (a "company doctor"), unless the employer is located in a remote area with limited health care access. Employees must release medical information to the second opinion provider if requested to do so. [825.307(b)]

4) if the first and second opinion conflict, request a **third opinion at the employer's expense** from a health care provider jointly agreed upon by the employer and employee. The third opinion is final and binding. Employees must release medical information to the third opinion provider if requested to do so. [825.307(c)]

Copies of the second or third opinions must be provided to the employee upon request (within five business days), and employees must be reimbursed for reasonable out of pocket (e.g., travel) expenses incurred in seeking the second and third opinions. The employer may not require the employee or family member to travel outside normal commuting distance to obtain these opinions. [825.307(d, e)]

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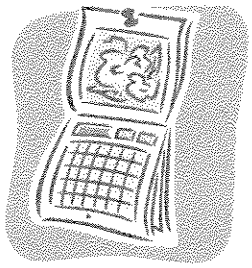
[70] Note that under 2008 DOL revised regulations, the employer is no longer required to obtain the employee's permission before initiating such contacts. Instead, the DOL's position is that HIPAA privacy rules apply to any contact between the employer and the health care provider and that these rules should prohibit the provider from sharing any additional medical information with the employer beyond what appears on the certification form. [2008 Preamble @ .307] See also the "Note on Medical Privacy" in the above box.

Employers must accept certifications signed by **foreign health care providers** in cases where an employee or family member is visiting or residing in another country. If a **certification is in a language other than English,** the employee must provide a written translation of the certification upon the employer's request. [825.307(f)]

■ How Often and When Can the Employer Require Additional Medical Certifications (Recertification)? [825.308]

For any condition with an extended duration of incapacity or intermittent incapacity (including pregnancy, **chronic or lifetime conditions**), the employer may request recertification no more than once **every six months** in connection with an absence. [825.308(b)]

If a certification lists a minimum duration of incapacity, the employer **may not request recertification during that minimum period.** For example, if the certification states a condition will render the employee unable to work (either continuously or intermittently) over the next 40 days, the employer must wait 40 days before requesting recertification. [825.308(b)]



In any case, employers may request recertification **no more often than every 30 days** and only in connection with an absence. [825.308(a)]

The employer may request recertification more often (e.g., in less than 30 days) only if:

- the employee requests an extension of the leave.
- circumstances of the illness have changed, or
- the employer has specific cause to question the legitimacy of the leave. [825.308(c)]

As part of a recertification request, the employer may provide the health care provider with a record of the employee's **absence pattern** and ask the provider if the pattern is consistent with the employee's condition.[71]

While requests for initial certifications must be written, the employer's request for recertification **may be verbal**. [825.305(b)]

Once requested, the worker must provide recertification within **15 calendar days** unless not practicable despite diligent, good faith efforts. [825.308(d)]

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[71] This 2008 DOL addition to the regulations codifies elements of an earlier Opinion Letter. In an Opinion Letter dated May 25, 2004, the DOL opined that the employer would be within its rights in sharing with the health care provider information about an employee's pattern of absence: "The FMLA does not prohibit an employer from including a record of an employee's absences along with the medical certification form for the health care provider's consideration in determining the employee's likely period of future absences. Nor does the FMLA prohibit an employer from asking, as part of the recertification process, whether the likely duration and frequency of the employee's incapacity due to the chronic condition is limited to Mondays and Fridays."

Recertification is **at the worker's expense** unless the employer provides otherwise. No second or third opinions on recertifications may be required. [825.308(f)]

Returning to work

■ Workers Must Be Restored to Their Original Positions or an Equivalent Position [825.214-216]

As long as a worker can perform the essential functions of his/her job when returning to work, **FMLA guarantees a return to the same or a virtually identical job.**[72] [825.214]

If the employee is not returned to her or his original job, the position must have pay, benefits and working conditions, including privileges, perquisites and status, which are "virtually identical" [825.215(a)] to the former position.[73] This includes:

- **same shift and worksite** unless that opportunity was eliminated for business reasons.
- opportunities to transfer to another shift or worksite that s/he would have had absent the leave.
- **same or substantially similar duties**, which must entail substantially equivalent skill, effort, responsibility, and authority. [825.215][74]

■ Workers Must Give Notice of Intent to Return to Work

Employers may require workers on leave to report periodically on their status and intent to return to work. [825.311(a)]

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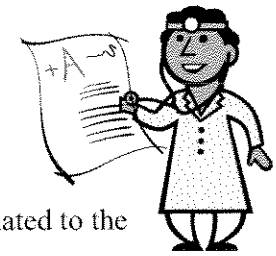
[72] If an employee cannot perform the essential functions, however, this guarantee no longer exists. In *Bloom v. Metro Heart Group of St. Louis, Inc.*, No. 05-2682 (8th Cir. March 16, 2006), a worker off for carpal tunnel could not perform extended gripping required of her job when she returned to work, and the court upheld her termination.

[73] An 8th Circuit Court of Appeals case considered what constitutes a "virtually identical" position in a case where an employee was reassigned, upon return from FMLA leave, to a desk job with the same salary, title and benefits as her previous job as a locomotive engineer. The court noted that "the restoration of salary, title, and benefits does not necessarily constitute restoration to the same position within the meaning of section 2614(a)(1)(A) when the job duties and essential functions of the newly assigned position are materially different from those of the employee's pre-leave position" (*Cooper v. Olin Corp*, 2001). In contrast, an earlier decision had suggested that "'Equivalent' under FMLA means 'that which is substantially equal or similar, not necessarily identical or exactly the same. The employer may take into account the employee's physical capabilities in determining the equivalent work and compensation involved" (*Watkins v. J & S Oil Co., Inc.*, 164 F.3d 55, 59, 1st Cir., 1998).

[74] In *Hunt v. Rapides Healthcare System*, 2001 WL 1650961 (5th Cir., 2001), the employer offered a returning employee the same job, but on a different shift, claiming that no full-time day shift position was available. It offered, instead, a full-time, night-shift job at the same pay and benefits. The plaintiff sued under the FMLA on the grounds that a night-shift job was not the equivalent of her day shift job. The 5th Circuit Appeals Court ruled in favor of the employee that the employer's offer of a night-shift position was not an offer of an equivalent position.

The worker must give **reasonable notice (2 business days)** of return to work if earlier than anticipated or if the worker needs to have leave extended beyond the originally planned date of return. A worker may not be required to take more FMLA leave than necessary. [825.311(c)] If a worker determines in the middle of a leave that s/he wishes to return to work earlier than planned, the employer is still obligated "to promptly restore the employee" to the original or an equivalent position after the two-day notice is given. [1995 Preamble @ .200]

■ Fitness-for-Duty Reports



Employers may require a worker on FMLA leave due to his or her own serious health condition to provide a fitness-for-duty report (from a health care provider) before returning to work.

Before requiring such reports, the employer:

- must limit a fitness-for-duty report to the serious health condition related to the FMLA leave. [825.312(b)]
- must have a **uniformly-applied policy** covering all similarly-situated employees [825.312(a)]
- must **give the worker notice** that a fitness-for-duty report will be required **along with the initial written notice designating the leave as FMLA leave**. [825.312(d)]
- must **include in this same notice a list of the essential functions** of the worker's job if the employer will require the fitness-for-duty report to specifically address abilities to perform essential functions of the job. [825.312(b)]

For workers using **intermittent or reduced schedule leave**, employers may request fitness-for-duty reports **up to once every 30 days** but only **if reasonable safety concerns exist**. Reasonable safety concerns means "a reasonable belief of significant risk of harm to the individual employee or others" which takes into account "the nature and severity of the potential harm and the likelihood that potential harm will occur."[75] [825.312(f)]

The **worker is responsible for the cost** of obtaining fitness-for-duty reports (including time and travel costs). [825.312(c)]

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[75] The 2008 DOL revisions created the ability for employers to request fitness-for-duty reports from employees using intermittent leave (previously this was not allowed) where "safety concerns" exist. In response to concerns about what constitutes legitimate safety concerns, the DOL stated that it "intends for this to be a high standard" and that employers "must rely on objective factual evidence, not subjective perceptions" when claiming safety concerns exist. The DOL goes on to provide the following examples: "In other words, the employer must have a reasonable belief, based on the objective information available, that there is a significant risk of harm. Both the employee's condition for which FMLA leave was taken and the employee's essential job functions are relevant to determine if there are reasonable safety concerns. For example, a delivery person whose essential job functions require him or her to lift articles over a certain weight and who suffers from a back condition that limits his or her ability to lift items above that weight may present reasonable safety concerns . . . An air traffic controller who takes intermittent leave to treat high blood pressure may present reasonable safety concerns . . . A roofer who experiences panic attacks may present reasonable safety concerns . . . In contrast, an office worker who has periodic seizures would likely not present reasonable safety concerns. Similarly, a cashier who suffers from migraines would likely not present reasonable safety concerns." [2008 Preamble @ .312]

The **employer may contact the health care provider** to **clarify or authenticate** the report.

- **Authenticate** means to request verification that the certification was completed and/or authorized by the health care provider who signed it.
- **Clarify** means to understand the handwriting on the certification or to understand the meaning of a response.

During such contact, the employer **may not request additional information from the health care provider,** and any information discussed must be limited to what is already on the form (see box above). This contact may be made by **the employer's own health care practitioner (e.g., company nurse or doctor), human resources professional, leave administrator, or management official**, but not by the employee's direct supervisor. [825.312 / 825.307(a)]

No second or third opinions can be required for fitness-for-duty reports. [825.312(b)]

Failure to provide a fitness-for-duty report allows the employer to delay restoration to work until the worker submits it. A worker who does not provide a report (if properly requested) may lose their rights to return to work once FMLA leave expires. [825.312(e) / 825.313(d)]] An employer, however, **may not terminate** a worker while awaiting a fitness-for-duty report following an intermittent or reduced schedule leave. [825.312(f)]

The FMLA fitness-for-duty exam **cannot be performed by the employer's health care provider** (company doctor), though *after* the employee returns to work the employer may have its own practitioner conduct an exam. If the employer does so, the exam must follow requirements under the **Americans with Disabilities Act** that any such exam **be job-related and consistent with business necessity** and be paid for by the employer. [825.312(g, h)]. Other relevant state laws and collective bargaining agreements governing returning to work may also apply.

■ What if the Worker is Not Deemed Fit for Duty?

If an employee cannot perform all the essential functions of the job to which he or she is returning, there is no FMLA right of restoration to another position. [76] [825.214] The employee then must turn to the **Americans with Disabilities Act.** If an employee is unable to perform the essential functions of the same job because of a disability, the Americans Disability Act may require the employer to make a reasonable accommodation for the employee.

"...just a slight accommodation and I can do it!"

[76] An 8th Circuit Court of Appeals case stressed that the employee must be able to perform the essential functions of the job s/he was performing for the current employer at the time leave began. *Duty v. Norton-Alcoa Proppants*, 293 F.3d 481 (8th Cir., 2002).

Worker protections and enforcement mechanisms

■ Employers Must Not Interfere with, Restrain, or Deny Workers' FMLA Rights [825.220]

Examples of prohibited employer actions include:[77]

- **refusing to authorize** FMLA leave
- **discouraging** an employee from using leave
- transferring employees among worksites to remain below the 50-employee covered employer threshold
- **changing the essential functions of the job** to preclude the taking of leave
- **reducing employee work hours** to prevent an employee from attaining the 1250 hours for eligibility
- **discriminating or retaliating** against employees for using or attempting to use FMLA[78]
- **counting** FMLA leave as an absence **under "no fault" attendance** policies or treating it differently from other forms of unpaid leave for absence purposes[79]
- using FMLA leave as a **negative factor in employment actions**, including hiring, promotions or discipline[80]
- inducing employees to waive rights under FMLA[81]

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[77] Individual supervisors are subject to individual liability for violations of the FMLA. Persons who have the ability to decide "in whole or in part" whether an employee will be allowed to claim FMLA leave can be personally liable; see *Bryant v. Delbar*, M D. Tenn (6th Cir., 1998). At least one case has confirmed that union leaders are *not* included in the FMLA's definition of "individuals acting in the interest of an employer" who are subject to liability for violations; see *Cole v. Beros and Jordan,* U.S. Dist. LEXIS 57669 (W.D. Pa., 2008).

[78] Earlier established court standards for what is needed to prove a prima facie case of retaliatory discharge under FMLA relied on the standards for discrimination under Civil Rights law. *Dodgens v Kent Mfg. Co.*, D SC (4th Circuit, 1997); *Oswalt v Sara Lee*, N D Miss (5th Circuit, 1995), *McCown v UOP Ind.*, N D Ill (7th Circuit, 1995). *Bryant v. Delbar*, M D. Tenn (6th Circuit, 1998) described the standard as: 1. the employee engaged in an activity protected by the FMLA, 2. the employee's exercise of rights under the FMLA was known to the employer, 3. the employer thereafter took an employment action adverse to the employee, and 4. there was a causal connection between the protected activity and the adverse employment action. Based on more recent court rulings, 2008 DOL revisions added language clarifying that "retaliation" constitutes a form of discrimination under the Act. See *Bryant v. Dollar General Corp.*, 538 F.3d 394 (6th Cir., 2008); *Colburn v. Parker Hannifin Corp.* 429 F.3d 325, 331 (1st Cir., 2005).

[79] In an Ohio case, the employer was prohibited from counting FMLA leave as additional time added to an attendance improvement plan (AIP) when work comp leave, court appearances, or bereavement leave were not counted. Extending the improvement plan meant that the employee was terminated for an absence which otherwise would have fallen outside the AIP period. The court found that Honda's policy discouraged workers from taking FMLA leave as well as constituted a negative factor in employment actions (*Schmauch v. Honda of America Manufacturing, Inc.*, 295 F. Supp. 2d 823 S.D. Ohio, 2003).

[80] An employee on FMLA may, however, be discharged for valid reasons unconnected to taking the leave. If for example, an employee on leave engages in conduct that would result in discharge of an employee not on FMLA leave, the discharge would not be illegal interference with FMLA rights (*Throneberry v. McGehee Desha Count Hospital,* 403 F.3d 972 8th Cir., 2005).

[81] 2008 DOL revisions state that this does not prohibit employees from settling past FMLA claims without DOL or court approval. Previously, courts had been split on this question. In *Taylor v. Progress Energy*, 493 F.3d 454 (4th

- inducing an employee against his or her will to work **"light duty"** rather than take FMLA leave (although this does not prevent an employee from working light duty if s/he prefers to do so; acceptance of the assignment must be "voluntary and uncoerced" and any time in such a light duty position does not count as FMLA leave)
- discharging or discriminating against any person for opposing or complaining about unlawful practices under the Act
- discharging or discriminating against anyone who has filed a charge or instituted a proceeding under the Act; who has given or is about to give information in connection with an inquiry; or who has testified or is about to testify in an inquiry

■ What if FMLA Rights are Violated? [825.400]

A worker who believes an employer has not fully complied with the law and FMLA regulations may:

- file a **grievance** under contractually negotiated grievance procedures.

- file a **private lawsuit** against the employer **within two years** after the last violation occurred (or within three years if the violation was willful).[82]

- file a **complaint with U.S. Department of Labor**. Note that the DOL may defer the complaint to arbitration if a collective bargaining agreement is in place. Complaints may be filed with the DOL in person, or by mail or telephone with any local office of the Wage and Hour Division. Complaints must be reduced to writing and should include a full statement of the employer's acts and/or failures to act, with all pertinent dates. The employee may have someone else, such as a family member or union representative, file the complaint. [825.400-.401]

The DOL Wage and Hour Division enforces the FMLA. In addition to receiving complaints, they can often provide information and assistance on FMLA questions. Iowa and Illinois offices:

Des Moines (District Office)	**515/284-4625**
Waterloo	319/233-2903
Council Bluffs	712/323-8614
Cedar Rapids	319/362-8074
Sioux City	712/252/2907
Davenport	319/324-2038

Cir., 2007), the court ruled that such claims could not be settled without DOL/court approval, while in *Faris v. Williams WPC-I Inc.*, 332 F.3d 316 (5th Cir., 2003), the court ruled that such settlements were not prohibited. Most unions and worker advocacy groups opposed this change on the grounds that it may make it easier for employers to escape liability for FMLA violations by convincing workers to settle FMLA claims or sign severance agreements in exchange for some immediate monetary compensation. [2008 Preamble @ .220]

[82] A recommendation from unions and women's groups that employees need injunctive relief from employer abuses (i.e., the ability to seek a court order requiring an employer to immediately cease violating the law) was turned down by the DOL as having no statutory basis. [1995 Preamble @ .400]

Springfield, IL (District Office).....217-492-4060

■ What Legal Remedies are Available? [825.400(c)]

If FMLA law has been violated, an employee may be entitled to recover one or more of the following:

- wages, employment benefits, and other compensation lost or denied (including double damages in some cases)
- employment, reinstatement, promotion, removal of disciplinary record
- reimbursement of legal costs
- any actual monetary loss sustained (such as the cost of providing child or parental care because a leave was denied) up to a sum equal to 12 weeks of the employee's wages, possibly including interest [825.400(c)].

Damages for emotional distress are not available under the FMLA.[83]

State employee rights to sue may be limited. The 8th Circuit initially ruled that state employers are protected by sovereign immunity and that therefore state employees could not sue under FMLA. More recently, however, the US Supreme Court ruled in 2003 that state employees could sue their employers under FMLA for violation of their rights *to care for family members* as part of a federal commitment to remedy gender discrimination. It remains unclear whether state employees can sue regarding leave taken for their own serious health conditions under FMLA.[84]

FMLA and Collective Bargaining Agreements

Family and medical leave provisions can be collectively bargained, and many union contracts improve on the law and regulations. The employer must follow **whichever provides greater benefits and protections**—the law, contract, or employer policy.

If the contract (or employer policy) is better than the law: "An employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA." [825.700(a)]

If the law is better than the contract or employer policy: "The rights established by the Act may not be diminished by any employment benefit program or plan." For example, if the

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[83] This was affirmed in an 8th Circuit case, where the court based its opinion on the Supreme Court's earlier ruling that FMLA damages were strictly defined and must be measured by actual monetary losses. *Rodgers v City of Des Moines*, 152 LC ¶35,092 (8th Cir., 2006).

[84] *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 123 S. Ct. 1972 (2003). Following this case, the 10th Circuit ruled that the Supreme Court decision, based as it is on gender equality issues, only refers to leave taken to care for family members, not an employee's own health condition. *Brockman v. Wyoming Department of Family Services*, 342 F.3d 1159 (10th Cir. 2003).

contract provides for reinstatement to a job with lesser pay or benefits (based on seniority), the law would supersede that provision for employees on FMLA leave. [825.700(a).]

FMLA and State and Federal Laws

Nothing in FMLA "supersedes any provision of any State or local law that provides greater family or medical leave rights than the rights under FMLA." The determination of which law applies—state or federal—"must be examined on a provision-by-provision basis. Where . . . the laws contain differing provisions, an analysis must be made of both laws, provision-by-provision, to determine which standard(s) will apply to the particular situation. **The standard providing the greater right or more generous benefit to the employee from each law ... will apply**." [1995 Preamble @ .701; FMLA, Sec. 401 (b); 825.701.]

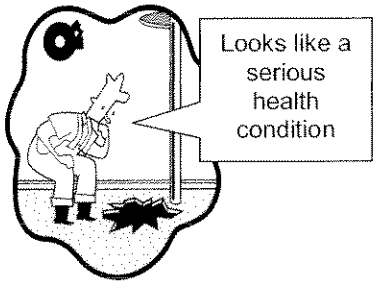
■ FMLA and Iowa's Pregnancy Disability Law

Iowa law provides disability leave for the mother in connection with the birth of a child. [Code of Iowa 601A.6(2)(e)] The Iowa law:

- **provides 8 weeks of unpaid leave** (less than FMLA)
- **covers employers with four or more employees** (better than FMLA)
- has **no eligibility requirements for employees** to meet (better than FMLA).

A mother who used 12 weeks of FMLA leave earlier in the year for a purpose other than giving birth or adopting a child would still be eligible for eight weeks of leave under state law. [1995 Preamble @ .701] However, if a mother still had at least 8 weeks of FMLA leave available at the time childbirth leave was taken, the employer could designate the state pregnancy leave as FMLA leave, and the worker would concurrently use up leave under both acts.

■ FMLA, Workers' Compensation, and Light Duty [825.702(d)(2)]



Absences for workers' compensation injuries that also meet the FMLA definition of a "serious health condition" **may be designated (by the employee or employer) as FMLA leave** and subtracted from an employee's 12 week entitlement." [825.207] The designation must be made at the beginning of the absence.

An employee on workers' compensation whose injury is also a serious health condition **may not be forced to give up FMLA leave to return to a "light duty" job**. [825.220] This would violate both the worker's right to take FMLA leave and to return to the same or an equivalent position. However, should the worker elect not to take the "light duty" job, the worker may then have to **forfeit workers' compensation benefits**. The worker could however choose to remain off work on unpaid FMLA leave until the 12 weeks are exhausted, and to concurrently use paid leave if available. [825.702(d)(2)]

FMLA for Military Family Leave

The National Defense Authorization Act for 2008 (NDAA) amended the FMLA and created two new leave rights for workers:

- to use up to **12 weeks of FMLA leave for any "qualifying exigency"** arising out of the active duty or call to active duty status of a spouse, child, or parent

- to use up to **26 weeks of FMLA leave to care for a military family member with a serious injury or illness** [FMLA 29 USC 2612(a)(1)(E)]

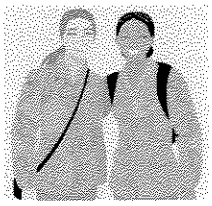
Weeks of leave available for these purposes are to be part of a **combined total** of leave taken for any FMLA-qualifying purpose In other words, a worker is entitled to use up to 12 or 26 weeks of FMLA leave for these purposes, but is *not* entitled to an *additional* 12 or 26 weeks of leave beyond the existing 12 weeks. [825.127(c)(3)]

Many rules for the use of these two types of military family leave are identical to the rules that apply to other types FMLA leave:

- the same employer coverage and worker **eligibility** rules apply (12 months/1,250 hours, etc.) [825.104-.111]
- similar employee and employer **notice** rules apply (except that a worker may give notice of the need for qualifying exigency leave "as soon as practicable," regardless of how far in advance it is foreseeable) [825.302(a)]
- the same rules on using **paid leave** concurrently with FMLA leave apply [825.207]
- the same rules apply to the employer's right to designate leave as FMLA [825.127(c)(4)]
- the leave may be taken in a single block or as **intermittent or reduced schedule** leave [825.202(b), (d)]
- the same definition of **care** applies (care may include physical care and/or psychological comfort) [825.124]
- the same rights to benefits and job protection apply
- the same enforcement procedures apply

Rules unique to using each of these types of military family leave are detailed below.

■ Leave for a "Qualifying Exigency" Related to a Family Member's Call to Active Duty



Employers must grant **up to 12 weeks** of this type of leave to a worker whose **spouse, child (of any age),**[85] **or parent** is a member of the **Reserves or National Guard** called to active duty. [825.122, 825.126(b)] A call to active duty is defined as participation in a contingency operation (where a unit may become involved in military actions against an enemy force, as designated by Secretary of Defense) or a call to duty under provisionof law during a war or national emergency declared by President or Congress [825.126(b)(3)] Note that family members of military members in the **Regular Armed Forces are *not* eligible** for this type of leave, and that the leave applies to federal calls to duty only (not state). [825.126(b)(2)]

Qualifying exigencies for which an eligible family member may take leave include: [825.126]

- any issue arising from a **short-notice deployment** (call to active duty with seven or less days of notice); for such issues an employee can take leave for seven calendar days beginning on the date of notification
- **military events and activities**, such as an official military-sponsored ceremony, program or event related to servicemember's call to duty, or family support or assistance programs/briefings sponsored by the military, military service organizations, or American Red Cross
- **child care and school activities** necessitated by a call to active duty, such as arranging alternative childcare or school arrangements; providing child care on an urgent, immediate need basis (not a routine, regular basis); attending meetings with school or daycare staff to discuss issues arising from the call to duty
- **financial and legal arrangements**, such as making or updating arrangements to address the servicemember's absence or acting as the servicemember's representative at government agencies to obtain military service benefits (both during and 90 days following the tour of duty)
- **counseling** necessitated by the call to active duty; includes counseling (provided by someone other than a health care provider) for oneself, the servicemember, or the child of the servicemember
- spending time with the servicemember on **rest and recuperation**, short-term, temporary leave during a deployment (up to **five days** per each "rest and recuperation" leave)
- **post-deployment activities**, such military-sponsored arrival or reintegration events (up to 90 days following the tour of duty)
- **funeral arrangements** and recovery of the body in the event of the servicemember's death
- **any other related events** that the worker and employer agree are qualifying exigencies.

---

[85] Note that for military family leave (unlike other types of FMLA leave), the definition of "child" includes children 18 and over.

Employers may request **certification** of an employee's need for leave due to a qualifying exigency when a qualifying exigency leave is first requested. [825.309]

The DOL provides an optional form (WH-384) for obtaining certification for qualifying exigency leave. Employers may substitute their own form, but if they do so, the form must not require any information beyond what is requested on the DOL form. [825.309(c)]
Information requested **must be limited to**:

1. A copy of the military member's **active duty orders** and the **dates of the active duty service.** Copies of the active duty orders need only be provided to the employer once, unless a future need for leave arises out of a different call to active duty. [825.309(a)]
2. **Certification** which may include [825.309(b)]:
    - signed **statement of the facts** regarding the need for leave and the **type of qualifying exigency** leave requested
    - any available **written documentation** which supports the need for leave (e.g., copy of meeting announcements, confirmation of appointments with school officials, bills for handling legal/financial affairs, etc.)
    - approximate **date** leave will start (and end, if the request is for a single block of leave); and estimated **frequency and duration** of leave (if the request is for intermittent or reduced schedule leave)
    - **contact information** for relevant third parties if the leave involves meetings with an individual or organization (such as name, title, organization, address, phone, fax, e-mail) and a brief **description of the meeting(s)**

The **employer may directly contact third parties** (without the employee's permission) **to verify** the need for leave requested for meetings or appointments or to verify that a military member is on active duty (by contacting the Department of Defense). When making such contacts, however, the employer **may not request additional information** beyond what is already included in the certification. [825.309(d)]

■ Leave to Care for a Military Family Member with a Serious Injury or Illness

Employers must grant eligible workers **up to 26 weeks during a "single 12-month period"** to care for a **spouse, child (of any age),[86] parent, or next of kin** who is a covered military **servicemember with a serious injury or illness**. [825.127]

"**Next of kin**" of a covered servicemember is defined as:

1) the blood **relative designated by the servicemember** in writing for

[86] Note that for military family leave (unlike other types of FMLA leave), the definition of "child" includes children 18 and over.

the purposes of FMLA caregiver leave

OR

2) the **nearest blood relative** (besides spouse, child or parent) in the following priority order: blood relatives granted legal custody, siblings, grandparents, aunts and uncles, first cousins.

If no relative has been designated and multiple family members (e.g., several siblings) have the same priority level of relationship, all are considered next of kin and may take FMLA leave either consecutively or simultaneously. [825.122(d) / 825.127(b)(3)]:

Covered servicemembers include members of the **Armed Forces, National Guard, or Reserves** undergoing medical treatment, recuperation, or therapy for a serious injury or illness incurred in the line of duty. The definition includes servicemembers on the temporary disability retired list, but not former (retired) servicemembers or those on the permanent disability retired list. [825.127(a)(1)]

A **serious injury or illness** is one **incurred in the line of duty** that renders the servicemember **unfit to perform the duties** of his or her office, grade, rank or rating. [825.127(a)(1)]

The **"single 12-month period"** for this type of leave begins on the first day of FMLA leave taken for this purpose, regardless of the employer's standard leave year. At the end of twelve months, there is no entitlement to additional leave to care for the servicemember due to this particular injury (but note that if the servicemember is an eligible family member with a serious health condition, regular FMLA leave may still be used if available during a new FMLA leave year). [825.127(c)(1)] Up to 26 weeks of this type of leave are **available on a per-covered-servicemember, per-injury basis**. In other words, a worker may use this type of leave more than once if it is to care for a different servicemember, or for the same servicemember with a new injury or illness. [825.127(c)(2)]

Spouses who work for the **same employer** may be limited to **combined total of 26 weeks** of this type of leave. [825.127(d)]

Employers may request **certification** of an employee's need for leave to care for a covered servicemember with a serious injury or illness.

An employee may fulfill the employer's request for certification either by:

1) submitting a copy of **"invitational travel orders" (ITOs) or "invitational travel authorizations" (ITAs)** issued to any family member to join the servicemember. ITOs/ ITAs constitute sufficient certification for the period of time specified in the ITO or ITA. The employee requesting leave **need not be named in the ITO/ITA** as long as the employee is an eligible family member of the servicemember. [825.309(e)]

OR

2) completing a **certification** according to the rules detailed below.

Any one of the following **health care providers** may complete a certification for military caregiver leave [825.309(a)]:

- A U.S. Department of Defense (DoD) health care provider
- A U.S. Department of Veterans Affairs (VA) health care provider
- A private health care provider authorized by DoD TRICARE

Information on the certification is **to relate only to the serious illness or injury** in question, and the employer may not require personal or confidential information beyond what is listed below. The DOL provides an optional form (WH-385) for obtaining medical certification. Employers may substitute their own form, but if they do so, the form must not require any medical information beyond what is requested on the DOL form. [825.309(d)] For example, the employer **cannot *require* a diagnosis or require an employee to sign a blanket release of medical information**. [825.306(e)]

Information requested on the certification form for military caregiver leave **must be limited to** [825.309 (b, c)]:

- contact information for the **health care provider**, type of practice/specialty, and whether provider is a DoD, VA, or DoD TRICARE authorized provider
- whether patient's injury or illness was **incurred in the line of duty**
- approximate **date** the condition started and likely **duration**
- statement of **medical facts** establishing whether the condition may render the patient medically unfit to perform their usual military duties and whether they are receiving treatment/therapy or recuperating
- if for intermittent or reduced schedule leave to assist patient with planned medical treatments, the **medical necessity of the treatments and estimated dates and duration** of treatments
- if for intermittent or reduced schedule leave to care for the patient, the **medical necessity for such care and estimated frequency and duration** of care
- name and address of employer and employee requesting leave and name of covered servicemember
- **relationship** of the employee to the servicemember
- whether the servicemember is a member of the Armed Forces, National Guard or Reserves, and his or her military branch, rank, and unit assignment
- whether the servicemember is 1) an outpatient assigned to a military medical facility or a unit established to care for Armed Forces members and name of facility, or 2) on the temporary disability retired list
- **description of the care** the family member will provide and an **estimate of how much leave is needed** to provide it

The employer **may contact the health care provider** to **authenticate or clarify** a certificate,

- **Authenticate** means to request verification that the information on the certification was completed and/or authorized by the health care provider who signed it.
- **Clarify** means to understand the handwriting on the certification or to understand the meaning of a response.

During such contact, the employer **may not request additional information from the health care provider,** and to comply with HIPAA any information discussed must be limited to what is already on the form (see box above). This contact may be made by **the employer's own health care practitioner (e.g., company nurse or doctor), human resources professional, leave administrator, or management official**, but not by the employee's direct supervisor. [825.309(d), 825.307(a)]

No second opinions and **no recertifications** may be required for this type of leave. [825.309(d)]

APPENDIX:
Tools and Forms

Initial questions for stewards to ask when helping members with FMLA problems:

1. **Is the employee eligible to take FMLA leave? Have they worked for the employer for a year? Worked 1250 hours in past 12 months? Do they have unused FMLA time remaining for the current leave year (how much)?**

2. **Did the employer inform the employee of all his or her FMLA rights and options?**

3. **Is the leave occasioned by a serious health condition? Does that condition meet the regulatory criteria (in 825.114)?**

4. **Is the leave for care of a family member? If so, is the family member a spouse, child, or parent? Does the family member have a serious health condition that meets the regulatory criteria?**

5. **Is the leave to care for a healthy newborn or to place an adoptive or foster child?**

6. **Did the employee give required notice?**

7. **Did the employer ask for a medical certification? Did the employee provide it in a timely fashion?**

Note to Health Care Providers on Completing the FMLA Certification Form

The Family and Medical Leave Act (FMLA), passed by Congress in 1993, provides unpaid, job-protected leave to eligible employees for certain specific family and medical reasons.

As a health care provider, you may be asked to complete a medical certificate that the employer of your patient or the relative of your patient requires as a condition of granting leave. **Based on your answers, employees may or may not qualify for FMLA leave.** Failure to complete this form fully and accurately may result in termination and loss of income for the affected employee, discipline for absences which would otherwise be excused, and/or loss of health insurance coverage. For example, the number of days of incapacity is critical information—if more than 3 consecutive calendar days, note it on the form; if a prescription medicine is prescribed, note it.

1. **If the employee is your patient (Questions 3, 5, 6 and 7), you should know:**
   - Employees have the right to take short leaves intermittently for incapacity, treatment, or recovery.
   - Employees have the right to move to a reduced or part-time work schedule for incapacity, treatment, or recovery.
   - An employee cannot be forced to return to a "light duty" job in lieu of taking FMLA.
   - "Essential functions" of a job are those actions or tasks that an employee must be able to do to perform his or her job (as opposed to marginal functions that are not really necessary to achieve the end results of a job)

2. **If the employee is the spouse, child or parent of your patient (Question 8), you should know:**
   - Employees (fathers as well as mothers) have the right to take leave for the birth of a child.
   - Employees have the right to take leave to care for a spouse, child or parent with a serious health condition (or to care for a military family member with a serious injury or illness incurred in the line of duty).
   - Employees have the right to take leave to assist the patient with basic medical or personal needs or safety, or to assist with transportation.
   - Employees may take leave to provide psychological comfort to the patient or to assist in the patient's recovery.
   - Employees may take leave to provide intermittent or part-time care for the patient.

Labor Center, The University of Iowa

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

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

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

SECTION I: For Completion by the EMPLOYER

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

Employer name and contact: _____

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

Employee's essential job functions: _____

_____

Check if job description is attached: _____

SECTION II: For Completion by the EMPLOYEE

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

Your name: _____
First Middle Last

SECTION III: For Completion by the HEALTH CARE PROVIDER

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

Provider's name and business address: _____

Type of practice / Medical specialty: _____

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

CONTINUED ON NEXT PAGE

PART A: MEDICAL FACTS

1. Approximate date condition commenced: _____

   Probable duration of condition: _____

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

   _____

   Date(s) you treated the patient for condition:

   _____

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

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

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

   _____

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

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

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

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

   _____

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

   _____

   _____

   _____

   _____

   _____

   _____

   _____

CONTINUED ON NEXT PAGE

PART B: AMOUNT OF LEAVE NEEDED

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

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

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

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

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

   _____

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

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

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

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

   _____

   _____

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

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

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

ADDITIONAL INFORMATION: IDENTIFY QUESTION NUMBER WITH YOUR ADDITIONAL ANSWER.

_____

_____

_____

_____

_____

_____

Signature of Health Care Provider **Date**

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

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

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

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

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

SECTION I: For Completion by the EMPLOYER

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

Employer name and contact: _____

_____

SECTION II: For Completion by the EMPLOYEE

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

Your name: _____
First Middle Last

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

Relationship of family member to you: _____

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

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

_____

_____

_____

_____ _____
Employee Signature Date

CONTINUED ON NEXT PAGE

SECTION III: For Completion by the HEALTH CARE PROVIDER

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

Provider's name and business address:_____

Type of practice / Medical specialty: _____

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

PART A: MEDICAL FACTS

1. Approximate date condition commenced: _____

   Probable duration of condition: _____

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

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

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

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

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

   _____

   _____

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

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

_____

_____

_____

_____

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

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

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

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

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

   _____

   _____

   _____

   _____

   _____

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

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

   _____

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

   _____

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

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

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

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

   _____

   _____

   _____

   _____

CONTINUED ON NEXT PAGE

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

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

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

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

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

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

_____

_____

_____

_____

ADDITIONAL INFORMATION: IDENTIFY QUESTION NUMBER WITH YOUR ADDITIONAL ANSWER

_____

_____

_____

_____

_____

_____

_____ _____

Signature of Health Care Provider **Date**

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

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

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

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

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

SECTION I: For Completion by the EMPLOYER

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

Employer name: _____

Contact Information: _____

SECTION II: For Completion by the EMPLOYEE

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

Your Name: _____
First Middle Last

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

_____
First Middle Last

Relationship of covered military member to you: _____

Period of covered military member's active duty: _____

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

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

CONTINUED ON NEXT PAGE

PART A: QUALIFYING REASON FOR LEAVE

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

_____

_____

_____

_____

_____

_____

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

PART B: AMOUNT OF LEAVE NEEDED

1. Approximate date exigency commenced: _____

   Probable duration of exigency: _____

2. Will you need to be absent from work for a single continuous period of time due to the qualifying exigency? ☐ No ☐ Yes.

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

   _____.

3. Will you need to be absent from work periodically to address this qualifying exigency? ☐ No ☐ Yes.

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

   _____

   _____

   _____

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

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

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

CONTINUED ON NEXT PAGE

PART C:

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

Name of Individual: _____ Title: _____

Organization: _____

Address: _____

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

Email: _____

Describe nature of meeting: _____

_____

_____

_____

_____

_____

_____

_____

_____

PART D:

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

_____ _____

Signature of Employee Date

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

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

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

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

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

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

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

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

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

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

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

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

Part A: EMPLOYEE INFORMATION

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

_____

Name of Employee Requesting Leave to Care for Covered Servicemember:

_____
First Middle Last

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

_____
First Middle Last

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

Part B: COVERED SERVICEMEMBER INFORMATION

(1) Is the Covered Servicemember a Current Member of the Regular Armed Forces, the National Guard or Reserves? ☐ Yes ☐ No

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

_____

Is the covered servicemember assigned to a military medical treatment facility as an outpatient or to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients (such as a medical hold or warrior transition unit)? ☐ Yes ☐ No If yes, please provide the name of the medical treatment facility or unit:

_____

(2) Is the Covered Servicemember on the Temporary Disability Retired List (TDRL)? ☐ Yes ☐ No

Part C: CARE TO BE PROVIDED TO THE COVERED SERVICEMEMBER

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

_____

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

Part A: HEALTH CARE PROVIDER INFORMATION

Health Care Provider's Name and Business Address:

_____

Type of Practice/Medical Specialty: _____

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

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

PART B: MEDICAL STATUS

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

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

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

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

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

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

(3) Approximate date condition commenced: _____

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

(5) Is the covered servicemember undergoing medical treatment, recuperation, or therapy? ☐ Yes ☐ No. If yes, please describe medical treatment, recuperation or therapy:

_____

CONTINUED ON NEXT PAGE

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

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

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

(3) Is there a medical necessity for the covered servicemember to have periodic care for these follow-up treatment appointments? ☐ Yes ☐ No

(4) Is there a medical necessity for the covered servicemember to have periodic care for other than scheduled follow-up treatment appointments (e.g., episodic flare-ups of medical condition)? ☐ Yes ☐ No If yes, please estimate the frequency and duration of the periodic care:

_____

_____

Signature of Health Care Provider: _____ **Date:** _____

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