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FAMILY AND MEDICAL LEAVE ACT

Overview

Summary:

The Family and Medical Leave Act of 1993 was signed into law by President Bill Clinton on February 5, 1993. Final regulations implementing the FMLA were issued by the Department of Labor on January 6, 1995, and effective April 6, 1995. A summary of the final regulations is provided following pertinent provisions of the law below.

Important Notice

The information provided herein is general in nature and designed to serve as a guide to understanding. These materials are not to be construed as the rendering of legal or management advice. If the reader has a specific need or problem, the services of a competent professional should be sought to address the particular situation.

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FAMILY AND MEDICAL LEAVE ACT OF 1993

I. Introduction

The Family and Medical Leave Act of 1993 was signed into law by President Clinton on February 5, 1993. For most employers covered by the law, *the law took effect on August 5, 1993, six months from the date of enactment.* There was a delayed effective date in situations where a collective bargaining agreement controlled the employment relationship.

The Family and Medical Leave Act (the "Act" or "FMLA") *requires* covered employers to provide eligible employees unpaid family or medical leave of up to 12 workweeks during any 12-month period. Final regulations implementing the FMLA were issued by the Department of Labor on January 6, 1995, and effective April 6, 1995. A summary of the final regulations is provided following pertinent provisions of the law below.

II. Coverage Under the FMLA

A. Employer

Any "person . . . 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." Includes:

1. Any person acting, directly or indirectly, in the interest of the employer [*Corporate officers and other managers are individually liable, 29 CFR §825.104(d)*].
2. Any successor in interest of the employer [§825.107]; and
3. Any "public agency."

REGULATIONS: For purposes of the Act, employers who meet the 50-employee threshold are deemed to be "engaged in commerce or in an industry or activity affecting commerce." 29 CFR §825.104(b).

Any employee whose name "appears on the employer's payroll," including part-time employees will be considered employed each working day of the calendar week, and must be counted whether or not any compensation is received for the week. However, the FMLA applies only to employees who are employed within any State of the United States, the District of Columbia or any Territory or possession of the United States. Employees who are employed outside these areas are not counted for purposes of determining employer coverage or employee eligibility. §825.105(b). Employees on paid or unpaid leave, including FMLA leave, leaves of absence, disciplinary suspension, etc., are counted as long as the

employer has a reasonable expectation that the employee will later return to active employment. Employees on layoff, whether temporary, indefinite or long-term, are not counted.

Integrated employer Where one corporation has an ownership interest in another corporation, it is a separate employer unless it meets the "joint employment" or "integrated employer" test. A determination of whether or not separate entities are a single integrated employer is based on a "totality" of the circumstances. §825.104(c). Factors considered in determining whether two or more entities are an integrated employer include:

- a. Common management;
- b. Interrelation between operations;
- c. Centralized control of labor relations; and
- d. Degree of common ownership/financial control.

Joint employment Where two or more businesses exercise some control over the work or working conditions of an employee, the businesses may be "joint employers" under FMLA. Factors which are considered in determining whether an employer-employee relationship exists include, but are not limited to:

- a. The nature and degree of control of the workers;
- b. The degree of supervision, direct or indirect, of the work;
- c. The power to determine pay rates or methods of payment of workers;
- d. The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; and
- e. Preparation of the payroll and payment of wages.

A determination of whether a joint employment relationship exists is based on a "totality" of the circumstances. A joint employment relationship often exists in temporary help or leasing agencies. Employees jointly employed by two employers must be counted by both employers, whether or not maintained on one of the employer's payroll, in determining employer coverage and employee eligibility. For example, an employer who jointly employs 15 workers from a leasing or temporary help agency and 40 permanent workers is covered by FMLA. In joint employment relationships, only the "primary" employer - the one with authority/responsibility to hire and fire, assign/place the employee, make the payroll, and provide employment benefits - is responsible for giving required

notices to its employees, providing leave and maintenance of health benefits. For employees of temporary help or leasing agencies, the placement agency most commonly would be the primary employer. § 825.106. Job restoration is the primary responsibility of the primary employer (e.g. the temporary agency). The secondary employer (even if it is not covered by FMLA) is responsible for accepting the employee returning from FMLA leave in place of the replacement employee if the secondary employer continues to utilize an employee from the temporary or leasing agency and the agency chooses to place the employee with the secondary employer.

Public agency A State or a political subdivision of a State constitutes a single public agency and, therefore, a single employer for purposes of determining employee eligibility. All public agencies are covered by FMLA regardless of number of employees. §825.108.

B. Eligible Employee

An "employee who has been employed for at least *12 months* by the employer with respect to whom leave is requested . . . *and* for at least *1,250 hours* of service with such employer during the previous 12-month period."

NOTE: Employees at a worksite with less than 50 employees within 75 miles of that site are excluded from eligibility.

REGULATIONS: 12 months The 12 months an employee must have been employed by the employer need not be consecutive months. If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation (e.g., workers' compensation, group health plan benefits, etc.) are provided by the employer, the week counts as a week of employment. The determinations of whether an employee has been employed by the employer for a total of at least 12 months and has worked for the employer for at least 1,250 hours in the past 12 months must be made as of the date leave commences. §825.110(d). If the employer does not advise the employee that the employee is eligible as soon as practicable (i.e., two business days absent extenuating circumstances) after the date employee eligibility is determined, the employee's notice of the need for leave is considered current and the employee is deemed eligible to take leave. The employer cannot, then, deny the leave. Alternatively, where the employee does not give notice of the need for leave more than two business days prior to commencing leave, the employee will be deemed eligible if the employer fails to advise the employee that the employee is not eligible within two business days of receiving the employee's notice.

Hours of service The minimum 1,250 hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA) for

determining compensable "hours of work" (see 29 CFR Part 785). This determination may not be limited by methods of recordkeeping, or by compensation agreements that do not accurately reflect all of the hours an employee has worked for or been in service to the employer. Exempt employees who have worked for the employer for at least 12 months are presumed to have worked at least 1,250 hours during the previous 12 months, unless the employer can clearly demonstrate otherwise. §825.110.

Worksite An employee's worksite under FMLA will ordinarily be the site the employee reports to or, if none, from which the employee's work is assigned. For employees with no fixed worksite, e.g., construction workers, transportation workers, salespersons, etc., the "worksite" is the site to which they are assigned as their home base, from which their work is assigned, or to which they report. §825.111. For jointly employed persons, the employee's worksite is the primary employer's office from which the employee is assigned or reports.

The 75-mile distance from the site is measured by surface miles, using surface transportation over public streets, roads, highways, and waterways, by the shortest route from the facility where the eligible employee requesting leave is employed. §825.111(b). Whether 50 employees are employed within 75 miles to ascertain an employee's eligibility for FMLA benefits is determined when the employee gives notice of the need for leave. §825.110(f).

C. Health Care Provider

A "doctor of medicine or osteopathy authorized to practice . . . by the State in which the doctor practices or any other person determined by the Secretary [of Labor] to be capable of providing health care services."

REGULATIONS: Others "capable of providing health care services" include only: Podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners and nurse midwives and clinical social workers authorized to practice in the State and performing within the scope of their practice as defined under State law; Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts; any health care provider from whom an employer or the employer's group health plan benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and a health care provider listed above who practices in a country other than the United States, is authorized to practice in accordance with the law of that country and who is performing within the scope of his or her practice. §825.118(b).

D. Parent

The "biological parent of an employee or person who stood in loco parentis to an employee when the employee was a [child.]"

REGULATIONS: "Parent" does not include "in laws." §825.113(b). A biological or legal relationship is not required to be in loco parentis. §825.113(c)(3).

E. Serious Health Condition

An "illness, injury, impairment, or physical or mental condition that involves

1. inpatient care in a hospital, hospice or residential medical facility; or
2. continuing treatment by a health care provider."

REGULATIONS: **Serious health condition** Further defined as an illness, injury, impairment, or physical or mental condition that involves:

- a. Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity (for purposes of this section, defined to mean inability to work, attend school or perform other regular daily activities due to serious health condition, treatment therefor, or recovery therefrom) in connection with such inpatient care; or
- b. Continuing treatment by a health care provider.
 - i. A period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to a serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, that also involves:
 - Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or
 - Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

A "REGIMEN OF CONTINUING TREATMENT" INCLUDES: a course of prescription medication (e.g., antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen).

A "REGIMEN OF CONTINUING TREATMENT" EXCLUDES: taking over-the-counter medications such as aspirin, antihistamines, or salves; or bed rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment. §825.114(b).

- ii. Any period of incapacity due to pregnancy, or for prenatal care.
- iii. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition, i.e., requires periodic visits for treatment by a health care provider, or nurse or physician's assistant under the supervision of the health care provider; continues over an extended period of time (including recurring episodes of a single underlying condition); and may cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

NOTE: Absences attributable to PREGNANCY or a CHRONIC serious health condition qualify for FMLA leave even though the employee or immediate family member does not receive treatment from a health care provider during the absence and even if the absence does not last more than three days, e.g., severe morning sickness, asthma attack! §825.114(e).

- iv. A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or terminal stages of a disease.
- v. Any period of absence to receive multiple treatments (including any recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis). §825.114(a)

TREATMENT INCLUDES: exams to determine if a serious health condition exists and evaluations of the condition.

TREATMENT EXCLUDES: routine physical examinations, eye examinations and dental examinations. §825.114(b)

SERIOUS HEALTH CONDITIONS INCLUDE: Restorative dental or plastic surgery after an accident or removal of cancerous growths provided all the other conditions of the regulation are met. "Mental illness resulting from stress" or allergies or substance abuse if all the other conditions of the regulation are met. §825.114(c), (d). FMLA leave may be taken only for treatment of substance abuse by a health care provider or provider of health care services on referral by a health care provider. Absences due to substance use do not qualify for FMLA leave. Treatment for substance abuse does not prevent an employer from taking employment action against an employee - not for taking FMLA leave for treatment - but for substance abuse in violation of "an established policy, applied in a nondiscriminatory manner that has been communicated to all employees." §825.112(g). An employer may not take action against an employee who is providing care for an immediate family member receiving treatment for substance abuse.

SERIOUS HEALTH CONDITIONS EXCLUDE: Cosmetic treatments (such as most treatments for acne or plastic surgery) are not serious health conditions unless inpatient hospital care is required or complications develop. Unless complications develop, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc. are not serious health conditions.

F. Son or Daughter

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

REGULATIONS: **Incapable of self-care** The individual requires active assistance or supervision to provide daily self-care in three or more of the "activities of daily living" (ADLs) or instrumental activities of daily living (IADLs). ADLs include activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. IADLs include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc. §825.113(c)(1).

G. Spouse

A "husband or wife, as the case may be."

REGULATIONS: Includes common law marriages in States where the employee resides and where common law marriage is recognized. §825.113(a).

For purposes of confirming "family relationship," the employer may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship, e.g., "simple statement from the employee, birth certificate, court document, etc." §825.113(d). Therefore, an employer may request verification of leave needed to care for a newborn.

III. Leave Entitlements

A. Types of Leave Situations

1. Birth of a son or daughter and in order to care for such child;
2. Placement of a son or daughter with the employee for adoption or foster care;
3. To care for a spouse, son, daughter or parent if they have a serious health condition; and
4. A serious health condition of the employee which makes the employee unable to perform the functions of the employee's position.

REGULATIONS: **Care-giving leave** Leave taken "to care for" a family member includes both physical and psychological care. §825.116(a). Care includes inpatient or home care. The term also includes situations where the employee may be needed to fill in for others who are caring for the family member, or to make arrangements for changes in care, such as transfer to a nursing home. An employee's intermittent leave or a reduced leave schedule necessary to care for a family member includes not only a situation where the family member's condition itself is intermittent, but also where the employee is only needed intermittently -- such as where other care is normally available, or care responsibilities are shared with another member of the family or a third party.

Employee's health condition An employee is "unable to perform the functions of the position" where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act (ADA). An employer has the option, in requiring certification from a health care provider, to provide a statement of the essential functions of the employee's

position for the provider to review. §825.115. Essential functions are determined with reference to the position the employee held at the time notice is given or leave commenced, whichever is earlier. An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be "unable to perform the essential functions of the position" during the absence for treatment.

B. Length of Leave

1. An eligible employee is entitled to 12 workweeks leave during any 12-month period.

NOTE: For birth and adoption cases, the employee's entitlement to leave expires at the end of 12 months following the event, unless state law allows or the employer permits leave for a longer period. §825.201.

REGULATIONS: Workweek The Act and its regulations do not define workweek. The legislative history contemplates that the Fair Labor Standards Act ("FLSA") is to provide interpretive guidance. Applying the FLSA, it would appear that "workweek" is intended to be 40 hours of work per week. In the case of eligible part-time employees, the amount of leave to which an employee is entitled is determined on a pro rata or proportional basis by comparing the new schedule with the employee's normal schedule. For example, if an employee who normally works 30 hours per week works only 20 hours a week under a reduced leave schedule, the employee's ten hours of leave would constitute one-third of a week of FMLA leave for each week the employee works the reduced leave schedule. §825.205. The fact that a holiday (rather than a temporary closing) may occur within the week taken as FMLA leave has no effect, i.e., the day counts against the employee's leave entitlement. §825.200(f).

12-Month Period An employer is permitted to choose any one of the following methods for determining the 12-month period in which the 12 weeks of leave entitlement occurs:

- a. The calendar year;
- b. Any fixed 12-month "leave year," such as a fiscal year, a year required by State law, or a year starting on an employee's "anniversary" date;
- c. The 12-month period measured forward from the date any employee's first FMLA leave begins; or,
- d. A "rolling" 12-month period measured backward from the date an employee uses any FMLA leave (except that such measure may not extend back before August 5, 1993).

Employers are allowed to choose any one of the alternatives as long as the alternative chosen is applied consistently and uniformly to all employees. An employer wishing to change to another alternative is required to give at least 60 days' notice to all employees, and the transition must take place in such a way that the employees retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the employee. Under no circumstances may a new method be implemented in order to avoid the Act's leave requirements. §825.200. The uniformity required by this section may be subject to change where a multi-State employer has eligible employees in a State which has a more restrictive family and medical leave statute. §825.200(d)(2). If an employer fails to select one of the options, the option that provides the most beneficial outcome for the employee will be used. The employer may then only select an option after giving the requisite 60-day notice. §825.200(e).

2. Intermittent Leave or a Reduced Leave Schedule may be taken by an eligible employee in certain cases.
 - a. Birth and adoption cases: An employee may not take intermittent or reduced leave *except* by the agreement of the employer and the employee.
 - b. Serious health condition cases: An employee may take intermittent or reduced leave when "medically necessary."
 - (1) Employee notice and medical certification requirements discussed below apply.
 - (2) The employer may transfer the employee to an available alternative position:
 - (a) with equivalent pay and benefits; and
 - (b) which better accommodates recurring periods of leave than the employee's regular job.

REGULATIONS: Intermittent leave Leave which is taken periodically, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy. §825.203(c)(1).

Reduced leave schedule A leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday. In other words, a reduced leave schedule is a change in the employee's schedule for a period of

time, normally from full-time to part-time. Such a schedule reduction might occur, for example, where an employee, with the employer's agreement, works part-time after the birth of a child; or because an employee who is recovering from a serious health condition is not strong enough to work a full-time schedule. §825.203.

There is no minimum on the length of an increment of leave when an employee takes intermittent leave or leave on a reduced leave schedule. However, an employer may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave. For example, an employee might take two hours off for a medical appointment, or might work a reduced day of four hours over a period of several weeks while recuperating from an illness. §825.203(d). Intermittent or reduced schedule leave may be taken for absences where the employee or family member is incapacitated or unable to perform the essential functions of the position because of a chronic serious health condition even if he or she does not receive treatment by a health care provider. Except for school employees, in no event may an employee be required to take more FMLA leave than necessary to address the circumstance that precipitated the need for leave.

Medically necessary A medical need for leave (as distinguished from voluntary treatments and procedures) and the medical need can be best accommodated through an intermittent or reduced leave schedule. §825.117.

Available alternative position Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave. The alternative position must have equivalent pay and benefits. An alternative position for these purposes need not have equivalent duties. Furthermore, absent an agreement, there is no requirement that the employee agree to the transfer. However, transfer to an alternative position may require compliance with any applicable collective bargaining agreement, federal law (such as the ADA), and State law. The employer may transfer the employee to a part-time job with the same hourly rate of pay and benefits, provided the employee is not required to take more leave than is medically necessary. For example, an employee desiring to take leave in increments of 4 hours per day could be transferred to a half-time job paying the same hourly rate as the employee's previous job and enjoying the same benefits. The employer may not eliminate benefits which otherwise would not be provided to part-time employees; however, an employer may proportionately reduce earned benefits, such as vacation leave, where such a reduction is normally made by an employer for its part-time employees. §825.204. An employer may not transfer the employee to an alternative position in order to discourage the employee from taking leave or otherwise work a hardship on the employee, e.g., a white collar employee may not be assigned to perform laborer's work, day shift employee reassigned to the graveyard shift, etc.

C. Married Employees of the Same Employer:

1. Birth, adoption or the care of a sick parent: The married employees may be limited to 12 workweeks *total* during any 12-month period.
2. Seriously ill child, spouse or employee: *Each* married employee may take 12 workweeks.

REGULATIONS: For example, if each spouse took 6 weeks of leave for the birth of a child, each could later use an additional 6 weeks due to a personal illness or to care for a sick child. Also, the limitation on the total weeks of leave applies as long as a husband and wife are employed by the "same employer." It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. §825.202.

NOTE: Many State pregnancy disability laws recognize a period of disability before or after the birth of a child. Such periods would also be considered FMLA leave for the serious health condition of the mother and would not be subject to the combined limit.

D. Unpaid Leave

1. Leave mandated by this law is *unpaid*.
2. Compliance by an employer will not affect the exempt status of an employee under the FLSA. Therefore, an employer with an exempt employee taking unpaid reduced leave in partial-day increments under FMLA will not lose the exemption under the FLSA. [This "pay-docking" exception only applies to eligible employees of covered employees taking FMLA leave. §825.206(c).]
3. Fluctuating workweek. If an employee is paid in accordance with the fluctuating workweek method of payment for overtime (see 29 C.F.R. 778.114), the employer, during the entire period in which intermittent or reduced schedule FMLA leave is scheduled to be taken (including weeks in which no leave is taken), may compensate an employee on an hourly basis and pay only for the hours the employee works, including time and one-half the employee's regular rate for overtime hours. If an employer chooses to follow this exception, the employer must do so uniformly with respect to all employees paid on a fluctuating workweek basis for whom FMLA leave is taken on an intermittent or reduced leave schedule basis. §825.206(b).

E. Paid Leave Substitution

Substitution of paid leave is permitted at the election of either the employer or the employee.

1. In cases of birth, adoption or a serious health condition of a family member, any accrued paid vacation, personal or family leaves may be substituted for any part of the 12-week period.

EXAMPLE: An employer provides four (4) weeks of vacation or personal leave per year; if the employer requires the employee to take his or her accrued paid leave, then the employee is entitled to eight additional weeks of unpaid leave for a total of 12 weeks leave. §825.207(e).

2. In cases of a serious health condition of an employee or a family member, any accrued paid medical or sick leave may be substituted in addition to vacation, personal or family leave for any part of the 12-week period.
3. An employer is not required to provide paid sick or family leave not normally provided to employees under the particular circumstances for which the employee seeks leave.

EXAMPLE: An employer's sick leave policy allows employees to use accrued time when the employee is sick, not when family members are sick. If the employee takes leave to care for a child and if the employee has two weeks vacation and one week sick leave, the employee can elect to use two weeks paid vacation leave as part of the 12-week total leave, but not the sick leave as leave for that purpose is not normally provided to employees.

4. Disability leave for the birth of a child is considered leave for a serious health condition for FMLA purposes and is counted toward the 12-week period. §825.207(c).

Policy Considerations An employer's pay continuation policies, such as vacation, personal leave and disability leave, should be kept separate from FMLA leave. Why? If an employee uses paid leave under circumstances which do not qualify as FMLA leave, the leave does not count against the 12 weeks of FMLA leave to which the employee is entitled. For example, paid sick leave used for a medical condition which is not a serious health condition does not count against the 12 weeks of FMLA leave entitlement. §825.207(g). Also, whenever an employee uses paid leave, the employee can only be required to comply with the requirements of the employer's leave plan, and not any more stringent requirements of FMLA (e.g., notice or certification requirements). However, where accrued paid vacation or personal leave is substituted for unpaid FMLA leave for a serious health condition, an employee may be required to comply only

with any less stringent medical certification requirements of the employer's sick leave program. §825.207(h).

STD Plans Because leave under a temporary disability benefit plan is paid, the provision for substitution of paid leave is inapplicable. However, the leave may be counted a FMLA leave and run concurrently for purposes of both the benefit plan and the FMLA leave entitlement. If the requirements to qualify for payments under the STD plan are more stringent than the FMLA, the employee must comply with the more stringent requirements of the plan or may choose not to meet the requirements of the plan and instead receive no payments from the plan and use unpaid FMLA leave or substitute available accrued paid leave. §825.207(d)(1).

Workers' Compensation Injuries on or off the job may constitute serious health conditions. Either the employee or employer may choose to have the employee's FMLA 12-week leave entitlement run concurrently with a workers' compensation absence when the injury meets the criteria for a serious health condition. Because the workers' compensation absence is paid, the provision for substitution of paid leave is not applicable. Therefore, an employee cannot receive both paid leave from the employer and workers' compensation benefits. If the employee is certified as able to return to a "light duty job" but is unable to return to the same or equivalent job, the employee may decline the employer's offer of a "light duty job." As a result, the employee may lose workers' compensation payments, but is entitled to remain on unpaid leave until the 12-week entitlement is exhausted. As of the date workers' compensation benefits cease, the substitution provision becomes applicable and either the employee may elect or the employer may require the use of paid leave. §825.207(d)(2).

Comp time Compensatory time off for public employers is not a form of accrued paid leave that an employer may require the employee to substitute for unpaid FMLA leave. If the employer permits the accrual of compensatory time to be used in compliance with regulations, 29 CFR 553.25, the absence which is paid from the employee's accrued compensatory "account" may not be counted against the employee's leave entitlement. §825.207(i).

Designation of Paid Leave In all circumstances, it is the employer's responsibility to designate (and give notice that) leave, paid or unpaid, as FMLA-qualifying based on information provided by the employee. In the case of intermittent (or reduced basis) leave, only one such notice is required unless the circumstances regarding the leave have changed. The employer's designation decision must be based only on information received from the employee or the employee's spokesperson. In any circumstance where the employer does not have sufficient information about the reason for an employee's use of paid leave, the employer must inquire further to ascertain whether the paid leave is potentially FMLA-qualifying. §825.208(a).

An employee giving notice of the need for unpaid FMLA leave must explain the reasons for the needed leave to allow the employer to determine that the leave qualifies under the Act. §825.208(a)(1). However, an employee giving notice of the need for unpaid FMLA leave does not need to expressly assert rights under the Act (or even mention the FMLA) to meet their obligation to provide notice, though they would need to state a qualifying reason for the needed leave. If an employee requesting to use paid leave for an FMLA-qualifying purpose does not explain the reason for the leave - consistent with the employer's established policy or practice - and the employer denies the employee's request, the employee will need to provide sufficient information to establish an FMLA-qualifying reason for the needed leave so that the employer is aware of the employee's entitlement (i.e., so that the leave may not be denied) and, then, may designate that the paid leave be appropriately counted against (substituted for) the employee's 12-week entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for an FMLA-qualifying purpose will need to state the reason. §825.208(a)(2).

The employer's designation must be made before the leave starts, unless the employer does not have sufficient information as to the employee's reason for taking leave until after the leave has commenced.

Once the employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave. Any dispute and discussion must be documented. §825.208(b). The employer's designation must be made within two business days of the time the employee gives notice of the need for leave, or where the employer does not initially have sufficient information to make a determination, when the employer determines that the leave qualifies as FMLA leave if this happens later.

Form of designation of paid leave The employer's notice to the employee that leave has been designated as FMLA leave may be orally or in writing. If oral, it must be confirmed in writing no later than the following payday (unless the payday is less than one week after the oral notice, then the subsequent payday). The written notice may be in any form, including notation on the employee's pay stub.

Retroactively counting leave as FMLA leave

1. Employer knows or should know leave is FMLA-qualifying, but does nothing. If the employer has the requisite knowledge to make a determination that paid leave is for an FMLA reason at the time the employee gives notice of the need for leave or commences leave, and fails to designate leave as FMLA leave, the employer may not designate leave

retroactively, and may designate only prospectively as of the date of notification to the employee of the designation! In such cases, the employee is subject to the full protections of the Act, but none of the absence preceding the notice may be counted against the employee's FMLA leave entitlement. §825.208(c)

2. Employer discovers leave is FMLA-qualifying . If the employer learns that leave is for an FMLA purpose after leave has begun, such as when an employee requests an extension of the paid leave with unpaid FMLA leave, all or part of the paid leave period may be retroactively counted as FMLA leave, to the extent that the leave period qualified as FMLA leave. §825.208(d).
3. The employee has returned from leave, and the employer did nothing. Employers may not designate leave as FMLA leave after the employee has returned to work unless:
 - a. The employee was absent for an FMLA reason and the employer did not learn the reason for the absence until the employee's return (e.g., absence for a brief period), the employer may, upon the employee's return, promptly (within two business days of the employee's return) designate the leave retroactively with appropriate notice to the employee. Similarly, where the employer has not designated the leave as FMLA leave, but the employee desires that the leave be counted as FMLA leave, the employee must notify the employer within two business days of returning to work that the leave was for an FMLA reason. In the absence of such timely notification by the employee, the employee may not subsequently assert FMLA protections for the absence.
 - b. The employer knows the reason for the leave, but has not been able to confirm that the leave qualifies under FMLA (or medical certification has been requested, but not yet been received or parties are in the process of obtaining a second opinion), the employer may make a preliminary designation, and so notify the employee, at the time the leave begins or as soon as the reason for leave becomes known. Upon receipt of confirmation, the preliminary notice becomes final. §825.208(e).

BOTTOM LINE: If neither the employee nor the employer elects to substitute paid leave for unpaid FMLA leave under the above conditions and circumstances, the employee will remain entitled to all the paid leave which is earned or accrued under the terms of the employer's plan.

F. Employee Notice Requirements

1. Foreseeable birth or adoption. An employee must give 30 days' notice prior to the date the leave is to begin (unless circumstances do not permit timely notice, then as soon as practicable).

REGULATIONS: As soon as practicable Means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. For foreseeable leave where it is not possible to give as much as 30 days' notice, "as soon as practicable" ordinarily would mean at least verbal notification to the employer within one or two business days of when the need for leave becomes known to the employee. §825.302(b).

Content of notice The employee's notice need only be given one time, but the employee shall advise the employer as soon as practicable if dates of scheduled leave change, or are extended or were initially unknown. §825.302(a). An employee must provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under the FMLA or even mention the FMLA. For example, the notice may only state that leave is needed for an expected birth or adoption, an FMLA-qualifying event. §825.302(c). The employer may require the employee to comply with its usual and customary notice and procedural requirements for requesting leave. However, if the employee gave timely verbal notice, the employer may not disallow leave for failure to follow such internal procedures. §825.302(d). Also, if an employee (or employer) elects to substitute paid vacation leave for unpaid FMLA leave, and the employer's paid vacation leave plan imposes no notification requirements for taking such leave, no advance notice may be required for FMLA leave taken in these circumstances. §825.302(g).

2. Planned medical treatment of a serious health condition.
 - a. An employee must give 30 days' notice prior to the date the leave is to begin (unless circumstances do not permit timely notice, then as soon as practicable); and
 - b. An employee shall make a reasonable effort to schedule treatment so as not to disrupt the daily operations of the employer subject to the approval of the health care provider.

REGULATIONS: Undue disruption of operations Employees are ordinarily expected to consult with their employers prior to the scheduling of treatment in order to work out a treatment schedule which best suits the needs of both the employer and the employee. When notice is given of the need for leave on an intermittent basis for planned medical treatment, and the employee neglects to consult with the employer to arrange the schedule of treatments so as not to unduly disrupt the employer's operations, an employer may require an employee to attempt to reschedule treatment subject to the approval of the health care provider. §825.302(e).

3. Unforeseeable circumstances.

REGULATIONS: When the need for leave, or its approximate timing, is not foreseeable, an employee should give notice to the employer of the need for FMLA leave "as soon as practicable" under the facts and circumstances of the particular case. It is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances. In the case of a medical emergency requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employer's internal rules and procedures cannot be required when FMLA leave is involved. §825.303(a). Notice may be given by any means, e.g., telephone, facsimile machine, etc., and by the employee's spokesperson, e.g., spouse, **adult** family member, etc., if the employee is unable to do so personally. Remember, the employee need not expressly assert rights under the FMLA or even mention the FMLA!

4. Effect of Failure to Give Notice?

REGULATIONS: Unless the notice requirement is waived by the employer, if an employee fails to give 30 days' notice for foreseeable leave with no reasonable excuse for the delay, the employer may delay the taking of FMLA leave until at least 30 days after the date the employee provides notice to the employer of the need for FMLA leave. However, in order for the onset of an employee's FMLA leave to be delayed due to lack of required notice, it must be clear that the employee had actual notice of the FMLA notice requirements, e.g., proper posting of the FMLA notice at the worksite. §825.304.

G. Medical Certification Requirements

1. An employer may require sufficient certification of a serious health condition issued by a health care provider. The employee must provide a copy of the certification to the employer in a "timely manner."

REGULATIONS: **Timely manner** Where leave is foreseeable, the employee should provide medical certification before the leave begins. If this is not possible, the employee must provide the requested certification to the employer within the time frame requested by the employer, and the employer must allow at least 15 calendar days from the date of the request, unless it is not practicable under the particular circumstances. §825.305(b). An employer must give notice of any requirement for medical certification each time a certification is required; such notice must be in writing. Requests for any subsequent certifications may be made verbally. §825.305(a). Also, if an employer's sick or medical leave plan imposes less stringent requirements than the FMLA, and the employer or employee elect to substitute paid sick, vacation, etc. leave, only the less stringent sick leave certification requirements may be imposed.

2. Certification is sufficient if it states:
 - a. Date on which the serious health condition commenced;
 - b. Probable duration of the condition;
 - c. Appropriate medical facts (see §825.306);
 - d. A statement that the employee is needed to care for an immediate family member, if applicable, and an estimate of the amount of time necessary to care for the family member; *or*
 - e. A statement that the employee is unable to perform the functions of his or her position, if applicable; *and*
 - f. For intermittent or reduced leave involving planned medical treatment, the dates on which treatment is expected and the duration of treatment; *or*
 - g. For intermittent or reduced leave based on a serious health condition of the employee or immediate family member, a statement of the medical necessity for such leave and expected duration of the intermittent or reduced leave.

REGULATIONS: DOL has developed an optional form -- WH-380 -- for the employee's (or their family member's) use. No additional information may be required by an employer. The form contains required entries for certification as to which part of the serious health condition applies to the patient's condition with supporting medical facts; approximate date the condition commenced and its probable duration; whether or not leave will be taken intermittently or on a reduced leave basis; if the employee is pregnant or has a chronic condition, whether the patient is presently incapacitated and the likely frequency and

duration of episodes of incapacity; estimate of probable number of treatments if additional treatments are necessary; if intermittent or reduced leave is necessary, an estimate of the probable number and interval between such treatments, actual or estimated dates of treatment if known and period of recovery, if any; a general description of any regimen of continuing treatment; and whether the employee is unable to perform work of any kind, or any one or more of the essential functions of the job, or must be absent from work for treatment; etc. The regulations no longer provide for a diagnosis. §825.306(b)

3. An employer reasonably doubting the validity of the certification may require, *at the employer's expense*, a second opinion of a health care provider approved by the employer.
 - a. In the case of conflicting opinions, an employer may obtain a third opinion at the employer's expense. The third opinion is *final*.
 - b. A health care provider giving a second opinion cannot be employed on a regular basis with the employer.

REGULATIONS: If an employee submits a complete certification signed by the health care provider, the employer may not request additional information from the employee's health care provider. However, a health care provider representing the employer may contact the employee's health care provider, with the employee's permission, for purposes of clarification and authenticity of the medical certification. (It is recommended the employer get the employee's permission in writing.) If the FMLA leave is running concurrently with a workers' compensation absence, and the state workers' compensation statute permits the employer or its representative to have direct contact with the employee's workers' compensation health care provider, the employer may follow the workers' compensation provisions.

An employer may require the employee to obtain a second opinion at the employer's expense. Pending receipt of the second (or third) opinion, the employee is provisionally entitled to the benefits of the Act. §825.307(a)(2). The employer may not regularly contract with or otherwise regularly utilize the services of the health care provider furnishing the second opinion unless the employer is located in an area where access to health care is extremely limited (e.g., a rural area where no more than one or two doctors practice in the relevant specialty in the vicinity). The third health care provider, if a continuing dispute, must be designated or approved jointly by the employer and the employee. The employer and the employee must each act in good faith to attempt to reach agreement on whom to select for the third opinion provider. §825.307. The employer is required to provide the employee with a copy of the second and third medical opinions, upon request, within two business days barring extenuating circumstances. §825.307(d). Also, the employer must reimburse the employee or

family member for any reasonable "out of pocket" travel expenses incurred to obtain the second or third opinion. If the serious health condition occurs in another country, the employer shall accept the medical certification, as well as second and third opinions, from a health care provider that practices in that country.

4. An employer may require subsequent recertification on a "reasonable" basis.

REGULATIONS: For pregnancy, chronic or permanent/long-term conditions, an employer may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless: (1) Circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of absences, the severity of the condition, complications); or (2) The employer receives information that casts doubt upon the employee's stated reason for the absence. §825.308(a).

For circumstances not covered above, an employer may request recertification at any reasonable interval, but not more often than every 30 days, unless: (1) The employee requests an extension of leave; (2) Circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of absences, the severity of the condition, complications); or (3) The employer receives information that casts doubt upon the continuing validity of the certification. §825.308(c).

In cases where the minimum duration of the period of incapacity specified on a certification is more than 30 days, or for FMLA leave taken intermittently or on a reduced basis, the employer may not request recertification in less than the minimum period specified on the certification as necessary for such leave (including treatment) unless one of the conditions set forth above is met. §825.308(b).

The employee must provide the recertification within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request) unless it is not practicable to do so despite the employee's diligent, good faith efforts. Recertification is at the employee's expense unless the employer provides otherwise. No second or third opinion on recertification may be required.

5. Effect of Failure to Provide Certification?

- a. In the case of foreseeable leave, an employer may **delay** the taking of FMLA leave to an employee who fails to provide timely certification after being requested by the employer to furnish such certification (e.g., within 15 calendar days, if practicable) until the required certification is provided. §825.311(a).

- b. When the need for leave is not foreseeable, or in the case of recertification, an employer may delay the employee's continuation of leave if an employee fails to provide a medical certification within a reasonable time (e.g., within 15 calendar days, if practicable) under the particular circumstances. §825.311(b). If the employee never produces the certification, the leave is not FMLA leave!
- c. When the employee must provide medical certification at the end of FMLA leave taken for the employee's serious health condition, i.e., that the employee is fit for duty and able to return to work (and the employer has provided the required notice), the employer may delay restoration until the certification is provided. §825.311(c). If the employee fails to provide either a fitness-for-duty certification or a new medical certification at the time the FMLA leave is concluded, the employee may be terminated!

IV. Employer Notice Requirements

- A. A covered employer is required to post and keep posted, in a conspicuous place on the premises where notices are customarily posted (whether or not it has any eligible employees), a notice of the provisions of the Act approved by the Secretary of Labor.

REGULATIONS: Copies of the notice are available from the local office of the Wage and Hour Division. The notice must be large enough to be easily read and contain fully legible text. If a significant portion of the workforce is not literate in English, the employer must post in a language in which the employees are literate. §825.300.

- B. The penalty for a willful failure to post the notice is up to \$100 per offense.

REGULATIONS: If a representative of the Department of Labor determines that an employer has committed a willful violation of the posting requirement, and that the imposition of a civil money penalty for such violation is appropriate, the representative may issue and serve a notice of penalty on such employer in person or by certified mail. §825.402. However, an employer may obtain a review of the assessment of a penalty from the Wage and Hour Regional Administrator for the region in which the alleged violation(s) occurred. §825.403.

- C. Other Notices Required by the Regulations: §825.301
 - 1. A covered employer with written guidance regarding leave rights, e.g., employee handbook or manual, must include information concerning FMLA rights in the handbook or other documentation.

2. If a covered employer has no written guidance describing leave rights, the employer must provide information regarding FMLA leave rights whenever an employee requests leave under FMLA, e.g., the FMLA Fact Sheet.
3. In any case in which an employee provides notice of the need for FMLA leave, the employer must detail the specific expectations and obligations of the employee and explain the consequences of failure to comply. The written notice must be in a language in which the employee is literate. The notice must include the following:
 - a. That leave will be counted against annual FMLA entitlement;
 - b. Any requirement to provide medical certification/effect of failure to do so;
 - c. Employee/employer's right to substitute paid leave and conditions;
 - d. Any requirement to make premium payments/arrangements for such payments and possible consequences of failure to make such payments on a timely basis;
 - e. Any requirement for the employee to present a fitness-for-duty certificate to be restored;
 - f. Employee's status as a "key" employee and potential consequences;
 - g. Right to restoration to same or equivalent job; and
 - h. Any potential liability for payment of health care premiums upon failure to return to work.
4. Other information is optional, e.g., whether the employer will require periodic reports on the employee's status and intent to return to work.

NOTE: The DOL has developed a form notice -- Employer Response to Employee Request for Family and Medical Leave (Form WH-381) -- for use by employers. The written notice must be provided to the employee no less often than the first time in each six-month period that an employee gives notice of the need for FMLA leave (if taken during the six-month period). The notice shall be given within a reasonable time after notice of the need for leave -- within one to two business days if feasible. If leave has already begun, the notice should be mailed to the employee's address of record. Employers must give notice of any changes in the same manner. Written notice of the need for medical certification

or a "fitness-for-duty" report shall be given with each employee notice of the need for leave except where the initial notice in the six-month period and the employee handbook, etc., clearly provide that a certification or a fitness-for-duty report would be required. §825.301(c). Therefore, FMLA policies should include a statement, for example, that certification will be required in all cases, or certification will be required in all cases in which leave of more than a specified number of days is taken, or a fitness-for-duty report will be required in all cases for back injuries for employees in a certain occupation.

V. Reemployment Rights

A. Employee Rights

Upon reemployment, the employer must return the employee to:

1. The position of employment held when the leave commenced (even if the employee has been replaced or the position been restructured to accommodate the employee's absence); or
2. An *equivalent* position with *equivalent* employment benefits, pay and other terms and conditions of employment.

REGULATIONS: Equivalent position "Virtually identical." If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, fly a minimum number of hours, etc., as a result of the leave, the employee must be given a reasonable opportunity to fulfill those conditions upon return to work. If the employee is unable to perform the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA, but the employer's obligations may be governed by the ADA. §825.215.

Equivalent Pay An employee is entitled to any unconditional pay increases which have occurred during the FMLA leave period, such as cost of living increases. Pay increases conditioned upon seniority, length of service, or work performed would not have to be granted unless it is the employer's policy or practice to do so with respect to other employees on "leave without pay." An employee is entitled to be restored to a position with the same or equivalent pay premiums, such as a shift differential. §825.215(c).

Bonuses. Bonuses for perfect attendance and safety do not require performance by the employee but rather contemplate the absence of occurrences. To the extent an employee who takes FMLA leave had met all the requirements for either or both of these bonuses before FMLA leave began, the employee is entitled to continue this entitlement upon return from FMLA leave, that is, the employee

may not be disqualified. A monthly production bonus, on the other hand, does require performance by the employee. If the employee is on FMLA leave during any part of the period for which the bonus is computed, the employee is entitled to the same consideration for the bonus as other employees on paid or unpaid leave as appropriate. §825.215(c)(2).

Equivalent benefits At the end of an employee's FMLA leave, benefits must be resumed in the same manner and at the same levels as provided when the leave began, and subject to any changes in benefit levels that may have taken place during the period of FMLA leave affecting the entire workforce, unless otherwise elected by the employee. Upon return from FMLA leave, an employee cannot be required to requalify for any benefits the employee enjoyed before FMLA leave began. For example, if an employee was covered by a life insurance policy before taking leave, but coverage lapses during the period of unpaid FMLA leave, the employee cannot be required to meet any qualifications, such as taking a physical examination, in order to requalify upon return from leave. Accordingly, some employers may find it necessary to modify life insurance and other benefits programs in order to restore employees to equivalent benefits upon return from FMLA leave; make arrangements for continued payment of costs to maintain such benefits during unpaid FMLA leave; or pay these costs subject to recovery from the employee on return from leave. §825.215(d).

If an employee desires to continue life insurance, disability insurance, or other types of benefits for which he or she typically pays during unpaid FMLA leave, the employer is required to follow established policies or practices for continuing such benefits for other instances of leave without pay. If the employer has no established policy, the employee and the employer are encouraged to agree upon arrangements before FMLA leave begins. With respect to pension and other retirement plans, unpaid FMLA leave periods need not be treated as credited service for purposes of benefit accrual, vesting and eligibility to participate. §825.215(d)(4). However, unpaid leave does not constitute a "break in service," because FMLA leaves may not result in the loss of any employment benefit accrued prior to the date leave commenced.

Equivalent Terms and Conditions of Employment An equivalent position must have substantially similar duties, conditions, responsibilities, privileges and status as the employee's original position. The employee must be reinstated to the same or a geographically proximate worksite where the employee had previously been employed. The employee is ordinarily entitled to return to the same shift or the same or an equivalent work schedule. The employee must have the same or an equivalent opportunity for bonuses, profit-sharing, and other similar discretionary and non-discretionary payments. However, de minimis or intangible, unmeasurable aspects of the job are not encompassed in equivalent terms and conditions of employment. §825.215(e).

B. Employer rights.

1. The employer may require, if a uniformly applied policy, certification that an employee is able to resume work if the leave was precipitated by a serious health condition.

REGULATIONS: Fitness for duty This does not mean the employer's policy or practice must require fitness-for-duty certification from all employees who are absent due to serious health condition, but an employer requiring fitness-for-duty certifications must have a uniformly-applied policy that requires all similarly-situated employees (i.e., same occupation, same serious health condition) to obtain certification that the employee is able to resume work. The certification itself need only be a simple statement of an employee's ability to return to work. A health care provider employed by the employer may contact the employee's health care provider with the employee's permission for purposes of clarification. (It is recommended, though not required, the employer get the employee's permission in writing.) No additional information may be acquired and clarification may be requested only for the serious health condition for which FMLA leave was taken. The cost of the fitness-for-duty certification shall be borne by the employee and no travel costs are payable for acquiring the certification. §825.310(c) Requirements under the ADA that any return-to-work physical be job-related and consistent with business necessity must be met. §825.310(b).

The notice that employers are required to give to each employee regarding their FMLA rights and obligations shall advise the employee if the employer will require fitness-for-duty certification to return to work. If the employer has a handbook explaining employment policies and benefits, the handbook should explain the employer's policy regarding any requirement for fitness-for-duty certification to return to work. Specific notice shall also be given to any employee from whom fitness-for-duty certification will be required either at the time leave is requested or immediately after leave commences and the employer is advised of the medical circumstances requiring the leave, unless the employee's condition changes from one that did not previously require certification pursuant to the employer's practice or policy. No second or third fitness-for-duty certification may be required. Restoration may be delayed until the employee submits a required fitness-for-duty certification. §825.310(e).

2. The employer may require the employee on leave to "report periodically" on the status and intention of the employee to return to work.

REGULATIONS: Intent to return to work. The regulations permit advance notice of return as long as the employer's policy regarding such periodic reports is not discriminatory and takes into account all relevant facts and circumstances. Only upon unequivocal notice of intent not to return do the employer's obligations

to maintain health coverage and to restore the employee end. §825.309. The employee may need more leave than originally anticipated. Conversely, circumstances may change permitting the employee to return earlier than anticipated. An employee may not be required to take more FMLA leave than necessary to resolve the circumstance that precipitated the need for leave. In both of these situations, the employer may require that the employee provide the employer with reasonable notice (i.e., within two business days) of the changed circumstance where foreseeable.

C. Key Employee Exception

A salaried employee, who is among the highest paid 10 percent of all employees (*both salaried and non-salaried*) of the employer within 75 miles of the facility at which the employee works, may be denied restoration if:

1. Denial is necessary to prevent substantial and grievous economic injury to the employer's operations;
2. The employer notifies employee of intent of the employer to deny restoration at the time the employer determines such economic injury would occur; and
3. Where the leave has already commenced, the employee elects not to return after receiving such notice from the employer.

REGULATION: Timing The determination of whether a salaried employee is among the highest paid 10 percent shall be made at the time of the request for leave. No more than 10 percent of the employer's employees within 75 miles of the worksite may be "key employees." §825.217.

Substantial and grievous economic injury A precise test cannot be set for the level of hardship or injury to the employer which must be sustained. It is different from and more stringent than the "undue hardship" test under the ADA. If the reinstatement of a key employee threatens the economic viability of the firm, that would constitute substantial and grievous economic injury. A lesser injury which causes substantial, long-term economic injury would also be sufficient. Minor inconveniences and costs that the employer would experience in the normal course of doing business would certainly not constitute substantial and grievous economic injury. §825.218.

Procedure Written notice by the employer to the employee of the employee's "key employee status" and potential consequences is required. Written notice by the employer that substantial and grievous economic injury to operations will result is also required. A key employee may still request reinstatement. §825.219.

D. Delay or denial of leave or restoration

1. If an employee fails to give timely advance notice when the need for FMLA leave is foreseeable, the employer may delay the taking of FMLA leave until 30 days after the date the employee provides notice to the employer of the need for FMLA leave.
2. If an employee fails to provide in a timely manner a requested medical certification to substantiate the need for FMLA leave due to a serious health condition, an employer may delay FMLA leave until an employee submits the certification. If the employee never produces the certification, the leave is not FMLA leave.
3. If an employee fails to provide a requested fitness-for-duty certification to return to work, an employer may delay restoration until the employee submits the certification.
4. As is discussed more fully below, if an employer can show that the employee would not otherwise have been employed had the leave not been taken, e.g., termination by layoff, the employee's entitlement to reinstatement, continued leave, and health benefits ceases (unless the employee remains on paid FMLA leave).
5. If an employee unequivocally advises the employer (before or while taking FMLA leave) that he or she does not intend to return to work, the employment relationship is deemed terminated, and the employee's entitlement to reinstatement, continued leave, and health benefits ceases (unless the employee remains on paid FMLA leave). On the other hand, the employee may return earlier than anticipated. In such case, the employee must provide two business days' notice where feasible.

MESSAGE: Require the employee on FMLA leave to report periodically on his or status and intention to return to work.

6. An employer may deny restoration to employment, but not the taking of FMLA leave and the maintenance of health benefits, to an eligible "key employee."
7. An employee who fraudulently obtains FMLA leave from an employer is not protected by FMLA's job restoration or maintenance of health benefits provisions. §825.312(g).
8. If the employer has a uniformly-applied policy governing outside or supplemental employment, such a policy may continue to apply to an employee while on FMLA leave. An employer which does not have such

a policy may not deny benefits to which an employee is entitled under FMLA on this basis unless the FMLA leave was fraudulently obtained as in subparagraph 7 above. §825.312(h).

VI. Employment Benefits

A. Definition

Employment Benefits are defined as follows:

All benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer or through an "employee benefit plan" defined under ERISA.

B. Protection of Employment Benefits

FMLA leave shall not result in the loss of any employment benefits *accrued prior* to the date on which the leave commenced.

1. Employment benefits, except as noted below, and seniority need not accrue during leave.
2. An employee is not entitled to any benefit or position other than that which the employee would have been entitled had he or she not taken leave.

EXAMPLES: If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employer's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee cease at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise. Also, an employee working for a specific term or on a specific project the work on which concluded during the leave period may be denied reemployment. §825.216. Finally, if the employee has been on a workers' compensation absence during which FMLA has been taken concurrently, and after 12 weeks of FMLA leave the employee is unable to return to work, the employee no longer has the protections of FMLA and must look to the workers' compensation statute or ADA for any relief.

C. Health Insurance

1. An employer shall maintain coverage under any group health plan for the duration of such leave at the level and under the conditions coverage

would have been provided had the employee remained continuously employed.

NOTE: "Group health plan" does not include any insurance program providing health coverage under which employees purchase individual policies from insurers provided that: (1) no contributions are made by the employer; (2) participation in the program is completely voluntary; (3) the sole function of the employer is to permit the insurer to publicize the program, to collect premiums through payroll deduction and to remit them to the insurer; (4) the employer receives no consideration other than administrative expenses; and (5) the premium charged does not increase in the event the employment relationship terminates. §825.209(a)

REGULATIONS: **Coverage** Notice of any changes or opportunity to change plans or benefits must be given to an employee on FMLA leave. Also, an employee may choose not to retain health coverage during FMLA leave. However, when an employee returns from leave, the employee is entitled to be reinstated on the same terms as prior to the leave, without any qualifying period, physical examination, exclusion of pre-existing conditions, *etc.* Except as required by the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) and for "key" employees, an employer's obligation to maintain health benefits under FMLA ceases if and when the employment relationship would have terminated if the employee had not taken FMLA leave (e.g., the employee's position is eliminated as part of a nondiscriminatory reduction in force and the employee would not have been transferred to another position); an employee informs the employer of his or her intent not to return from leave (including at the start of leave if the employer is so informed before the leave starts); or the employee fails to return from leave after exhausting his or her FMLA leave entitlement. §825.209(f).

Payment of Premiums Any share of health plan premiums which had been paid by the employee prior to FMLA leave must continue to be paid by the employee during the FMLA leave period. If premiums are raised or lowered, the employee would be required to pay the new premium rates. If the FMLA leave is substituted paid leave, the employee's share of premiums must be paid by the method normally used during any paid leave, presumably as a payroll deduction. §825.210.

However, if FMLA leave is unpaid, the employer has a number of options for obtaining payment from the employee. The employer may require that payment be made to the employer or to the insurance carrier, but no additional charge may be added to the employee's premium payment for administrative expenses. The employer may require employees to pay their share of premium payments in any of the following ways:

- a. Payment would be due at the same time as it would be made if by payroll deduction;
- b. Payment would be due on the same schedule as payments are made under COBRA;
- c. Payment would be prepaid pursuant to a cafeteria plan at the employee's option;
- d. The employer's existing rules for payment by employees on "leave without pay" would be followed, provided that such rules do not require prepayment (prior to the commencement of the leave) of the premiums that will become due during a period of unpaid FMLA leave or payment of higher premiums than if the employee had continued to work instead of taking leave; or
- e. Another system voluntarily agreed to between the employer and the employee, which may include prepayment of premiums (e.g., through increased payroll deductions when the need for the FMLA leave is foreseeable).

The employer must provide the employee with advance written notice of the terms and conditions under which these payments must be made. §825.210(d).

An employer may not require more of an employee using FMLA leave than the employer requires of other employees on "leave without pay." §825.210(e).

Workers' compensation leaves An employee receiving payments as a result of workers' compensation injury must make arrangements with the employer for payment of group health plan benefits when simultaneously taking unpaid FMLA leave. §825.210(f).

Effect of failure to pay premiums In the absence of an established employer policy providing a longer grace period, an employer's obligations to maintain health insurance coverage ceases if an employee's premium payment is more than 30 days late. §825.212(a)(1). In order to drop coverage for an employee whose premium payment is late, the employer must provide written notice that the payment has not been received. Notice must be mailed at least 15 days before coverage is to cease. All other obligations of an employer under FMLA continue. If the employer chooses to continue the employee's coverage and makes the employee's premium payments, the employer may later recover the employee's share of any premium payments missed by the employee during the FMLA leave period. Why would an employer make an employee's premium payment? Remember, upon the employee's return from FMLA leave, the employer must still restore the employee to coverage/benefits equivalent to those the employee would

have had if leave had not been taken including family or dependent coverage. §825.212.

2. An employer may recover the premiums paid for maintaining health coverage if:
 - a. The employee fails to return from leave *after* the period of leave has expired (an employee must return for at least 30 days to be considered to have returned unless the employee retires following leave); and
 - b. The failure to return is not caused by the continuation, recurrence or onset of a serious health condition that would entitle the employee to leave under the "serious health condition" provisions of the statute or other circumstances beyond the control of the employee.
3. An employer may require medical certification of the serious health condition for which the employee is unable to return to work.
4. Because paid leave provided under a plan covering temporary disabilities (including workers' compensation) is not unpaid, recovery of health insurance premiums does not apply to such paid leave.

REGULATIONS: Other circumstances beyond the employee's control Examples of other circumstances beyond the employee's control include situations such as where a parent chooses to stay home with a newborn child with a serious health condition; an employee's spouse is unexpectedly transferred to a job location more than 75 miles from the employee's worksite; a relative or individual other than an immediate family member has a serious health condition and the employee is needed to provide care; the employee is laid off while on leave; or, the employee is a "key employee" who decides not to return to work upon being notified of the employer's intention to deny restoration because of substantial and grievous economic injury to the employer's operations and is not reinstated by the employer. Other circumstances beyond the employee's control would not include a situation where an employee desires to remain with a parent in a distant city even though the parent no longer requires the employee's care, or a parent's decision not to return to work to stay home with a well newborn child. §825.213.

Collection When an employee fails to return to work, the employer's share of any health (and any non-health) premiums paid by the employer during a period of FMLA leave are a debt owed by the non-returning employee to the employer. The existence of this debt caused by the employee's failure to return to work does not alter the employer's responsibilities for coverage and, under a self-insurance plan, payment of claims incurred during the period of FMLA leave. In the circumstances where recovery is allowed, the employer may recover its share of health insurance premiums through deduction from any sums due to the employee (e.g., unpaid wages, vacation pay, profit sharing, etc.), provided such deductions

do not otherwise violate applicable Federal or State wage payment or other laws. Alternatively, the employer may initiate legal action against the employee to recover its share of health insurance premiums. §825.213(f).

COBRA "qualifying events" The IRS has issued guidance: Notice 94-103 in Internal Revenue Bulletin No. 1994-51 (December 19, 1994). The taking of leave under FMLA does not constitute a qualifying event under COBRA. A qualifying event occurs, however, if (1) an employee (or the spouse or a dependent child of the employee) is covered on the day before the first day of FMLA leave (or becomes covered during the FMLA leave) under a group health plan of the employee's employer, (2) the employee does not return to employment with the employer at the end of the FMLA leave, and (3) the employee (or the spouse or a dependent child of the employee) would, in the absence of COBRA continuation coverage, lose coverage under the group health plan before the end of what would be the maximum coverage period.

A qualifying event occurs on the last day of FMLA leave. The maximum coverage period is measured from the date of the qualifying event (i.e., the last day of FMLA leave). If, however, coverage under the group health plan is lost at a later date and the plan provides for the extension of the required periods, as permitted under COBRA, then the maximum coverage period is measured from the date when coverage is lost.

A qualifying event can occur if an employee fails to pay the employee portion of premiums for coverage under a group health plan during FMLA Leave or decline coverage under a group health plan during FMLA leave.

Multi-employer Plans In the case of an employer that contributes to a multi-employer health plan (a health plan to which more than one employer is required to contribute and which is maintained pursuant to one or more collective bargaining agreements), an employer must continue to make contributions on behalf of an employee using FMLA leave as though the employee had been continuously employed, unless the plan contains an explicit FMLA provision for maintaining coverage such as through pooled contributions by all employers party to the plan. §825.211. Coverage is maintained under the same terms as other group health plans. See §825.209(f).

- D. **Other benefits.** An employee's entitlement to benefits other than group health benefits during a period of FMLA leave (e.g., holiday pay) is determined by the employer's established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as appropriate). §825.209(h). Under some circumstances, an employer may elect to maintain other benefits, e.g., life insurance, disability insurance, etc., by paying the employee's (share of) premiums during periods of unpaid FMLA leave. For example, to ensure the employer can meet its responsibilities to provide equivalent benefits to the

employee upon return from unpaid FMLA leave, it may be necessary that premiums be paid continuously to avoid a lapse of coverage. In such circumstances the employer is entitled to recover only the costs incurred for paying the employee's share of any premiums whether or not the employee returns from FMLA leave. §825.213(b).

VII. Prohibited Acts

- A. An employer may not interfere with, restrain, or deny the exercise of or the attempt to exercise rights under this statute.

REGULATIONS: Examples of "interfering with" the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by an employer to avoid responsibilities under FMLA, such as unnecessarily transferring employees from one worksite to another in order to keep worksites below the 50-employee threshold for employee eligibility under the Act; changing the essential functions of the job in order to preclude the taking of leave; or reducing hours to avoid employee eligibility. §825.220.

An employer is prohibited from discriminating against employees who use FMLA leave. For example, if an employee substitutes paid leave for unpaid FMLA leave and the employer does not normally require written notice or certification for use of paid leave, an employer cannot require written notice or certification for the paid FMLA leave. Similarly, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies. §825.220. Therefore, check your Attendance Policy!

Employees cannot waive their rights under FMLA. For example, employees (or their collective bargaining representatives) cannot "trade off" the right to take FMLA leave against some other benefit offered by the employer. This does not prevent an employee's voluntary and uncoerced acceptance of a "light duty" assignment while recovering from a serious health condition. Employers are prohibited from inducing an employee to waive rights under the Act.

- B. An employer may not discharge or discriminate against any person for opposing any unlawful practice.
- C. An employer may not discharge or discriminate against any individual who has:
1. Filed, or caused to be instituted, any charge or proceeding under the FMLA;

2. Given, or is to give, information in connection with an inquiry or proceeding; or
 3. Testified, or is to testify, in any inquiry or proceeding.
- D. **Other benefits** An employee's entitlement to benefits other than group health benefits during a period of FMLA leave (e.g., holiday pay) is determined by the employer's established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as appropriate). §825.209(h). Under some circumstances, an employer may elect to maintain other benefits, e.g., life insurance, disability insurance, etc., by paying the employee's (share of) premiums during periods of unpaid FMLA leave. For example, to ensure the employer can meet its responsibilities to provide equivalent benefits to the employee upon return from unpaid FMLA leave, it may be necessary that premiums be paid continuously to avoid a lapse of coverage. In such circumstances the employer is entitled to recover only the costs incurred for paying the employee's share of any premiums whether or not the employee returns from FMLA leave. §825.213(b).

VIII. Investigations

- A. The Secretary of Labor has investigative authority provided under section 11(a) of FLSA, including subpoena power and the right to review an employer's books and records.
- B. Employers have an obligation to make, keep and preserve records of compliance.

REGULATIONS: **Form of records** No particular order or form of records is required. These regulations create no requirement that an employer revise its computerized payroll or personnel records systems to comply. However, employers must keep the records specified by the regulations for no less than three years and make them available for inspection, copying, and transcription by representatives of the Department of Labor upon request. §825.500.

Items required See 29 CFR §825.500(c)(1)-(7).

IX. Enforcement

- A. An employee may bring a private civil action for *money damages* to recover:
 1. Wages, salary, benefits or other compensation lost or denied by reason of a violation of FMLA; or

2. Where wages, etc., have not been denied or lost, any actual monetary loss sustained by the employee as a direct result of the violation, e.g., cost of providing care, up to a sum equal to 12 weeks of wages or salary; plus
 3. Interest at the prevailing rate; plus
 4. Liquidated damages in an amount equal to the amount of actual damages and interest except where an employer can prove a violation was in good faith and upon reasonable grounds for believing its action or omission was not a violation.
- B. Recovery may also include:
1. Equitable relief, including reinstatement and promotion.
 2. Fees and costs, including a reasonable attorney's fees and expert witness fees.
- C. Jurisdiction is proper in any state or federal court of competent jurisdiction.
- D. The Secretary of Labor may bring either an administrative action, in the same manner as sections 6 [minimum wage] and 7 [overtime] of FLSA; a civil action for money damages; or an action for injunctive or equitable relief.
- E. The Act has a two-year statute of limitation, extended to three years for a willful violation.
- F. The Wage and Hour Division, U.S. Department of Labor, is responsible for enforcing the Act. §825.401.

X. Local Educational Agencies

- A. A set of special rules exist for eligible employees of "local educational agencies," including public school boards and public and private elementary or secondary schools. Under this section of the FMLA, a public or private elementary or secondary school will not be considered in violation of any existing laws solely because leave was provided to an eligible employee. These special rules do not apply to colleges, universities, trade schools or pre-schools. Also, the Act's 50-employee coverage test does not apply to local educational agencies.
- B. The rules deal principally with intermittent leave and leave near the end of an academic term.
1. If an eligible employee employed principally in an "instructional" capacity, i.e., a teacher, instructor or coach, seeks to take intermittent or

reduced leave which is foreseeable based on planned medical treatment and if such leave will result in the teacher's absence from the classroom for over 20% of the time, the teacher may be required to elect either (a) to take leave for the entire treatment period, or (b) to transfer temporarily to an available alternative position. §825.601

NOTE: A leave period during summer vacation when the employee would not have been required to report for duty is not counted as FMLA leave.

2. A teacher may be required to extend leave through the end of an academic term if the teacher would otherwise have returned within the last two to three weeks of the term's end, depending on the date the leave commenced and the duration of the leave. §825.602
- C. Restoration of an eligible employee to an equivalent position, if necessary, is governed by established school board, or private school, policies and practices or the terms of a collective bargaining agreement. §825.604.

XI. Miscellaneous

- A. The FMLA does not supersede any state or local law, or employment benefit program or plan of an employer, providing *greater* family or medical leave rights.

REGULATIONS: An employer must observe any benefit program or plan that provides greater family or medical leave rights than does the FMLA. For example, provisions of a "collective bargaining agreement" which, because of seniority or otherwise, provide for reinstatement to a position that is not equivalent (e.g., provides lesser pay) are superseded by FMLA. If an employer provides greater unpaid family leave rights than are afforded by FMLA, the employer is not required to extend additional rights afforded by FMLA, such as maintenance of health benefits (other than through COBRA), to the additional leave period not covered by FMLA. §825.701. If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against the employee's FMLA entitlement.

- B. Nothing in the Act modifies or affects any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability.

REGULATIONS: **ADA** If an employee is a qualified individual with a disability within the meaning of the ADA, the employer must make reasonable accommodations, etc., barring undue hardship, in accordance with the ADA. §825.702. ADA's "disability" and FMLA's "serious health condition" are different concepts, and must be analyzed separately. FMLA entitles eligible

employees to 12 weeks of leave in any 12-month period, whereas the ADA allows an indeterminate amount of leave, barring undue hardship, as a reasonable accommodation. FMLA requires employers to maintain employees' group health plan coverage during FMLA leave on the same conditions as coverage would have been provided if the employee had been continuously employed during the leave period, whereas ADA does not require maintenance of health insurance unless other employees receive health insurance during leave under the same circumstances.

For example, a qualified individual with a disability who is also an "eligible employee" entitled to FMLA leave requests 10 weeks of medical leave as a reasonable accommodation, which the employer grants because it is not an undue hardship. The employer advises the employee that the 10 weeks of leave is also being designated as FMLA leave and will count towards the employee's FMLA leave entitlement. This designation does not prevent the parties from also treating the leave as a reasonable accommodation and reinstating the employee into the same job, as required by the ADA, rather than an equivalent position under FMLA, if that is the greater right available to the employee. At the same time, the employee would be entitled under FMLA to have the employer maintain group health plan coverage during the leave, as that requirement provides the greater right to the employee.

If FMLA entitles an employee to leave, an employer may not, in lieu of FMLA leave entitlement, require an employee to take a job with a reasonable accommodation. However, ADA may require that an employer offer an employee the opportunity to take such a position. An employer may not change the essential functions of the job in order to deny FMLA leave. §825.702(d).

Workers' compensation An employee may be on a workers' compensation absence due to an on-the-job injury or illness which also qualifies as a serious health condition under FMLA. The workers' compensation absence and FMLA leave may run concurrently (subject to proper notice and designation by the employer). At some point the health care provider providing medical care pursuant to the workers' compensation injury may certify the employee is able to return to work in a "light duty" position. If the employer offers such a position, the employee is permitted but not required to accept the position (see §825.220(d)). As a result, the employee may no longer qualify for payments from the workers' compensation benefit plan, but the employee is entitled to continue on unpaid FMLA leave either until the employee is able to return to the same or equivalent job the employee left or until the 12-week FMLA leave entitlement is exhausted. If the employee returning from the workers' compensation injury is a qualified individual with a disability, he or she will have rights under the ADA.