

THE FAMILY MEDICAL LEAVE ACT

Employers and Employees: Rights and Responsibilities in 2009

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Presented By:

Tevis Marshall
Troutman Sanders LLP
1001 Haxall Point
Richmond, VA 23218-1122
804-697-1284

Tevis.Marshall@TroutmanSanders.com

The Family Medical Leave Act of 1993 (FMLA) was enacted to “balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity.”¹ Many Human Resources professionals, however, might say that the FMLA’s primary purpose is to ensure an endless array of statutory and regulatory requirements which, although beneficial to employees, can sometimes prove to be extremely complex and frustrating to administer. In addition, the FMLA imposes numerous obligations, time limits and other compliance requirements on employees seeking to enforce their rights.

In a nutshell, the FMLA entitles eligible employees to unpaid leave for (i) medical reasons; (ii) the birth or adoption of a child; (iii) care of a child, spouse or parent who has a “serious health condition”; (iv) leave that is needed to care for a military servicemember; or (v) “any qualifying exigency.” Upon returning from such leave, an employee is entitled to be returned to the same position he or she held when the leave commenced, or to an equivalent position with equivalent benefits, pay and other terms and conditions of employment.

Although the scope of the FMLA is far too broad to cover in a single session, the purpose of this presentation is to highlight some of the key features of the FMLA, including the recent statutory revisions enacted as part of the National Defense Authorization Act of FY 2008, and the Department of Labor’s revised regulations issued in January 2009.

¹ 29 U.S.C. § 2601(b)(1).

TABLE OF CONTENTS

I.	COVERAGE AND ELIGIBILITY.....	4
A.	Covered Employers	4
1.	The “50 or More Employees” Rule	
2.	Definition of “employer”	
B.	Public Agencies and Schools.....	4
C.	Eligible Employees.....	4
II.	QUALIFYING REASONS FOR LEAVE.....	5
A.	What Constitutes A “Serious Health Condition”?.....	5
B.	What Constitutes “Any Qualifying Exigency”?.....	8
C.	What Is Military Caregiver Leave?.....	9
III.	NOTICE REQUIREMENTS.....	10
A.	Employers.....	10
1.	General notice	
2.	Eligibility Notice	
3.	Rights and Responsibility Notice	
4.	Designation Notice	
B.	Employees.....	12
1.	Foreseeable leave	
2.	Unforeseeable leave	
IV.	MEDICAL CERTIFICATIONS.....	12
A.	Timing of Request.....	13
1.	Employers	
2.	Employees	
B.	Time to Cure a Deficiency	13
1.	Timing	
2.	Failure to Provide Certification	

C.	Authentication and Clarification.....	14
D.	Second and Third Opinions.....	15
1.	Second Opinions	
2.	Third Opinions	
E.	Recertification.....	16
1.	Timing	
2.	Content	
3.	Expense	
V.	INTERMITTENT AND REDUCED SCHEDULE LEAVE.....	17
A.	Types of Leave.....	17
1.	Medical necessity	
2.	Birth or Placement	
3.	Any Qualifying Exigency Leave	
B.	Scheduling Intermittent or Reduced Schedule Leave.....	18
C.	Transfer or Reassignment.....	18
VI.	VOLUNTARY SETTLEMENTS.....	18
VII.	NOTABLE FMLA CASES.....	19
VIII.	RESOURCES.....	23

I. COVERAGE AND ELIGIBILITY

A. Covered Employers -

1. The “50 or More Employees” Rule:

Generally, smaller employers are not covered by the FMLA. An employer covered by the FMLA is “any person engaged in commerce or in any industry or activity affecting commerce, who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.”²

2. Definition of “employer”:

Under the FMLA, an employer includes “any person who acts directly or indirectly in the interest of an employer to any of the employer’s employees.”³ Accordingly, individuals such as corporate officers “acting in the interest of an employer” may be individually liable for any violations of the requirements of the FMLA.⁴

B. Public Agencies and Schools -

Public agencies and public and private elementary and secondary schools are covered by the FMLA without regard to the number of employees.⁵

C. Eligible Employees

Not all employees are eligible for FMLA leave. An “eligible employee” is an employee of a covered employer who:

1. Has been employed by the employer for at least 12 months; and
2. Has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave; and
3. Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.⁶

The 12 months that an employee must have been employed by the employer need not be *consecutive* months. Employees may count prior months of service with an employer as far back

² 29 C.F.R. § 825.104(a).

³ 29 C.F.R. § 825.104(d).

⁴ *Id.*

⁵ *Id.*

⁶ 29 C.F.R. § 825.110(a).

as seven years, or longer if the break in service was occasioned by (i) the fulfillment of the employee's National Guard or Reserve military service obligation or (ii) by written agreement (including collective bargaining agreements).⁷

II. QUALIFYING REASONS FOR LEAVE

Covered employers must grant FMLA leave to eligible employees for the following reasons:

1. For the birth of a child (12 weeks);
2. For adoption/foster care of a child (12 weeks);
3. To care for the employee's spouse, son, daughter, or parent with a serious health condition (12 weeks);
4. Because of a serious health condition that makes the employee unable to perform the functions of the employee's job (12 weeks);
5. Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on active duty (or has been notified of an impending call or order to active duty) (12 weeks); or
6. To care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the servicemember (26 weeks).⁸

A. What Constitutes A "Serious Health Condition"?

A serious health condition is an illness, injury, impairment or physical or mental condition that involves either:

1. **Inpatient care** - defined as an overnight stay in a hospital, hospice or residential medical facility, including any period of incapacity (e.g., the inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom) or any subsequent treatment in connection with such inpatient care;⁹ or

⁷ 29 C.F.R. § 825.110(b).

⁸ 29 C.F.R. § 825.112(a).

⁹ 29 C.F.R. § 825.114.

2. **Continuing treatment by a healthcare provider** - defined as any one or more of the following:¹⁰

- (a) Incapacity and treatment – A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:
- (i) treatment two or more times within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a healthcare provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (e.g. physical therapist) under orders of, or on referral by, a health care provider; or
 - (ii) at least one treatment by a healthcare provider, which results in a continuing regimen of treatment under the supervision of the health care provider.

Note - The requirements set forth above for treatment by a health care provider means an in-person visit to a health care provider. The first (or only) in-person treatment visit must take place within seven days of the first day of incapacity. Also, whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period shall be determined by the health care provider.¹¹

- (b) Pregnancy or prenatal care - Any period of incapacity due to pregnancy, or for prenatal care. Absences under this paragraph qualify for FMLA leave even though the employee or the covered 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 consecutive full calendar days.
- (c) Chronic conditions - Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:
- (i) requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a

¹⁰ 29 C.F.R. § 825.115.

¹¹ 29 C.F.R. § 825.115(a)(3).

nurse under direct supervision of a health care provider;

- (ii) continues over an extended period of time (including recurring episodes of a single underlying condition); and
- (iii) may cause episodic rather than a continuing period of incapacity (e.g. asthma, diabetes, epilepsy, etc.).

Note - Absences under this paragraph qualify for FMLA leave even though the employee or the covered 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 consecutive full calendar days.

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

B. What Constitutes “Any Qualifying Exigency”?

Leave for “any qualifying exigency” is leave that arises out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a “contingency operation.”¹² Employers can request certifications for qualifying exigency leave to determine if an operation qualifies as a “contingency operation.” Also, it is important to remember that qualifying exigency leave only applies to the National Guard, the Reserves and certain retirees. **It does NOT apply to members of the Regular Armed Forces.**

A non-exclusive list of reasons for such leave include the following:

- a. short-notice deployment
- b. military events and related activities
- c. childcare and school activities
- d. financial and legal arrangements
- e. counseling
- f. rest and recuperation
- g. post-deployment activities
- h. additional activities, provided that the employer and employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave.¹³

¹² The term “contingency operation” means a military operation that-- (A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or (B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of this title [10 USCS § 688, 12301(a), 12302, 12304, 12305, or 12406], chapter 15 of this title [10 USCS §§ 331 et seq.], or any other provision of law during a war or during a national emergency declared by the President or Congress. 10 U.S.C. § 101(a)(13).

¹³ 29 C.F.R. § 825.126.

C. What Is Military Caregiver Leave?

On January 28, 2008, President Bush signed into law the National Defense Authorization Act for FY 2008 (“NDAA”), which created new FMLA rights specific to military family members. The NDAA amended the FMLA rights of military family members in two important respects. It provided leave for “any qualifying exigency” (discussed above) and caregiver leave.

First, as amended, the FMLA now permits an employee who is a “spouse, son, daughter, parent, or next of kin” of a military servicemember to take up to 26 workweeks of leave in a “single 12-month period” to care for a “member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness” sustained while on active military duty.¹⁴ Unlike leave for “any qualifying exigency,” military caregiver leave also applies to members of the Regular Armed Forces.

Employers should be aware that the “single 12-month period” during which employees may take caregiver leave begins on the first day the eligible employee takes military caregiver leave and ends 12 months after that date, regardless of the method used by the employer to determine the employee’s 12 workweeks of leave entitlement for other FMLA-qualifying reasons (i.e. calendar year, fiscal year, “rolling” period, etc.).¹⁵ The new regulations further provide that an eligible employee is entitled to a combined total of 26 workweeks of military caregiver leave and leave for any other FMLA-qualifying reason in a “single 12-month period,” provided that the employee may not take more than 12 workweeks of leave for any other FMLA-qualifying reason. However, this presents a unique scenario in which an employee may be allowed up to 38 weeks (9 months) of FMLA leave in a year. Consider the following example:

Example #1 – Assume that an employer elected a calendar year for purposes of determining when its employees may take their standard 12 weeks of FMLA-qualifying leave. On January 1, 2009, an employee begins taking 12 weeks of leave under the FMLA due to a serious health condition. On April 1, the employee returns to work and has now exhausted the standard 12 weeks of leave allowed during the 12-month period established by the employer. However, in July 2009, the same employee requests leave to care for a military servicemember. Since the “single 12-month period” allowed for caregiver leave is separate from the 12 weeks of leave for standard FMLA-qualifying events, and does not begin to run until the employee begins taking such leave, the employee should be allowed to take an additional 26 weeks of leave. Thus, the employee could take up to 38 weeks of leave during 2009.

However, consider the previous example under slightly different facts:

Example #2 – Assume that an employer elected a calendar year for purposes of determining when its employees may take their standard 12 weeks of FMLA-

¹⁴ 29 C.F.R. § 825.127.

¹⁵ 29 C.F.R. § 825.127(c)(1).

qualifying leave. On January 1, 2009, an employee begins to take leave to care for a military servicemember. The employee returns to work after 26 weeks. One month later, the same employee requests FMLA leave for his or her own qualifying illness. The employee is not entitled to additional FMLA leave because an eligible employee is entitled to a combined total of 26 workweeks of military caregiver leave and leave for any other FMLA-qualifying reason in a “single 12-month period,” which, in this case, began on January 1, 2009. Thus, the employee cannot take additional FMLA leave until January 1, 2010.

III. NOTICE REQUIREMENTS

A. Employers -

1. **General notice** – Employers must “post” a notice providing information on employees’ rights under the FMLA (including the procedures for filing complaints of violations of the FMLA).¹⁶ This requirement may be fulfilled by physically posting the Department of Labor’s proposed general notice (Form 1420) in a conspicuous place, or by posting electronically, provided that each employee has access to the posted information (i.e. each employee must have access to a computer).

In addition, the regulations require that general notice must also be provided in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring.¹⁷

2. **Eligibility Notice** – When an employee requests FMLA leave, or when the employer acquires knowledge that an employee’s leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee’s eligibility to take FMLA leave within 5 business days, absent extenuating circumstances.¹⁸ Notice may be oral or in writing. Form WH-381 may be used by employers to satisfy this requirement.
3. **Rights and Responsibility Notice** – Employers must also provide written notice detailing the specific expectations and obligations of the employee and explaining any consequences of failure to meet these obligations.¹⁹ This may include certification requirements, the employee’s right to substitute paid leave, any requirements for employees to make premium payments to maintain health benefits, etc. Part B of Form WH-381 may be used by employers to satisfy this requirement.

¹⁶ 29 C.F.R. § 825.300(a).

¹⁷ 29 C.F.R. § 825.300(a)(3).

¹⁸ 29 C.F.R. § 825.300(b).

¹⁹ 29 C.F.R. § 825.300(c).

4. **Designation Notice** – Employers must also inform employees if the requested leave is FMLA-qualifying. When an employer has enough information to determine whether the leave is being taken for a FMLA-qualifying reason (e.g., after receiving a certification), the employer must notify the employee whether the leave will be designated and will be counted as FMLA leave within 5 business days absent extenuating circumstances.²⁰ If an employer determines that the leave will not be designated as FMLA-qualifying (e.g., if the leave is not for a reason covered by FMLA or the FMLA leave entitlement has been exhausted), the employer must notify the employee of that determination. If the employer requires paid leave to be substituted for unpaid FMLA leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, the employer must inform the employee of this designation at the time of designating the FMLA leave. Form WH-382 may be used by employers to satisfy this requirement.

Failure to follow the notice requirements set forth in this section may constitute an interference with, restraint, or denial of the exercise of an employee's FMLA rights. For instance, an employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered.²¹

The previous regulations imposed a penalty against employers who were untimely in meeting the notice requirements set forth above. Initially, there was a prohibition against retroactive designations of FMLA leave. The previous regulations stated that an employee's paid or unpaid leave did not count against his or her FMLA leave entitlement when the employer failed to properly designate the leave as FMLA leave. The U.S. Supreme Court struck down that penalty provision in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 122 S. Ct. 1155 (2002), indicating that the penalty was counter to the intent of the FMLA. *Ragsdale* suggested that the penalty provision required an employee to demonstrate that individual harm resulted from an employer's failure to properly designate the leave as FMLA-covered.

In response to the decision in *Ragsdale*, the new regulations provide that a retroactive designation of FMLA leave may be appropriate in certain circumstances, provided that the employer's failure to timely designate leave does not cause harm or injury to the employee.²² If an employer's failure to timely designate leave causes the employee to suffer harm, it may constitute an interference with, restraint of, or denial of the exercise of an employee's FMLA rights.²³

²⁰ 29 C.F.R. § 825.300(d).

²¹ 29 C.F.R. § 825.300(e).

²² 29 C.F.R. § 825.301(d).

²³ 29 C.F.R. § 825.301(e).

B. Employees

1. **Foreseeable leave** – An employee must provide at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or of a family member, or the planned medical treatment for a serious injury or illness of a covered servicemember. If 30 days notice is not practicable, notice must be given as soon as practicable (i.e. the same day or the next business day).²⁴
2. **Unforeseeable leave** - When the approximate timing of the need for leave is not foreseeable, an employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case.²⁵ It generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements applicable to such leave.

If an employee fails to provide notice, the employer may, in some circumstances, delay the taking of FMLA leave. In all cases, 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 (i.e. by posting the general notice requirements).²⁶

In cases of foreseeable leave, an employer may delay notice until 30 days after notice is received.²⁷ In cases of unforeseeable leave or foreseeable leave which is less than 30 days, the regulations provide that "the extent to which an employer may delay FMLA coverage for leave depends on the facts of the particular case."²⁸

IV. MEDICAL CERTIFICATIONS

Medical certifications play an important role in determining whether an employee is entitled to take leave under the FMLA. In essence, certifications allow employees to provide information to their employers for the purpose of determining whether the need for leave is FMLA-qualifying. Certifications may be requested when an employee seeks leave due to:

1. **Serious health conditions** - (relating to the employee or the employee's spouse, son, daughter, or parent). Form 380-E may be used for an employee's own serious health condition, and Form 380-F may be used for a family member's serious health condition.

²⁴ 29 C.F.R. § 825.302(a), (b).

²⁵ 29 C.F.R. § 825.303.

²⁶ 29 C.F.R. § 825.304

²⁷ 29 C.F.R. § 825.304(b).

²⁸ 29 C.F.R. § 825.304(c), (d).

2. **Qualifying exigency leave** – Form 384 may be used by employers.
3. **Military caregiver leave** – Form 385 may be used by employers.

A. Timing of Request

1. **Employers** - In most cases, the employer should request that an employee furnish certification at the time the employee gives notice of the need for leave or within 5 business days thereafter, or, in the case of unforeseen leave, within 5 business days after the leave commences.²⁹

An employer may request certification at some later date if it has reason to question the appropriateness of the leave or its duration.³⁰

2. **Employees** - Employee must provide a certificate within 15 calendar days after an employer's request, unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts or the employer provides more than 15 calendar days to return the requested certification.³¹
 - a. The fact that an employee follows up with a health care provider will be evidence of the employee's diligent, good faith efforts to provide timely certification.³²
 - b. "Employers should be mindful that employees must rely on the cooperation of their health care providers and other third parties in submitting the certification and that employees should not be penalized for delays over which they have no control."³³

B. Time to Cure a Deficiency -

1. **Timing** - Employees are allowed 7 calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure deficiencies in their certifications only if the certification is:

²⁹ 29 C.F.R. § 825.305(b).

³⁰ *Id.*

³¹ *Id.*

³² 70 Fed. Reg. 68,011.

³³ *Id.*

- a. Incomplete – Certification is considered to be incomplete if the employer receives a certification, but one or more of the applicable entries have not been completed; or
 - b. Insufficient – Certification is considered to be insufficient if the employer receives a complete certification, but the information provided is vague, ambiguous or non-responsive.³⁴
2. **Failure to Provide Certification** - If an employee fails to provide the employer with a complete and sufficient certification, despite the opportunity to cure the certification, or fails to provide any certification, the employer may deny the taking of FMLA leave.³⁵

Note - “The Department [of Labor] has decided not to require employers to provide notice to employees when a certification is not received because of the administrative burden this would impose.”³⁶

C. **Authentication and Clarification** -

If an employee submits a “complete” and “sufficient” certification, the employer may not request additional information from the health care provider.³⁷ However, the employer may contact the health care provider for purposes of clarification and authorization of the medical certification after the employer has given the employee an opportunity to cure any deficiencies.

1. **Definitions** -

- a. “Authentication” means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document; no additional medical information may be requested.³⁸
- b. “Clarification” means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response. Employers cannot request any additional information beyond that required by the certification form.³⁹

³⁴ 29 C.F.R. § 825.305(c).

³⁵ 29 C.F.R. § 825.305(d).

³⁶ 70 Fed. Reg. 68,011.

³⁷ 29 C.F.R. § 825.307(a).

³⁸ *Id.*

³⁹ *Id.*

An employer may contact an employee's health care provider after the employee has been given the opportunity to cure any deficiencies. However, employers may only contact an employee's health care provider through the use of:

1. a health care provider;
2. a human resources professional;
3. a leave administrator; or
4. a management official.

Under no circumstances may an employee's direct supervisor contact the health care provider.⁴⁰

D. Second and Third Opinions -

1. **Second Opinion** - An employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employer's expense.⁴¹
 - a. The employee is provisionally entitled to the benefits of the Act while the second opinion is pending.⁴²
 - b. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave and may be treated as paid or unpaid leave under the employers established leave policies.⁴³
 - c. FMLA leave may be denied if an employee or an employee's family member fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a second opinion in order to render a sufficient and complete second opinion.⁴⁴
 - d. An employer may choose the health care provider rendering second opinion, but it cannot be one that is employed on a regular basis by the employer. Furthermore, an employer may not regularly contract or utilize the services of the health care provider

⁴⁰ *Id.*

⁴¹ 29 C.F.R. § 825.307(a).

⁴² 29 C.F.R. § 825.307(b)(1).

⁴³ *Id.*

⁴⁴ *Id.*

furnishing the second opinion unless the employer is located in an area where access to health care is extremely limited (i.e. a rural area where no more than one or two doctors practice in the relevant specialty in the vicinity).⁴⁵

2. **Third Opinion** – If the opinions of the employee’s and the employer’s designated health care providers differ, the employer may require the employee to obtain certification from a 3rd provider, again at employer’s expense. This decision is final and binding.⁴⁶
 - a. Designation of the third health care provider must be approved jointly by the employer and employee.⁴⁷
 - b. Employers and employees must act in good faith in selecting a provider. If not, either party risks becoming bound to the unfavorable decision.⁴⁸
 - c. FMLA leave may be denied if an employee or an employee’s family member fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a third opinion in order to render a sufficient and complete third opinion.⁴⁹

E. Recertification

1. **Timing** – An employer may request recertification no more often than every 30 days and only in connection with an absence by the employee.⁵⁰ If the certification indicates that the minimum duration of the condition is more than 30 days, an employer cannot request certification until this period expires unless:
 - a. the employee requests an extension of leave;
 - b. the circumstances described by the previous certification have changed significantly; or

⁴⁵ 29 C.F.R. § 825.307(b)(2).

⁴⁶ 29 C.F.R. § 825.307(c).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ 29 C.F.R. § 825.308(a).

- c. the employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification.⁵¹

Employers must allow at least 15 calendar days for an employee to provide recertification, unless not practicable under the particular circumstances.⁵²

2. **Content** - As part of the information allowed to be obtained on recertification for leave taken because of a serious health condition, the employer may provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern.⁵³
3. **Expense** – Any recertification is at the employee's expense unless the employer provides otherwise.⁵⁴

V. INTERMITTENT AND REDUCED SCHEDULE LEAVE

FMLA leave may be taken "intermittently or on a reduced leave schedule" under certain circumstances.⁵⁵ Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason. A reduced leave schedule is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday (i.e. full-time to part-time).

A. **Types of Leave** –

FMLA leave may be taken intermittently or on a reduced leave schedule for the following reasons:

1. **Medical necessity** - For intermittent leave or leave on a reduced leave schedule taken because of one's own serious health condition, to care for a parent, son, or daughter with a serious health condition, or to care for a covered servicemember with a serious injury or illness, there must be a medical need for leave and it must be that such medical need can be best accommodated through an intermittent or reduced leave schedule.

Leave for a medical necessity may be taken for planned and/or unanticipated medical treatment. It may also be taken to provide care or

⁵¹ 29 C.F.R. § 825.308(b), (c).

⁵² 29 C.F.R. § 825.308(d).

⁵³ 29 C.F.R. § 825.308(e).

⁵⁴ 29 C.F.R. § 825.308(f).

⁵⁵ 29 C.F.R. § 825.202(a).

psychological comfort to a covered family member.⁵⁶

2. **Birth or Placement** - When leave is taken after the birth of a healthy child or placement of a healthy child for adoption or foster care, an employee may take leave intermittently or on a reduced leave schedule only if the employer agrees.⁵⁷
3. **Any Qualifying Exigency Leave** - Leave due to any qualifying exigency may be taken on an intermittent or reduced leave schedule basis.⁵⁸

B. Scheduling Intermittent or Reduced Schedule Leave –

If an employee needs leave intermittently or on a reduced schedule for planned medical treatment, then the employee must make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations.⁵⁹

C. Transfer or Reassignment -

If an employee needs intermittent leave or leave on a reduced leave schedule that is foreseeable, the employer may require the employee to transfer temporarily, during the period that the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position.⁶⁰

VI. VOLUNTARY SETTLEMENTS

Under the old regulations, it was not clear whether employees could release claims under the FMLA through voluntary settlement agreements. In *Taylor v. Progress Energy, Inc.*, 493 F.3d 454 (4th Cir. 2006), the Court held that the plain language of 29 C.F.R. § 825.220(d), which provided that “employees cannot waive, nor may employers induce employees to waive, their rights under FMLA,” precluded both the prospective and retrospective waiver of all FMLA rights, including the right of action (or claim) for a past violation of the FMLA. The Department of Labor contended that the regulation was designed to bar only the prospective waiver of FMLA rights; however, the law of the Fourth Circuit after *Taylor* made it virtually impossible for employers to enter into severance agreements with a full release of claims relating to the FMLA.

The revised regulation solved this problem for employers and now expressly states:

Employees cannot waive, nor may employers induce employees to waive, their *prospective* rights under FMLA. For example, employees (or their collective

⁵⁶ 29 C.F.R. § 825.202(b).

⁵⁷ 29 C.F.R. § 825.202(c).

⁵⁸ 29 C.F.R. § 825.202(d).

⁵⁹ 29 C.F.R. § 825.203.

⁶⁰ 29 C.F.R. § 825.204(a).

bargaining representatives) cannot “trade off” the right to take FMLA leave against some other benefit offered by the employer. This does not prevent the settlement or release of FMLA claims by employees based on past employer conduct without the approval of the Department of Labor or a court...⁶¹

VII. NOTABLE FMLA CASES

A. Eligibility

In *Reynolds v. Inter-Industry Conference on Auto Collision Repair*, 2009 U.S. Dist. LEXIS 4686 (N.D. Ill. Jan. 29, 2009), the court held that employees may still be entitled to some protection from interference with their prospective FMLA rights prior to becoming eligible to exercise such rights. The plaintiff had worked for his employer for approximately 11 months when his pregnant fiancée went into premature labor. After she gave birth, the plaintiff asked for FMLA leave to care for the child once his fiancée’s medical leave ran out, by which time he would have worked for his employer for more than 12 months and would have been eligible for FMLA leave. Later on the day of his request, the plaintiff was told that he had been fired for reasons “purely related to his skill set.” The employer argued that the plaintiff had no claim under the FMLA because, at the time of his termination and FMLA leave request, he was not an “eligible employee” under the FMLA since he had not yet worked with the company for at least 12 months. The court disagreed, and noted that its holding was the only logical choice in light of the FMLA’s requirement that employees provide 30 days notice where the need for leave is foreseeable. Although the plaintiff was theoretically “ineligible” at the time he requested leave, dismissing his FMLA claim would have punished him for providing ample notice.

B. Medical Certifications and FMLA Paperwork

Where the medical certifications an employee submitted were suspicious, contradictory, and unreliable, the FMLA did not protect a hospital worker from being fired for absenteeism. In *Novak v. Metrohealth Med. Ctr.*, 503 F.3d 572 (6th Cir. 2007), the employee told her employer that she had a painful back condition, but she gave the employer several medical certifications that were incomplete or inconsistent with her description of her symptoms and failed to document a condition qualifying for FMLA leave. The Court held that such forms were insufficient to establish the existence of a serious health condition for the purposes of the FMLA. The employer had satisfied its duty to inform the employee that her certification was deficient, yet the additional forms she submitted did not cure the deficiency. Furthermore, the fact that the employer had failed to require a second opinion did not preclude it from contesting the employee’s certification.

In *Peery v. CSB Behavioral Health Sys.*, 2008 U.S. Dist. LEXIS 76627 (S.D. Ga. Sept. 30, 2008), a former employee alleged a FMLA violation even though it was undisputed that he had never returned the required FMLA paperwork. The employee had not filled out the necessary paperwork, but claimed that his employer told him that the forms were not necessary. The court held that he had not availed himself of a protected right, and thus he had no case for a

⁶¹ 29 C.F.R. § 825.220(d).

FMLA violation. The court followed the lead of other courts within the 11th Circuit and declined to apply the doctrine of equitable estoppel to FMLA eligibility certifications.

C. Employer Notice

The Seventh Circuit took “constructive notice” to another level in *Stevenson v. Hyre Electric Co.*, 505 F.3d 720 (7th Cir. 2007). In that case, an employee with no documented history of misconduct or health problems had an extreme emotional and physical response to a stray dog entering her workspace and continued to demonstrate erratic and emotional behavior in the days following. The court held that a jury could find that her behavior was so bizarre that it amounted to *constructive notice* of the need for leave under the FMLA and that doctor’s notes and testimony, even without explicitly referencing the FMLA, could establish that the employee suffered from a serious health condition. Therefore, the employee was entitled to a trial on her FMLA claims.

A two-year gap between an employee’s last use of FMLA leave and his current related request was insufficient to break the linkage for employer notice purposes in *Fritz v. Phillips Service Industries, Inc.*, 2008 U.S. Dist. LEXIS 38266 (E.D. Mich. May 12, 2008). In 2003, the employer had granted the employee FMLA leave to undergo surgery on his right knee. The employee requested leave on May 2, 2005, due to right knee pain. The employer was also aware that the employee was scheduled to undergo another surgery on his right knee on May 24, 2005. On these facts, the court found that the employer had clear notice that the employee had a serious health condition related to his right knee sufficient to shift the burden of inquiry to the employer to determine whether his May 2, 2005, request may be covered by the FMLA.

Terminating an employee for unexcused absences beyond the 12-week FMLA leave period is not a FMLA violation. In *Edwards v. Heatcraft, Inc.*, 2008 U.S. Dist. LEXIS 11596 (M.D. Ga. Feb. 15, 2008), an employee remained out of work beyond 12 weeks based on a misunderstanding regarding the amount of FMLA leave available. Her supporting medical certification indicated that she would need leave from April 16 to November 16 but also indicated the probable duration of her condition to December 6, 2004. Based on the medical certification, the employee believed that she had until December 5 to return to work but the employer properly designated 12 weeks of her leave as FMLA and so informed the employee. After the expiration of 12 weeks of FMLA leave but before December 6, the employee ignored the employer’s repeated requests to return to work or face discipline for unexcused absences and she was terminated. The court found no FMLA violation because her right to job-protected FMLA leave expired 12 weeks after her leave began.

D. Internal Employer Policies

Employers can, knowingly or unknowingly, adopt family and medical leave policies that are more generous than the minimum required by the FMLA. In *Peters v. Gilead Sciences, Inc.*, 2008 U.S. App. LEXIS 14894 (7th Cir. July 14, 2008), the 7th Circuit pointed out the risks of doing so by holding that violation of those more generous policies may be a breach of contract or a claim for promissory estoppel based on the employee’s detrimental reliance on the employer’s policy. The company’s policy did not include the FMLA requirement that employees be

employed at a worksite that employs at least 50 employees within 75 miles. The employee was not entitled to FMLA leave because he did not work at a worksite where there were at least 50 employees within 75 miles, but the court held that he still had a valid claim against the employer. Such a claim is not based on the FMLA, nor will the employer be able to successfully defend these types of actions by arguing that the FMLA does not apply.

If an employer has an employee handbook in which FMLA leave is discussed, it should clearly state its basis for calculating the FMLA leave year, or else an employee will be able to choose the method most beneficial for him. Such was the holding of *Spencer v. Marygrove College*, 2008 U.S. Dist. LEXIS 65515 (E.D. Mich. Aug. 26, 2008). There, the employer's handbook stated that "[e]mployees are entitled to take up to 12 weeks unpaid leave per year," without explicitly referring to its fiscal year, and so the plaintiff employee could choose the calendar year as the basis for her leave calculation. Since the calendar year method applied, the employer violated her FMLA rights since it terminated her ten days before the expiration of her available leave period.

E. FMLA Leave as a Factor in Employment Decisions

An employer is not allowed to use its employee's decision to take FMLA leave as a factor in its employment decisions. In *Martin v. Brevard County Public Schools*, 2008 U.S. App. LEXIS 20580 (11th Cir. 2008), a payroll supervisor took FMLA leave during a period in which he was on a performance improvement plan. His employer did not renew his contract because he failed to fulfill the improvement plan. The 11th Circuit, however, held that the record did not establish beyond dispute that his employer would have discharged the employee had he not taken FMLA leave, and therefore his FMLA interference claim survived summary judgment.

Similarly, in *Wojan v. Alcon Laboratories, Inc.*, 2008 U.S. Dist. LEXIS 69576 (E.D. Mich. Sept. 15, 2008), the employee did not meet her sales quota because she took 12 weeks of FMLA leave and the employer did not adjust her sales quota to account for her leave. The court found the employer had used the employee's FMLA leave as a negative factor in her evaluation.

F. FMLA Interference Claims

An employer that discourages an employee from taking FMLA leave may be liable for interfering with an employee's FMLA rights even though the employer ultimately grants all FMLA leave requested. In *Jennings v. Ford Motor Co.*, 2008 U.S. Dist. LEXIS 62761 (S.D. Ind. Aug. 15, 2008), the employer argued that the employee could not establish an unlawful interference claim because he was not denied any FMLA benefits and denial of FMLA benefits is one of the five factors that an employee must prove to establish an FMLA interference claim. The court modified the fifth element of a FMLA interference claim to require that the employer deny the employee FMLA benefits or interfere with FMLA rights to which the employee was entitled. Thus even if there was not an outright denial of FMLA leave, an employee's interference claim may still survive if the employer discouraged him from exercising his FMLA rights.

A police officer requested FMLA leave from the police department but was told FMLA leave was not an option in *Santiago v. New York City Police Department*, 2007 U.S. Dist. LEXIS 91880 (S.D.N.Y. Dec. 14, 2007). His FMLA interference claim was defeated by the fact that he failed to utilize a known paid leave alternative provided by the employer, even though the employer had acted in violation of the FMLA. Furthermore, the employee could not establish that he was injured by the denial of FMLA leave because “[n]o injury can result when the available alternative [paid sick leave] is superior to the FMLA remedy.”

G. Serious Health Condition: What Qualifies?

In *Scott v. Honda Manufacturing of Alabama, LLC*, 2008 U.S. App. LEXIS 6054 (11th Cir. Mar. 20, 2008), the 11th Circuit held that the employee's mother did not have a chronic serious health condition entitling the employee to FMLA leave because the employee presented no evidence that her mother's condition required periodic visits for treatment by a health care provider or continued over an extended period of time. The employee's mother underwent testing after experiencing shortness of breath in September 2005. The only other appointment was for a heart catheterization on October 25, 2005, from which she completely recovered within 48 hours. There was no evidence of medical follow up regarding the heart catheterization.

H. Intermittent Leave

The Sixth Circuit held that a customer service representative who was approved in September 2004 for intermittent leave under the FMLA was not entitled to carry over that approval into 2005. In *Davis v. Mich. Bell Telephone Co.*, 2008 U.S. App. LEXIS 20438 (6th Cir. Sept. 29, 2008), the appeals court found that at the start of the new 12-month leave period at the beginning of calendar year 2005, the employer was entitled to re-evaluate the employee's eligibility because the approved intermittent leave could only extend to the end of the 12-month leave period in which it began. If it were to hold otherwise, the court noted, employees would never have to reestablish their eligibility for FMLA leave and would therefore be perpetually entitled to twelve weeks of FMLA leave per year based on a single eligibility determination. The employee worked less than 1,250 hours during the preceding 12 months and therefore was not eligible for FMLA leave in 2005, so the employer did not violate FMLA by firing her in early 2005 for absenteeism.

VIII. RESOURCES

- A complete copy of the Department of Labor's revised regulations and corresponding commentary is available at:

<http://www.dol.gov/federalregister/PdfDisplay.aspx?DocId=21763>

- All of the FMLA forms mentioned above are available at:

<http://www.dol.gov/esa/whd/fmla/finalrule.htm>

- A copy of the National Defense Authorization Act of 2008 is available at:

<http://www.dol.gov/esa/whd/fmla/fmlaAmended.htm>

Disclaimer – The foregoing materials are not comprehensive and are not intended to be a substitute for the Department of Labor's regulations with respect to the Family Medical Leave Act. Attorneys should always review the full text of the regulations or the statute when dealing with issues relating to the FMLA.