A Union of Professionals

The Family and Medical Leave Act

A HANDBOOK FOR AFT MEMBERS

A Union of Professionals

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MARY LANGENFELD

Introduction

Dear AFT Members,

In 1993, AFT's combined our efforts with other unions and public interest organizations to secure passage of the Family and Medical Leave Act (FMLA). On Feb. 5, 1993, the Family and Medical Leave Act (FMLA) became the very first bill that President Clinton signed into law after he was sworn in. The law establishes minimum standards of 12 weeks of unpaid leave for all working Americans who need time off to care for their families; continuation of health insurance for those on family leave on the same basis as when they were working; and the right of re-employment to the worker's same or equivalent position upon return from leave. Of course, a collective bargaining agreement provides greater protection above these minimum standards required by law.

Regulations for implementing the bill took effect shortly after its passage, and these regulations remained the same for more than a decade. In 2009, however, new regulations for implementing the FMLA became effective. The updated regulations contain new provisions for military family leave; they also clarify and modify various provisions such as the definition of a serious health condition and the law's effect on light duty, perfect attendance awards, substitution of paid leave, and other provisions.

This handbook provides a summary description of the most important provisions of FMLA that affect AFT members, including a section about the special terms that apply exclusively to K-12 instructional employees. We hope that it will help you better understand your rights and responsibilities regarding the FMLA. Because this is a summary document, it may not contain the answers to all of your specific questions. If you have additional questions or need further guidance, please call the AFT's Legal department at 202/393-7472. For sample contract language related to the FMLA, please contact AFT's Research and Information Services department at 202/879-4428.

Sincerely,

RANDI WEINGARTEN
President

Overview

On Feb. 5, 1993, President Clinton signed into law the Family and Medical Leave Act (FMLA).

This law requires both public and private employers operating in the United States who employ at least 50 employees for 20 or more weeks a year within a 75-mile radius to provide up to 12 weeks of unpaid leave each year for several specific family and medical events. The law also provides up to 26 weeks of unpaid leave to a parent, child, spouse or next of kin for care of a service member. FMLA permits eligible employees to take leave for childbirth, adoption or placement of a foster child with an employee within one year of the date of birth or placement of the child. FMLA also allows time off for the care of a seriously ill child, spouse, parent, for the employee's own serious illness and for certain situations arising out of the fact that an employee's immediate family member is a covered military member on active duty. FMLA obligates an employer to maintain health benefits for any employee on FMLA leave on the same basis as active employees. In addition, the law requires covered employers to restore employees who take leave to their same or equivalent position upon their return to work.

To qualify for FMLA leave, an employee must have been employed by the same employer for at least 12 months and must have worked at least 1,250 hours during that 12-month period. Consequently, an employee with one year of service who worked an average of 24 hours per week during the preceding 12 months is eligible for FMLA leave. The 12 months of employment do not need to be consecutive; however, employment before a break in service or seven years or more is not required to be counted (with certain exceptions for military service or if different terms are contained in a collective bargaining agreement). If an employee has worked for at least 12 months for an FMLA-covered employer who has failed to keep track of service time, the employee is automatically considered qualified for FMLA leave.

If the leave is for the employee's own serious health condition or the serious health condition of the employee's child, spouse or parent, the employer may require that the leave request be certified by a healthcare provider. The employer can require the employee to obtain a second opinion (paid for by the employer) if the employer is not satisfied by the first certification report. The employer may pay for a third opinion if the first two differ. The employer and employee must jointly select the third provider, and that opinion will be final.

FMLA also permits employees to take leave on an intermittent or reduced-schedule basis. If, however, the leave is for an employee's own serious health condition or the serious health condition of a family member, an employer has the right to temporarily transfer the employee to an alternative position, provided two conditions are met. First, the alternative position must offer the transferring employee equivalent pay and benefits to the position that was held prior to the FMLA leave request. Second, it must accommodate regularly recurring periods of leave better than the customary position of the employee.

FMLA contains special provisions for "instructional employees" of "local educational agencies" (generally, school districts or similar entities) and of private elementary or secondary schools. The extent of the leave is determined by the point in the semester the teacher requests leave or whether a teacher's intermittent leave will constitute more than 20 percent of the work week. **These special provisions do not apply to colleges and universities, trade schools, preschools or other types of educational institutions.**

Summary Provisions of FMLA

- FMLA provides up to 12 weeks of unpaid leave during any 12-month period for childbirth, adoption or foster child placement, or for the serious health condition of a spouse, parent, child or eligible employee. FMLA also requires employers to grant leave for qualifying exigencies for military family members on or called up to active duty. An employee may take FMLA leave in increments.
- The employer must continue the employee's health benefits during the period of leave under the same conditions that exist for active employees.
- Upon the expiration of the leave, the employee is entitled to be restored to the same position held before the leave was taken or to an equivalent position with the same pay, benefits and working conditions.
- To be eligible for FMLA leave, an employee must work for an employer who employs 50 or more employees within 75 miles of the worksite, be employed by the same employer for at least 12 months, and have worked at least 1,250 hours (about 24 hours per week) over the 12 months prior to the leave.
- Special leave rules apply for teachers and other instructional employees in elementary and secondary schools. These special rules do not apply to Employees who work for U.S. firms outside the United States are not eligible for FMLA leave and are not counted for purposes of determining employer coverage.

Checklist To Determine if FMLA Applies to a Medical or Family Leave Request

The Family and Medical Leave Act provides **minimum** federal standards governing medical and family leave. It is possible that your state law or collective bargaining agreement provides lower eligibility standards or greater benefits than FMLA. If that is the case, an eligible worker is entitled to use the best of the three standards–state, federal or contract.

The following threshold questions are provided to help readers determine whether FMLA, state law or your collective bargaining agreement applies to the specific leave request under consideration.

1. Is the employer covered (i.e., does he/she employ 50 or more employees within a 75-mile radius)?

2. Is the employee covered (i.e., has the employee worked at least 1,250 hours for the same employer in the past year)?

3. Does state law provide lower requirements (i.e., fewer than 50 employees, less than 75 miles, less than 1,250 hours)?

4. Does the collective bargaining agreement provide lower eligibility requirements than FMLA or state law?

5. If the FMLA, state law or your collective bargaining agreement provides coverage, then what benefits are applicable for leave?

If the FMLA is the governing law, then refer to the applicable sections of this document for benefit entitlement and individual coverage.

Key Definitions

In order to fully understand the scope of FMLA coverage, it is important to know the definitions of several key terms used in the regulations. These definitions identify which family members are covered by the law and the types of medical conditions that qualify for leave. These important definitions are presented in the following section to assist in understanding the rules for taking FMLA leave.

"**Son or daughter**" and "**parent**" are broadly defined under the FMLA to recognize that many children do not live with both biological parents and that many stepparents and grandparents accept the responsibility for child rearing. Therefore, a son or daughter can be a biological, adopted or foster child, stepchild or a child of a person standing in loco parentis. The son or daughter must be under age 18, unless he or she is incapable of self-support due to a mental or physical disability. FMLA's intent is to ensure that an employee who actually has day-to-day responsibility for a child is entitled to leave, even if the employee does not have a biological or legal relationship with the child. Therefore, coverage under FMLA is not restricted to biological parents or legal guardians, but also includes grandparents or other relatives or adults who have day-to-day responsibility to care for and financially support a child.

"**Parent**" is defined as the biological parent of an employee or an individual who stood in loco parentis to an employee when the employee was a child. **The definition of parent does not include parents-in-law, and an employee may not take FMLA leave to care for a seriously ill parent-in-law**.

"**Spouse**" means a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee lives, including common law marriage in the states where it is recognized. An employer is not required to grant leave to care for an unmarried domestic partner unless the laws of the state where the employee lives require such leave. Collective bargaining agreements, however, may provide for FMLA leave to care for a domestic partner.

A person who is the "**next of kin of covered service member**" may take FMLA leave for care of the service member or for certain other deployment-related issues discussed later in this Handbook. This term refers to the nearest blood relative other than the covered service member's spouse, parent, son or daughter (who would already qualify for FMLA leave as a result of their relationship to the service member), or to the blood relative specifically designated by the service member for purposes of military caregiver leave under the FMLA. If there are multiple family members with the same level of relationship to the service member, all of these family members will be considered the next of kin for FMLA purposes, and all may take FMLA leave to care for the service member, either consecutively or simultaneously. For example, if a covered service member has three siblings and has not designated a blood relative to provide care, all three siblings would be considered the covered service member's family.

A "**serious health condition**" is broadly defined in the law to include a variety of physical and mental conditions that involve ***either* inpatient care *or* continuing treatment** by a healthcare provider. (See these definitions below.) A "serious health condition" may also be

a condition that is not ordinarily incapacitating but for which treatments are being given because the conditions would otherwise result in a period of incapacity of more than three days (for example, kidney dialysis, radiation or chemotherapy for cancer treatment or physical therapy for severe arthritis). The condition need not be chronic or long term to qualify as a serious health condition.

"**Inpatient care**" is defined as an overnight stay in a hospital or similar facility, including any period of incapacity (inability to work, go to school or perform other regular daily activities), or the subsequent treatment in connection with the inpatient care. For example, serious surgery and the subsequent recuperation period would be eligible for FMLA leave under this definition.

"**Continuing treatment**" involves a period of incapacity that requires absence from work, school or other normal daily activities of *more than three consecutive, full calendar days* **and** related continuing treatment by a healthcare provider. There must be at least two (2) visits to a healthcare provider within thirty (30) days of the beginning of the period of incapacity; the first visit to the healthcare provider must occur within seven (7) days of the beginning of the period of incapacity. Alternatively, three or more consecutive days of incapacity plus a regimen of continuing treatment is also considered a serious health condition. The absence may be associated with an inpatient hospital stay, or may be due to continuing treatment for a chronic or long-term health condition that is incurable, or may also be for pregnancy or prenatal care. Specifically, the definition includes one or more of the following:

1. The employee or qualifying family member is treated two or more times by a healthcare provider.
2. The employee or family member is treated by a healthcare provider on at least one occasion that results in a regimen of continuing treatment under the supervision of the healthcare provider (e.g., medication or therapy).
3. The employee or family member is treated two or more times by a provider of healthcare services (e.g., speech therapist) under orders of, or on referral of a healthcare provider.
4. The employee or family member is under the continuing supervision by a healthcare provider due to a serious long-term or chronic condition or disability that is incurable. Examples include people with Alzheimer's or people in the terminal stages of a disease who are not actively receiving treatment.
    - Examples of "continuing treatment" eligible for FMLA leave include, but are not limited to: heart attacks or heart conditions requiring surgery, back conditions requiring surgery or extensive therapy, severe arthritis, severe nervous disorders, pregnancy, severe morning sickness, miscarriages, a parent or spouse suffering from Alzheimer's disease or clinical depression. Conditions such as the common cold or routine dental problems are usually not considered to require continuing treatment eligible for FMLA leave unless complications arise. Likewise, treatment such as taking over-the-counter medications, drinking fluids and other similar activities that do not require a visit to a healthcare provider do not, by themselves, constitute continuing treatment for FMLA purposes. A course of prescription medications or therapy, however, will usually qualify as continuing treatment.

A "**long-term chronic condition**" does not have to be incurable to be covered under the FMLA. The regulations clarify this point by saying that such a condition (i.e., Alzheimer's disease or a severe stroke) need only involve a period of incapacity that is long term or permanent for which treatment may not be effective. Unless complications occur, the common cold, flu, earaches, upset stomach, minor ulcers, headaches (other than migraines), routine dental or orthodontia problems and periodontal disease are **not** covered as serious health conditions. An employee is covered for absence due to treatment of a substance abuse problem. However, absence because of use of the substance is not covered.

- For employees with "**chronic conditions**" that extend for a period of time and may cause periods of incapacity that do not last for more than three consecutive days, the rules have been relaxed. For example, an employee with asthma may be incapacitated for only one day with an attack. This one day would be covered under FMLA.

"**Incapacity**" is defined as the inability to work, attend school or perform regular daily activities due to the serious health condition, treatment or recovery.

The term "**equivalent position**" is one that is virtually identical to the position the employee held prior to the leave in terms of pay, benefits and working conditions, including perquisites ("perks") and status.

"**Return to work**" means that an employee has returned to their former or an equivalent position for at least 30 days after the end of an FMLA leave event. If an em-

ployee fails to return to work, the employer may recover his or her share of the healthcare premium for the period of the leave.

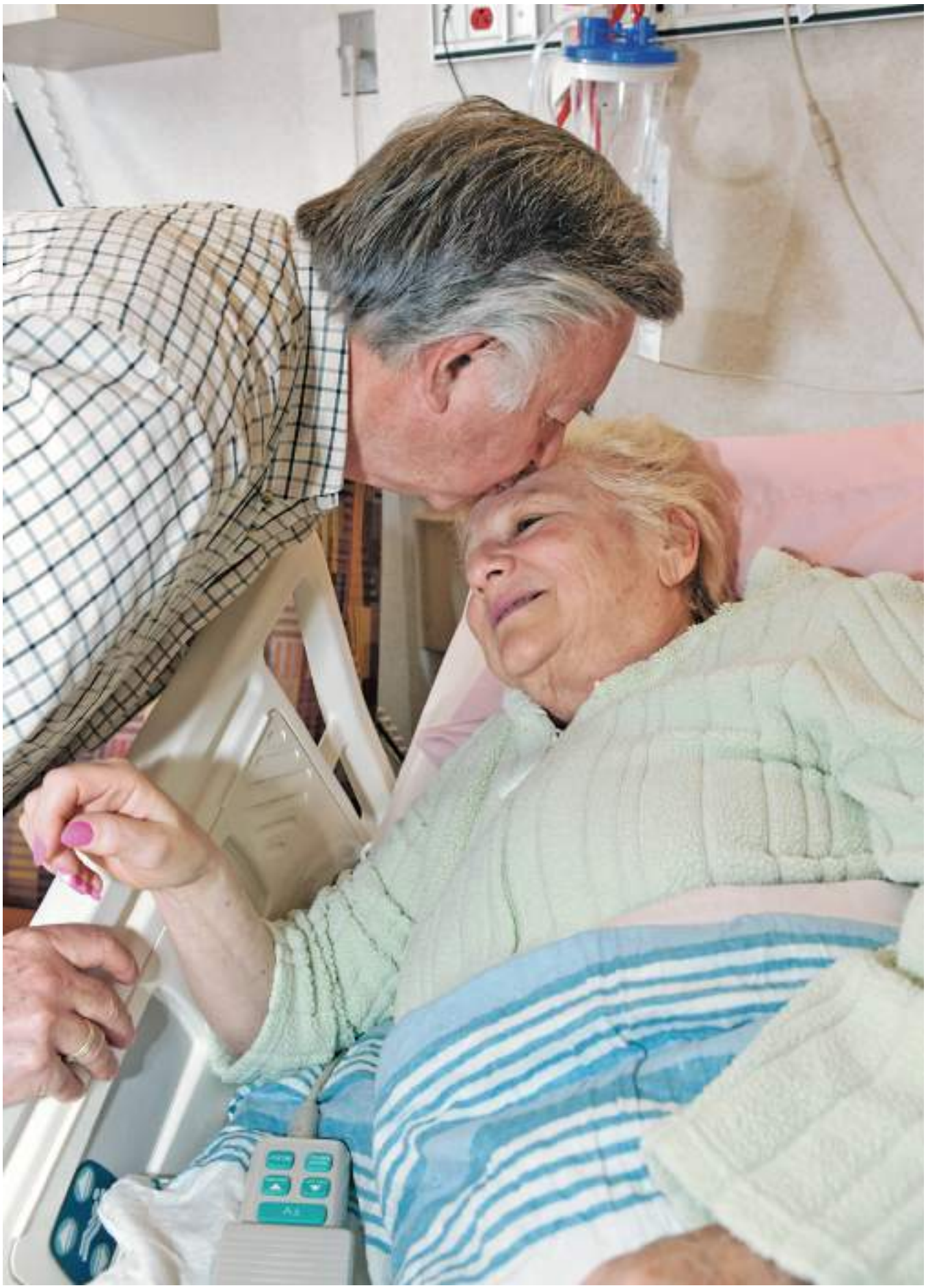
A "**healthcare provider**" generally includes any person from whom a group's health plan will accept certification of the existence of a serious health condition to substantiate a claim for benefits. The definition is very broad and includes, but is not limited to: doctors of medicine or osteopathy, podiatrists, dentists, clinical psychologists, nurse practitioners, nurse-midwives and Christian Science practitioners.

The regulations define an employee as "**unable to perform the functions of the position**" where the healthcare provider has found either that the employee is unable to work at all or is unable to perform one of the essential functions of the job. An employee who must be absent from work to receive medical treatment for a serious health condition is automatically considered to be "unable to perform the functions of the position" during the absence for treatment.

A "**local educational agency**" is defined in the Elementary and Secondary Education Act of 1965 as "a public board of education or any other public authority legally constituted within a state for either administrative control or direction of public elementary or secondary schools."

"**Instructional employees**" are those whose principal function is to teach and instruct students in a class or individual setting. This definition includes teachers, athletic coaches, driving instructors and special education aides like signers for the hearing impaired.

"**Academic term**" means the school semester, which typically ends near the end of the calendar year and the end of the spring each school year. In no case can a school have more than two academic terms or semesters each year for purposes of FMLA.



How To Apply for FMLA Leave

If an employee's family or medical leave is **foreseeable** (e.g., childbirth, adoption, placement in foster care or planned medical treatment), the employee must provide the employer with **at least 30 days' notice**. If leave is foreseeable fewer than 30 days in advance of the need to take leave, the employee must provide notice as soon as possible, generally defined as the same or next business day as the employee finds out about the need for leave.

In the event that the need for FMLA leave is **unforeseeable** (e.g., premature childbirth, unanticipated early adoption or a medical emergency), an employee must provide the employer with such notice as soon as practicable under the facts and circumstances of the specific case. This means that an employee must at least provide verbal notice to the employer on the same or next business day that the need for leave becomes known to the employee.

The employee may provide notice either in person or by telephone, fax or other electronic medium. Notice may also be given by a member of the employee's family, or other responsible person, if the employee is unable to personally provide notice.

Employees must give notice of FMLA leave to the employer according to the employer's usual and customary procedure for requesting leave. This means that the notice should be provided to the same person the employee typically contacts to request other types of leave, usually the employee's supervisor. Also, if an employer's customary practice requires written notice for any type of leave, the employee must abide by that practice when requesting FMLA leave unless unusual or emergency circumstances exist. For instance, if employer policy requires two days' advance written notice to a supervisor for other types of leave, then FMLA leave will also require the same notice unless unusual or emergency circumstances are present.

If the employer does not require written notice for leave requests, no specific form of notice is required. However, an employee must at least provide verbal notice sufficient to make the supervisor aware that the employee needs FMLA leave. Additionally, when scheduling planned medical treatment, the employee must consult with the employer and is required, if possible, to make a reasonable effort not to disrupt the employer's operations, subject to the approval of the healthcare provider.

It is not necessary that the employee expressly state that he or she is requesting FMLA leave. However, the employee must identify the general cause of the need for the leave (i.e., birth of a child, adoption, etc.) or provide enough

information so that the employer can determine whether FMLA applies to the leave request. If the leave is for a reason for which the employer has previously provided FMLA leave (such as leave for continuing treatment), then the employee must specify this fact when requesting leave. It is then the employer's responsibility to ask follow-up questions or request more information from the employee if necessary, such as a medical certification or proof of military caregiver status. If possible, the employee should get these employer requests in writing. The employee should respond to the employer's reasonable questions for the purpose of determining whether the leave qualifies for FMLA leave, since failure to respond to reasonable employer inquiries may result in denial of FMLA leave by the employer.

As a practical matter, it is much more prudent for an employee to make an FMLA leave request in written form than to make a verbal request. A **sample** FMLA leave request form is presented in Appendix I. These forms may be modified to meet local practices.

Intermittent Leave and Temporary Transfers

Under certain conditions, an employee may opt to take intermittent leave or to work a reduced leave schedule.

According to the FMLA, "**intermittent leave**" is leave taken in separate blocks of time for one illness or injury. Such leave includes periods of one hour to several weeks; for example, leave taken for several days at a time over a period of 6 months for chemotherapy, or two hours a week for a necessary visit to a physical therapist, would be considered intermittent leave. A change in an employee's usual schedule for a period of time constitutes a "**reduced leave schedule**." For instance, an employee who chooses to work part time for an extended period while recuperating from an illness is on a reduced-leave schedule.

Leave may be taken intermittently or on a reduced-leave schedule when medically necessary. If an employee requires treatment, planned or unplanned, for a serious health condition, intermittent leave may be taken. Intermittent leave may also be taken if the employee is not able to work because of a chronic serious health condition even if no treatment is received. It should be noted that an employee is also permitted to take intermittent leave for the care or comfort of a spouse, parent or child with a serious health condition, or if the employee is the next of kin of a covered service member with a serious illness or injury. However, the regulations require that the employee taking intermittent leave make a reasonable attempt to schedule this leave so as to create as little disruption as possible of the employer's operations.

Intermittent or reduced-schedule leave may be taken after the birth of a child or placement of an adopted child only with the permission of the employer. However, the employer's agreement is not required if the mother has a serious health condition in connection with childbirth or if the newborn child has a serious health condition. An expectant mother may also take leave prior to the birth of the child for prenatal care or for her own condition without the permission of the employer because it is considered a serious health condition.

An employer has the right to temporarily transfer an employee who needs intermittent leave or a reduced-leave schedule to an alternative position for the period that the leave is required. The alternative position must have pay and benefits, but not necessarily duties, equivalent to the employee's regular position. **An employer may not transfer an employee for the purpose of discouraging the employee from taking leave or to create hardship for the employee**. Also, **if the employee is on a reduced-leave schedule and is therefore deemed a part-time employee, the employer does not have the right to eliminate benefits that regular part-time employees do not receive**. However, an employer may prorate benefits that are based on hours worked (vacation leave or sick leave). In all cases, transfer of an employee to an alternative position may require compliance with any collective bargaining agreements, state laws or pertinent federal laws such as the Americans with Disabilities Act (ADA).

The application of the intermittent leave rule is illustrated by the following example:

> An employee works full time (8 hours per day; 5 days per week) for an employer who provides healthcare coverage for full-time employees but not for part-time employees. Additionally, the employer's policy regarding sick leave accumulation is that an employee accumulates one day of sick leave for every month (4 weeks at 40 hours per week) of service. Part-time employees must work for two months (8 weeks at 20 hours per week) to receive one day of sick leave. The full-time employee requests a reduced-leave schedule of four hours per day for 8 weeks. In this case, the

employer may not eliminate healthcare coverage even though the employee is a part-time employee for two months. However, the employee will only accumulate one day of sick leave during the two months that he works part time.

An employee is not required to take more leave time than necessary. An employee who has been transferred to a part-time position for purposes of intermittent leave must be reinstated to her old job or an equivalent position once the need for leave no longer exists.

Only the amount of leave actually taken is counted in determining how much FMLA leave was used during intermittent or reduced-leave schedule. For example, if an employee who normally works five days a week takes off one day, he has used 1/5 of a week of FMLA leave. Likewise, an employee who normally works 8-hour days but who is currently working a reduced schedule of 4-hour days for FMLA purposes uses 1/2 a week of FMLA leave each week during this reduced-schedule period. For part-time employees, the time on leave is determined on a proportional basis by comparing the employee's usual schedule with the new reduced-leave schedule. For example, if a part-time employee who generally works 30 hours per week works a reduced-leave schedule of 20 hours per week, only the 10 hours of leave are counted. In this case, the employee would use 1/3 of a week of FMLA leave each week on the reduced schedule.

It is important to note that if an employee is assigned to "light duty" following FMLA leave, the time spent working light duty does not count against an employee's FMLA leave entitlement. In other words, if an employee is voluntarily performing a light duty assignment, the employee is not on FMLA leave.

Medical Certification

The regulations provide that an employer may require medical certification from a healthcare provider for leave based on the employee's own serious health condition or the serious health condition of a spouse, child or parent.

Employers may request a new medical certification each leave year for medical conditions that last longer than one year and can request recertification of an ongoing condition every six months in conjunction with an absence.

Medical certification by a healthcare provider must include four basic pieces of information: 1) the diagnosis of the medical condition; 2) the date the condition began and the healthcare provider's judgment as to the probable duration of the condition; 3) the prescribed treatment protocol (e.g., the frequency and duration of treatment); and 4) whether inpatient hospitalization is required.

The FMLA regulations recognize the existence and importance of the Health Insurance Portability and Accountability Act (HIPAA), especially the HIPAA privacy requirements and their application to communications between employers and employees' healthcare providers. In response to these privacy requirements, the following rules apply: An employee *may* comply with the certification requirement by allowing the employer to directly contact the employee's healthcare provider, but *is not required* to provide such an authorization. If the employee chooses to take this route to certification, the employer's representative contacting the healthcare provider must be a healthcare provider, human resource professional, a leave administrator, or a management official, but **cannot in any case be the employee's direct supervisor**. In addition, employers may not ask healthcare providers for additional information beyond that required by the certification form.

The Department of Labor has developed sample Medical Certification Forms for employees' own FMLA leave and for leave taken to care for a family member. A sample certification form is also available for leave taken for a qualifying exigency for military family leave. Locals may choose to incorporate any or all of these forms into their contracts. The employer must allow the employee at least fifteen (15) calendar days following the request of certification for the employee's response. **The employee must pay for the cost of the initial medical certification**.

If an employer deems a medical certification to be incomplete or insufficient, the employer must specify in writing what information is lacking, and must give the employee seven (7) calendar days to cure the deficiency. If an employer doubts the accuracy of an employee's original medical certification, it may require the employee to obtain a second opinion from another healthcare provider of its choice. The healthcare provider cannot be a regular employee of the employer. Also, the healthcare provider cannot be a contract employee of the employer, unless the employer is located in a rural area with only one or two doctors. **The employer must pay for the requested second opinion**.

If there is a disagreement between the first and second opinion, the employer may request a third opinion, which must be jointly approved by the employer and the employee. The third opinion, which the employer must also pay for, will be final and binding on both parties. The employer and employee must each act in good faith to reach agreement on the third provider. If the employer does not act in good faith to designate a third opinion provider, the employer will be bound by the first certifica-

tion. Similarly, if the employee does not act in good faith to designate the provider of the third opinion, he will be bound by the second medical certification that was requested by the employer. Any necessary travel expenses for the second and third opinions must be paid by the employer; however, travel to a provider outside normal commuting distance is limited to very unusual circumstances.

If an employee requests leave for his or her own serious health condition, in addition to the above-mentioned four elements, the certification must provide a statement that the employee is unable to perform the essential functions of their job. The employer is responsible for defining the essential functions of every job. This can be accomplished by a written job description or through collective bargaining. If an employee requests leave for the serious health condition of a family member, the medical certification must include a statement that the family member needs assistance of a physical or psychological nature or that leave is needed to make arrangements for care by a nursing home, home care nurse or aide.

If an employee takes leave on an intermittent or reduced-leave schedule, medical certification must include:

1. a statement from a healthcare provider that the leave is medically necessary and
2. the expected duration and schedule of the requested leave.

Sample certification forms for employees and for family members of employees are included in Appendix III; these forms may be modified to fit local practices.

Recertification, Fitness for Duty and Intent to Return to Work

The regulations provide that an employer may request **recertification** of a "serious health condition" at any reasonable interval of time, but not more often than every thirty (30) days.

The employer may ask for the same information contained in the original certification, but second and third opinions may not be required for recertification. However, the employer may provide the healthcare provider with a record of the pattern of the employee's absences and ask the provider whether the serious health condition and need for leave are consistent with the pattern.

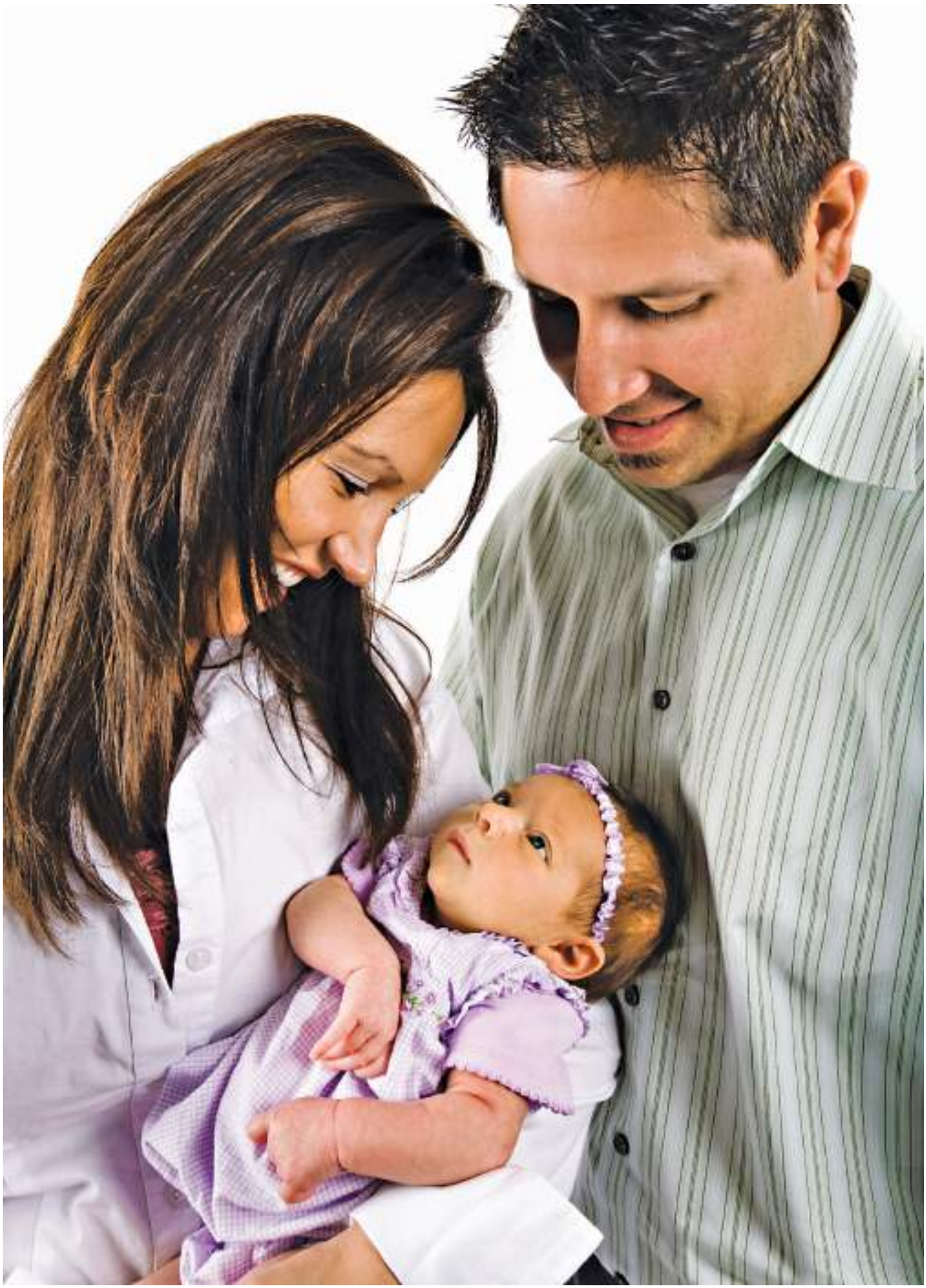
There are four exceptions to this 30-day rule, under which the employer can request recertification even though less time than 30 days has passed:

1. the employee requests a leave extension;
2. the circumstances surrounding the original certification have changed significantly;
3. the employer receives information that casts doubt on the original certification; or
4. the employee cannot return to work due to the continuation, recurrence or onset of a serious health condition that prevents the employer from recovering its share of the healthcare premium during the FMLA leave.

As a condition of restoration of employment, an employer is also permitted to require all employees who take leave for their own serious health conditions to obtain certification from a healthcare provider that they are able to return to work, also known as **fitness-for-duty certification**. At the start of FMLA leave or shortly thereafter, the employer must notify the employee requesting leave that the employee must obtain fitness-for-duty certification before he or she can return to work. The employer may require that the certification address the employee's ability to perform specified essential job functions. The employer's uniform policy must be based on the nature of the illness or duration of the absence. Certification of the employee's fitness to return to work may only deal with the condition or illness that caused the need for leave. Costs for fitness-for-duty certification are the responsibility of the employee.

An employer may not require a second "fitness-for-duty" certification. If the employee does not submit the required "fitness-for-duty" certification, the employer may deny the employee a return to his or her position. In addition, where reasonable job safety concerns exist, an employer may request fitness-for-duty certification even if an employee is taking intermittent FMLA leave rather than continuous leave.

If the employer does not require a "fitness-for-duty" certification, the employee should still notify the employer in writing of his or her intent to return to work. A sample Notice of Intention To Return from Leave is included as Appendix II.



Special Leave Rules for Spouses Employed by the Same Employer

FMLA has a special provision designed to remove an employer's incentive to refuse to hire married couples.

Where both spouses are employed by the same employer, the total amount of leave may be limited to 12 weeks maximum that both spouses can take for three FMLA-approved reasons:

1. childbirth,
2. adoption of a son or a daughter or to care for a sick parent. For example, a married couple, working for the same employer, may decide to take leave to care for a newborn child. Both parents may take off six weeks for a total of twelve weeks. Alternatively, one parent may take off four weeks and the other parent may take off eight weeks. However, both parents may not take off 12 weeks each (for a total of 24 weeks) for any of the reasons cited above.

If the requested leave is for another approved condition (e.g., husband's or wife's own serious health condition), the cumulative leave limitation does not apply. For example, if an employee elects to take off 12 weeks for his own serious health condition, his spouse may take off 12 weeks of leave to care for him. Also, if the couple's child was diagnosed with a serious health condition, each parent could take 12 weeks of leave to care for the child.

If both husband and wife use a portion of their 12 weeks of leave for either birth or adoption, each would be entitled to the remainder of the 12 weeks for another purpose. For example, a married couple each takes six weeks of leave for the birth of their child. Each parent could later use their remaining six weeks for their own personal illness or to care for a sick child.

Military Family Leave

Military Family or Covered Service Member Leave

The FMLA regulations provide for up to 26 work weeks of leave in a single 12-month period to care for a covered member of the armed forces who has an illness or injury incurred in the line of duty. This leave is known as "**military family leave**" or "**covered service member leave**."

Specifically, employees who are family members or next of kin of covered service members are eligible for this type of FMLA leave. A "**covered service member**" is defined as a current member of any branch of the U.S. Armed Forces, including a member of the National Guard or Reserves, or a member of the Armed Forces, the National Guard or Reserves who is on the temporary disability retired list, who has a serious injury or illness incurred in the line of duty on active duty for which he or she is undergoing medical treatment, recuperation or therapy; or otherwise in outpatient status; or who is otherwise on the temporary disability retired list. "Outpatient status" means that the service member is receiving care from a military medical facility as an outpatient or former member of the Armed Forces, former members of the National Guard and Reserves, and members on the permanent disability retired list are not considered "covered service members" for FMLA purposes. An employer is permitted to require an employee to provide confirmation of the family relationship to the covered service member.

The 26-week leave entitlement is calculated on a per-covered-service member, per-injury basis. This means that an employee may be entitled to take more than one period of leave to care for different covered service members or to care for the same service member with a subsequent serious injury or illness. However, the total amount of FMLA leave taken for this purpose within a 12-month period is still limited to a total of 26 workweeks.

Although the rules provide for 26 weeks of leave for care of a covered service member, an employee is still only eligible for 12 weeks of leave for the other FMLA purposes. So, for instance, an employee may take 16 weeks of FMLA leave to care for a covered service member and an additional 10 weeks to care for a newborn child within a single 12-month period. However, the employee may not take more than 12 weeks of leave for care of the newborn child even if she takes fewer than 14 weeks to care for an injured service member.

Like the other rules for married couples, a husband and wife who work for the same employer may be limited to a combined total of 26 workweeks of leave during a 12-month period. However, if one spouse is ineligible for FMLA leave, the other spouse is entitled to the full 26 weeks of leave.

Qualifying Exigency Leave

This provision helps spouses, parents, sons and daughters of members of National Guard and Reserves manage their affairs while the service member is on federally called active duty. FMLA rules provide that the normal 12 work weeks of protected FMLA leave are available to eligible employees with a covered military member serving in the National Guard or Reserves to use for "any qualifying exigency" arising out of the fact that a covered military member is on active duty or called to active duty status in support of a contingency operation.

A "**qualifying exigency**" for which a spouse, parent, son or daughter of a service member who is on active duty or has been called to active duty may take FMLA leave but is not limited to the following: short-notice deployment; military events and related activities; childcare and school activities, including arranging for alternative childcare or providing childcare on an urgent, immediate need basis (but not an ongoing, regular basis); financial and legal arrangements; counseling; rest and recuperation; post-deployment activities; and additional activities not encompassed in other categories but agreed to by the employee or employer.

Benefit Entitlements while on FMLA Leave

If FMLA only provided a worker 12 weeks of unpaid leave for childbirth, adoption or a serious family illness, most workers could not afford to take the loss in wages due to family and medical needs.

Therefore, in addition to the 12 weeks of unpaid leave, FMLA provides other important benefits to workers on leave. First, it permits workers to substitute accrued paid leave for unpaid leave, so workers can maintain their living standards. Second, FMLA provides that health insurance coverage for a worker on leave must be maintained, and other accrued benefits must be protected while on leave. Third, FMLA leave takers are entitled to return to their same or equivalent job at the end of their leave. A description of these important benefits follows.

Paid and Unpaid Leave

FMLA provides for 12 weeks of unpaid leave. However, if an employee has accrued paid vacation, personal leave, or family leave, he or she may elect to substitute the paid leave for unpaid leave if it is for:

1. the birth and care of a child,
2. the placement of a child with an employee for adoption or foster care and to care for the child or
3. to care for a seriously ill spouse, child or parent.

An employer cannot override an employee's election to substitute appropriate paid leave for unpaid FMLA leave nor place any other limits on its use. For example, the employer cannot require the employee to take leave a full day at a time or a week at a time.

However, an employer may also require the employee to substitute accrued paid leave for unpaid FMLA leave. This means that paid leave provided by the employer runs concurrently with the period of FMLA leave, and the employee gets paid according to the employer's paid leave policy during the period of otherwise unpaid FMLA leave. Under this rule, an employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employer's normal leave policy.

If leave is taken for the serious health condition of an immediate family member, or for the employee's own serious health condition, the employee may elect to substitute any accrued paid vacation, personal leave or medical or sick leave for unpaid FMLA leave. Again, however, the employer is not required to substitute paid sick leave or paid medical leave for any situation where it would not be normally provided. For example, if an employer's sick leave plan does not provide paid time off for care of a sick parent, an employee is not entitled to substitute paid sick leave for this purpose.

If an employee does not elect to substitute paid leave for unpaid leave, **the employer retains the right to require the substitution**. The regulations state that an employee must accept an employer's decision to require the substitution of paid for unpaid leave, even when an employee would desire a different outcome. The only way that the employer's control over the decision to substitute paid leave for FMLA leave can be moderated is through existing state law or collective bargaining.

The substitution provision generally prohibits the "pyramiding" of unpaid leave on top of paid leave. For example, if an employee had accrued four weeks of paid sick leave at the time of an FMLA leave event, he or she might want to pyramid the four weeks of paid leave on top of the 12 weeks of unpaid leave for a total of 16

weeks off the job. With the policy of substitution established in the Act, the employee may use the four weeks of paid leave as part of the 12 weeks of leave, or be required to do so by the employer. Once the four weeks have been exhausted, the employer must still provide eight weeks of unpaid leave for a total of 12 weeks.

An employee electing to use any type of paid leave concurrently with FMLA leave must follow the same terms and conditions of the employer's policy that apply to other employees for the use of such leave. The employee is always entitled to unpaid FMLA leave if he or she does not meet the employer's conditions for taking paid leave, and the employer may waive any procedural requirements for the taking of paid leave.

On the other hand, if an employee uses paid leave under circumstances that do not qualify as FMLA leave, the leave will not count against the employee's 12 weeks of FMLA leave entitlement. For example, paid sick leave used for a medical condition that is not a serious health condition or serious injury or illness, such as to go to the eye doctor or for a common cold, does not count against the employee's FMLA leave entitlement.

Overlap Between ADA and FMLA

While the Americans with Disabilities Act (ADA) and FMLA have important distinctions with regard to coverage,i.e., which employers and employees are included, in the area of medical leave there is the possibility for substantial overlap. This overlap does not extend to time off to take care of a family member for the ADA, unlike the FMLA, does not provide for family leave when a son, daughter, spouse or parent is seriously ill.

In the area of medical leave the ADA covers job applicants with "disabilities," whereas the FMLA protects qualified employees with "serious health conditions." Therefore, with regard to short-term medical conditions, such as a broken leg, it is possible that an employee would be covered under the FMLA but not the ADA.

However, in some circumstances, an employee could be covered by both laws. For example, an employee could take 12 weeks of FMLA leave due to a heart attack. Then, as a result of the heart attack, the employee's doctors could determine that, due to a weakened heart, a light or reduced-work schedule is required for the employee. At such point the employee would be able to show that he suffers from a disability under the ADA, and the employer would then have to provide this accommodation unless to do so would constitute an undue hardship. Similarly, it is possible that an employee with an ADA-recognized disability would be able to take more than 12 weeks' leave provided that such leave did not constitute an undue hardship on the employer.

The rights of an employee upon return to work also may differ between the ADA and FMLA. Under the ADA, an employee is entitled to the position he or she held prior to the leave, provided the employee is qualified for the position. If the position is no longer open because to leave it vacant for the period of the leave would result in an undue hardship for the employer, or if the employee cannot perform the job with reasonable accommodation, the employer must consider reassigning the employee. Under the FMLA, by contrast, an employer is required to place an employee returning from a 12-week leave in the position previously held or in an "equivalent position" with equivalent pay and benefits. Pursuant to FMLA, an employer can thus transfer an employee to an equivalent position without proving undue hardship. Thus, the ADA may provide greater reinstatement rights to qualified employees than FMLA.

Interaction Between FMLA Leave and Workers' Compensation

An employee who incurs a work-related injury or illness has the option of electing FMLA paid leave from the employer or workers' compensation benefits. An employee cannot receive both. Therefore, where a work-related injury or illness causes a "serious health condition" that makes the employee unable to perform his or her job, and the employee elects to receive workers' compensation benefits, the employer cannot require the employee to substitute any paid vacation or other paid leave during the absence that is covered by workers' compensation fund payments. However, absence from work due to a workers' compensation event can count against the employee's FMLA leave entitlement if the illness or injury meets the FMLA definition of a "serious health condition."

An employer is precluded from requiring an employee to return to work prematurely in a "light-duty" assignment if the employee remains unable to perform any one or more of the "essential functions" of the original position, provided the employee has not exhausted his or her 12 weeks of leave entitlement within the 12-month period. However, FMLA does not prevent the stoppage of workers' compensation payments where an employee refuses to accept a medically approved "light-duty" assignment. In such an instance, the employee may continue on FMLA leave, and elect to substitute appropriate paid leave, or continue on unpaid leave until the 12 weeks of FMLA leave have been used.

Healthcare Coverage

FMLA provides that during the leave period, an employer must maintain coverage under its group health plan at the same level and conditions that coverage is provided for active employees.

A group health plan includes both insured and self-insured plans contributed by an employer to provide healthcare to employees. If an employer requires a $75 per month employee contribution toward the group health premium, the FMLA leave recipient must pay the $75 premium contribution while on leave. The employer must continue to pay its portion of the premium and continue the health insurance coverage for the employee during the entire leave.

The regulations explain that if a leave employee is substituting paid leave for unpaid leave, his or her share of any required premium be paid through payroll deduction. If the leave is unpaid, the employer may ask the employee to pay his or her premium share at the same time as it would be if made by payroll deduction. Alternatively, payment could be made on the same schedule as payments are made under COBRA. The employer must give the employee advanced written notice of the terms for payment of the employee's premium share during the leave and may not apply more stringent requirements to an FMLA leave employee than required of employees on other forms of unpaid leave.

An employer does not have to provide health benefits to an employee on FMLA leave if the employer does not provide such benefits to active employees. However, if an employer establishes a group health plan during an employee's leave, the employee is entitled to health benefits on the same basis and on the same date that other active employees are entitled to coverage. Also, if an employer changes health plans while an employee is on FMLA leave, the employee is entitled to the changed benefits to the same extent as other active employees. An employee on FMLA leave must be given notice of any opportunity to change plans or benefits.

Employer's Obligation to Maintain Health Benefits During Leave

The employer's obligation to maintain health insurance coverage ceases if an employee's premium payment is more than 30 days late. In order to drop group health plan coverage for an employee whose premium payment is late, the employer must provide written notice to the employee that the payment has not been received 15 days before coverage will cease. Even if the employee stops paying his or her premium share during the FMLA leave, the employee is entitled to be restored to full coverage immediately upon returning to work. Therefore, the employee cannot be subject to any waiting period, physical examination or exclusion for preexisting conditions.

Employer Recovery of Premium if Employee Quits

An employer may recover the premiums it paid for maintaining employee health coverage for an employee on unpaid leave if the employee does not return to work after the leave has expired. This recapture feature does not apply to any employee who cannot return to work because of the continuation of his or her serious health condition or that of an immediate family member. It also does not apply where other circumstances beyond the employee's control prevent them from returning to work. For example, if a newborn has a serious health condition, a parent's de-

cision not to return to work is considered beyond his or her control. On the other hand, a mother's or father's decision not to return to work to stay home with a healthy newborn would not be considered circumstances beyond the employee's control. **The employee must return to work for at least 30 days to be considered "returned to work."**

When an employee fails to return to work for any other reason, the health premiums paid by the employer are a debt owed by the non-returning employee to the employer. The employer may recover its share of premiums through deductions from any amount owed to the employee (e.g., unpaid wages, vacation pay, etc.).

Effect of the Family and Medical Leave Act on COBRA Coverage

Under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), every employer with 20 or more employees who sponsors a group health plan must offer any employee who terminates their employment the opportunity to continue their health insurance coverage under the plan. Affected employees may continue on the employer's health plan for a maximum of 18 months, provided the employee pays the entire healthcare premium plus up to an additional 2 percent administrative fee. Since FMLA provides continuation of health insurance coverage for up to 12 weeks of unpaid leave each year, it is important to note how these two laws relate to one another.

The taking of leave under FMLA is not considered termination of employment under COBRA. However, if an employee on FMLA leave chooses to terminate his or her employment and not return to work, he or she would trigger COBRA coverage. Therefore, COBRA coverage can be pyramided on top of FMLA coverage. The following example will illustrate this point:

An employee covered by a health plan on April 2 elects to take 12 weeks of FMLA leave starting on April 3 and ending on June 23. If, at the end of the leave (June 23), the employee elects not to return to work with their employer, they qualify for 18 months of COBRA coverage starting on June 23.

COBRA coverage is always available to a covered employee on the day that FMLA health insurance coverage is lost. This notion can be depicted by the following example. An employee takes 12 weeks of FMLA leave starting on March 8. After only six weeks on leave (April 12), the employee informs the employer that he or she will not be returning to work. The employee's FMLA coverage ceases on April 12, and he or she qualifies for 18 months of COBRA coverage beginning on that date.

Other Benefits While on Leave

During the period of the FMLA leave, other employee benefits such as life insurance, disability insurance and pension accumulation may be suspended by the employer. Therefore, if an employee on an unpaid leave dies during the leave, and the employer suspended life insurance coverage, the employee's estate is not entitled to any life insurance benefit. However, since an employee who returns from FMLA leave is entitled to full restoration of all benefits enjoyed before the leave without any requalification or waiting period, the employer may elect to pay the full premium for these nonhealth benefits in order to avoid a lapse in coverage. If the employer pays the full premium for such nonhealth benefits during the leave, the employee is covered for the various events described in the benefit plans. The employer has the right to recover the employee's share of any nonhealth premium costs when the employee returns to work. If the employee fails to return to work for any reason, the employer may also recover only the employee's share of any nonhealth premium paid by the employer.

Unpaid FMLA leave does not constitute service credit, except for purposes of break-in-service rules, because the taking of FMLA leave cannot result in the loss of any accrued benefit earned prior to the commencement of the leave. However, paid leave is counted as service credit for vesting and benefit accrual. Moreover, if the employer has established (or union and employer have negotiated) a special maternity or paternity leave plan that provides pension credit during periods of unpaid leave, the more generous provision will apply.

Return-to-Work Rights

FMLA requires that any employee on a covered family or medical leave be restored to their original position or an equivalent position with equivalent wages, benefits and working conditions upon the employee's return from leave. The term "equivalent position" is one that is virtually identical to the position the employee held prior to the leave in terms of pay, benefits and working conditions, including perquisites and status. This definition parallels Title VII's general prohibition against job discrimination with respect to pay, working conditions and benefits. Therefore, an employer is prohibited from permanently replacing an employee who takes FMLA leave or to restructure a position then refuse to reinstate the returning employee on the grounds that no job exists. Neither can an employer consider reinstating an employee to a worksite that involves a significant increase in either travel time or distance.

An employee on FMLA leave may decide to return to work before the end of the planned leave. In that event, the employee is required to provide the employer with at least two business days' advance notice of the intent to return to work. The employer is also entitled to obtain periodic status reports from the employee to determine when the employee anticipates returning to work.

KAREN SACHER

Specific Leave Rules for Certain Educational Employees

There are special leave rules in the law for certain "instructional employees" of local education agencies and private elementary and secondary schools.

These special rules do not apply to colleges, universities, trade schools or preschools.

Employees of local education agencies must meet the same eligibility criteria as other employees in order to qualify for coverage. This means that educational employees must have been employed for at least 12 months and completed a minimum of 1,250 hours of work (about 24 hours per week) prior to the leave. The employee must also work for an employer who employs at least 50 employees within a 75-mile radius to be eligible for FMLA leave. For example, an employee of an elementary school with 30 employees would be eligible for FMLA leave if all other elementary or secondary schools under the jurisdiction of the same school board employed 20 or more employees within 75 miles. However, an employee of a rural school with 30 employees would not be eligible for FMLA leave, where there are no other schools under the jurisdiction of that school board.


LAUREN LONG

In determining whether a particular employee meets the 1,250-hour requirement, the FMLA regulations apply the principles established under the Fair Labor Standards Act (FLSA). FLSA divides employees into two categories: exempt and nonexempt, and different principles apply to each category.

Exempt Employees

"Exempt employees," including full-time teachers, are designated as professional employees under the Fair Labor Standards Act (FLSA). As such, full-time teachers are presumed to meet the 1,250-hour requirement and, if necessary, can count time spent at home reviewing homework and tests to reach the 1,250-hour threshold. This means that a full-time teacher who is required to teach only six hours a day for 180 days (1,080 hours) would still be eligible for FMLA leave if he or she spent at least one hour a day on school-related work outside the classroom. With regard to exempt employees, the employer has the burden of proof to clearly demonstrate that such an employee did not work 1,250 hours during the previous 12 months in order to claim that the employee is not eligible for FMLA leave.

Although the FMLA regulations only cite full-time teachers as the only professional educational employees entitled to this presumption, the Department of Labor (DOL) has determined that certain other categories of educational employees are to be treated as professional employees and automatically deemed to meet the 1,250-hour standard. These categories include: guidance counselors, school psychologists, school registered nurses (as opposed to school nurses who are not registered) and certified public accountants. **Higher education faculty are also presumed to meet the 1,250-hour threshold, even though they are not specifically cited in the FMLA regulations.**

Nonexempt Employees

Maintenance workers, bus drivers, cafeteria workers, secretarial support, day care workers, non-RN school nurses and security personnel have been designated as nonexempt workers by the DOL. Their eligibility for FMLA leave depends on how many hours they are compensated or entitled to be compensated under FMLA. For example, a food service worker who works seven hours a day for 180 days during a 12-month period (1,260 hours) will be eligible for FMLA leave. However, a food service

worker who works six and a half hours a day for 180 days (1,170 hours) will not be eligible.

Instructional Employees

The special rules affect the taking of leave near the end of a semester or intermittent leave or leave on a reduced schedule by "instructional employees." Instructional employees are those whose principal function is to teach and instruct students in a class or individual setting. This definition includes teachers, athletic coaches, driving instructors and special education aides, such as signers for the hearing impaired. The special rules do not apply to school board employees who do not have as their prime function teaching or instructing students. Therefore, teacher assistants and teacher aides are not covered by these special rules, nor do they apply to auxiliary personnel like counselors, psychologists or curriculum specialists. School-related personnel, such as secretaries, bus drivers and cafeteria workers are also excluded from these special rules.

Return-to-Work Rules for Instructional Employees on FMLA Leave at the End of an Academic Term

If an employee is able to return to work sooner than anticipated, he or she need only provide the employer two working days' notice of a desire to return to work. Then the employee must be reinstated.

However, certain "instructional employees" of "local education agencies," including public elementary and secondary schools under their jurisdiction and private elementary and secondary schools, can be forced to delay their return to the start of a new semester.

There are separate rules for instructional employees who start leave more than five weeks before the end of an academic term, less than five weeks before the end of an academic term, and less than three weeks before the end of an academic term. "**Academic term**" **means a school semester**, which typically ends near the end of the calendar year and the end of spring each year. In no case can a school have more than two semesters a year for purposes of FMLA. A description of each rule follows.

Rule 1

If an instructional employee begins a leave period more than five weeks before the end of a semester, and the leave will last at least three weeks, and the employee would return to work during the last three weeks of the semester, t**he employer may require the employee to continue taking leave until the end of the semester**. This situation is illustrated below.

Example 1: *The spring term ends on Friday, June 16. An employee begins leave on* **Monday, May 1**, *for his own serious illness. The employee plans to return to work on* **Monday, May 29**, *after four weeks on leave. The return-to-work date falls within the three-week period before the end of the term. Therefore, the employer may require the employee to remain on leave until the end of the term. This would amount to an additional three weeks (***15 working days***) on leave.*

MAY

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14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	**29**	**30**	**31**			

JUNE

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				1	**2**	3
4	**5**	**6**	**7**	**8**	**9**	10
11	**12**	**13**	**14**	**15**	**16**	17
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Rule 2

If an instructional employee starts a leave period for other than his or her own serious health condition within five weeks of the end of the school term, and the leave will last more than two weeks, and the employee would return to work within two weeks before the end of the academic term, **the employer may require the employee to continue taking leave until the end of the term**.

Example 2: *The fall term ends on Friday, January 20. An employee begins leave on* **Monday, December 19**, *to care for a newborn. The employee plans to return to work on* **Monday, January 9**. *Because the absence lasted longer than two weeks and the return-to-work date falls during the last two weeks of the term, the employer may require the employee to continue on leave until the end of the term. This would amount to an additional two weeks (***10 working days***) of leave for the employee.*

DECEMBER

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JANUARY

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Rule 3

If an employee commences leave for other than his or her own serious health condition within three weeks before the end of the school term, and the leave will last more than five working days, the employer may require the employee to continue taking leave until the end of the term.

Example 3: *The spring term ends on Friday, June 16. An employee begins leave on* **Monday, May 29**, *to care for a sick parent. The employee plans to return to work on* **Wednesday, June 7**. *The absence has been longer than five days and the return-to-work date falls during the last two weeks of the term. Because these two conditions apply, the employer may require the employee to remain on leave until the end of the term, which would mean* **an additional eight days on leave**.

MAY

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JUNE

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18	19	20	21	22	23	24
25	26	27	28	29	30	

Summary of Special Rules

Conditions	Leave Begins ...	Duration of Leave is ...	Return-to-Work Date is ...
RULE 1	... more than five weeks before the end of the term	... at least three weeks	... during the three-week period before the end of the term
RULE 2	... during the five weeks before the end of the term	... more than two weeks	... during the two-week period before the end of the term
RULE 3	... during the three weeks before the end of the term	... more than five working days	... during the two-week period before the end of the term

If the three conditions in each rule apply, the employer may require the instructional employee to remain on leave until the end of the academic term. however, when an employee is required to take extra leave until the end of the academic term or semester, that additiona time will not be charged against the employee's FMLA leave entitlement. Moreover, the employer shall be required to maintain the employee's group health insurance during the extra leave time and restore the employee to the same or equivalent postion at the start of the new academic term.

Application of Return-to-Work Rules for College and University Faculty

The above-cited rules do not apply to college or university faculty. Therefore, when a college or university faculty member returns from an FMLA leave, the employer must return him or her to an equivalent **position at any time during the school term**. Such employer may not place a faculty member returning from leave into a temporary nonteaching position until the start of the new school term. Instead, the college or university must reinstate the faculty member to an equivalent instructional position upon completion of the leave. The two-business-day requirement is all that is required by the faculty member wishing to return sooner than the scheduled leave.

Special Intermittent Leave Rules for Instructional Employees

Special rules also apply to "instructional employees" who request intermittent leave or leave on a reduced-leave schedule to care for a family member or for their own foreseeable serious health condition that requires planned medical treatment.

If the requested leave would be for **more than 20 percent** of the total number of working days over the entire period of the leave, the employer may require the employee to choose either:

1. to take leave for the entire period of the planned treatment or
2. transfer temporarily to an available alternative position for which the employee is qualified, has equivalent pay, benefits and working conditions and better serves the employer's work needs.

If an employee elects to take leave for the entire period of planned treatment in (1) above, the entire period of leave will count as FMLA leave.

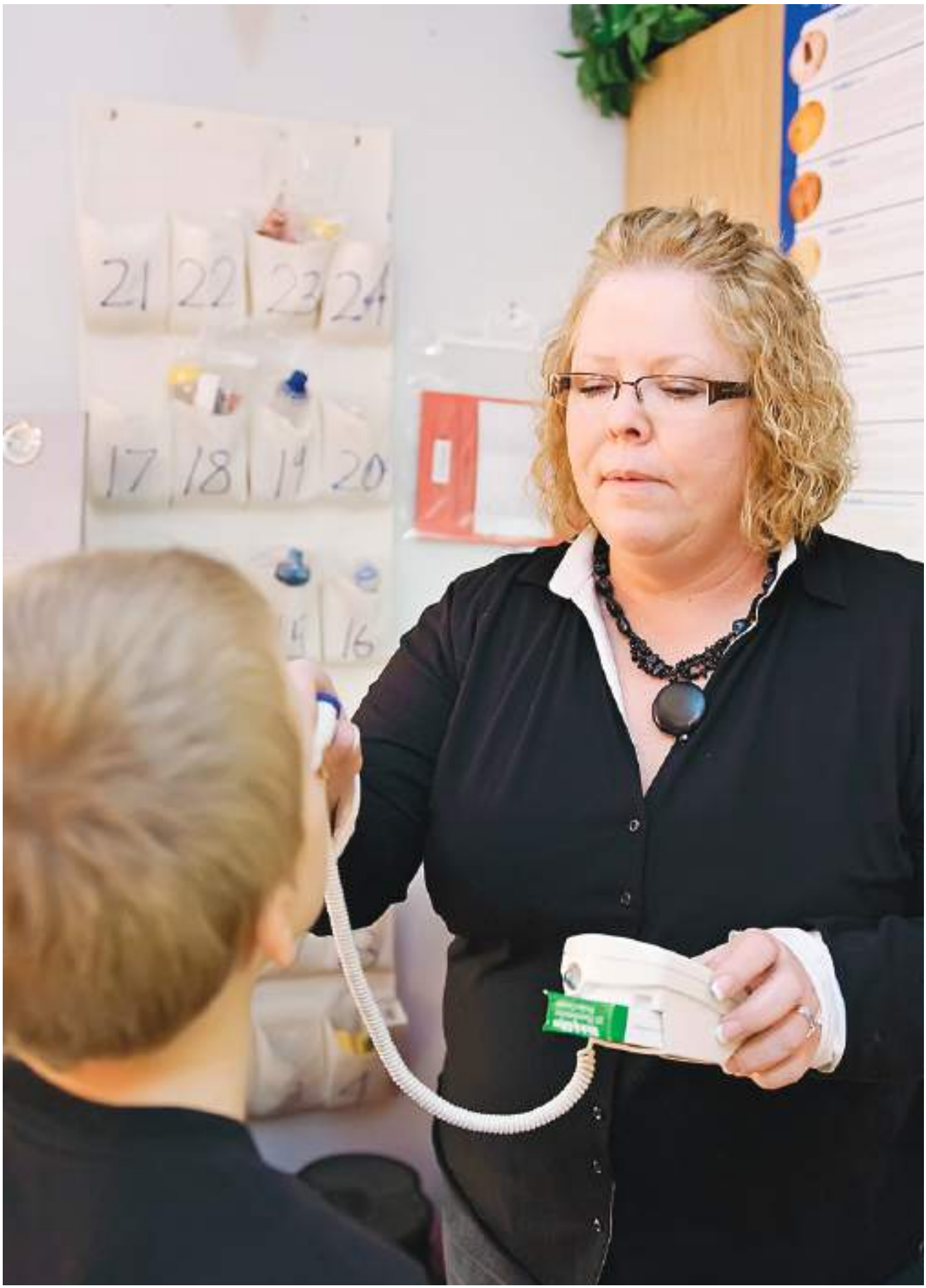
These rules apply only to a leave involving **more than 20 percent** of the working days during the period of the leave. For example, if an instructional employee who normally works five days a week needs to take two days of leave each week, for several weeks, the special rules apply. If the leave is 20 percent or less of the working days during the period of leave, the instructional employee cannot be transferred to an alternative position.

Notice Requirements

If an "instructional employee" does not give 30 days' notice of foreseeable FMLA leave to be taken intermittently, the employer may require the employee to take leave of a particular duration or to transfer temporarily to an alternative position. The employer may also delay the taking of leave until the required notice is given.

Reinstatement to an Equivalent Position

The determination of how an "instructional employee" is to be restored to "an equivalent position" upon return from FMLA leave will be based on established school board policies and practices, private school policies and practices and collective bargaining agreements. Any established policy or contract that is used as the basis for restoration must be in writing, communicated to the employee before taking FMLA leave, and provide equivalent pay, benefits, working conditions and other terms and conditions of employment. **For example, any employee may not be required to obtain additional licensure or certification in order to be restored to an equivalent position.** Also, a returning employee cannot be reassigned to a position that requires a substantial increase in either travel time or distance.



CRAIG HACKER

Key Provisions for Educational Employees

Because the FMLA rules for educational employees are so specific, key provisions are summarized in this section. The following provisions, which are covered in more detail in the preceding sections, are presented below for quick reference. As indicated elsewhere, these special rules do not apply to college or university faculty. These faculty are covered by the general provisions of the law.

- Educational employees must work in a school district that employs at least 50 employees to be eligible for FMLA leave. If a school district does not employ at least 50 employees, school personnel are not entitled to FMLA leave.

- Classroom teachers, guidance counselors, school psychologists, school registered nurses (as opposed to school nurses who are not registered) and certified public accountants are presumed to meet the 1,250 hour per year work test to qualify for FMLA leave. Higher education faculty are also presumed to meet the 1,250-hour threshold even though they are not specifically cited in the FMLA regulations.

- Maintenance workers, bus drivers, cafeteria workers, secretarial support, day care workers, non-RN school nurses, and security personnel are not automatically presumed to meet the 1,250 hours of work requirement. Their eligibility for FMLA leave will depend on how many hours they are compensated or entitled to be compensated under FMLA. For example, a food service worker who works seven hours a day for 180 days during a 12-month period (1,260 hours) will be eligible for FMLA leave. However, a food service worker who works six and a half hours a day for 180 days (1,170 hours) will not be eligible.

- If a holiday occurs during a week of FMLA leave, the entire week is still counted against the employee's total leave entitlement. However, if FMLA leave occurs during a normally scheduled school break (i.e., spring break or summer vacation) when the employee would not have been required to report for duty for a week or more, it is not counted against the employee's FMLA leave.

- Where husband and wife work for the same school district, FMLA leave for 1) childbirth, 2) child adoption or foster care or 3) care of a sick parent will be limited to a combined total of 12 weeks for both spouses. Married couples working for the same employer will retain the right to take the full 12 weeks of FMLA leave for their own serious illness or to care for a sick parent or child.

- If an "instructional employee" elects to take leave toward the end of a school term, the school district may require the employee to stay on leave until the new semester begins. Such treatment is not applied to any other group of workers, including college and university faculty. When such an event takes place, the school district must continue to maintain health insurance coverage during the extra period of leave and cannot count the extra leave as part of the 12 weeks of FMLA leave entitlement.

- If an "instructional employee" requests intermittent leave that is less than 20 percent of the work days during the period of leave, he or she is entitled to take the intermittent leave. Of course, the employee should discuss the leave with the employer and try to accommodate the employer's work needs, if possible. For example, assume there is only one physics teacher

in a high school, and the teacher needs time off work for six Fridays to take a sick parent for therapy. If the time off is during the time that physics is to be taught, the teacher should try to schedule the therapy sessions during noninstructional times. If he or she cannot change the therapy sessions, the school district must accommodate this request.

- If the requested intermittent leave would be for more than 20 percent of the total number of working days over the entire period of the leave, the employer may require the employee to choose either: 1) to take leave for the entire period of the planned treatment or 2) transfer temporarily to an available alternative position for which the employee is qualified, has equivalent pay, benefits and working conditions and better serves the employer's work needs.

- If an employee requests intermittent leave that is more than 20 percent of the working days during the period of the leave and elects to take leave for the entire period of planned treatment, the entire period of leave will count as FMLA leave.

- The determination of how an "instructional employee" is to be restored to "an equivalent position" upon return from FMLA leave will be based on established school board policies and practices, private school policies and practices and collective bargaining agreements. An employer may not require a returning employee to obtain additional licensure or certification in order to be restored to an equivalent position. Also, a returning employee cannot be reassigned to a position that requires a substantial increase in either travel time or distance.

- If an employee fails to return to work at the end of the leave, the employer may recover its share of the healthcare premiums paid during the leave. An employee must return to work for at least 30 days to be deemed "returned to work."

Coordination of FMLA and State Law

FMLA provides a minimum benefit, or floor, for all covered workers. It does not override any state law or collective bargaining provision that provides **greater** family and medical leave rights than federal law. Therefore, employers in states where the leave law is greater than federal law must comply with both laws.

The coordination of FMLA and state leave laws can be illustrated by the following examples. Assume a state provides 16 weeks of unpaid leave over a two-year period. Under this state law, an eligible employee would be entitled to take 16 weeks of unpaid leave in year one, as opposed to 12 weeks under FMLA. Because the employee used all of his or her 16 weeks of leave in the first year, the employee would not be entitled to take leave in year two. However, since FMLA provides a minimum of 12 weeks of leave each year, the employee is entitled to take 12 weeks of FMLA leave in year two. Therefore, an employee in a state that provides for 16 weeks of unpaid leave over a two-year period could receive up to 28 weeks of family and medical leave over two years through combining the provisions of state and federal law. However, the employer would only be required to provide health insurance coverage for the first 12 weeks of leave each year.

If a state law provides half-pay for six weeks a year to an employee considered by the law to be temporarily disabled because of pregnancy, the employee would be entitled to an extra six weeks of unpaid leave for a total of 12 weeks of leave within a 12-month period. If, however, state law calls for six weeks of paid leave for a reason **not covered by FMLA** (e.g., care of a parent-in-law, sick grandparent or spouse equivalent), the employee would still be entitled to 12 weeks of FMLA leave for any family or medical reason covered under the Act.

Another example that will be of interest to "instructional employees" occurs when state law prohibits mandatory leave beyond the actual period of leave for an FMLA-covered condition, like pregnancy disability. Since state law provides greater rights than federal law, an "instructional employee" may not be required to stay on leave until the start of a new academic term.

Approximately 30 states and the District of Columbia have adopted some form of family and medical leave law. However, many of these laws only apply to public employees. While none of the state laws are as broad as FMLA, individual provisions of some state laws are broader than the federal law. Please check with your own state department of labor on the current status of state family and medical leave law or call the AFT's Legal department for guidance.

Enforcement of the FMLA

An individual who believes that his or her employer has violated the FMLA should first contact the union representative to see if the dispute can be resolved informally.

Barring such resolution, the employee has two choices. He or she can file, or have another person file on his or her behalf, a complaint with the local office of the Wage and Hour Division within the U.S. Department of Labor. Alternatively, the employee may file a private lawsuit in United States District Court.

Complaints filed with the Wage and Hour Division do not have to meet any specific form. However, such filings must be in writing and contain a full statement of the acts and/or omissions, with reference to the pertinent dates that are believed to constitute the violation. Such a complaint should be filed with the Wage and Hour Division within a reasonable period from the time the employee discovers the violation. A **two-year statute of limitations** running from the time the action that is alleged to be a violation of the FMLA occurred will be applied to complaints filed both with the Wage and Hour Division and in District Court. This limitation period may be extended to three years in situations where the employer has willfully violated the FMLA.

Employees who prevail are entitled to compensatory damages for lost wages, benefits or other compensation lost or denied as a result of the violation. Further, unless the employer's violation was in good faith, the court may double those damages. Under appropriate circumstances, such as where an employee is improperly terminated for exercise of FMLA rights, equitable relief may be ordered including reinstatement, promotion, payment of reasonable attorneys' fees, expert witness fees and other appropriate costs.

Thoughts for Collective Bargaining

As mentioned earlier, the FMLA, much like our nation's minimum wage laws, represents a floor of protections upon which locals may want to build.

Collective bargaining provides the opportunity to potentially enhance a number of those protections provided by FMLA. Subject areas where locals could use collective bargaining to enhance FMLA coverage include the following:

- expanding the definition of the family;
- expanding the reasons for taking leave;
- increasing the length of allowable leave;
- expanding coverage throughout the bargaining unit;
- including FMLA provisions in the contract; and
- providing for voluntary use of paid leave.

Some examples of possibilities for bargaining in these areas are as follows:

- Incorporate the provisions of FMLA into the collective bargaining agreement so that enforcement will be available more speedily through the grievance and arbitration process. ***IMPORTANT NOTE:*** *If the FMLA (or any other law) is expressly incorporated into the contract, the contract should also make clear that members do not lose their right to pursue individual claims if the union decides not to take a matter to arbitration. If you would like to see sample contract language, please contact the AFT Research and Information Services Department.*
- Expand the scope of FMLA coverage to include part-timers and those full-timers who work fewer than 1,250 hours per year.
- Make FMLA leave paid, rather than unpaid.
- Extend the period of FMLA leave beyond the 12 weeks per year.
- Continue all benefits during the period of FMLA leave.
- If the health insurance plan requires premium sharing by the employee, have the employer make that payment during FMLA leave subject to repayment over a predetermined period upon the employee's return to work.
- Ensure that the substitution of paid leave for FMLA leave is left to the employee's and not the employer's discretion.
- Expand the triggering events to permit FMLA coverage by including serious illnesses of grandparents, grandchildren or parents-in-law.
- Guarantee that new parents may take intermittent leave, rather than the current arrangement, which leaves the decision with the employer.
- Limit or eliminate the right of the employer to transfer employees on intermittent or reduced-leave schedules to other jobs.
- Remove the limitations that apply to educational employees who seek intermittent or reduced leave.
- Remove the limitations that apply to educational employees who take leave near the end of the academic semester.
- Enhance employees' rights to be restored to their actual prior position and not just an equivalent position.
- Create a leave bank that employees on FMLA leave could utilize.

Questions and Answers on the Family and Medical Leave Act

What is the Family and Medical Leave Act and to whom does it apply?

- The Family and Medical Leave Act (FMLA) allows "eligible" employees to receive job-protected, unpaid leave for up to a total of 12 weeks within any 12-month period.
- Reasons for FMLA leave include: to care for a newborn or placement of an adopted or foster child; to care for a child, spouse or parent with a serious health condition; because of the employee's own serious health condition; or for a qualifying exigency arising from a family member's deployment.
- Family members or next-of-kin of covered service members in the U.S. Armed Forces may take up to 26 weeks of leave to care for an injured or ill service member.
- Health benefits are maintained throughout the duration of the leave.
- An employee has the right to return to the same, or an equivalent position, upon returning from leave.
- Whenever possible, the employer has the right to 30 days' advance notice of leave.

In determining whether an employer is covered by FMLA, what does it mean to employ 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year?

- Any employee whose name is on the payroll is considered employed, whether or not they receive compensation for any given week.
- Only employees who are employed within any state of the United States, the District of Columbia, or any territory or possession of the United States are counted in determining employer coverage and employee eligibility for FMLA leave.
- Any employee on leave, unpaid or paid, is included in determining eligibility as long as the employer has reason to expect that the employee will return to work. However, employees who have been laid off, even temporarily, are not counted.

Which employees are "eligible" to take leave under FMLA?

- An eligible employee:
  a) has been employed by a covered employer for at least 12 months;
  b) has been employed at least 1,250 hours during the 12 months immediately prior to the leave; and
  c) is employed at a worksite where the employer has 50 or more employees within 75 miles of the worksite.
- Full-time teachers of elementary and secondary school systems, institutes of higher education or other educational establishments meet the 1,250-hour test (under Fair Labor Standards Act exemptions) and are eligible for FMLA leave.
- An employee's 12-month, 1250-test for eligibility is counted back from the day leave begins. If an employee requests the leave but has not yet reached the 12-month requirement, the leave is valid as long as it begins after the employment requirement has been met.

Under what circumstances are employers required to grant family or medical leave?

- Employers must grant leave for any of the following situations:
  a) for the birth or care of a newborn or for the placement of an adopted or foster child;
  b) to care for a spouse, child or parent with a serious health condition; or
  c) for the employee's own serious health condition.
- FMLA leave applies equally to the sexes. Fathers have the same right to leave for care of a newborn as mothers do.
- If an employee requires treatment for substance abuse, the leave is covered under FMLA.

How much leave may an employee take?

- An employee may take up to 12 workweeks of leave in any 12-month period. The 12-month period may be determined by calendar year, fiscal year or any

reasonable determination set by the employer. If a holiday falls during a week of leave, it is still counted as FMLA leave. However, if a teacher is on FMLA leave and the leave extends over a regular school break (i.e., Christmas break), the weeks of school vacation do not count against the FMLA leave.
- Family members or next of kin of covered service members can take up to 26 workweeks of leave in a 12-month period.

If leave is taken for the birth of the child, or for placement of a child for adoption or foster care, when must the leave be concluded?

- Unless the state law or the employer's individual codes allow for more time, the leave must be concluded at the end of one year following the birth or placement of a child.

How much leave may a husband and wife take if they are employed by the same employer?

- The husband and wife are eligible for a combined total of 12 weeks for the care of a newborn, placement of an adopted or foster child or care of a sick parent. However, the amount of individual leave a spouse takes for such an event is then subtracted from the total 12-week individual allotment to determine how much leave time is left. For example, if a the the couple use 6 weeks each for care of a newborn, the leave entitlement to care for the newborn is gone. However, both employees still have a remaining 6 weeks of leave available to them for the care of a parent or for their own serious health condition. A similar rule limiting a married couple to 26 weeks of leave applies to both spouses at the same employer caring for a service member.

Does FMLA leave have to be taken all at once or can it be taken in parts?

- Intermittent leave, or reduced-schedule leave, may be taken under certain circumstances.
- Employer permission must be granted for intermittent leave for the birth or placement of a child unless the birth results in a serious health condition for the mother or the newborn.
- Intermittent leave is also available for a serious health condition that requires the care of a healthcare practitioner. This would include chemotherapy treatments and recovery from such treatments.
- There is no limitation to the size of the time increments that may be taken.

May an employer transfer an employee to an "alternative position" in order to accommodate intermittent leave or a reduced-leave schedule?

- Yes, an employer may move an employee to an alternative job provided: the pay and benefits are equivalent to the employee's regular job; the transfer is only for the length of the intermittent or reduced-schedule leave; and the transfer is not made to create a hardship on the employee or to discourage the employee from taking leave. However, "light duty" does not count against available FMLA leave.

How does one determine the amount of leave used where an employee takes leave intermittently or on a reduced-leave schedule?

- Only the amount of leave actually taken may be counted toward the FMLA leave limitations. If an employee works five days a week normally and takes a reduced-leave schedule of four days per week, the one day of leave counts as 1/5 of a week of FMLA leave.
- For employees who work part time or variable hours, the amount of leave is determined proportionate to the amount of time the employee generally works. This is done by comparing the old schedule to the new, reduced-leave schedule.

Is FMLA leave paid or unpaid?

- Generally, FMLA leave is unpaid. If an employee has paid leave (i.e., sick leave or vacation) available, he may request, or the employer may require, the use of paid leave as part of FMLA leave.
- If an employee is on workers' compensation for a condition that is considered a serious health condition under FMLA, the employee or employer may choose to have the workers' compensation absence run concurrently with FMLA leave. Because workers' compensation is not unpaid leave, the employee would not be entitled to substitute paid leave during this period.
- Should the employee refuse a light-duty return to work and lose workers' compensation benefits, the FMLA leave would still be in effect until the 12-week allotment is used. When the workers' compensation benefits cease, the employer or employee may then call for the substitution of paid leave for the duration of the leave.

Under what circumstances may an employer designate leave, paid or unpaid, as FMLA leave and, as a result, count it against the employee's total FMLA leave entitlement?

- The employer, in all cases, must designate leave as FMLA leave and notify the employee of the designation.

- An employee requesting FMLA leave must give notification and reasoning so the employer may determine if the leave is acceptable under FMLA rules. If the employee fails to provide the reason, the leave may be denied.
- The employer may notify the employee either orally or in writing regarding whether leave has been designated FMLA leave. Oral notification must be confirmed in writing.
- In most cases, the employer may not designate FMLA leave retroactively. However, there are exceptions. For example, an employee who is on a two-week paid vacation breaks his leg at the start of the second week. The employer may designate FMLA leave from the time the accident occurred through the extension of the leave. In other words, the second week of vacation would also count as FMLA leave.
- In two situations the employer may designate leave as FMLA leave after the employee returns to work. They are 1) if the employer was unaware of the reason for the absence or 2) the employer knew the reason but was unsure if the leave qualified as FMLA leave.

Is an employee entitled to benefits while using FMLA leave?

- Yes, an employer must maintain group health insurance coverage for an employee on FMLA leave. If any changes are made in the health plan coverage that the employee on leave would otherwise be entitled to, they must be made available.
- An employee may choose not to maintain coverage during FMLA leave. In this case, full coverage resumes upon the employee's return to work.

What are the consequences of an employee's failure to make timely health plan premium payments?

- An employer's obligation to maintain group health coverage ceases when an employee is 30 days delinquent in a payment. The employer must notify the employee, in writing, at least 15 days before the benefits will end to allow the employee time to make the payment.

May an employer recover costs it incurred for maintaining "group health plan" or other nonhealth benefits coverage during FMLA leave?

- Yes, an employer may recover costs if an employee fails to return to work at the conclusion of FMLA leave unless: the employee does not return because of the continuation or onset of a serious health condition of the employee or employee's family member or other circumstances beyond the employee's control
.
- Other circumstances may include a parent choosing to stay home with a sick newborn or an unexpected transfer for the employee's spouse.
- An employee who has returned to work for at least 30 calendar days is considered returned to work under this section. Also, an employee who moves directly from leave to retirement is considered as returned to work and the employer may not recover costs.

What are the employee's rights on returning to work from FMLA leave?

- Upon returning from FMLA leave, the employee has the right to the same, or an equivalent, position as the employee had before the leave.

What is an equivalent position?

- An equivalent position is one that is essentially identical in terms of pay, benefits, status, etc. as the employee's former position. The workload and duties as well as other conditions of employment must also be virtually the same.
- Equivalent pay amounts to the same as the employee was previously getting but includes any unconditional pay raises that occurred during the employee's leave.
- Equivalent benefits include all benefits made available to the employee through the employer. At the conclusion of leave, all benefits will be fully resumed in the same manner and at the same level as before the leave.
- Regarding pensions, an FMLA leave is not considered a break in service for purposes of vesting and eligibility to participate. However, any time on leave will not be seen as credited service for purposes of vesting and participation.
- Any changes in benefit plans will be applied to employees on leave as if they had continued to work.
- "Equivalent terms and conditions of employment" means that an employee will return to a job with the same essential duties, responsibilities and status. Also, this includes a return to a job at the same worksite or one close by.

How are employees protected who request leave or otherwise assert FMLA rights?

- Employers are prohibited from denying rights or interfering with an employee who attempts to exercise any rights under the Act. These prohibitions include denying leave for other than a valid reason under FMLA, cutting hours to exclude an employee from being eligible, or transferring employees from one worksite to another to keep the employee count below 50 employees.

- Employees may not waive their FMLA rights even as a trade-off in collective bargaining.

What posting requirements does the Act place on employers?

- Every employer covered by FMLA must post the provisions in a prominent place in the worksite. This includes those employers without "eligible" employees. Also, the employer must post a notice of how the employee can request leave and file complaints under the FMLA. An employer must also distribute information about FMLA leave to new employees upon hire.

What other notices to employees are required of employers under FMLA?

- FMLA-covered employers with eligible employees must provide written guidelines pertaining to FMLA leave. If the employer already has a handbook or something similar available to the employees regarding employee benefits, they need only add a section regarding the FMLA leave rules.
- If the employer does not have a guideline or book of benefits, the employer must make FMLA rules available to the employees. Employers may use copies of the FMLA fact sheet for this purpose.
- The employer must also provide the employee with a list of written expectations and obligations and the consequences of failing to meet these obligations.

What are the requirements for an employee to furnish notice to an employer where the need for FMLA leave is not foreseeable?

- When an unforeseeable leave happens, the employee should notify the employer as soon as possible after realizing the need for leave. This is best done within one or two days of learning of the need for leave.
- Employees, in requesting leave for a condition covered under FMLA leave, need not specifically ask for FMLA leave; it is implied that the employer will designate it as such and notify the employee.

What recourse do employers have if employees fail to provide the required notice?

- An employer may delay FMLA leave if an employee fails to give 30 days' notice without a reasonable excuse for the delay.
- The leave may be delayed up to 30 days after the notice of the leave was given. In order for the employee's leave to be delayed due to lack of notice, it must be clear that the employee was aware of the notice requirements. This can be determined by assessing whether the employer has followed posting requirements. Also, it must be reasonably determined that the employee knew of the need for leave and the foreseeable date of the leave at least 30 days in advance of the leave.
- An employer may waive the notification requirement under FMLA.

When must an employee provide medical certification to support FMLA leave?

- An employer may require an employee to provide medical certification for a serious health condition of the employee or the employee's family member. The medical certification should be given at the time the leave is requested or within two business days of the request whenever possible.
- If an unforeseeable leave occurs, medical certification should be provided to the employer within two days after the leave begins.

How much information may be required in medical certifications of a serious health condition?

- The DOL's Form WH-380 or a similar form may be used to obtain medical certification from healthcare providers. Only information regarding the serious health condition for which the current need for leave exists may be requested on the form by the employer.

Under what circumstances may an employer request subsequent recertifications of medical conditions?

- For permanent or chronic long-term conditions or for pregnancy, an employer may request recertification of medical conditions no more often than every 30 days. This holds true unless the initial certification has changed drastically or unless the employer has reason to doubt the employee's reason of absence.

What notice may an employer require regarding an employee's intent to return to work?

- While an employee is on FMLA leave, the employer may require the employee to periodically report on the status of the leave.
- If an employee is on leave and needs less time than anticipated, the employee is not required to take more leave than necessary. In this case the employee is expected to give reasonable notice (2 business days) of intent to return to work.
- If the employee ever expresses an unequivocal desire to not return to work, the employer's obligations under FMLA are ended.

What happens if the employee fails to satisfy the medical certification and/or recertification requirements?

- Given certain circumstances, the leave may be delayed or even denied if the employee fails to meet the employer's medical certification requirements.
- If an employee fails within the employer's reasonable time limits to produce the medical certification, the leave may be delayed until such time as certification is produced.
- If the certification is never produced, the employee is not considered to be on FMLA leave.

Under what circumstances may a covered employer refuse to provide FMLA leave or reinstatement to eligible employees?

- An employer may delay the FMLA leave for an employee if the employee: 1) fails to provide timely notice (where feasible); or 2) provide medical certification to support the need for leave.
- An employer may delay restoration to the employee if the employee does not provide a fitness-for-duty report upon the employer's request.
- If an employee unequivocally informs the employer that he has no intention of returning to work, the employer is free of any obligation to the employee under FMLA. This includes job restoration and maintenance of health and other benefits.
- Under all circumstances where an employee has committed fraud in obtaining FMLA leave, the employer is exempted from all obligations to the employee under FMLA rules.

What can employees do who believe their rights under FMLA have been violated?

- An employee may either file a private lawsuit against the employer or file a complaint with the Secretary of Labor.
- If an employee files a private lawsuit it must be done within two years of the last alleged violation.
- When a violation is proven, the employee may be compensated with benefits and wages.

Can an employer deny a perfect attendance award because an employee has taken FMLA leave?

- FMLA regulations allow employers to deny a "perfect attendance" award to an employee who does not have perfect attendance because of taking FMLA leave as long as the employer treats employees taking non-FMLA leave the same way.

What if an employer provides more generous benefits than required by FMLA?

- The employer's benefits, if they are more generous, supersede the FMLA benefits. However, if an employer has lesser benefits, the FMLA rules take effect.
- An employer may amend leave benefits as long as they still comply with FMLA.
- Nothing in the Act is intended to discourage an employer from providing more generous benefits than are provided under FMLA.

Appendices

Appendix A:
Application for Family or Medical Leave

Name: _____

Current Address: _____

Start Date of Anticipated Leave: _____

Expected Date of Return to Work: _____

Reason for Leave (Explain): _____

_____

_____

_____

_____

_____

_____

Signature: _____ Date: _____

Appendix B:
Notice of Intention to Return from Leave

Name: _____

Supervisor: _____

Date Leave Commenced: _____

Date of Planned Return: _____

_____ _____

Employee's Signature Date

Appendix C:
Application for Charter

Certification of Health Care Provider
(Family and Medical Leave Act of 1993)

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

(When completed, this form goes to the employee, __Not to the Department of Labor__.)

OMB No.: 1215-0181
Expires: 09-30-2010

1\. Employee's Name

2\. Patient's Name *(If different from employee)*

3\. Page 4 describes what is meant by a "**serious health condition**" under the Family and Medical Leave Act. Does the patient's condition[1] qualify under any of the categories described? If so, please check the applicable category.

(1) ___ (2) ___ (3) ___ (4) ___ (5) ___ (6) ___ or None of the above ___

4\. Describe the **medical facts** which support your certification, including a brief statement as to how the medical facts meet the criteria of one of these categories:

5\. a. State the approximate **date** the condition commenced, and the probable duration of the condition (and also the probable duration of the patient's present **incapacity**[2] if different):

b. Will it be necessary for the employee to take work only **intermittently or to work on a less than full schedule** as a result of the condition (including for treatment described in Item 6 below)?

If yes, give the probable duration:

c. If the condition is a **chronic condition** (condition #4) or **pregnancy**, state whether the patient is presently incapacitated[2] and the likely duration and frequency of **episodes of incapacity**[2]:

[1] Here and elsewhere on this form, the information sought relates only to the condition for which the employee is taking FMLA leave.

[2] Incapacity, for purposes of FMLA, is defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom.

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Form WH-380
Revised December 1999

6. a. If additional **treatments** will be required for this condition, provide an estimate of the probable number of such treatments.

If the patient will be absent from work or other daily activities because of **treatment** or an **intermittent** or **part-time** basis, also provide an estimate of the probable number of and interval between such treatments, actual or estimated dates of treatment if known, and period required for recovery if any.

b. If any of these treatments will be provided by **another provider of health services** (e.g., physical therapist), please state the nature of the treatments.

c. If **a regimen of continuing treatment** by the patient is required under your supervision, provide a general description of such regimen (e.g., prescription drugs, physical therapy requiring special equipment).

7. a. If medical leave is required for the employee's **absence from work** because of the **employee's own condition** (including absences due to pregnancy or a chronic condition), is the employee **unable to perform work** of any kind?

b. If able to perform some work, is the employee **unable to perform any one or more of the essential functions of the employee's job** (the employee or the employer should supply you with information about the essential job functions)? If yes, please list the essential functions the employee is unable to perform.

c. If neither a. nor b. applies, is it necessary for the employee to be **absent from work for treatment**?

Page 3 of 4

8 a. If leave is required to **care for a family member** of the employee with a serious health condition, **does the patient require assistance** for basic medical or personal needs or safety, or for transportation?

b. If no, would the employee's presence to provide **psychological comfort** be beneficial to the patient or assist in the patient's recovery?

c. If the patient will need care only **intermittently** or on a part-time basis, please indicate the probable **duration** of this need.

Signature of Health Care Provider

Type of Practice

Address

Telephone Number

Date

To be completed by the employee needing family leave to care for a family member:

State the care you will provide and an estimate of the period during which care will be provided, including a schedule if leave is to be taken intermittently or if it will be necessary for you to work less than a full schedule.

Employee Signature

Date

A "**Serious Health Condition**" means an illness, injury, impairment, or physical or mental condition that involves one of the following:

1. Hospital Care

   Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity[2] or subsequent treatment in connection with or consequent to such inpatient care.

2. Absence Plus Treatment

   (a) A period of incapacity[2] of **more than three consecutive calendar days** (including any subsequent treatment or period of incapacity[2] relating to the same condition), that also involves:

   (1) **Treatment**[3] **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

   (2) **Treatment** by a health care provider on **at least one occasion** which results in a **regimen of continuing treatment**[4] under the supervision of the health care provider.

3. Pregnancy

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

4. Chronic Conditions Requiring Treatments

   A **chronic** condition which:

   (1) Requires **periodic visits** for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

   (2) Continues over an **extended period of time** (including recurring episodes of a single underlying condition); and

   (3) May cause **episodic** rather than a continuing period of incapacity[2] (e.g., asthma, diabetes, epilepsy, etc.).

5. Permanent/Long-term Conditions Requiring Supervision

   A period of **incapacity**[2] 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 the terminal stages of a disease.

6. Multiple Treatments (Non-Chronic Conditions)

   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, either for **restorative surgery** after an accident or other injury **or** for a condition that **would likely result in a period of incapacity**[2] **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), and kidney disease (dialysis).

This optional form may be used by employees to satisfy a mandatory requirement to furnish a medical certification (when requested) from a health care provider, including second or third opinions and recertification (29 CFR 825.306).

Note: Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number.

[2] Treatment includes examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations.

[3] A regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). A regimen of treatment does not include the taking of 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.

Public Burden Statement

We estimate that it will take an average of 20 minutes to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

DO NOT SEND THE COMPLETED FORM TO THIS OFFICE; IT GOES TO THE EMPLOYEE.

A Union of Professionals

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04/10