

Chapter 39

THE FAMILY AND MEDICAL LEAVE ACT (FMLA)

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39a GENERAL

39a00 Statutory and regulatory provisions.

(a) Purpose of the FMLA

The Family and Medical Leave Act (FMLA), Pub. L. No. 103-3, 107 Stat. 6 (*see* 29 USC 2601 *et seq.*), was enacted on 02/05/1993, and became effective for most covered employers on 08/05/1993. The FMLA is intended to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. The FMLA is intended to accomplish these purposes in a manner that accommodates the legitimate interests of employers, and that is consistent with the Equal Protection Clause of the Fourteenth Amendment.

(b) Statute

- (1) The FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave.
- a. Eligible employees are entitled to twelve (12) workweeks of leave in a 12-month period for:
1. the birth of a child and to care for the newborn child within 1 year of birth;
 2. the placement with the employee of a child for adoption or foster care and to care for the newly placed child within 1 year of placement;
 3. to care for the employee's spouse, child, or parent who has a serious health condition;
 4. a serious health condition that makes the employee unable to perform the essential functions of his or her job; and
 5. any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on "covered active duty."
- b. Eligible employees who are the spouse, son, daughter, parent, or next of kin of a covered servicemember with a serious injury or illness are entitled to twenty-six (26) workweeks of leave during a single 12-month period to care for the covered servicemember (*i.e.*, military caregiver leave).

29 USC 2612

29 CFR 825.112

- (2) The Wage and Hour Division (WHD) is responsible for administering and enforcing the FMLA for most employees. Most federal and certain congressional employees are also covered by the law but are subject to the jurisdiction of the U.S. Office of Personnel Management (OPM) or Congress. *See* FOH 39b04.

5 USC 6381 *et seq.*

5 CFR 630

(c) Amendments

- (1) The FMLA was amended 01/28/2008 by Section 585(a) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2008, Pub. L. No. 110-181 (FY 2008 NDAA). This amendment expanded the FMLA to include special military family leave provisions (*i.e.*, qualifying exigency and military caregiver leave).

- (2) Further amendments to the FMLA were enacted on 10/28/2009 by section 565(a) of the NDAA for FY 2010, Pub. L. No. 111-84 (FY 2010 NDAA), amending the military family leave provisions.
- (3) On 12/21/2009, the FMLA was amended by the Airline Flight Crew Technical Corrections Act, Pub. L. No. 111-119 (AFCTCA), providing a special eligibility requirement for airline flight crew members and flight attendants (*i.e.*, airline flight crew employees).

(d) Regulations

29 CFR 825 is the official source for regulatory information concerning the application of the FMLA.

39a01 Geographical scope.

- (a) The FMLA’s coverage extends to any state of the United States (U.S.), the District of Columbia (DC), and to any territory or possession of the U.S. (Section 101(3) of the FMLA defines the term “state” to have the same meaning as defined in section 3(c) of the Fair Labor Standards Act (FLSA)).
- (b) Employees of U.S. firms stationed at worksites outside the U.S., its territories, or possessions are not protected by the FMLA, nor are such employees counted for purposes of determining employer coverage or employee eligibility with respect to worksites inside the U.S.
- (c) Foreign firms operating in the U.S. are subject to the FMLA with respect to U.S. locations and employees. The foreign firm’s employees working outside the U.S. are not counted in determining employer coverage or employee eligibility.

29 USC 2611(3)

29 CFR 825.105(b)

WHD Non-Administrator Opinion Letter FMLA-9 (October 18, 1993)

39a02 FMLA protections.

(a) Unpaid leave

The FMLA allows eligible employees of covered employers to take job-protected, unpaid leave, or to substitute appropriate earned or accrued paid leave, for up to a total of 12 workweeks in a 12-month period for qualifying FMLA reasons, or up to 26 workweeks in a single 12-month period for military caregiver leave. *See* FOH 39d.

29 USC 2612(a)

29 CFR 825.100

(b) Maintenance of health benefits

During any FMLA leave, an employer must maintain the employee's pre-existing coverage under any group health plan on the same conditions as coverage would have been provided if the employee had been continuously employed during the FMLA leave period. *See* FOH 39i.

29 USC 2614(c)

29 CFR 825.209

(c) Job restoration

On return from FMLA leave, an employee is entitled to be restored to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. The job-restoration protections of the FMLA are contingent upon the employee's continued ability to perform the essential functions of his or her job. *See* FOH 39j.

29 USC 2614(a)

29 CFR 825.214

39a03 Waiver of rights.

An employee cannot waive his or her prospective (*i.e.*, future) rights under the FMLA and an employer is prohibited from attempting to induce an employee to waive such rights. Employees cannot trade their rights under FMLA for another benefit offered by the employer. This does not, however, prevent the settlement or release of FMLA claims by employees based on past employer conduct. Any such private settlement of past claims does not need the approval of the Department of Labor (DOL) or a court.

29 CFR 825.220(d)

73 FR 67934 and 73 FR 67986 -67988

39b EMPLOYER COVERAGE

39b00 General.

(a) Covered employers

An employer covered by the FMLA is any person engaged in commerce or in any industry or activity affecting commerce, who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. Employers who meet the FMLA 50-employee coverage requirement are deemed to be "engaged in commerce or in any industry or activity affecting commerce" within the meaning of the FMLA.

29 USC 2611(4)(A)

29 CFR 825.104(b)

(b) Employ

The definition of employ is the same as used in the FLSA and includes instances when an individual is suffered or permitted to work. Employees whose names appear on the payroll are considered to be employed each working day of the week.

29 USC 2611(3)

29 CFR 825.105(a)

(c) Counting employees for private employer coverage

Any employee whose name appears on the employer's payroll will count toward the 50-employee coverage requirement even if the employee has received no compensation for the week, or was on paid or unpaid leave. Part-time employees maintained on the payroll are considered employed for each working day of the week. Employees on paid or unpaid leave, including FMLA leave, leaves of absence, disciplinary suspension, etc., are counted as long as there is a reasonable expectation that the employee will return to active employment. If there is no employer/employee relationship, such as when the employee is laid-off, the individual is not counted.

29 CFR 825.105(b)-(c)

(d) Volunteers

Unpaid volunteers do not appear on the payroll and do not meet the definition of an "employee" and, therefore, are not counted when determining employer coverage or employee eligibility. *See* FOH 10b03.

WHD Non-Administrator Opinion Letter FMLA-7 (October 8, 1993)

(e) Joint and temporary employees

Employees who are jointly employed by two employers must be counted by both employers in determining employer coverage and employee eligibility under the FMLA, regardless of whether maintained on only one or both of the employers' payrolls. Temporary employees are ordinarily considered to be jointly employed by both the temporary employment agency and the worksite employer and are counted for coverage purposes by both entities. *See* FOH 39b01 and FOH 39c03.

29 CFR 825.106

WHD Opinion Letter FMLA 2004-1-A

(f) Firms with multiple departments/divisions

- (1) Corporations are single employers under the FMLA and all employees of the corporation, at all locations, are counted for coverage purposes.
- (2) Separate entities or corporations may be parts of a single employer for FMLA purposes if they meet the integrated employer test. Factors to be considered in determining if separate entities are an integrated employer include:
 - a. common management,

- b. interrelation between operations,
- c. centralized control of labor relations, and
- d. degree of common ownership or financial control.

29 CFR 825.104(c)

(g) Change in coverage status

Once a private employer meets the 50-employee requirement for FMLA coverage, the employer remains covered until it has no longer employed 50 employees for 20 workweeks in the current and preceding calendar year. For example, an employer who employed 50 or more employees for 20 workweeks in 1 year would continue to be a covered employer under the FMLA the following year even if it now employed fewer than 50 employees because it still would meet the requirement of 50 employees in any 20 workweeks for the preceding year.

29 CFR 825.105(f)

39b01 Joint employment.

- (a)** Where two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under the FMLA. The relationship is viewed in its totality in making a determination of whether or not a joint employment relationship exists.

(b) Determining joint employment

The FMLA uses the FLSA standard to determine whether employment of the same employee by two employers is to be considered joint employment or separate and distinct employment. Generally, a joint employment relationship will be considered to exist where:

- (1) there is an arrangement between employers to share an employee's services or to interchange employees;
- (2) one employer acts, directly or indirectly, in the interest of the other employer in relation to the employee; or
- (3) the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

Additional guidance regarding joint employment is contained in FOH 10f.

29 CFR 825.105 -.106

WHD Opinion Letter FMLA 2004-1-A

(c) Professional employer organizations (PEO)

A PEO that contracts with client employers to perform administrative functions does not enter into a joint relationship with the employees of its client companies when it merely performs administrative functions. The determination of whether a PEO is a joint employer depends upon the economic realities of the situation and all the facts and circumstances. For example, if the PEO exercises control of the client's employees or benefits from the work that the employees perform, such facts may indicate that the PEO would be a joint employer with the client employer. Where a PEO is a joint employer, the client employer is commonly the primary employer.

(d) Primary and secondary employers

In joint employment situations under the FMLA, only the primary employer is responsible for giving required notices to its employees, providing FMLA leave, and maintaining health benefits. Factors considered in determining which is the primary employer include authority and/or responsibility to hire and fire, assign and/or place the employee, make payroll, and provide employment benefits. The primary employer is responsible for job restoration and the secondary employer is responsible for accepting the employee returning from leave. For example, if the joint employment relationship is that of temporary and/or leased employee and the secondary employer continued to use the agency to fill the position, the employee is entitled to return to the position he or she held with the secondary employer. If the secondary employer did not fill the position from that agency, then the primary employer must place the employee in an equivalent position.

29 CFR 825.106

WHD Opinion Letter FMLA 2004-1-A

39b02 Successor in interest.

When an employer meets the definition of successor in interest (*see* 29 CFR 825.107(a)) employee entitlements are the same as if the employee were continuously employed by a single employer. This includes continuing leave begun while employed by the predecessor and counting hours of service and periods of employment for the predecessor when determining employee eligibility for FMLA leave.

29 CFR 825.107

39b03 Public agencies: general.

- (a) All public agencies are covered employers under the FMLA without regard to the number of employees. However, employees of public agencies must meet all of the FMLA's eligibility criteria in order to take protected leave. *See* FOH 39c.
- (b) "Public agency" is defined under the FLSA, 29 USC 203(x). The determination of whether an entity is a public agency, as distinguished from a private employer, is determined by whether the agency has taxing authority, or whether the chief administrative officer or board, etc., is elected by the voters-at-large or their appointment is subject to approval by an elected official.
- (c) A state or political subdivision of a state constitutes a single public agency. For example, a state is a single employer; a county is a single employer, a city is a single employer.

29 USC 2611(4)(A)(iii)

29 CFR 825.108

FOH 39c03(c)(1)

39b04 Public agencies: Federal Government.

- (a) The Federal Government is a covered employer under the FMLA without regard to the number of employees. However, most federal employees are covered under Title II of the FMLA and are not under the jurisdiction of the WHD. DOL's enforcement authority under Title I of the FMLA excludes any federal officer or employee covered under 5 USC 63, subchapter V. Such federal employees are covered by Title II of the FMLA, which is administered by OPM, pursuant to regulations at 5 CFR 630.
- (b) However, the WHD has enforcement authority under Title I of the FMLA for the following federal executive branch employees:
 - (1) Employees of the Postal Service
 - (2) Employees of the Postal Regulatory Commission
 - (3) Employees of the Federal Aviation Administration
 - (4) A part-time employee who does not have an established tour of duty
 - (5) An employee who is serving under an intermittent or temporary appointment with a time limitation of 1 year or less

29 CFR 825.109(b)

- (c) Additionally, employees of other federal executive agencies not covered by Title II of the FMLA will also be under the jurisdiction of the WHD.
- (d) While employees of the Government Accountability Office and the Library of Congress are covered by Title I of the FMLA, the Comptroller General of the U.S. and the Librarian of Congress, respectively, have responsibility for the administration of the FMLA with respect to these employees.

29 USC 2611(4)(A)(iv) and 29 USC 2617(f)

- (e) The Congressional Accountability Act of 1995 (CAA) protects the employees of the U.S. Congress and its associated employees. The CAA applies to the following offices and their employees:
 - (1) House of Representatives (both DC and state district office staff)
 - (2) Senate (both DC and state district office staff)
 - (3) Capitol Police
 - (4) Capitol Guide Service

- (5) Congressional Budget Office
- (6) Office of the Architect of the Capitol
- (7) Office of the Attending Physician
- (8) Office of Compliance. The Office of Compliance is an independent non-partisan agency established to administer and enforce the CAA. The Office of Compliance has responsibility for the administration of the FMLA with respect to employees covered by the CAA.

(f) Employees of the judicial branch of the U.S. are covered by Title I and under the enforcement authority of the WHD if they are employed in a unit which has employees in the competitive service, such as employees of the U.S. Tax Court.

29 CFR 825.109

39b05 Schools.

Public and private elementary and secondary schools are covered entities under the FMLA. Such schools are not subject to the FMLA 50-employee coverage requirement. Other schools such as public and private colleges and universities and day care providers are subject to the same criteria as private employers.

29 USC 2618

29 CFR 825.600 -.604

39b06 Members of the military.

The U.S. military is not a covered employer under the FMLA and therefore military members are not entitled to take leave under the FMLA. However, civilian employees of the military departments are considered employees of a public agency.

29 CFR 825.102

39c EMPLOYEE ELIGIBILITY

39c00 General.

(a) Eligibility requirement

An employee is eligible for FMLA leave if he or she meets all of the following:

- (1) Works for an FMLA-covered employer
- (2) Has been employed by the employer for at least 12 months
- (3) Has at least 1,250 hours of service for the employer during the previous 12-month period

- (4) Is employed at a worksite with 50 or more employees at that site or within 75 miles of the worksite

Note: special hours of service requirements apply to airline flight crew employees. *See* FOH 39m01.

29 USC 2611(2)

29 CFR 825.110

(b) Frequency of eligibility determination

Employee eligibility is determined at the commencement of the first instance of leave for each FMLA-qualifying reason in the applicable 12-month period. An employee remains eligible for leave for that same qualifying reason during that applicable 12-month period. Eligibility may be re-tested when leave is for a different qualifying reason within that same 12-month period, or with the first instance of FMLA leave for any reason in a new 12-month period.

29 CFR 825.300(b)(1)

WHD Opinion Letter FMLA 2005-3-A

WHD Opinion Letter FMLA-112 (September 11, 2000)

(c) When eligibility criteria are determined

- (1) The determination of whether an employee has been employed for at least 12 months and has at least the required hours of service is made as of the date the FMLA leave is to start.

29 CFR 825.110(d)

- (2) The determination of whether at least 50 employees are employed at the employee's worksite, or within 75 miles, is made when the employee gives notice of the need for leave.

29 CFR 825.110(e)

- (3) An employee may be on non-FMLA leave at the time he or she meets the 12-month of employment requirement. In that event, any portion of the leave taken for an FMLA-qualifying reason after the employee becomes eligible would be FMLA leave.

29 CFR 825.110(d)

39c01 12 months of service.

(a) 12 months need not be consecutive

- (1) An employee's 12 months of employment for the employer need not be consecutive. However, an employer is not required to count periods of employment prior to a break in service of seven years or more, unless the break in service is caused by the

employee's fulfillment of a Uniformed Services Employment and Reemployment Rights Act (USERRA) covered service obligation, or a written agreement, including a collective bargaining agreement (CBA), exists concerning the employer's intention to rehire the employee after the break in service.

- (2) An employer may choose to consider employment prior to a break in service of 7 years. If the employer chooses to recognize such periods of employment, the employer is required to do so with respect to all employees with similar breaks in service.
- (3) The FMLA requires employers to keep records for 3 years (*see* FOH 39k). If the employer retains records for the 7-year period, it may use those records in determining the employee's eligibility. However, if the employer retains records only for the required 3 years, it may base its initial determination on the retained records. If based on these records the employee is determined not to be eligible, the employee will have to submit proof of employment in years 4 through 7 to demonstrate eligibility.

Such proof might include:

- a. W-2 forms
- b. Pay stubs
- c. A statement which identifies the dates of prior employment, name of employee's supervisor and/or co-workers, and similar information
- d. An application for employment

73 FR 67934 and 73 FR 67942

29 CFR 825.110(b)

(b) Intermittent, casual or occasional employees

For purposes of determining if employees who work on an intermittent, casual, or occasional basis meet the 12 months of service requirement, 52 weeks is equal to 12 months. If an employee is maintained on the payroll for any part of a week, the week counts as a week of employment.

29 CFR 825.110(b)(3)

39c02 Hours of service: general.

(a) Hours worked

For most employees, the 1,250 hours of service is determined according to the principles under the FLSA for determining compensable hours of work (*see* 29 CFR 785). Consequently, hours not actually worked such as paid or unpaid vacation and sick leave (including FMLA-qualifying leave), holidays, and other similar time are not counted. Overtime hours worked are counted toward FMLA eligibility.

29 CFR 825.110(c)(1)

WHD Non-Administrator Opinion Letter FMLA-70 (August 23, 1995)

(b) No record of hours

If accurate records are not kept, the employer has the burden of showing that the employee has not met the hours of service requirement in order to claim the employee is not eligible for FMLA leave. An employer must clearly show, for example, that bona fide exempt employees under FLSA regulations 29 CFR 541, such as full-time teachers of an elementary or secondary school system, have not met the hours of service requirement in order to claim that they are not entitled to FMLA leave. This is true even though the employer would not be required by the FLSA regulations to keep records of the hours worked and even though the work may be done outside the classroom.

29 CFR 825.110(c)(3)

(c) Time for military service

Pursuant to USERRA, an employee returning from fulfilling a USERRA-covered military service obligation is credited with the hours of service that would have been performed but for the period of military service. In order to determine the hours that would have been worked (or, in the case of airline flight crew employees, would have been paid) during the period of military service, the employee's pre-service work schedule can generally be used for calculations.

29 CFR 825.110(c)(2)

39c03 Employees within 75 miles.

(a) Worksite

An employee's worksite is ordinarily the site the employee reports to, or from which the employee's work is assigned. A worksite can refer to a simple location, a group of buildings, such as a campus or industrial park, or to separate facilities in geographic proximity to one another. The 75 miles are measured from the employee's worksite by surface miles using surface transportation over public streets, roads, highways, and waterways by the shortest route possible. If surface transportation is not available between worksites, the distance is measured by the most frequently used mode of transportation.

29 CFR 825.111(a)-(b)

(b) No fixed worksite

For employees with no fixed worksite, such as in the case for many construction workers, transportation workers, and salespersons, the site to which they report, from which their work is assigned, or the location to which they are assigned as their home base, is their worksite. An employee's personal residence is not a worksite. In the case of employees who work from home under telework or flexi place arrangements, or others such as salespersons who may leave to work from home and return to their residence, their worksite is the office to which they report or from which their assignments are made. If 50 employees are employed

within 75 miles from the employee's official worksite, the employee meets the requirements for that test, regardless of where the employee is currently performing his or her duties.

29 CFR 825.111(a)(2)

(c) Public agency employees

- (1) A state or political subdivision of a state constitutes a single public agency for purposes of determining employee eligibility. For example, a state is a single employer, a county is a single employer, a city is a single employer. The definition of "employee" does not include an individual who holds public elective office in the state, is selected by an officeholder to be a member of his or her personal staff, is appointed by an officeholder to serve on a policymaking level, is an immediate adviser to an officeholder with respect to legal powers, or is an employee in the legislative branch or body of the state and is not employed by the legislative library. Such employees are not eligible for FMLA benefits and should not be counted in determining the number of employees within 75 miles at the worksite of the employee requesting FMLA leave.

29 CFR 825.108(c)

WHD Non-Administrator Opinion Letter FMLA-28 (January 31, 1994)

- (2) The U.S. Government constitutes a single employer for purposes of determining employee eligibility.

29 CFR 825.109

29 CFR 825.102

(d) Teachers

Educational employees who are employed permanently or who are under contract are considered on the payroll during any portion of the year when school is not in session and are counted when determining the number of employees at a worksite.

29 CFR 825.111(c)

39c04 Temporary employees jointly employed.

- (a) Employees who are jointly employed by two employers must be counted by both employers in determining employee eligibility, regardless of whether the jointly-employed employees are maintained on only one or both of the employers' payrolls. A temporary agency, as a primary employer, and its client are ordinarily considered to be joint employers under the FMLA. Day laborers supplied by a temporary agency may also be jointly employed by the agency and the client firm if there is a continuing employment relationship.

(b) Months and hours of service

If the temporary employee is subsequently hired directly by the client employer, any hours previously worked for the temporary agency on the premises of the client employer are

counted toward eligibility for FMLA leave. In addition, any months previously worked on the premises of the client would likewise count toward the 12 month eligibility test.

WHD Non-Administrator Opinion Letter FMLA-37 (July 7, 1994)

(c) Employees within 75 miles of worksite

Generally, when an employee is jointly employed by two or more employers, the employee's worksite is the primary employer's office from which the employee is assigned or reports. However, if the employee has physically worked for at least 1 year at a facility of a secondary employer, the employee's worksite is that secondary employer's location.

29 CFR 825.106 and 29 CFR 825.111(a)(3)

WHD Opinion Letter FMLA 2004-1-A

39d REASONS FOR LEAVE

39d00 Qualifying reasons for FMLA leave.

Employers covered by the FMLA are required to grant leave to an eligible employee:

- (a) for the birth of a child and to care for the newborn child;
- (b) for the placement with the employee of a child for adoption or foster care and to care for the newly placed child;
- (c) to care for the employee's spouse, child, or parent who has a serious health condition;
- (d) because of a serious health condition that makes the employee unable to perform any of the essential functions of his or her job;
- (e) because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty; and
- (f) to care for a covered servicemember with a serious injury or illness when the employee is the spouse, son, daughter, parent, or next of kin of the servicemember.

29 USC 2612(a)

29 CFR 825.112

39d01 Leave for birth or pregnancy.

- (a) Eligible employees are entitled to FMLA leave for pregnancy or the birth of a child. Parents are entitled to up to 12 workweeks of FMLA leave for the birth and to be with the healthy newborn child (*i.e.*, bonding time). Leave for bonding time must be completed during the 12-month period beginning on the date of the birth.
- (b) Pregnancy and childbirth are also considered FMLA-qualifying serious health conditions. The expectant mother is entitled to FMLA leave for incapacity due to pregnancy, for prenatal care, or for her own serious health condition following the birth of the child. The mother's

spouse is entitled to FMLA leave if the leave is needed to care for the mother during her prenatal care or when she is incapacitated during pregnancy or following the birth of the child. Employees are not entitled to any additional leave for twins or other multiple births.

WHD Non-Administrator Opinion Letter FMLA-45 (October 14, 1994)

- (c) FMLA leave may be taken intermittently or on a reduced leave schedule when medically necessary due to the pregnancy or birth. When the leave is for bonding time with the newborn child, the employee may take the leave intermittently or on a reduced leave schedule only if the employer agrees.

29 CFR 825.203

WHD Non-Administrator Opinion Letter FMLA 2002-4

- (d) Spouses who are eligible and employed by the same employer may be limited to a combined total of 12 workweeks to care for the healthy child after birth. *See* FOH 39e03.
- (e) Leave to bond with and care for a healthy newborn or newly placed child is distinguished from leave to care for a son or daughter with a serious health condition. An employer may not require a medical certification for leave for bonding with a child. However, an employer may require the employee to submit documentation of the relationship between the employee and the child.

29 CFR 825.122(k)

- (f) The FMLA definition of “son or daughter” includes a child of a person standing *in loco parentis* to the child. Therefore, an employee who will assume the responsibilities of a parent to the child may take FMLA leave for the birth of the child and to bond with the child during the first 12 months following the birth. *See* FOH 39d03(d)(4). Whether an individual stands *in loco parentis* to a child depends on the particular facts of a given situation; however, a blood or legal relationship is not required. For example, an employee who is in a same-sex relationship and who will share equally in the raising of a child with the child’s biological parent would be entitled to leave for the child’s birth because he or she will stand *in loco parentis* to the child.

Administrator’s Interpretation Letter FMLA 2010-3

WHD Non-Administrator Opinion Letter FMLA-53 (December 29, 1994)

29 CFR 825.120

39d02 Leave for placement of a child for adoption or foster care.

- (a) Eligible employees are entitled to up to 12 workweeks of FMLA leave for placement with the employee of a son or daughter for adoption or foster care; such leave must be taken within 12 months of the placement. Adoption means legally and permanently assuming the responsibility of raising a child as one’s own. Foster care is 24-hour care for children in substitution for, and away from, their parents or guardian. Such placements involve state action, voluntary or involuntary removal of the child from the parents or guardian, and an

agreement between the state and foster family that the family will care for the child. FMLA leave may be taken for a foster care placement of any duration.

29 CFR 825.122(f)-(g)

WHD Opinion Letter FMLA-84 (October 25, 1996)

- (b) Employees may take FMLA leave before the actual placement of a child if an absence from work is required for the placement or adoption to proceed. For example, FMLA leave may be taken for required counseling sessions, court appearances or consultations with an attorney or doctor representing the child.
- (c) Leave taken after the placement of a healthy child for adoption or foster care may be taken intermittently or on a reduced leave schedule only with the employer's agreement.
- (d) Multiple placements for adoption or foster care in a single leave year are separate FMLA-qualifying events. However, employees are not entitled to more than 12 weeks of leave for any combination of qualifying reasons in a single leave year. *See* FOH 39d09 for special rules applicable to military caregiver leave. Leave for each individual child placed must be completed within 12 months of the date of the placement.

WHD Opinion Letter FMLA-84 (October 25, 1996)

- (e) If a child is placed in a home for foster care and is subsequently adopted by the same family, only the placement for the foster care is an FMLA-qualifying event. The child would be newly placed at the time of the foster care placement rather than when the subsequent adoption occurs.

WHD Opinion Letter FMLA 2005-1-A

- (f) The FMLA definition of "son or daughter" includes a child of a person standing *in loco parentis* to the child. Therefore, an employee who will assume the responsibilities of a parent to an adopted or foster child is entitled to FMLA leave to bond with the child during the first 12 months following the placement, regardless of blood or legal relationship. For example, if one member of an unmarried couple adopts a child, and the other member of the couple will be assuming the responsibilities of a parent towards the child, then both individuals would be entitled to take FMLA leave for the placement of the child. *See* FOH 39d03(d)(4).

29 CFR 825.121

Administrator Interpretations Letter 2010-3

39d03 Leave to care for spouse, son, daughter, or parent with a serious health condition.

- (a) An eligible employee is entitled to take up to 12 workweeks of FMLA leave in a 12-month period to care for a covered family member with a serious health condition. The employee must provide notice to the employer of the need for leave and provide requested certifications pursuant to 29 CFR 825.305.
- (b) An employee is entitled to take intermittent leave or a reduced leave schedule to care for a family member only when medically necessary. This may include not only a situation where

the condition of the family member is intermittent but also where the employee is only needed intermittently—such as where other care is normally provided by others.

29 CFR 825.202(b)

- (c) The concept of “needed to care for” a family member encompasses both physical or psychological care, and may include one or more of the following:
- (1) Providing psychological comfort and reassurance to a child, parent, or spouse receiving inpatient or home care
 - (2) Providing basic nutritional, medical, hygienic care of the family member who is unable to care for these needs him or herself
 - (3) Providing safety for the family member with a serious health condition who cannot safely be left alone
 - (4) Providing transportation to doctor appointments, therapy, or other treatments
 - (5) Attending care conferences during which the family member’s health care provider discusses the family member’s condition, immediate needs, incidents, and general well-being

29 CFR 825.124

WHD Non-Administrator Opinion Letter FMLA-94 (February 27, 1998)

(d) **Definitions**

(1) *Spouse*

- a. Spouse means a husband or wife as defined or recognized in the state where the individual was married and includes individuals in a same-sex marriage or common law marriage.
- b. Spouse also includes a husband or wife in a marriage that was validly entered into outside of the U.S. if the marriage could have been entered into in at least one state.

29 USC 2611(13)

29 CFR 825.122(b)

(2) *Son or daughter*

- a. The FMLA defines a son or daughter as a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis* who is under age 18; or 18 or older and incapable of self-care because of a physical or mental disability at the time that FMLA leave is to commence. It does not matter if the onset of the disability occurs before or after the son or daughter turns 18 for purposes of FMLA leave, provided that the disability

exists and renders the adult child incapable of self-care at the time the employee's leave is to commence.

29 USC 2611(12)

29 CFR 825.122(d)

Administrator Interpretations Letter 2013-1

b. Physical or mental disability

Physical or mental disability means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 CFR 1630.2 (h)- (j), issued by the U.S. Equal Employment Opportunity Commission (EEOC) under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, define these terms.

The Americans with Disabilities Act Amendments Act of 2008 (ADAAA) significantly broadened the scope of the ADA's definition of disability. Because the FMLA's definition of an adult son or daughter relies on the ADA's definition of disability, the changes to the definition of disability set forth in the ADAAA and its implementing regulations apply to the definition of a son or daughter 18 years of age or older under the FMLA. *See* Administrator Interpretations Letter 2013-1.

1. "Substantially limits" does not require that the impairment prevents, or severely or significantly restricts, the individual in performing a major life activity.
2. Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working. Major life activities also include the operation of major bodily functions, such as functions of the immune system, normal cell growth, and digestive, brain, respiratory, neurological and reproductive functions.
3. The use of mitigating measures to ameliorate the effects of an impairment may not be considered when determining the limitations on a major life activity, except for the use of ordinary eyeglasses or contact lenses.
4. An impairment that is episodic or in remission is a disability if the impairment would substantially limit a major life activity when active. Examples include, but are not limited to, multiple sclerosis, asthma, epilepsy, diabetes, lupus, post-traumatic stress disorder, and cancer in remission.
5. There is no minimum duration of time required for an impairment to be considered a disability.

6. The term disability is to be construed in favor of broad coverage when determining if an individual has a disability.
7. The EEOC's regulations provide that some impairments will virtually always qualify as disabilities because, by their very nature, they substantially limit at least one major life activity. Impairments that should easily be concluded to be substantially limiting include deafness, blindness, intellectual disability, missing limbs or mobility impairments requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, multiple sclerosis, Human Immunodeficiency Virus (HIV) infection, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia.

c. Incapable of self-care

Incapable of self-care means that the individual requires active assistance or supervision to provide daily self-care in three or more activities of daily living (ADLs) or instrumental activities of daily living (IADLs) due to a disability.

1. ADLs include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing, and eating.
2. IADLs include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.
3. These lists of ADLs and IADLs are not exhaustive and additional activities should also be considered in determining whether an adult son or daughter is incapable of self-care due to a disability.
4. The determination of whether an adult son or daughter is incapable of self-care is made based on the individual's condition at the time the employee requests leave. The determination should include, for example, the current effects of any episodic impairment.

d. There are special definitions of "son and daughter" applicable to military family leave that are not limited by age. *See* 29 CFR 825.122(h) -(i).

(3) *Parent*

Parent means a biological, adoptive, step or foster father or mother, or any other individual who stood *in loco parentis* to the employee when the employee was a son or daughter (as defined by the FMLA). This term does not include parents-in-law.

29 USC 2611(7)

29 CFR 825.122(c)

There is a special definition of “parent” applicable to military caregiver leave. See 29 CFR 825.122(j).

(4) *In loco parentis*

In loco parentis means in the place of a parent. An employee who stands *in loco parentis* to a child is entitled to leave for bonding purposes or if leave is needed to care for the child with a serious health condition. An eligible employee is also entitled to FMLA leave to care for someone who stood *in loco parentis* to the employee when he or she was a child. Whether an *in loco parentis* relationship exists is dependent upon the specific facts of the case. Factors to be looked at in determining whether an *in loco parentis* relationship exists include:

- a. the age of the child;
- b. the degree to which the child is dependent on the person claiming *in loco parentis* status;
- c. the amount of support, if any, provided; and
- d. the extent to which duties commonly associated with parenthood are exercised.

A blood or legal relationship is irrelevant to determining *in loco parentis* status. For example, an employee who will share equally in the raising of an adopted child with a same-sex partner, but who does not have a legal relationship with the child, stands *in loco parentis* to the child. In addition, the fact that a child has a biological mother and father does not prevent a finding that another individual stands *in loco parentis* to the child.

Administrator Interpretations Letter 2010-3

(e) **Leave for other family members**

- (1) Generally, an employee is not entitled to FMLA leave to care for other family members with serious health conditions, such as siblings, grandparents, grandchildren, or parents-in-law.
- (2) Exceptions may arise where the employee can document the existence of an *in loco parentis* relationship. For example, an employee may take FMLA leave to care for an aunt or uncle with a serious health condition if the aunt or uncle stood *in loco parentis* to the employee when the employee was a child. See FOH 39d09(b)(4) for military caregiver “next of kin” definition.

Administrator Interpretations Letter 2010-3

WHD Non-Administrator Opinion Letter FMLA-73 (October 26, 1995)

WHD Non-Administrator Opinion Letter FMLA-21 (December 7, 1993)

39d04 Employee’s own serious health condition.

- (a) An eligible employee may take up to 12 workweeks of FMLA leave if he or she is unable to perform the functions of his or her job because of a serious health condition. An employee is unable to perform the functions of his or her position if the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within the meaning of the ADA.
 - (1) An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment.
 - (2) An employee who suffers from a serious health condition that does not prevent him or her from performing the essential functions of the position is not entitled to FMLA leave. Similarly, an employee who cannot perform one or more of the essential functions of the position, but whose condition does not meet the statutory and regulatory definition of a serious health condition, is not entitled to FMLA leave.

29 CFR 825.123

WHD Non-Administrator Opinion Letter FMLA-77 (January 30, 1996)

- (b) An employer may provide a statement of the essential functions of the employee's position held at the time notice is given or leave commenced, whichever is earlier, for the employee's health care provider to review during the medical certification process.

When such statement is provided, a sufficient medical certification must specify what functions of the employee's position the employee is unable to perform so that the employer can then determine whether the employee is unable to perform one or more essential functions of the position.

29 CFR 825.123(b)

39d05 Documentation of relationship.

- (a) For purposes of confirmation of family relationship, the employer may require the employee giving notice of the need for FMLA leave to provide reasonable documentation or statement of family relationship.
- (b) This documentation may take the form of a simple statement from the employee, a child's birth certificate, a court document, or other documentation connected with a foster care placement, such as the agreement between the state and the foster care provider. The employer is permitted to examine documentation, but the employee is entitled to the return of the official document submitted for this purpose.

29 CFR 825.122(k)

WHD Opinion Letter FMLA-84 (October 25, 1996)

39d06 Serious health condition.

- (a) **General**

(1) *For FMLA purposes:*

- a. A “serious health condition” means an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment.
- b. “Incapacity” means the inability to work, attend school, or perform other regular daily activities due to a serious health condition or its treatment or recovery.
- c. “Treatment” includes examinations to determine if a serious health condition exists, evaluations of the condition, and actual treatment by or under the supervision of a health care provider to resolve or alleviate the condition. An examination or treatment requires a visit to the health care provider to qualify under FMLA; a telephone conversation is not sufficient. Treatment does not include routine physical, eye, or dental exams.

(2) The FMLA is not intended to cover short-term conditions for which treatment and recovery are very brief. Unless complications arise, the following conditions generally will not meet the definition of an FMLA serious health condition: the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease.

The objective test defining what constitutes a serious health condition under the FMLA is controlling. Common ailments such as those listed above ordinarily will not qualify for FMLA leave because they generally will not satisfy these regulatory criteria.

73 FR 67934 and 73 FR 67946

(3) Conditions for which cosmetic treatments are administered, such as for acne or plastic surgery, do not qualify unless inpatient hospital care is required or complications develop that result in the condition meeting the definition of a serious health condition.

29 USC 2611(11)

29 CFR 825.113

(b) Inpatient care

Inpatient care means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity or any subsequent treatment in connection with such inpatient care.

29 CFR 825.114

(c) Continuing treatment

A serious health condition involving continuing treatment by a health care provider includes any one of the following:

(1) *Incapacity and treatment*

- a. A period of incapacity of more than 3 consecutive, full calendar days, and any subsequent treatment or period of related incapacity that also involves:
 - 1. an in-person treatment by a health care provider within seven days of the first day of incapacity followed by at least one more in-person treatment within 30 days, unless extenuating circumstances exist; or
 - 2. an in-person treatment by a health care provider within seven days of the first day of incapacity which results in a regimen of continuing treatment under the supervision of the health care provider.
 - 3. whether additional treatment visits or a regimen of continuing treatment are necessary within the 30-day period is to be determined by the health care provider.
- b. A regimen of continuing treatment includes, for example, a course of prescription medication or therapy requiring special equipment. It does not include only the taking of over-the-counter medications, bed-rest, or drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, even if these are recommended by the health care provider.

29 CFR 825.115(a)

WHD Opinion Letter FMLA-87 (December 12, 1996)

(2) *Pregnancy or prenatal care*

- a. Any period of incapacity due to pregnancy or for prenatal care. Absences occasioned by prenatal visits to a health care provider, severe morning sickness, or other complications of pregnancy constitute serious health conditions under the FMLA.
- b. Absences attributable to incapacity for pregnancy or prenatal care qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence and even if the absence does not last more than 3 consecutive, full calendar days. For example, an employee who is pregnant may be unable to report to work because of severe morning sickness.

29 CFR 825.115(b) and (f), and 29 CFR 825.120(a)

(3) *Chronic conditions*

- a. Any period of incapacity or treatment due to a condition which requires at least two visits per year for treatment by a health care provider, or a nurse under direct supervisions of a health care provider, and that continues over an extended period of time (including recurring episodes of the same underlying condition).

- b. Examples of chronic conditions that may meet the FMLA definition of a serious health condition include but are not limited to asthma, diabetes, epilepsy, migraine headaches, etc.
- c. Chronic conditions frequently involve intermittent leave or leave on a reduced schedule. Absences attributable to incapacity for chronic conditions qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence and even if the absence does not last more than 3 consecutive, full calendar days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level.

29 CFR 825.115(c) and (f)

(4) *Permanent or long-term conditions*

- a. A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective.
- b. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider.
- c. Examples of permanent or long-term conditions include but are not limited to Alzheimer's, a severe stroke, or the terminal stages of a disease.

29 CFR 825.115(d)

(5) *Conditions requiring multiple treatments*

- a. Any period of absence to receive multiple treatments (or a period of recovery from treatments) by a health care provider, or under the orders of a health care provider, for:
 1. Restorative surgery after an accident or other injury, or
 2. A condition that would likely result in a period of incapacity of more than 3 consecutive, full calendar days in the absence of medical intervention or treatment.
- b. Examples of such conditions may include but are not limited to chemotherapy or radiation for cancer, physical therapy for severe arthritis, or dialysis for kidney disease.

29 CFR 825.115(e)

39d07 Treatment for substance abuse.

- (a) Treatment for substance abuse may be a serious health condition for purposes of FMLA if the regulatory definition of a serious health condition is met. FMLA leave, however, may only

be taken for treatment for substance abuse that is provided by a health care provider or by a provider of health care services on referral by a health care provider. Absence because of the employee's use of the substance, rather than treatment, does not qualify for FMLA leave.

- (b) Treatment for substance abuse does not prevent an employer from taking employment action against an employee. The employer may not take action against an employee because the employee has exercised the right to take FMLA for treatment. If, however, the employer has an established policy applied in a nondiscriminatory manner that has been communicated to all employees that provides that under certain circumstances an employee may be terminated for substance abuse, an employee may be terminated pursuant to that policy whether or not the employee is presently taking FMLA leave.
- (c) An employee may take FMLA leave to care for a covered family member who is receiving treatment for substance abuse and the employer may not take action against the employee for such leave.

29 CFR 825.119

WHD Non-Administrator Opinion Letter FMLA-69 (July, 21, 1995)

WHD Non-Administrator Opinion Letter FMLA-59 (April 28, 1995)

WHD Non-Administrator Opinion Letter FMLA-27 (January 31, 1994)

39d08 Qualifying exigency leave.

(a) General

Eligible employees may take FMLA leave for qualifying exigencies arising from the fact that the employee's spouse, son, daughter, or parent (the military member) is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty) in the Armed Forces.

29 USC 2612(a)(1)(E)

29 CFR 825.126(a)

(1) *Covered active duty*

a. Members of the Regular Armed Forces

Covered active duty or call to covered active duty status in the case of a member of the Regular Armed Forces means duty during the deployment of the member with the Armed Forces to a foreign country. "Armed Forces" is defined pursuant to 10 USC 101(a)(4) as the Army, Navy, Air Force, Marine Corps and Coast Guard and does not include the National Oceanic and Atmospheric Administration Commissioned Corps and the U.S. Public Health Service Commissioned Corps.

29 USC 2611(14)(A)

29 CFR 825.126(a)(1)

b. Members of the Reserve components

Covered active duty or call to covered active duty status in the case of a member of the Reserve components of the Armed Forces means duty during the deployment of the member with the Armed Forces to a foreign country under a federal call or order to active duty in support of a contingency operation as defined in 10 USC 101(a)(13)(B).

The provisions referred to in 10 USC 101(a)(13)(B) are limited to duty by members of the Reserve components, the National Guard, and certain retired members of the Regular Armed Forces and retired Reserve.

29 USC 2611(14)(B)

29 CFR 825.126(a)(2)

c. Deployed to a foreign country

Deployed to a foreign country means deployment outside of the U.S., DC, or any territory or possession of the U.S., including international waters.

Military members of the Regular Armed Forces who are *assigned* overseas to remote areas may be considered on covered active duty if they are called or ordered to active duty under deployment and the remote area to which they are deployed is an area outside of the U.S., DC, or any territory or possession of the U.S., including international waters.

29 CFR 825.126(a)(3)

78 FR 8843

d. Call or order to covered active duty

A call to covered active duty for purposes of FMLA qualifying exigency leave refers to a federal call to covered active duty. State calls to active duty are not covered unless under order of the President of the United States.

29 CFR 825.126(a)(4)

(2) *Active duty orders*

The active duty orders of a military member will generally specify if the member is deployed to a foreign country and, for members of the Reserve components, whether the member is serving in support of a contingency operation either by reference to the relevant section of 10 USC, by reference to a specific contingency operation, or both.

29 CFR 825.126(a)(1) and (2)(ii)

(3) *Son or daughter on covered active duty*

Son or daughter on covered active duty or call to covered active duty status means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child

for whom the employee stood *in loco parentis*, who is on covered active duty or call to covered active duty status, *and who is of any age*.

29 CFR 825.126(a)(5)

(b) Qualifying exigencies

An eligible employee may take FMLA leave for one or more of the following qualifying exigencies:

(1) *Short-notice deployment*

Leave may be taken to address any issue that arises from the fact that the military member is notified of an impending call or order to covered active duty 7 or fewer calendar days before the date of deployment. Leave taken for this purpose can be used for a period of 7 calendar days beginning on the date the military member is notified of an impending call or order to covered active duty.

29 CFR 825.126(b)(1)

(2) *Military events and related activities*

- a. Leave may be taken to attend any official ceremony, program, or event sponsored by the military that is related to the covered active duty or call to covered active duty of the military member.
- b. Leave may be taken to attend family support or assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross that are related to the covered active duty or call to active duty of the military member.

29 CFR 825.126(b)(2)

(3) *Childcare and school activities*

a. Childcare

Leave may be taken to arrange for alternate childcare for the military member's child where the need to arrange such childcare is necessitated by the military member's covered active duty or to provide childcare on an urgent, immediate need basis where the need to provide such care for the military member's child arises from the military member's covered active duty. FMLA leave may not be used for routine, regular, or everyday childcare.

b. School activities

Leave may be taken to enroll or transfer a child of the military member to a new school or day care facility when the enrollment or transfer is necessitated by the covered active duty of the military member, or to attend meetings with staff due to circumstances arising from the military member's

covered active duty. Such meetings may include, for example, meetings with school officials regarding disciplinary measures, parent-teacher conferences, or meetings with school counselors. FMLA leave may not be used to meet with staff for routine events or academic concerns.

c. Child of the military member

For purposes of childcare and school activities, a child of the military member means a biological, adopted, or foster child, a step child, or a legal ward of the military member or a child for whom the military member stands *in loco parentis* who is under age 18 or age 18 or older and incapable of self-care because of mental or physical disability.

The military member must be the spouse, parent, son or daughter of the employee requesting leave. No relationship is required between the child of the military member on covered active duty and the employee requesting leave.

29 CFR 825.126(b)(3)

(4) *Financial and legal arrangements*

- a. Leave may be taken to make or update financial or legal arrangements necessary to address the military member's absence.

For example, preparing and executing financial and healthcare powers of attorney, transferring bank account signature authority, enrolling in the Defense Enrollment Eligibility Reporting System (DEERS), obtaining military ID cards, or preparing or updating a will or living trust.

- b. Leave may also be taken to act as the military member's representative before a federal, state, or local agency for purposes of obtaining, arranging, or appealing military service benefits while the military member is on covered active duty and for a period of 90 days following the termination of covered active duty status.

29 CFR 825.126(b)(4)

(5) *Counseling*

Leave may be taken to attend counseling provided by someone other than a health care provider (such as pastoral counseling) for oneself, for the military member, or for a child of the military member provided the need for counseling arises from the covered active duty of the military member. In addition, leave for counseling by a health care provider may be FMLA-protected if the condition qualifies as a serious health condition. See FOH 39d03 -04.

29 CFR 825.126(b)(5)

(6) *Rest and Recuperation*

- a. Leave may be taken to spend time with a military member who is on short-term, temporary, Rest and Recuperation leave during the period of deployment.
- b. Leave taken for this purpose may be taken for a period of up to 15 calendar days. Leave for this reason is available beginning on the first day of the military member's Rest and Recuperation leave and must be taken within the period of time specified in the military member's Rest and Recuperation leave orders.
- c. The employee may take this leave in a continuous block of time or intermittently during the period of the military member's Rest and Recuperation leave.
- d. An employer may request a copy of the military member's Rest and Recuperation orders, or other documentation from the military indicating that the military member has been granted Rest and Recuperation leave and the date of the Rest and Recuperation leave, to determine the employee's specific leave period for this type of qualifying exigency leave. *See* 29 CFR 825.309(b)(6).

29 CFR 825.126(b)(6)

(7) *Post-deployment activities*

a. Events and briefings

Leave may be taken to attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following the termination of the military member's covered active duty.

b. Death of the military member

Leave may be taken to address issues that arise from the death of the military member while on covered active duty. Such leave may include meeting and recovering the body of the military member, making funeral arrangements, and attending funeral services.

29 CFR 825.126(b)(7)

(8) *Parental care*

a. Arranging alternative care

Leave may be taken to arrange for alternative care for a parent of the military member when the parent is incapable of self-care and the covered active duty or call to covered active duty of the military member necessitates a change in the existing care arrangement.

b. Providing care

Leave may be taken to provide care on an urgent, immediate need basis for a parent of a military member when the parent is incapable of self-care and the need to provide such care arises out of the military member's covered active duty. FMLA leave is *not available* for routine, regular, or everyday care of the military member's parent.

c. Admitting or transferring to a care facility

Leave may be taken to admit or transfer a parent of the military member to a care facility when the parent is incapable of self-care and the admittance or transfer is necessitated by the covered active duty of the military member.

d. Attending meetings

Leave may be taken to attend meetings with staff at a care facility for a parent of the military member, such as meetings with hospice or social service providers, when the parent is incapable of self-care and such meetings are necessitated by the covered active duty of the military member. FMLA leave is *not available* for routine or regular meetings.

e. Parent of the military member

For purposes of parental care leave, a parent of the military member means a biological, adoptive, step, or foster father or mother, or any other individual who stood *in loco parentis* to the military member when the member was under 18 years of age.

The military member must be the spouse, parent, son, or daughter of the employee requesting leave. No relationship is required between the parent of the military member on covered active duty and the employee requesting leave.

f. Incapable of self-care

For purposes of leave for parental care, the parent of the military member must be incapable of self-care.

1. A parent who is incapable of self-care means that the parent requires active assistance or supervision to provide daily self-care in three or more of the ADLs or IADLs.
2. ADLs include, but are not limited to, adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing, and eating. IADLs include, but are not limited to, cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

29 CFR 825.126(b)(8)

(9) *Additional activities*

Leave may be taken to address events other than those listed above which arise out of the military member's covered active duty provided that the employee and employer agree the leave will qualify as an exigency and agree to the timing and duration of such leave.

29 CFR 825.126(b)(9)

39d09 Military caregiver leave.

(a) General

- (1) Eligible employees who are the spouse, parent, son, daughter, or next of kin of a covered servicemember with a serious injury or illness are entitled to up to 26 workweeks of FMLA leave in a single 12-month period to care for that covered servicemember. Covered servicemembers include current members of the Regular or Reserve components of the Armed Forces and certain veterans.

29 USC 2611(15) and 29 USC 2612(a)(3)

Employers were not required to provide military caregiver leave for the care of a veteran until the Department defined a qualifying serious injury or illness of a veteran through regulations and those regulations became effective. Regulations defining a qualifying serious injury or illness of a veteran became effective on 03/08/2013.

78 FR 8834 and 78 FR 8848

A covered servicemember means:

a. Current servicemember

A current member of the Armed Forces of the U.S., including a member of the National Guard or Reserves; who has a serious injury or illness for which he or she is undergoing medical treatment, recuperation, or therapy; is in outpatient status; or is on the temporary disability retired list for a serious injury or illness.

29 USC 2611(15)(A)

29 CFR 825.127(b)(1)

b. Veteran

A veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness and who was a member of the Armed Forces, including a member of the National Guard or Reserves, and was discharged or released under conditions other than dishonorable at any time during the period of 5 years preceding the date on which the employee first takes leave to care for the veteran (the 5-year period).

1. Veteran discharged on or after 03/08/2013

For a veteran discharged on or after 03/08/2013, the 5-year period for FMLA military caregiver leave begins on the date of discharge.

2. Veteran discharged between 10/28/2009 and 03/08/2013

For a veteran discharged between 10/28/2009 and 03/08/2013, the 5-year period for FMLA military caregiver leave begins on 03/08/2013.

3. Veteran discharged before 10/28/2009

For a veteran discharged before 10/28/2009, the period between 10/28/2009 and 03/08/2013 does not count toward the determination of the 5-year period for covered veteran status.

In this case, the veteran will have the same amount of time available on 03/08/2013 as he or she would have had on 10/28/2009.

- A.** For example, if a servicemember retired on 10/28/2007, he or she would have had 3 years remaining of the 5-year period on 10/28/2009. Therefore, the family member requesting FMLA leave will have 3 years to begin military caregiver leave starting on 03/08/2013.
- B.** However, if a servicemember was discharged on 12/01/2003, the discharge would have occurred more than 5 years prior to 10/28/2009 and the veteran would not be a covered veteran for military caregiver leave purposes.

29 USC 2611(15)(B)

29 CFR 825.127(b)(2)

(2) *A serious injury or illness for a covered servicemember is:*

a. *Current servicemember's serious injury or illness*

- 1.** an injury or illness incurred in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank, or rating; or
- 2.** an injury or illness that existed before the beginning of the servicemember's active duty and was aggravated by service in line of duty on active duty in the Armed Forces that may render the member medically unfit to perform the duties of his or her office, grade, rank, or rating.

29 USC 2611(18)(A)

29 CFR 825.127(c)(1)

b. Veteran's serious injury or illness

1. an injury or illness incurred in the line of duty on active duty that that manifested itself before or after the servicemember became a veteran and that is:
 - A. a continuation of a serious injury or illness that was incurred or aggravated when the veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; *or*
 - B. a physical or mental condition for which the veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and the VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; *or*
 - C. a physical or mental condition that substantially impairs the veteran's ability to work because of a disability or disabilities related to military service, or would do so absent treatment; *or*
 - D. an injury that is the basis for the veteran's enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.
2. an injury or illness that existed before the beginning of the member's active duty and was aggravated by service in line of duty on active duty in the Armed Forces that otherwise meets any of the definitions in FOH 39d09(a)(2)b.1.A. -D. above.

29 USC 2611(18)(B)

29 CFR 825.127(c)(2)

(3) *26 workweeks of leave in a 12-month period*

- a. The single 12-month period for military caregiver leave begins on the first day the employee takes FMLA leave to care for a covered servicemember and ends 12 months after that date, regardless of the method used by the employer to determine the employee's 12 workweeks of leave entitlement for other FMLA-qualifying reasons.

For example, if an employee first takes military caregiver leave beginning 06/01/2013, the employee's single 12-month period for military caregiver leave is 06/01/2013 through 05/31/2014, regardless of the fact that the employer may use the calendar year for tracking FMLA leave usage.

If an employee does not take all of his or her 26 workweeks to care for a covered servicemember during this single 12-month period, the remaining leave is forfeited.

- b. The single 12-month period is applied on a per-covered servicemember, per-injury basis. Therefore, an eligible employee may take more than one period of 26 workweeks of leave if the leave is to care for a different covered servicemember or to care for the same servicemember with a subsequent (different) serious injury or illness. However, no more than 26 workweeks of leave may be taken within any single 12-month period.
 - 1. A subsequent serious injury or illness of the same covered servicemember could arise either from a different injury or illness incurred by the current servicemember during a subsequent deployment or from a different injury or illness that relates back to the initial incident but that manifests at a later time.
 - A. For example, an eligible employee may take leave in one 12-month period to care for a servicemember who incurs a traumatic brain injury and take leave in a subsequent 12-month period to care for the same servicemember who returns to duty and is injured by an incendiary explosive device.
 - B. Additionally, if a current covered servicemember suffers severe burns in the line of duty, an eligible employee is entitled to 26 workweeks of military caregiver leave. If the servicemember later manifests post-traumatic stress disorder that was incurred in the same incident as the burns, the eligible employee would be entitled to an additional 26 workweeks of leave to care for the same servicemember.
 - 2. A “current” covered servicemember and a “veteran” covered servicemember will be considered different covered servicemembers for purposes of the 26 workweeks in a single 12-month period requirement. Therefore, an eligible employee could take military caregiver leave to care for a current servicemember who suffered a burn injury while in active duty service and later take leave to care for the same servicemember for the same injury when the servicemember becomes a veteran. All normal eligibility requirements would apply when the employee seeks military caregiver leave to care for the veteran.

29 CFR 825.127(e) and 29 CFR 825.200(b)

73 FR 67934 and 73 FR 67969

77 FR 8960 and 77 FR 8970

78 FR 8834 and 78 FR 8854

- c. During the single 12-month period the employee can take a combined total of 26 workweeks of leave, no more than 12 weeks of which can be for any combination of FMLA-qualifying reasons other than military caregiver leave (*i.e.*, leave for the birth or placement of a child; leave due to the serious

health condition of the employee or the employee's spouse, son, daughter, or parent; or leave due to a qualifying exigency arising from a military member's covered active duty status). However, the employee's entitlement to FMLA leave for reasons other than military caregiver leave is limited by his or her prior use of FMLA leave during the applicable 12-month period.

1.

- A.** For example, where an employee first takes military caregiver leave beginning 06/01/2013 and works for an employer who uses the calendar year for tracking FMLA leave usage, the employee's single 12-month period for military caregiver leave is 06/01/2013 through 05/31/2014. If the employee had used 5 weeks of FMLA leave between 01/01/2013 and 06/01/2013 for a qualifying reason other than military caregiver leave, such as for his or her own serious health condition, he or she would only have 7 weeks of FMLA leave for a qualifying reason other than military caregiver leave available through 12/31/2013. Once the employee exhausts his or her 26-workweek entitlement, he or she may not take any FMLA leave for any reason until the single 12-month period ends.

- B.** Thus, if the employee used 20 weeks of military caregiver leave from June through December, 2013, 4 weeks of leave in January, 2014 for his or her own serious health condition, and another 2 weeks of military caregiver leave in March, 2014, the employee will have exhausted his or her 26-workweek entitlement for the single 12-month period (*i.e.*, 06/01/2013 through 05/31/2014). The employee would still have 8 weeks of FMLA leave for a qualifying reason other than military caregiver leave available in calendar year 2014; however, he or she could not take this leave until after the single 12-month period ends on 05/31/2014.

29 CFR 825.127(e)

73 FR 67934 and 73 FR 67970 -67971

(4) *Qualifying leave to care for a family member with a serious health condition*

Leave that qualifies as both leave to care for a covered servicemember and leave to care for a family member with a serious health condition during the single 12-month period must be designated by the employer as leave to care for a covered servicemember. It cannot be designated and counted as leave for both reasons.

28 CFR 825.127(e)(3)

(5) *Spouses working for the same employer*

Spouses employed by the same employer are limited to a combined total of 26 workweeks of leave during the single 12-month period if the leave is taken to care for a covered servicemember with a serious injury or illness or for a combination of military caregiver leave and leave for the birth of the employee's son or daughter, placement of a son or daughter with the employee for adoption of foster care, or to care for the employee's parent with a serious health condition. *See* FOH 39e03.

29 CFR 825.127(f)

(b) Definitions

(1) *Outpatient status*

The status of a member of the Armed Forces assigned to either a military medical treatment facility as an outpatient or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.

29 USC 2611(16)

29 CFR 825.127(b)(1)

(2) *Son or daughter of a covered servicemember*

The covered servicemember's biological, adopted, or foster child; stepchild; legal ward; or a child for whom the covered servicemember stood *in loco parentis*; and *who is of any age*.

29 CFR 825.127(d)(1)

(3) *Parent of a covered servicemember*

A covered servicemember's biological, adoptive, step, or foster father or mother, or any other individual who stood *in loco parentis* to the covered servicemember. This does not include parents in law.

29 CFR 825.127(d)(2)

(4) *Next of kin of a covered servicemember*

The covered servicemember's next of kin is the servicemember's nearest blood relative. The next of kin is someone other than the servicemember's spouse, parent, son or daughter, and is determined in the following order of priority:

a. Designated next of kin for purposes of military caregiver leave under the FMLA

The covered servicemember may specifically designate in writing his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When such designation has been made, the designated individual is deemed the covered servicemember's *only* next of kin. The designated next of kin must be a blood relative of the covered servicemember.

b. Order of priority

When a servicemember does not make a designation for purposes of FMLA leave, the next of kin is determined in the following order of priority:

1. Blood relatives who have been granted legal custody of the servicemember by court decree or statutory provisions
2. Brothers and sisters
3. Grandparents
4. Aunts and uncles
5. First cousins

When there are multiple family members with the same level of relationship and the covered servicemember has not designated a next of kin for FMLA purposes, all such family members are considered the next of kin and *all* may take leave to provide care to the covered servicemember, either consecutively or simultaneously.

For example, if a covered servicemember has three siblings and has not designated a blood relative to provide care for FMLA purposes, all three siblings would be considered the covered servicemember's next of kin. Alternatively, where a covered servicemember has one or more siblings and designates a cousin as his or her next of kin for FMLA purposes, then only the designated cousin is eligible as the covered servicemember's next of kin.

29 USC 2611(17)

29 CFR 825.127(d)(3)

39e **COUNTING FMLA LEAVE USAGE**

39e00 **FMLA leave entitlement.**

(a) **General**

An eligible employee is entitled to up to 12 workweeks of FMLA leave per 12-month period for FMLA-qualifying reasons other than military caregiver leave (*see* FOH 39d09). Multiple serious health conditions or qualifying reasons for leave do not increase the FMLA leave entitlement. However, an employee is entitled to up to 12 workweeks of leave for any one or for multiple qualifying reasons in the same leave year and additional leave for the same qualifying reason, including the same serious health condition, in subsequent leave years.

See FOH 39d09(a)(3) for the single 12-month period applicable to military caregiver leave.

(b) **12-month FMLA leave year for qualifying leave reasons other than military caregiver leave**

- (1) The employer may select any one of the following methods for determining the 12-month period during which the 12 workweeks of leave entitlement occur:
 - a. The calendar year
 - b. Any fixed 12-month leave year, such as a fiscal year
 - c. A 12-month period measured forward from the first date of FMLA leave for the employee (the next 12-month period would begin the first time FMLA leave is taken after completion of the prior 12-month period)
 - d. A rolling 12-month period measured backward from the date an employee uses FMLA leave (under this method, each time an employee takes FMLA leave the remaining leave would be the balance of the 12 weeks which has not been used during the immediately preceding 12 months)

1. Scenario 1:

Employee A used 8 weeks of FMLA leave during the past 12 months; Employee A has an additional 4 weeks of FMLA leave available.

2. Scenario 2:

Employee B used 4 weeks of FMLA beginning 02/01/2011, 4 weeks beginning 06/01/2011, and 4 weeks beginning 12/01/2011. Employee B may not take any additional leave FMLA leave until 02/01/2012. Beginning on 02/01/2012, Employee B is entitled to use 1 additional day of FMLA leave each day for 4 weeks. Employee B also begins to regain additional days of FMLA leave beginning on 06/01/2012, and additional days beginning on 12/01/2012.

- (2) Employers may choose any method as long as it is applied uniformly and consistently to all employees. An exception to this uniformity applies in the case of a multi-state employer who must comply with a state requirement for determination of the leave year. In this case the employer may comply with the state requirement for employees in that state and uniformly choose another method for all its other employees.
- (3) An employer may change to another leave year determination only after providing 60 days notice to all employees. During the 60-day transition, employees retain full benefit of their 12 workweeks of leave under whichever method provides the greatest benefit.
- (4) If an employer fails to select one of these methods for setting the 12-month period, the employer must use the 12-month period calculation method that is most beneficial to the employee.

29 CFR 825.200

39e01 **Intermittent leave.**

(a) General

(1) FMLA leave may be taken intermittently or on a reduced leave schedule under the following conditions:

a. When there is a medical need for leave that can be best accommodated through an intermittent or reduced leave schedule for an employee's own serious health condition; to care for a spouse, parent, son, or daughter with a serious health condition; or to care for a covered servicemember with a serious injury or illness. Such leave may be necessary for planned and/or unanticipated medical treatment of a serious health condition or of a serious injury or illness of a covered servicemember, or during recovery from treatment. It may also be taken to provide care or psychological comfort to a spouse, parent, son, or daughter with a serious health condition or a covered servicemember with a serious injury or illness. Examples of medically necessary intermittent leave include:

1. Leave taken for a condition which requires treatment by a health care provider periodically, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks
2. Leave taken by a pregnant employee for prenatal examinations or for periods of severe morning sickness
3. Leave taken for absences where a family member is incapacitated or the employee is unable to perform the essential functions of the position intermittently because of a chronic serious health condition, even if he or she does not receive treatment from a health care provider

b. When leave is taken due to a qualifying exigency

(2) Intermittent leave or a reduced leave schedule after the birth of a healthy child or placement of a healthy child for adoption or foster care may only be taken if the employer agrees.

29 USC 2612(b)(1)

29 CFR 825.202

(b) Scheduling of leave

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

29 USC 2612(e)(2)

29 CFR 825.203

(c) Transfer to an alternate position

- (1) If an employee needs intermittent leave that is foreseeable based on planned medical treatment, the employer may require the employee to transfer temporarily, during the period that the intermittent or reduced leave schedule is required, to an alternative position for which the employee is qualified and that better accommodates recurring periods of leave.
- (2) An employer must provide equivalent pay and benefits in the alternative position, but the position does not have to have equivalent duties. The employer may increase the pay and benefits of an existing alternative position to make them equivalent to those of the employee's regular job. Where an employer's normal practice bases benefits on the number of hours worked, the employer may proportionately reduce benefits for an employee's reduced hours worked.
- (3) An employer may not transfer an employee to an alternative position in order to discourage the employee from taking leave or otherwise work a hardship on the employee. *See* FOH 39o.
- (4) When an employee no longer needs to continue on intermittent or reduced schedule leave and is able to return to full-time work, the employer must place the employee in the same or equivalent job as the job the employee left when the leave commenced. The employee may not be required to take more leave than necessary to address the circumstance that precipitated the need for leave.
- (5) The FMLA limits an employer's ability to require that an employee transfer to an alternate position to situations involving foreseeable leave for planned medical treatment. This is the only situation where an employer may require a transfer.

29 USC 2612(b)(2)

29 CFR 825.204

73 FR 67934 and 73 FR 67974 -67975

(d) Increments of leave

- (1) The employer must account for intermittent leave or reduced schedule leave by no greater than the shortest period of time used to account for other forms of leave, provided it is not greater than 1 hour and does not reduce the employee's FMLA entitlement by more than the amount of leave actually taken. For example, if an employer accounts for the use of annual leave in increments of 1 hour and the use of sick leave in increments of ½ hour, then FMLA leave use must be accounted for using increments no larger than ½ hour. If the employer accounts for other forms of leave use in increments greater than 1 hour during the period the FMLA leave is taken, the employer must account for FMLA leave in increments no greater than 1 hour. *See* FOH 39m02 for special rules applicable to airline flight crew employees.
- (2) If an employer uses varying increments to account for leave usage at different times of the day or shift, the employer may not account for FMLA leave in a larger increment than the shortest period used to account for other leave during the period

the FMLA leave is taken. For example, if an employer usually accounts for all types of leave in increments of 15 minutes, but accounts for all non-FMLA leave for the first hour of the day in 30-minute increments, the employer may also account for FMLA leave in an increment no greater than 30 minutes *only* during the first hour of the day.

- (3) Where it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to commence or end work mid-way through a shift, the entire period that the employee is forced to be absent is designated as FMLA leave and counts against the employee's entitlement. The physical impossibility provision is intended to be narrowly construed and applied only in instances of true physical impossibility. Thus, if the exception applies to a flight attendant, train conductor, ferry operator, bus driver, or truck driver whose worksite is on board an airplane, train, boat, bus, or truck; or to a laboratory technician whose workplace is inside a clean room that must remain sealed for a certain period of time; the exception will only apply until the vehicle has returned to the departure site or while the clean room remains sealed.

29 CFR 825.205(a)

73 FR 67934 and 73 FR 67976 -67978

78 FR 8868

(e) Calculation of leave

- (1) The employee's actual workweek is the basis for the FMLA entitlement.
 - a. If an employee is normally required to work more than 40 hours per week, the hours worked beyond 40 must be included in determining the employee's leave entitlement. For example, if an employee normally works overtime in 3 of every 4 weeks, then such overtime hours are part of the usual and normal workweek schedule of the employee and are included in calculating the FMLA entitlement available to the employee.
 - b. If overtime hours are not required or are voluntary, such hours are not counted to calculate the employee's FMLA entitlement and are not counted against the employee's FMLA entitlement when not worked.

73 FR 67934 and 73 FR 67978 -67979

- (2) The FMLA provides eligible employees with up to 12 workweeks of leave for qualifying reasons and up to 26 workweeks of leave for military caregiver leave. When an employee takes leave on an intermittent or reduced leave schedule in periods of less than 1 full week, only the amount of leave actually taken may be counted toward the employee's leave entitlement. An employer may convert fractions of a workweek to their hourly equivalent so long as the conversion equitably reflects the employee's total hours. For example, an employee whose actual workweek is always 40 hours per week is entitled to an hourly equivalent of 480 hours (12 workweeks × 40 hours per week). For an employee whose schedule

varies from week to week, the hourly equivalent must equitably reflect the actual hours that would be worked during each workweek that FMLA leave is needed.

- (3) If the employee's schedule varies from week to week to such an extent that the employer is unable to determine how many hours the employee would have worked had he or she not taken FMLA leave, the employer may use a weekly average of the hours scheduled over the 12 months prior to the period of leave for calculating the employee's leave entitlement.

29 CFR 825.205(b) and (c)

39e02 Substitution of accrued paid leave.

(a) General

An eligible employee may choose, or the employer may require the employee, to substitute accrued paid leave for FMLA leave. Substitute means that the paid leave provided by the employer will run concurrently with the unpaid FMLA leave.

(b) Accrued paid leave

For the purpose of substituting accrued paid leave, the employee must have both earned the leave and be able to use that leave during the FMLA leave period. The employer may not require the employee to substitute leave that is not yet available to the employee to use under the terms of the employer's leave plan.

This, however, would neither prevent an employer from voluntarily advancing paid leave to an employee nor an employee from voluntarily accepting such leave during an FMLA absence.

WHD Non-Administrator Opinion Letter FMLA-81 (June 18, 1996)

WHD Non-Administrator Opinion Letter FMLA-61 (May 12, 1995)

(c) Adherence to employer's leave policy

When accrued paid leave is substituted, the employee receives pay pursuant to the employer's applicable paid leave policy during the otherwise unpaid FMLA leave. An employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employer's normal leave policy. For example, pursuant to an employer's uniform policy for all employees, an employer may request a doctor's note in order for the employee to receive paid sick leave. The employer must inform the employee that he or she must satisfy any procedural requirements of the paid leave policy to receive payment for the substituted leave. If the employee does not comply with the additional requirements of the employer's paid leave policy, the employee is no longer entitled to substitute accrued paid leave, but remains entitled to take unpaid FMLA leave.

(d) Concurrent use of FMLA and other paid leaves

- (1) Leave taken pursuant to a disability leave plan, which also meets the definition of a serious health condition under the FMLA, may be counted against the employee's

FMLA leave entitlement. A serious health condition may result from an injury on or off the job and leave for an injury meeting the FMLA criteria may be designated by the employer as FMLA leave.

- (2) Because leave under a disability benefit plan or workers' compensation program is not unpaid, the provision for substitution of accrued paid leave does not apply, and neither the employee nor the employer may require the substitution of paid leave. However, employers and employees may agree, where state law permits, to have accrued paid leave supplement the paid plan benefits, such as in a case where a plan only provides two-thirds of an employee's salary.
- (3) Section 7(o) of the FLSA permits public employers, under certain conditions, to substitute compensatory time off at one and one-half hours for each overtime hour worked in lieu of paying cash to employees who work overtime. If an employee requests and is permitted to use accrued compensatory time concurrently with FMLA leave, or the employer requires its use, the time may be counted against the employee's FMLA entitlement.

29 USC 2612(d)

29 CFR 825.207

73 FR 67934 and 73 FR 67979 -67983

39e03 Spouses employed by same employer.

- (a) Spouses employed by the same employer are limited to a combined total of 12 workweeks for the birth or placement of a healthy child, care for a healthy child after birth or placement, or to care for a parent with a serious health condition. The limitation would apply even if the spouses are employed at locations more than 75 miles apart but would not apply if one of the spouses was ineligible for FMLA leave.
- (b) Spouses are entitled to 12 workweeks each for their own serious health condition or to care for a spouse, son, or daughter with a serious health condition.
- (c) Where a spouse uses a portion of his or her leave for a purpose that is subject to the combined 12-week limit, that employee has the remainder of his or her 12 workweeks for any leave that is not subject to the combined limit.
- (d) Spouses employed by the same employer may also be limited to a combined total of 26 workweeks of leave for the care of a covered servicemember with a serious injury or illness.

29 CFR 825.127(f)

FOH 39d09(a)(5)

29 USC 2612(f)

29 CFR 825.120(a)(3), 29 CFR 825.121(a)(3), and 29 CFR 825.201(b)

39e04 Effects on an employee's salary.

(a) Employee exempt under 29 CFR 541 (salary basis test)

An employee exempt from minimum wage and overtime requirements of the FLSA as a salaried executive, administrative, professional, or computer employee does not lose the FLSA exemption by receiving unpaid FMLA leave. The employer may make deductions from the employee's salary for any hours taken as intermittent or reduced FMLA leave within a workweek without affecting the exempt status of the employee. *See* 29 CFR 541.602(b)(7).

29 USC 2612(c)

(b) Employee paid under 29 CFR 778.114 (fluctuating workweek)

(1) For an employee paid in accordance with the fluctuating workweek method of payment for overtime, the employer, during the period in which intermittent or reduced schedule FMLA leave is scheduled to be taken, may compensate the employee on an hourly basis and pay only for the hours the employees works, including time and one-half the employee's regular rate for overtime hours. The change to payment on an hourly basis must include the entire period during which the employee is taking intermittent leave, including weeks in which no leave is taken. The employer must use this practice uniformly with respect to all employees paid in this manner who take FMLA leave on an intermittent or reduced schedule basis.

(2) If an employer does not elect to convert the employee's compensation to hourly pay, no deduction may be taken for FMLA leave absences.

29 CFR 825.206

39f EMPLOYEE NOTICE REQUIREMENTS

39f00 General.

When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee does not have to expressly assert rights under the FMLA or even mention the FMLA. When an employee seeks leave due to a FMLA-qualifying reason for which he or she has previously taken leave, the employee must specifically reference the qualifying reason for leave or the need for FMLA leave. This requirement applies to both foreseeable and unforeseeable leave requests.

An employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable inquiries may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying.

29 CFR 825.302 -.303

39f01 Notice of foreseeable leave.

(a) Timing of notice

(1) An employee must provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for leave is foreseeable based on an expected

birth, placement for adoption or foster care, planned medical treatment for a serious health condition, or planned treatment for a serious injury or illness of a covered servicemember.

- (2) If 30 days' notice is not practicable, such as because of a lack of knowledge of approximately when the leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as possible and practical taking into account all of the circumstances.
- (3) Whether FMLA leave is to be continuous or intermittent, notice need only be given one time, but the employee must advise the employer as soon as practicable if the dates of scheduled leave change or are extended, or were initially unknown.
- (4) If the need for leave was foreseeable based on an expected birth or placement for adoption or foster care, for planned medical treatment of a serious health condition of the employee or family member or a serious injury or illness of a covered servicemember, and the employee fails to provide 30 days advance notice, the employee may be required, at the employer's request, to explain why such notice was not practicable.
- (5) For foreseeable leave due to a qualifying exigency, an employee must provide notice as soon as practicable, regardless of how far in advance such leave is foreseeable.

29 USC 2612(e)

29 CFR 825.302(a)

(b) Content of notice

An employee must provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave and the anticipated timing and duration of the leave. In all cases the employer is expected to inquire further if it is necessary to obtain more information about whether the employee is seeking FMLA-protected leave. When the employee has taken leave previously for more than one FMLA-qualifying reason, the employer may need to ask additional questions to determine for which qualifying reason the employee is seeking FMLA leave.

29 CFR 825.302(c)

(c) Complying with employer policies

The employer may require the employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave absent unusual circumstances. If the employee does not comply with the employer's usual and customary policy and procedures and no unusual circumstances exist, the FMLA-protected leave may be delayed or denied. However, if the employer's policy requires notice to be provided sooner than required under the FMLA and the employee does not comply with the employer's policy, FMLA-protected leave may not be delayed or denied.

29 CFR 825.302(d)

(d) Scheduling planned medical treatment

The employee must make a reasonable effort to schedule planned medical treatment so as not to unduly disrupt the employer's operations. An employee should consult with his or her employer prior to scheduling treatment in order to work out a schedule that best suits the employee's and employer's needs.

29 USC 2612(e)

29 CFR 825.302(e)

39f02 Notice of unforeseeable leave.

(a) Timing of notice

When the approximate timing of the need for leave is not foreseeable, an employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case. It generally should be possible and practical within the time prescribed by the employer's usual and customary notice requirements.

29 CFR 825.303(a)

(b) Content of notice

An employee must provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request. Calling in sick without providing more information is not considered sufficient notice to trigger an employer's obligations under the FMLA. The employer is expected to obtain additional information through informal means.

29 CFR 825.303(b)

(c) Complying with employer policies

When the need for leave is not foreseeable, the employee must still comply with the employer's usual and customary notice and procedural requirements for taking leave unless there are unusual circumstances. For example, an employee would not be required to follow an employer's procedural requirement to call-in prior to the start of his or her shift if a medical emergency requiring FMLA leave prevented the employee from doing so. If the employee does not comply with the employer's usual and customary policies for requesting unforeseeable leave and no unusual circumstances exist, FMLA leave may be delayed or denied.

29 CFR 825.302(c)

39f03 Failure to comply with FMLA notification policies.

If an employee has been provided notice of the FMLA notice requirements and fails to comply with those requirements, his or her FMLA coverage may be delayed.

- (a)** If an employee knows of the need for leave and the approximate date the leave would be taken 30 days in advance of the leave but fails to give notice of the need for leave with no

reasonable excuse, the employer may delay FMLA coverage until 30 days after the date the employee provides notice.

- (b) If the employee knows of the need for leave fewer than 30 days in advance but fails to give notice of the need for leave as soon as practicable under the circumstances, the extent to which the employer may delay leave depends on the facts of the particular case. For example, if an employee reasonably should have given the employer 2 weeks notice but instead only provided 1 week notice, then the employer may delay FMLA-protected leave for 1 week.
- (c) If the need for leave is unforeseen, the extent to which the employer may delay leave depends on the circumstances. For example, if it was practicable for the employee to provide notice very soon after the need for leave arises but the employee does not provide notice until 2 days after the leave began, then the employer may delay FMLA coverage of the leave by 2 days.

29 CFR 825.304

39g EMPLOYER NOTICE REQUIREMENTS

39g00 Required notices.

(a) General notice

(1) *FMLA poster*

- a. All covered employers, including those with no eligible employees, are required to keep posted a notice explaining the provisions of the FMLA and providing information concerning the procedures for filing complaints of FMLA violations with the WHD. The poster and text must be large enough to be easily read and be prominently posted where it may readily be seen by employees and applicants.
- b. Electronic posting is sufficient provided it meets all other requirements. Electronic posting does not excuse the employer from the statutory requirement to post in a location viewable by applicants for employment. Therefore, if the employer posts such information on an intranet that is not accessible to applicants, additional posting would be necessary.

73 FR 67934 and 73 FR 67991

- c. If a significant portion of the employer's workforce is not literate in English, the employer must provide the general notice in a language in which employees are literate.

(2) *Additional distribution of general notice*

If a covered employer has any eligible employees, it must also provide this general notice to each employee. If the employer has an employee handbook or other written guidance to employees concerning benefits or leave rights, the FMLA general notice must also be included therein. If the employer does not have such written materials, the employer must distribute a copy of the FMLA general notice to each new

employee upon hiring. In either case, distribution may be accomplished electronically. The employer must translate the notice if a significant portion of workers are not literate in English into a language in which the employees are literate.

29 CFR 825.300(a)

(b) Eligibility notice

- (1) When an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA leave within 5 business days, absent extenuating circumstances. The notice must state whether the employee is eligible for FMLA leave, and if not, at least one reason why the employee is not eligible. *See* FOH 39c for determining employee eligibility.
- (2) The eligibility notice must be provided to the employee following the first request for FMLA leave in each 12-month leave year and only for subsequent requests for FMLA leave for a different qualifying reason within the same 12-month leave year if the employee's eligibility status has changed from the first notice.
- (3) Notice may be oral or in writing; employers may use optional form WH-381 to provide the eligibility notice. The employer must translate the notice if a significant portion of workers are not literate in English into a language in which the employees are literate.

29 CFR 825.300(b)

(c) Rights and responsibilities notice

- (1) Employers must provide *written notice* detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. This notice must be provided to the employee each time the eligibility notice is provided. If the employee's leave has already begun, the notice must be mailed to the employee's address of record. *See* FOH 39g00(b).
- (2) The notice must include, as appropriate, the following:
 - a. that the leave may be designated and counted against the employee's FMLA entitlement;
 - b. any requirements for the employee to furnish certification and the consequences of failing to do so;
 - c. the employee's right to substitute paid leave, whether the employer will require the substitution of paid leave, the conditions related to substitution, and the employee's entitlement to take unpaid FMLA leave if the employee does not meet the conditions for paid leave;

- d. any requirement for the employee to make any premium payments to maintain health benefits, the arrangements for making such payments, and the consequences for failure to make timely payments;
 - e. the employee's status as a key employee, the potential consequence that restoration may be denied following FMLA leave, and explanation of the conditions required for denial of restoration;
 - f. the employee's rights to maintenance of benefits during the FMLA leave and restoration upon return from FMLA leave; and
 - g. The employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave.
- (3) The notice may include additional information or be accompanied by a certification form but is not required to do so. Employers may use optional use form WH-381 and may adapt it as appropriate to meet the notice requirements. Electronic distribution is permitted so long as it otherwise meets the requirements. The employer must translate the notice if a significant portion of workers are not literate in English into a language in which the employees are literate.
- (4) If any of the information in the notice changes, the employer must provide written notice referencing the prior notice and providing the changes to an employee within five business days of receipt of the employee's first notice of need for leave subsequent to any change.
- (5) Employers are expected to be responsive in answering questions from employees concerning their rights and responsibilities under the FMLA.

29 CFR 825.300(c)

(d) Designation notice

- (1) When the employer has enough information to determine whether leave is being taken for an FMLA-qualifying reason, the employer must notify the employee of that designation *in writing* within 5 business days, absent extenuating circumstances. If the employer requires paid leave to be substituted for unpaid FMLA leave, the employer must inform the employee of this designation at the time of designating the FMLA leave. If the employer will require a fitness-for-duty certification for restoration to employment, notice of this requirement must be provided with the designation notice.
- (2) The employer must notify the employee of the amount of leave counted against the employee's FMLA leave entitlement.
- a. If the amount of leave needed is known at the time of designation, the employer must notify the employee of the number of hours, days, or weeks that will be counted against the employee's FMLA leave entitlement in the designation notice.

- b. If it is not possible to provide the exact time that will be counted, such may be the case with unforeseeable intermittent leave, then upon request by the employee, the employer must provide notice of the amount of leave counted against the employee's FMLA leave entitlement, but no more often than once in a 30-day period and only if leave is taken in that period. This notice may be oral or in writing, but if given orally, must be confirmed in writing no later than the next payday, and can be in any form, including a note on the employee's pay stub.
- (3) Only one notice of designation is required for each FMLA-qualifying reason per applicable 12-month period. The employer may use the optional form WH-382. If the leave is not designated as FMLA because it does not meet the requirements, the notice to the employee that the leave is not designated as FMLA leave may be a simple written statement.
- (4) If the information provided in the notice changes, the employer must provide written notice of the change within 5 business days of receiving the employee's first notice of need for leave after the change.

29 CFR 825.300(d)

39g01 **Designation of FMLA leave.**

- (a) The employer is responsible in all circumstances for designating leave as FMLA-qualifying once the employer has knowledge that the leave is being taken for an FMLA-qualifying reason. In any circumstance where the employer does not have sufficient information about the employee's reason for leave, the employer should inquire further of the employee to determine whether leave is potentially FMLA-qualifying. The employer's determination on whether leave is FMLA-qualifying must be based only on information received from the employee or the employee's spokesperson. Once the employer has acquired knowledge that the leave is being taken for a FMLA-qualifying reason, the employer must notify the employee. *See* FOH 39g00(d).

(b) Retroactive designation

If the employer fails to designate leave timely (*i.e.*, within 5 business days absent unusual circumstances), the employer may retroactively designate leave as FMLA leave with appropriate notice to the employee provided that the employer's failure to timely designate leave does not cause harm or injury to the employee. In all cases where leave would qualify for FMLA protections, an employer and an employee can mutually agree that leave be retroactively designated as FMLA leave.

(c) Disputes

If there is a dispute between an employer and an employee as to whether leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employer. Such discussions and the decision must be documented.

29 CFR 825.301

39h **CERTIFICATION AND DOCUMENTATION**

39h00 **General.**

(a) **Valid reasons for requesting certification**

(1) Employers may require employees seeking leave to care for a covered family member with a serious health condition or for their own serious health condition to support the request with a certification issued by the health care provider of the family member or the employee, respectively, and subsequent recertification, as appropriate. In certain circumstances, an employer may also require a fitness-for-duty certification for restoration to employment when the leave is for the employee's own serious health condition. *See* FOH 39h01 for medical certification for a serious health condition and 39h02 for fitness for duty certification.

(2) An employer may also require that an employee's leave due to a qualifying exigency or to care for a covered servicemember with a serious injury or illness be supported by a certification.

See FOH 39h06 -07 for certification requirements for military family leave.

(3) An employer *may not request* certification of leave to care for a healthy newborn child, or for placement with the employee of a son or daughter for adoption or foster care, although the employer may request documentation of the family relationship.

FOH 39h05

(b) **Notice to employee of certification requirement**

(1) An employer must give notice to the employee each time a certification is required. When required for the rights and responsibilities notice, the notification must be written. Requests for subsequent certification may be oral. When requesting a certification, the employer must advise an employee of the consequences of an employee's failure to provide adequate certification.

(2) In most cases, the employer should request that an employee furnish certification at the time the employee gives notice of the need for leave or within 5 business days. The employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration.

(c) **Employee certification responsibilities**

(1) The employee must provide the requested certification to the employer within 15 calendar days after the employer's request, unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts, or the employer provides more than 15 calendar days to return the requested certification.

(2) The employee must provide the employer with a complete and sufficient certification. It is the employee's responsibility to furnish a complete and sufficient certification or to furnish the health care provider providing the certification with any necessary authorization from the employee or family member in order for the

healthcare provider to release a complete and sufficient certification to the employer to support the employee's FMLA request.

(d) Deficient certification and opportunity to cure

- (1) The employer must advise an employee whenever the employer finds any certification, including medical certification of a serious health condition or serious injury or illness of covered servicemember or certification of a qualifying exigency, incomplete or insufficient, and must state *in writing* what additional information is necessary to make the certification complete and sufficient. The employer must provide the employee with 7 calendar days to correct any deficiency, unless it is not practicable under the particular circumstances for the employee to cure any identified deficiency in the 7-day period despite the employee's diligent good faith efforts. If the deficiencies specified by the employer are not cured in the resubmitted certification, the employer may deny the taking of FMLA leave.
- (2) A certification is considered incomplete if one or more *applicable* entries have not been completed. A certification is considered insufficient if the information provided is vague, ambiguous, or non-responsive.

(e) Consequences of employee's failure to provide certification

It is the employer's responsibility to advise the employee of the consequences of failure to provide adequate certification. When an employee is unable to meet the 15-calendar day deadline to submit a certification despite the employee's diligent good faith efforts, the employee is entitled to additional time to provide the certification. Employees are expected to communicate to their employers the efforts they are making to secure the completed certification.

If the employee fails to provide the employer with a timely complete and sufficient certification, absent extenuating circumstances, or fails to provide any certification, the employer may delay or deny the taking of FMLA leave. *See* FOH 39h03.

29 CFR 825.313

73 FR 67934 and 73 FR 68036

29 USC 2613

29 CFR 825.305

39h01 Medical certification of a serious health condition.

When leave is taken because of an employee's own serious health condition or the serious health condition of a family member, an employer may require the employee to obtain a medical certification at the employee's expense. *See* FOH 39h06 for certification of qualifying exigency leave and FOH 39h07 for certification of military caregiver leave.

(a) Sufficient medical certification

- (1) The FMLA provides that a medical certification is sufficient if it states:

- a. the date the serious health condition commenced and probable duration of the condition;
- b. the contact information of the health care provider and type of practice/specialization;
- c. the appropriate medical facts within the knowledge of the health care provider regarding the condition sufficient to support the need for leave;
- d. for leave to care for a family member, a statement that the employee is needed to care for the family member and an estimate of the amount of time needed; or for leave for the employee's own serious health condition, a statement that the employee is unable to perform the essential functions of the position and the likely duration of such inability; and
- e. for intermittent or reduced schedule leave, the certification must also include:
 - 1. for planned medical treatment of the employee's or the employee's family member's serious health condition, a statement of the medical necessity for intermittent or reduced leave schedule and the dates treatment is expected and duration of such treatment;
 - 2. for unforeseeable leave for the employee's own serious health condition (including pregnancy) that causes unforeseen periods of incapacity, a statement of the medical necessity for intermittent or reduced leave schedule and an estimation of the frequency and duration of such periods of incapacity; and
 - 3. for unforeseeable leave for a family member's serious health condition, a statement that the leave schedule is medically necessary for the care of the family member, which can include assisting in the family member's recovery, and an estimate of the frequency and duration of the intermittent or reduced schedule leave.

29 USC 2613(b)

29 CFR 825.306(a)

(2) *Medical facts*

The medical facts appropriate for inclusion on the certification form will vary depending on the nature of the serious health condition and are to be determined by the health care provider but must be sufficient to support the need for leave. For example, at the health care provider's discretion, the medical facts may include information on symptoms, doctor's visits, or a diagnosis. Whether a diagnosis is included in the certification form is left to the discretion of the health care provider and an employer may not reject a complete and sufficient certification because it lacks a diagnosis.

73 FR 67934 and 73 FR 68014

(3) *Frequency and duration of the condition*

Not all absences caused by certain serious health conditions are predictable. Health care providers are expected to provide only their best informed medical judgment when estimating the need for unforeseeable intermittent leave. The FMLA does not permit an employer to require an exact schedule of leave for such instances.

73 FR 67934 and 73 FR 68017

(b) Medical certification forms

- (1) An employer may, but is not required to, use the DOL's two optional forms (Form WH-380-E and Form WH-380-F) for use in obtaining medical certification.
- (2) Employers may develop their own forms but may not request any additional information beyond that specified by the regulations. An employer may not reject a medical certification that otherwise contains the information required by the regulations due to the form of the certification provided. In all instances, the certification must relate only to the condition for which leave is needed.

29 CFR 825.306(b)

(c) Annual medical certification

Where leave for a serious health condition lasts beyond a single leave year, a new medical certification may be required in each subsequent FMLA leave year. The employer may request a medical certification with the first absence in a new 12-month leave year. The employer may seek authentication and clarification and second and third opinions for these new medical certifications.

29 CFR 825.305(e)

(d) Authentication and clarification of a medical certification

- (1) The employer may contact the health care provider for purposes of clarification and authentication of the medical certification after the employer has given the employee an opportunity to cure any deficiencies. Employers may not ask for additional information beyond that required by the certification form. To make such contact, the employer must use a health care provider, a human resources professional, a leave administrator, or a management official. Under no circumstances may the employee's direct supervisor contact the employee's health care provider.
- (2) Authentication means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document. No additional information may be requested. Clarification means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response. No additional information may be requested.

- (3) The requirements of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule govern the privacy of individually-identifiable health information created or held by HIPAA-covered entities. Therefore, HIPAA requirements must be satisfied when an employee's or an employee's family member's individually-identifiable health information is shared with an employer by a HIPAA-covered entity. HIPAA requires, among other things, a written authorization by the employee (or the employee's family member) in order to release information for authentication and clarification purposes. If an employee does not provide such authorization to the health care provider allowing the employer to obtain clarification of an unclear certification, and does not otherwise clarify the certification, the employer may deny the FMLA leave.

73 FR 67934 and 73 FR 68018 -68019

29 CFR 825.307(a)

(e) Second and third medical opinions

- (1) An employer who has reason to doubt the validity of a medical certification may request a second opinion at the employer's expense. The employer is permitted to designate the health care provider for the second opinion as long as the provider is not employed on a regular basis by the employer, is not under contract with the employer, or is not regularly utilized by the employer. An exception can be made if the employee is located in an area where access to health care is extremely limited, such as a rural area where there may be only one or two doctors in a relevant specialty. The designated health care provider must be within normal commuting distance, except in very unusual circumstances, and the employer must reimburse the employee for reasonable travel expenses.
- (2) Pending receipt of the additional medical opinion, the employee is provisionally entitled to FMLA benefits, including maintenance of group health benefits. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave cannot be designated as FMLA leave and may be treated as paid or unpaid leave under the employer's established leave policy.
- (3) If the first and second opinions differ, a third and binding opinion may be required at the employer's expense. The third health care provider must be approved jointly by the employer and the employee. The employer and the employee must each act in good faith to reach agreement on the third opinion provider. If the employer does not act in good faith, the employer will be bound by the first medical certification. If the employee does not act in good faith, the employee will be bound by the second medical certification.
- (4) Upon request by the employee, the employer must provide copies of second or third opinions within 5 business days absent extenuating circumstances.
- (5) If a second or third opinion health care provider requests relevant medical information from an employee's (or his or her family member's) health care provider, and the employee (or his or her family member) does not authorize his or her health care provider to release relevant medical information, the employer may deny the FMLA leave.

29 USC 2613(c) -(d)

29 CFR 825.307(b) -(e)

(f) Medical certification abroad

In circumstances in which the employee or family member is visiting another country, or a family member resides in another country, and a serious health condition develops, employers must accept medical certifications, including second and third opinions, from a health care provider who practices in that country. If a certification by a foreign health care provider is not in English, the employee must provide a written translation at the employer's request.

29 CFR 825.307(f)

(g) Recertification

- (1) An employer may request a recertification for leave taken because of an employee's own serious health condition or the serious health condition of a family member. Generally, an employer may ask for recertification no more frequently than every 30 days and only in connection with an absence by the employee. However, if the minimum duration indicated on the medical certification exceeds 30 days, an employer must wait the indicated minimum duration before requesting a recertification (unless the exception in FOH 39h01(g)(5) below applies). In all cases, however, an employer may request a recertification of a medical condition every 6 months in connection with an absence by the employee. This could apply when, for example, the health care provider indicates a condition will last a lifetime.
- (2) The employer may ask for the same information as permitted for the initial medical certification. In addition, the employer may provide a record of the employee's absence pattern to the health care provider and ask if the serious health condition and need for leave is consistent with such pattern.
- (3) The employer must allow at least 15 calendar days for the employee to provide the requested recertification, unless it is not practicable under the particular circumstances despite the employee's diligent, good faith efforts.
- (4) The employer may contact the health care provider to authenticate or clarify the recertification. No second or third opinions may be required on a recertification. The recertification is at the employee's expense.
- (5) *Less than 30 days exception*

An employer may request recertification in less than 30 days if:

- a. the employee requests an extension of leave; or
- b. circumstances described by the previous certification have changed *significantly* (for example, if the certification stated the employee needed leave for 1 to 2 days for a particular serious health condition and the employee's absences for that condition lasted 4 days each of the last two

times leave was needed, the increased duration might constitute a significant change); or

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

(6) *When recertification is not permitted*

Recertification does not apply to leave taken for a qualifying exigency or to care for a covered servicemember with a serious injury or illness (*i.e.*, military caregiver leave).

29 CFR 825.310(d)

29 CFR 825.307(a), 29 CFR 825.308, and 29 CFR 825.313(c)

WHD Opinion Letter FMLA-2004-2-A

39h02 **Fitness-for-duty certification.**

- (a) An employer may have a uniformly-applied policy or practice that requires all similarly-situated employees who take leave for their own serious health condition to obtain and present certification from the employee's health care provider that the employee is able to resume work as a condition of restoring an employee. The fitness-for-duty certification can only be requested for the health condition that caused the employee's need for FMLA leave. The employee has the same obligation to participate and cooperate as in the medical certification process. The cost of the fitness-for-duty certification is borne by the employee.

(b) **During intermittent or reduced schedule leave**

- (1) When the employee is on intermittent or reduced schedule leave, the employer is only entitled to a certification of fitness to return to duty up to once every 30 days and only if reasonable safety concerns exist regarding the employee's ability to perform his or her duties based on the serious health condition for which the employee took FMLA leave.
- (2) "Reasonable safety concerns" means a reasonable belief of significant risk of harm to the employee or others. In determining the reasonableness of safety concerns, an employer should consider the nature and severity of the potential harm and the likelihood that potential harm will occur.

(c) **Notice to employee**

If the employer will require the employee to present a fitness-for-duty certification to be restored to employment, the employer must provide notice of such requirement with the designation notice. An employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. In such case, the employer must indicate that in the designation notice and include a list of the essential functions of the employee's position.

(d) **Authentication and/or clarification, and second and third opinions**

An employer may contact the employee's health care provider for authentication and/or clarification of a fitness-for-duty certification, but may not delay reinstatement of the employee during the authentication or clarification period. Second and third opinions may not be required on fitness-for-duty certifications.

(e) State or local law, collective bargaining agreement

In all cases, if state or local law or the terms of a CBA govern an employee's return to work, those provisions shall be applied.

29 USC 2614(a)(4)

29 CFR 825.312

39h03 Employee failure to provide certification.

(a) Medical certification

- (1) If an employee fails to provide certification in a timely manner for foreseeable leave, an employer may deny FMLA coverage for the leave until the required certification is provided. For example, if an employee is given 15 days to provide certification and does not provide certification for 45 days without sufficient reason for the delay, the employer may deny FMLA protections for the period following expiration of the 15-day time period (*i.e.*, from day 16 through day 45).
- (2) In the case of unforeseeable leave, an employer may deny FMLA coverage for the requested leave if the employee fails to provide a certification within 15 calendar days from receipt of the request for certification unless not practicable due to extenuating circumstances. If the employee fails to timely return the certification, the employer can deny FMLA protections for the leave following the expiration of the 15-day time period until a sufficient certification is provided.
- (3) If the employee never produces the certification, the leave is not FMLA leave.

(b) Recertification

If an employee fails to provide a recertification within the time requested by the employer (which must be at least 15 calendar days) or as soon as practicable under the circumstances, then the employer may deny continuation of the FMLA leave protections until the employee produces a sufficient recertification. If the employee never produces the recertification, the leave is not FMLA leave.

(c) Fitness-for-duty certification

An employer may delay employment restoration until an employee submits a required fitness-for-duty certification unless the employer has failed to provide the proper notification. If the employee never submits the fitness-for-duty certification or a new medical certification, the employee may be terminated.

29 CFR 825.313

39h04 Health care provider.

(a) Within the United States

Medical certification must be issued by a health care provider. A “health care provider,” for purposes of the FMLA, is a provider who is one of the following:

- (1) A doctor of medicine or osteopathy authorized to practice medicine or surgery by the state in which the doctor practices
- (2) A podiatrist, dentist, clinical psychologist, optometrist, or chiropractor authorized to practice in the state and performing within the scope of his or her practice, meaning authorized to diagnose and treat physical or mental health conditions (treatment by a chiropractor is limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist)
- (3) A nurse practitioner, nurse-midwife, clinical social worker, or physician assistant authorized to practice in the state and performing within the scope of his or her practice, meaning authorized to diagnose and treat physical or mental health conditions
- (4) A Christian Science Practitioner listed with the First Church of Christ, Scientist in Boston, Massachusetts
- (5) Any health care provider from whom the employer or the employer’s group health plan’s benefits manager will accept a medical certification

(b) Outside the United States

A “health care provider” includes a health care provider listed above who practices in a country other than the U.S., who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

29 USC 2611(6)

29 CFR 825.125

39h05 Documentation of relationship.

For purposes of confirmation of family relationship, the employer may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement from the employee, or a child’s birth certificate, a court document, etc. The employer is entitled to examine the documentation but the employee is entitled to the return of the document.

29 CFR 825.122(k)

39h06 Certification for qualifying exigency leave.

(a) Active duty orders

The first time an employee requests leave for a qualifying exigency, the employer may require the employee to provide a copy of the military member's active duty orders or other military documentation which indicates the covered active duty or call to active duty and dates of such service. Official military correspondence, such as a letter from a superior officer in the military member's chain of command, will be sufficient to establish that the military member is on covered active duty or under a call to covered active duty. The military member's active duty orders or other military documentation need only be provided to the employer once. An employer may subsequently require an employee to provide a copy of new active duty order or other military documentation only for a qualifying exigency request arising out of a different period of covered active duty of the same military member or the covered active duty of a different military member.

29 USC 2613(f)

29 CFR 825.309(a)

77 FR 8960 and 77 FR 8970

78 FR 8854 -8855

(b) Additional certification

An employer may require that leave for any qualifying exigency be supported by a certification that provides the dates, description, and other details of the exigency and the needed leave. An employer may request the following information for qualifying exigency certification:

- (1) A statement or description, signed by the employee, of appropriate facts regarding the qualifying exigency, including information on the type of qualifying exigency for which leave is requested, and, if available, any written documentation that supports the need for leave
- (2) The approximate date on which the qualifying exigency commenced or will commence
- (3) The beginning and ending dates for leave taken for a single, continuous period of time
- (4) The estimated frequency and duration of the qualifying exigency for leave taken intermittently or on a reduced leave schedule
- (5) If the qualifying exigency involves a meeting with a third party, appropriate contact information for the individual or entity with whom the employee plans to meet (*e.g.*, name, title, organization, address, telephone number, fax number, and email address) and a brief description of the purpose of the meeting

An employer may use the DOL's optional Form WH-384 for obtaining this certification. An employer who uses Form WH-384 or another form containing the same basic information may not require any information beyond that specified in the regulations.

29 CFR 825.309(b) -(c)

(c) Rest and Recuperation leave orders

If the qualifying exigency leave is to spend time with the military member while he or she is on Rest and Recuperation leave, an employer may request a copy of the member's Rest and Recuperation orders or other documentation issued by the military which states the military member had been granted Rest and Recuperation leave and the dates. *See* FOH 39d08(b)(6).

29 CFR 825.309(b)(6)

(d) Verification

Once an employee submits a complete and sufficient certification, the employer may not request additional information. If the exigency involves meeting with a third party, the employer may contact the individual or entity only to verify the purpose and schedule of the meeting. An employer may also contact an appropriate unit of the Department of Defense only to request verification that a military member is on covered active or call to covered active duty status. The employer does not need the employee's permission for verification.

29 CFR 825.309(d)

(e) Second and third opinions and recertifications

The second and third opinion process applicable to certification of a serious health condition (*see* FOH 39h01(e)) does not apply to qualifying exigency leave as such leave does not involve a serious health condition. Recertification is not permitted for leave taken for the same qualifying exigency.

29 CFR 825.313(c)

39h07 Certification for military caregiver leave.

(a) An employer may require an employee to obtain a certification from an authorized health care provider when leave is taken to care for a covered servicemember with a serious injury or illness. The certification may be completed by:

- (1) a Department of Defense (DOD) health care provider,
- (2) a Department of Veterans Affairs (VA) health care provider,
- (3) a DOD TRICARE network authorized private health care provider,
- (4) a DOD non-network TRICARE authorized private health care provider, or
- (5) a health care provider as defined in 29 CFR 825.125.

The authorized health care provider may rely on determinations from an authorized DOD or VA representative for certain military-related determinations.

(b) An employer may request the following information for military caregiver leave certification:

- (1) The name, address, and appropriate contact information (*i.e.*, telephone number, fax number, and/or email address) of the health care provider, the type of medical

practice, the medical specialty, and whether the health care provider is one of the health care providers specified in FOH 39h07(a)

- (2) Whether the covered servicemember's injury or illness was incurred in the line of duty while on active duty or, if not, whether the covered servicemember's injury or illness existed before the beginning of the servicemember's active duty and was aggravated by service in the line of duty while on active duty
- (3) The approximate date on which the serious injury or illness commenced, or was aggravated, and its probable duration
- (4) A statement of appropriate medical facts regarding the covered servicemember's health condition, sufficient to support the need for leave:
 - a. Current member of the Armed Forces

For a current member of the Armed Forces, such medical facts must include information on whether the injury or illness may render the covered servicemember medically unfit to perform the duties of the servicemember's office, grade, rank, or rating and whether the member is receiving medical treatment, recuperation, or therapy.
 - b. Veteran

For a covered veteran, such medical facts must include information on whether the veteran is receiving medical treatment, recuperation, or therapy for an injury or illness that:

 1. is the continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and that rendered the member medically unfit to perform the duties of the member's office, grade, rank, or rating; or
 2. is a physical or mental condition for which the covered veteran has received a VASRD of 50 percent or greater. The VASRD rating must be based, in whole or in part, on the condition for which the need for military caregiver leave is requested; or
 3. is a physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or
 4. is substantiated by documentation of enrollment in the VA Program of Comprehensive Assistance for Family Caregivers.
- (5) Information sufficient to establish that the covered servicemember is in need of care, as described in 29 CFR 825.124, and whether the covered servicemember will need care for a single continuous period of time, including any time for treatment and recovery, and an estimate as to the beginning and ending dates for this period of time

- (6) If an employee requests leave on an intermittent or reduced schedule basis for planned medical treatment appointments for the covered servicemember, whether there is a medical necessity for the covered servicemember to have such periodic care, and an estimate of the treatment schedule for such appointments
- (7) If an employee requests leave on an intermittent or reduced schedule basis to care for a covered servicemember other than for planned medical treatment, whether there is a medical necessity for the covered servicemember to have such periodic care, which can include assisting in the covered servicemember's recovery, and an estimate of the frequency and duration of the periodic care
- (8) Name and address of the employee requesting leave, the name of the covered servicemember, and the relationship of the employee to the covered servicemember
- (9) Whether the covered servicemember is a current member of the Armed Forces and his or her military branch, rank, and current unit assignment, and if so, whether he or she is assigned to a military medical facility as an outpatient or to a unit established for the purpose of providing command and control of members of the Armed Forces received medical care as outpatients, and the name of the medical treatment facility or unit, or whether he or she is on the temporary disability retired list
- (10) Whether the covered servicemember is a veteran, the date of separation from military service, and whether the separation was other than dishonorable

An employer may use the DOL's optional form WH-385 for current servicemembers or form WH-385-V for covered veterans. An employer who uses form WH-385 or WH-385-V or another form containing the same basic information may not require any information beyond that specified in the regulations. *See* 29 CFR 825.310(b) -(c) for the information permitted on the certification.

- (c) When an employer requires an employee to submit certification to support military caregiver leave, the employer is required to accept a copy of Invitational Travel Orders (ITO) or an Invitational Travel Authorization (ITA) in place of the certification. The ITO/ITA is sufficient certification for the duration of time specified in the ITO/ITA and regardless of whether the employee is named in the order or authorization. If the employee's need for leave extends beyond the period covered by the ITO/ITA, an employer may request certification for the remainder of the leave period. The employer may require the employee to provide confirmation of the family relationship between the employee and the covered servicemember.
- (d) When an employer requires the employee to submit certification to support military caregiver leave, the employer is required to accept a copy of the covered servicemember's enrollment in the VA Program of Comprehensive Assistance for Family Caregivers as certification of the servicemember's serious injury or illness. The enrollment documentation is sufficient certification of the servicemember's serious injury or illness regardless of whether the employee is the named caregiver in the enrollment documentation.

The employee is still responsible for providing the employer with additional relevant information, such as that the veteran is within five years of discharge, the probable duration of the serious injury or illness, and the veteran's need for care and an estimate of the time period during which care will be needed. The employer may require the employee to provide

confirmation of the family relationship between the employee and the covered servicemember.

78 FR 8858

- (e) An employer may seek authentication and clarification of a certification for military caregiver leave, including authentication and clarification of an ITO/ITA or the documentation indicating a servicemember's enrollment in the VA Program of Comprehensive Assistance for Family Caregivers. *See* 29 CFR 825.307.
- (f) An employer may require second and/or third opinions when leave to care for a covered servicemember is certified by a non-military affiliated health care provider, as described in FOH 39h07(a). An employer may not require second and/or third opinions for leave to care for a covered servicemember when the leave is certified by a military-affiliated health care provider as described in FOH 39h07(a). Additionally, the recertification process does not apply to leave taken to care for a covered servicemember.

29 CFR 825.310

39i MAINTENANCE OF EMPLOYEE BENEFITS

39i00 Maintaining group health plan benefits.

- (a) An employer is required to maintain an employee's health benefit coverage under any group health plan for the duration of any FMLA leave period at the level and under the conditions that coverage would have been provided if the employee had remained continuously employed during the entire FMLA leave period.
- (b) A group health plan is any employer plan, or plan contributed to by an employer, to provide health care to employees, former employees, or the families of such employees. Such plans may include a self-insured plan.
- (c) A group health plan does not include insurance programs providing health coverage where employees purchase individual policies from insurers, provided that:
 - (1) no contributions are made by the employer;
 - (2) participation in the program is completely voluntary for employees;
 - (3) the sole functions of the employer with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions, and to remit them to the insurer;
 - (4) the employer receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deduction; and
 - (5) the premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

- (d) If an employer provides a new health plan or benefits, or changes health options while an employee is on FMLA leave, the employee is entitled to the new or changed benefits to the same extent as if the employee were not on leave. Any plan changes that apply to all employees would apply to an employee on FMLA leave. Notice of any opportunity to change plans or benefits must be given to an employee on FMLA leave and such change in benefits must be made available while an employee is on FMLA leave.
- (e) An employer must maintain benefit coverage during an employee's FMLA leave for dental care, eye care, mental health counseling, etc. if such coverage is provided in the employer's group health plan, including a supplement to a group health plan, whether or not provided through a flexible spending account or other component of a cafeteria plan.
- (f) If the employer is providing health insurance to discharge the health and welfare benefits requirement under a McNamara-O'Hara Service Contract Act wage determination, that benefit must continue during the entire period of the FMLA leave. If an employer pays cash wages in lieu of the health and welfare benefits, the employer is not required to continue such payments while the employee is on FMLA leave.

WHD Opinion Letter FMLA 2006-5-A

WHD Non-Administrator Letter FMLA-1 (June 15, 1993)

29 USC 2614(c)(1)

29 CFR 825.209

39i01 Maintaining non-health benefits.

- (a) The taking of FMLA leave cannot result in the loss of any employment benefit accrued prior to the commencement of the leave, except for the use of accrued paid leave to substitute for unpaid FMLA leave.
29 USC 2614(a)(2)
- (b) An employee's entitlement to benefits other than group health benefits during a period of FMLA leave is determined by the employer's established policy for providing such benefits when an employee is on other forms of leave, paid or unpaid, as appropriate. If benefits such as vacation or holiday pay accrue to employees on other types of paid and/or unpaid non-FMLA leave, employees on corresponding paid or unpaid FMLA leave are entitled to such accrual.
29 CFR 825.209(h)
- (c) Maintenance of other benefits, including health insurance policies that are not part of the employer's group health plan, is the sole responsibility of the employee. The employee and the insurer should make necessary arrangements for payment of premiums during periods of unpaid FMLA leave.
29 CFR 825.210(a) and 29 CFR 825.212(a)(2)

- (d) An employee's right to continue living in employer-provided housing is determined by the employer's established policy. If the policy provides that employees on leave for both FMLA and non-FMLA reasons must vacate the property, the employer will not be in violation of the FMLA so long as the employer restores the employee the lodging upon completion of the FMLA leave. The employer may not, however, require an FMLA-eligible employee to vacate the employer-provided lodging during the term of an FMLA leave period as an attempt to interfere with or restrain an employee's attempt to exercise rights under the FMLA.

WHD Opinion Letter FMLA 2006-1-A

39i02 Employee choice to not retain group health benefits.

An employee may choose not to retain group health plan coverage during FMLA leave. However, the employee retains his or her entitlement to be reinstated after the leave on the same terms as prior to taking the leave, without any qualifying period, physical exam, exclusion of pre-existing conditions, etc. *See* FOH 39j.

29 CFR 825.209(e) and 29 CFR 825.212(c)

WHD Non-Administrator Opinion Letter FMLA-64 (June 21, 1995)

39i03 Payment of group health plan premiums.

Any share of group health plan premiums paid by the employee prior to FMLA leave must continue to be paid by the employee during the FMLA leave period. If premiums are raised or lowered, the employee is required to pay the new premium rates.

Employers paying money through a flexible saving account or other component of a "cafeteria plan," a portion of which the employee uses to pay the premium payments for the employer's group health plan (including dental care, eye care, mental health counseling, substance abuse treatment, etc.), must continue to pay that same amount to the cafeteria plan during the period of FMLA leave.

WHD Opinion Letter FMLA-2006-3-A

(a) Payment when FMLA leave is paid

- (1) If accrued paid leave is substituted for unpaid FMLA leave, the employee's share of premiums must be paid by the method normally used during any paid leave, presumably as a payroll deduction.
- (2) An employee who is receiving payments from a workers' compensation injury must make arrangements with the employer for payment of group health plan benefits when simultaneously taking FMLA leave.

(b) Payment when FMLA leave is unpaid

- (1) If FMLA leave is unpaid, the employer has a number of options for obtaining payment from the employee for the employee's share of the premium. The employer may require that payment be made to the employer or to the insurance carrier, but no additional charge may be added for administrative expenses. The employer must

provide advanced written notice to the employee with the terms and conditions for payments to be made.

- (2) The employer may require the employee to pay in any of the following ways:
- a. Payment due at the same time as if made by payroll deduction
 - b. Payment due on the same schedule as under the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA)
 - c. At the employee's option, payment prepaid to a cafeteria plan
 - d. Payment according to the employer's existing rules for payment by employees on leave without pay, provided these rules do not require payment prior to the start of leave or premiums higher than if the employee had continued to work
 - e. Another system voluntarily agreed to between the employer and the employee

An employer may not require more of an employee using unpaid FMLA leave than other employees on leave without pay.

29 CFR 825.210

39i04 Maintenance of benefits under multi-employer health plans.

- (a) A multi-employer health plan is a plan to which more than one employer is required to contribute and is maintained pursuant to one or more CBAs between employee organizations and the employers.
- (b) An employer under a multi-employer plan must continue to make contributions on behalf of an employee using FMLA leave as though the employee were continuously employed, unless the plan contains an explicit FMLA provision for maintaining coverage such as through pooled contributions by all employers party to the plan.
- (c) An employee using FMLA leave cannot be required to use banked hours or pay a greater premium than he or she would have had to pay if he or she had been continuously employed.

29 CFR 825.211

39i05 Valid reasons for ending employee group health plan coverage.

- (a) Group health plan coverage must be maintained for an employee on FMLA leave until:
 - (1) the employee fails to return from leave or continues on leave after exhausting his or her FMLA entitlement;
 - (2) the employer can show that the employment relationship would have terminated if the employee had not taken FMLA leave, such as if the employee would have been laid off and not transferred to a new position; or

- (3) the employee provides unequivocal notice of intent not to return to work.
- (b) Additionally, under certain conditions, an employer may end group health plan coverage when an employee on FMLA leave fails to submit a required premium payment (*see* FOH 39i06 for details and requirements) or an employee chooses not to retain group health coverage during the FMLA leave (*see* FOH39i02). All other obligations of an employer under the FMLA would continue, such as the obligation to reinstate the employee upon return from leave and restoring the employee's benefits equivalent to those that the employee would have had if the employee had not taken leave.
- (c) To discontinue health benefit coverage under a multi-employer health plan based on termination of the employment relationship, the employer must demonstrate the employee would not have continued to be employed by either the employer or another employer who is a member of the same plan. For example, if the employee's construction site is closed but its employees are moved to another site to continue employment for that employer or another member of the plan, it can be assumed that the employee on leave would have continued employment and therefore the employer may not discontinue health benefit coverage.

WHD Non-Administrator Opinion Letter FMLA-14 (November 3, 1993)

- (d) An employer may cease health benefit coverage when an employee elects to withdraw from coverage during FMLA leave provided that the decision is truly voluntary and future reinstatement would not be barred by the terms of the plan or the employer. *See* FOH 39j03.

29 CFR 825.209(f), 29 CFR 825.211(e), and 29 CFR 825.212

39i06 Employee failure to pay premiums.

- (a) An employer's obligation to maintain health insurance coverage ceases under the FMLA if an employee's premium payment is more than 30 days late, unless the employer has an established policy providing a more generous grace period.

(b) Dropping employee coverage

In order to drop the 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. Such notice must be mailed to the employee at least 15 days before coverage is to cease, advising that coverage will be dropped on a specified date at least 15 days after the date of the letter unless the payment has been received before then. Coverage for the employee may be terminated at the end of the 30-day grace period (where the 15-day notice has been provided) unless the employer has established policies regarding other forms of unpaid leave that allow the employer to end coverage retroactively to the date the unpaid premium payment was due.

(c) Restoration of benefits entitlement remains

- (1) When coverage lapses because the employee has not made required premium payments or any other valid reason, upon the employee's return to work the employer must restore the employee to coverage and benefits that are equivalent to those the employee would have had if leave had not been taken and the premium payment(s) had not been missed or coverage had not been canceled, including family or dependent coverage. The employee cannot be required to meet any qualification

requirements imposed by the plan, including any preexisting condition requirements or waiting period, to wait for an open season, or to pass a medical examination to obtain reinstatement of coverage.

- (2) If an employer fails to restore the employee's health insurance upon the employee's return to work, the employer may be liable for benefits lost, for other actual monetary losses sustained as a direct result, and for appropriate equitable relief tailored to the harm suffered.

(d) Employer payment of employee's share of premium payments

An employer may choose to pay an employee's share of premium payments continuously while the employee is on FMLA leave. For example, an employer may choose to maintain an employee's group health plan benefits or other benefits, such as life insurance or disability insurance, during an employee's FMLA leave to avoid a lapse of coverage and ensure that it can meet its responsibilities to provide equivalent benefits upon the employee's return to work. If the employer elects to maintain such benefits during the leave, at the conclusion of the leave, the employer is entitled to recover the costs incurred for paying for the employee's share of any premiums whether or not the employee returns to work. *See* FOH 39i07.

29 CFR 825.212

39i07 Employer recovery of benefit costs.

- (a) If the employer pays the employee's share of premium payments to maintain health plan coverage when the employee fails to make payments, the employer may recover that expense from the employee.
- (b) In addition, the employer may recover its share of health plan premiums during a period of unpaid FMLA leave from the employee if the employee fails to return to work after the FMLA leave entitlement has been exhausted or expires. However, the employer may not recover its costs if the employee does not return due to a continued need for leave for a serious health condition of the employee or eligible family member, or a serious illness or injury of a covered servicemember, or to other circumstances beyond the employee's control.
 - (1) When the employer cannot recover its share of benefit payments due to the employee's continued need for FMLA leave, the employer may require medical certification of the serious health condition of the employee or family member or the serious injury or illness of a covered servicemember. If the employer requires such medical certification, the certification must be provided to the employer within 30 days of the employer's request. It is the employee's responsibility to provide the certification and pay any cost incurred.
 - (2) If the employee fails to provide the certification, or the reason for leave does not meet the test of circumstances beyond the employee's control, the employer may recover 100 percent of the health benefit premiums it paid during the period of unpaid FMLA leave.
- (c) If an employer elects to maintain other benefits by paying the employee's share of premiums during unpaid FMLA leave, such as life insurance, disability insurance, etc., at the conclusion

of the leave, the employer is entitled to recover only the costs incurred for paying the employee's share of any premiums, whether or not the employee returns to work.

WHD Opinion Letter FMLA-2006-3-A

WHD Non-Administrator Opinion Letter FMLA-6 (October 1, 1993)

- (d) For the purposes of the employer's recovery of benefit costs, an employee who has returned to work for at least 30 calendar days is considered to have returned to work. An employee who transfers directly from taking FMLA leave to retirement or who retires during the first 30 days after returning to work is deemed to have returned to work.
- (e) When paid leave is substituted for FMLA leave, the employer may not recover its share of benefit premiums for any period of the FMLA leave covered by the paid leave. Similarly, when FMLA leave runs concurrently with paid leave provided under workers' compensation or a temporary disability plan, recovery of premiums does not apply.
- (f) Self-insured employers may recover only the employer's share of allowable premiums as calculated under COBRA, excluding the 2 percent fee for administrative costs.
- (g) Any share of premiums that the employer is entitled to collect when an employee fails to return to work is a debt owed by the employee to the employer. Such a debt does not alter the employer's responsibilities for health benefit coverage or payment of claims incurred during the FMLA leave under a self-insurance plan. The employer may recover the costs through deductions from any sums due to the employee as allowed under state and federal law, or the employer may initiate legal action against the employee to recover such costs.

29 CFR 825.212(b) and 29 CFR 825.213

39j JOB RESTORATION

39j00 General.

- (a) Upon return from FMLA leave, an employee is entitled to be restored to the position held when the leave commenced or to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence. *See* FOH 39L for special rules applicable to school employees.

29 USC 2614(a)

29 CFR 825.214

- (b) If the returning employee is no longer qualified for the position because of his or her inability to continue to meet job requirements as a result of the leave (*e.g.*, attend a necessary course, renew a license, fly a minimum number of hours, etc.), the employer must give the employee a reasonable opportunity to fulfill those conditions after he or she returns to work.

29 CFR 825.215(b)

- (c) If an employee would have been laid off had he or she not been on FMLA leave, the employee's right to reinstatement is whatever it would have been had the employee not been on leave when the layoff occurred. If a position has been eliminated, the employer bears the burden of establishing that the job would have been eliminated and the employee not otherwise employed at the time of restoration if the employee had continued to work instead of taking leave.

29 CFR 825.216(a)(1)

60 FR 2180 and 60 FR 2213

- (d) If the provisions of a CBA govern an employee's return to work, those provisions will apply to the extent they do not conflict with the FMLA. For example, if the CBA prohibits a fitness-for-duty certification, the employer may not require one even though such certification is typically permitted if administered in accordance with 29 USC 2614(a)(4) and 29 CFR 825.312. Conversely, even if the CBA allows the employer to return the employee to a different, non-equivalent position because of seniority, the employer remains bound by the equivalent-position requirements of the FMLA.

29 USC 2652

29 CFR 825.700(a)

39j01 Equivalent position.

Equivalent position means a position that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. The position must involve the same or substantially similar duties and responsibilities, which require substantially equivalent skill, effort, responsibility, and authority.

29 CFR 825.215(a)

39j02 Equivalent pay.

(a) Pay increases or changes

- (1) An employee is entitled to any unconditional pay increase which may have occurred during the FMLA leave period, such as cost of living increases. An employee is also entitled to be restored to a position with the same or equivalent pay premiums, such as a shift differential.
- (2) Pay increases based on seniority, length of service, or work performed must be applied according to the employer's policy for other employees on an equivalent leave status for a non-FMLA reason.

(b) Bonuses

- (1) Equivalent pay includes any bonus or payment, whether it is discretionary or non-discretionary.

- (2) If a bonus is based on the achievement of a specified goal (*e.g.*, hours worked, products sold, perfect attendance, etc.) and the employee has not met the goal due to FMLA leave, the payment may be denied unless the employer pays such a bonus to other employees on an equivalent leave status for non-FMLA reasons.

For example, if an employer policy does not disallow an attendance bonus to an employee who takes vacation leave, the employer cannot deny the bonus to an employee who takes vacation leave for an FMLA purpose (*i.e.*, substitutes paid vacation leave for FMLA leave). However, if an employer does not count vacation leave against an attendance bonus but does count unpaid leave against the bonus, the employer may deny the bonus to an employee who takes 12 weeks of FMLA leave, 2 weeks of which the employee substituted paid vacation leave, but 10 of which the employee takes as unpaid FMLA leave.

Penalizing an employee for taking FMLA leave under a no-fault attendance policy is distinct from disqualifying an employee from a bonus or award for attendance because the former faults an employee for taking leave and the latter denies a reward for achieving the job-related performance goal of perfect attendance.

73 FR 67934 and 73 FR 67985

29 CFR 825.215(c)

39j03 **Equivalent benefits.**

- (a) “Benefits” include all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer through an employee benefit plan. Benefits accrued at the time leave began must be available to an employee upon return from leave.
- (b) For purposes of pension plans or other retirement plans, any period of unpaid FMLA leave is not treated as a break in service for vesting and eligibility purposes. If such a plan requires an employee to be employed on a specific date in order to be credited with a year of service for vesting, contributions, or participation purposes, an employee on unpaid FMLA leave on that date is deemed to be employed on that date. However, unpaid FMLA leave periods do not have to count as credited service for benefit accrual, vesting, or eligibility purposes.
- (c) Employees on unpaid FMLA leave are to be treated as if they continued to work for purposes of changes to benefit plans. Such employees are entitled to changes in benefits plans unless the changes are dependent on seniority or accrual during the leave period. For example, if the benefit plan is based on a pre-established number of hours worked each year and the employee does not have sufficient hours as a result of taking unpaid FMLA leave, the benefit is lost.

29 CFR 825.215(d)

39j04 **Equivalent terms and conditions of employment.**

- (a) An equivalent position must have substantially similar duties, conditions, responsibilities, privileges, and status as the employee’s original position.

- (b) The employee must be reinstated to the same worksite or one that does not involve a significant increase in commuting time or distance. If the original worksite has been closed, the employee is entitled to the same rights as if he or she had not been on leave at the time of closing. For example, the employee would have the same transfer rights as other employees.
- (c) An employee is ordinarily entitled to return to the same shift or to the same or equivalent schedule. An employer may accommodate an employee's request to be restored to a different shift, schedule, or position which better suits the employee's personal needs on return from leave. Similarly, an employer may offer a promotion to a better position. However, an employee may not be induced by the employer to accept a different position against the employee's wishes.
- (d) The employee must have the same opportunity for bonuses, profit-sharing, and other similar discretionary and non-discretionary payments.

29 CFR 825.215(e)

39j05 De minimis exception.

The requirement that an employee be restored to the same or equivalent job as to pay, benefits, and terms and conditions of employment does not extend to *de minimis*, intangible, or unmeasurable aspects of the job.

29 CFR 825.215(f)

39j06 Limitations to employee reinstatement.

- (a) Limited exceptions provide for an employer to deny job restoration to an employee when:
 - (1) the employment relationship ended and would have even if the employee had been continuously working,
 - (2) a key employee's reinstatement would cause substantial and grievous economic injury to the employer (*see* FOH 39j06(g)),
 - (3) the employee is unable to perform an essential function of his or her job because of a physical or mental condition, or
 - (4) the employee fraudulently obtained FMLA leave.

29 CFR 825.216(a) -(b)

- (b) If an employee chooses not to or is unable to return to work after exhausting his or her FMLA leave, all entitlements and rights under the FMLA cease at that time. The employee is no longer entitled to any further job restoration rights under the FMLA and may be terminated.

WHD Non-Administrator Opinion Letter FMLA-91 (December 9, 1997)

- (c) **No greater right**

An employee on FMLA leave maintains the same rights he or she would have if the employee had continued to work instead of taking FMLA leave. This applies to

reinstatement and other benefits and conditions of employment. An employer must be able to show that an employee would not otherwise have been employed at the time for reinstatement in order to deny restoration.

For example, an employee is not entitled to restoration at the end of 12 workweeks if the employee is laid off during the leave, the employee's shift has been eliminated, or the term or project for which the employee was hired has ended. An employer would have the burden of proving the employee would have been laid off, the shift would have been eliminated, or the term or project for which the employee was hired would have ended during the leave period.

29 CFR 825.216(a)

(d) Unable to perform an essential function

If an employee returning from FMLA leave is unable to perform an essential function of the position, the employee has no right to restoration to another position under the FMLA and the FMLA does not require the employer to create a position that did not previously exist. However, the employer may have obligations under the ADA, state, or other laws governing restoration.

29 CFR 825.216(c)

WHD Non-Administrator Opinion Letter FMLA-47 (October 17, 1994)

(e) Outside employment

The FMLA does not prohibit an employee from working at a second job while on FMLA leave unless the employer has a uniformly applied policy against outside or supplemental employment. An employer which does not have such a policy may not deny benefits to which an employee is entitled under the FMLA on this basis unless the FMLA leave was fraudulently obtained.

29 CFR 825.216(e)

WHD Non-Administrator Opinion Letter FMLA-106 (July 1, 1999)

(f) Fraudulent FMLA usage

An employee who fraudulently obtains leave under the FMLA is not protected by the FMLA's job restoration or maintenance of health benefits provisions.

29 CFR 825.216(d)

(g) Key employee

(1) An employer may deny job restoration to a key employee if the denial is necessary to prevent substantial and grievous economic injury to the operations of the employer.

a. Definition and determination

A key employee is a salaried FMLA-eligible employee who is among the highest paid 10 percent of all employees employed by the employer within

75 miles of the employee's worksite. The determination of whether a salaried employee is among the highest paid 10 percent is made at the time the employee gives notice of the need for leave.

b. Substantial and grievous economic injury

1. In order to deny restoration to a key employee, the employer must determine that the employee's *restoration*, not his or her absence, will cause "substantial and grievous economic injury."
 2. There is no precise test for determining the level of hardship or injury the employer must sustain. If the reinstatement of a key employee threatens the economic viability of the firm, that would constitute substantial and grievous economic injury. A lesser injury which causes substantial, long-term economic injury would also be sufficient. Minor inconveniences and costs that the employer would experience in the normal course of doing business do not constitute substantial and grievous economic injury.
- (2) An employer who believes that reinstatement may be denied to a key employee must give written notice to the employee at the time the employee gives notice of the need for FMLA leave (or when FMLA leave commences, if earlier) that he or she qualifies as a key employee. The employer must also fully inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employer should determine that substantial and grievous economic injury to the employer's operations will result if the employee is reinstated from FMLA leave. An employer who fails to provide such timely notice will lose its right to deny restoration even if substantial and grievous economic injury will result from reinstatement.
- (3) As soon as an employer makes a good faith determination that substantial and grievous economic injury to its operations will result if a key employee is reinstated, the employer must notify the employee in writing of its determination and that it cannot deny FMLA leave but that it intends to deny restoration on completion of the FMLA leave. The employer must serve this notice either in person or by certified mail. This notice must explain the basis for the employer's finding that substantial and grievous economic injury will result, and, if leave has commenced, must provide the employee a reasonable time in which to return to work.
- (4) After notification of the employer's intent to deny restoration has been given to an employee, an employee is still entitled to request reinstatement at the end of the leave period. The employer must then again determine whether there will be substantial and grievous economic injury from reinstatement, based on the facts at that time. If the determination remains the same, the employer must notify the employee in writing (in person or by certified mail) of the denial of restoration.
- (5) If an employee on leave does not return to work in response to the employer's notification of its intent to deny restoration, the employee continues to be entitled to maintenance of health benefits and the employer may not recover its cost of health benefit premiums. A key employee's rights under the FMLA continue unless and until the employee either gives notice that he or she no longer wishes to return to

work, or the employer actually denies reinstatement at the conclusion of the leave period.

29 CFR 825.216(b) and 29 CFR 825.217 -.219

39j07 **Light duty job offer.**

Under the FMLA, an employee may not be required to accept a light duty position or a reasonable accommodation in lieu of taking FMLA leave. However, the ADA may require the employer to offer the employee the opportunity to take such a position.

- (a) While an employee cannot be required to accept a light duty position, the FMLA does not prevent an employee from accepting, voluntarily and without coercion, a light duty position while recovering from a serious health condition. If an employee voluntarily accepts a light duty position, that employee retains the right under the FMLA to be restored to the same or equivalent position that the employee had when the employee's FMLA leave began. This right to restoration ceases at the end of the applicable 12-month FMLA leave year. The time employed in the light duty position will not count against the employee's FMLA entitlement.
- (b) If an employee is on FMLA leave concurrently with a worker's compensation absence and the employee's health care provider certifies that the employee is able to return to work in a light duty position and the employer offers the employee such a position, the employee is not required under the FMLA to accept it. However, if the employee refuses the light duty position, he or she may lose his or her workers' compensation benefits. In such a situation, the employee retains the right to continue on protected leave under the FMLA until the employee can return to his or her position or the FMLA entitlement is exhausted.
- (c) Whenever an employee performs his or her own job for less than a full schedule, the employee is using intermittent or reduced schedule leave and is not performing light duty for purposes of the FMLA. However, if the employee has already used his or her full entitlement in a 12-month period and then voluntarily accepts a light duty position, that employee no longer has a right under the FMLA to restoration.

29 CFR 825.207(e), 29 CFR 825.220(d), and 29 CFR 825.702(d)(2)

73 FR 67934 and 73 FR 67989

39k **RECORDKEEPING REQUIREMENTS**

39k00 **General.**

- (a) Employers subject to the FMLA are required to make, keep, and preserve records in accordance with the recordkeeping requirements of section 11(c) of the FLSA (*see* 29 CFR 516) and the FMLA regulations at 29 CFR 825.500.
- (b) Employers are not required to retain records in any particular order or form so long as those records are made available upon request. Records kept in computer form are allowed.
- (c) Employers must keep records for no less than 3 years and make them available for inspection, copying, and transcription by representatives of DOL upon request. Employers are not required to submit records to DOL unless specifically requested by a DOL official.

- (d) Special recordkeeping requirements apply to employers of airline flight crew employees. *See* FOH 39m03.

29 USC 2616(b)

29 CFR 825.500(a)-(b)

39k01 **Content of records.**

- (a) Covered employers who employ FMLA-eligible employees must maintain records that include the following information:

- (1) Basic payroll and identifying employee data, including:
 - a. Name, address, and occupation
 - b. Rate or basis of pay and terms of compensation
 - c. Daily and weekly hours worked each pay period
 - d. Additions to and deductions from wages
 - e. Total compensation paid
- (2) Dates FMLA leave is taken (which must be designated in the records as FMLA leave)
- (3) Hours of FMLA leave used if leave is taken in increments of less than a day
- (4) Copies of FMLA notices provided by an employee to his or her employer and by an employer to its employees concerning the FMLA (including any written requests for leave from the employee as well as any required notice that the employer provides to the employee concerning FMLA leave)
- (5) Any documents describing employee benefits or employer policies and practices regarding the taking of paid or unpaid leave
- (6) Premium payments for employee benefits
- (7) Records of any dispute between the employer and employee regarding the designation of leave as FMLA leave (*e.g.*, emails or other written statements between an employee and his or her employer regarding a disagreement on the designation of the employee's FMLA leave request).

29 CFR 825.500(c)

(b) Joint employment

Covered employers in a joint employment situation (*see* FOH 39b01) must keep all the records identified in FOH 39k01 with respect to primary employees and only basic payroll and identifying employee data (*see* FOH 39k01(a)(1)) with respect to any secondary employees.

29 CFR 825.500(e)

- (c) Covered employers with FMLA-eligible employees who are not subject to the FLSA's recordkeeping regulations for purposes of minimum wage or overtime compliance (*i.e.*, exempt from or otherwise covered by the FLSA) need not keep a record of actual hours worked (as otherwise required under the FLSA, 29 CFR 516.2(a)(7)), provided that:
- (1) eligibility for FMLA leave is presumed for any employee who has been employed for at least 12 months; and
 - (2) with respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written record maintained in the manner required for other FMLA-related records.

29 CFR 825.500(f)

39k02 Covered employers with no FMLA-eligible employees.

Covered employers with no eligible employees need only maintain the basic payroll and identifying employee data (*see* FOH 39k01(a)(1)).

29 CFR 825.500(d)

39k03 Confidentiality of records.

- (a) Covered employers are required to maintain records and documents relating to medical certifications and recertifications of employees or their family members as confidential medical records.
- (b) Such records are to be maintained in separate files from the usual personnel files. If the ADA, as amended, and/or the Genetic Information Nondiscrimination Act (GINA) is applicable, such records are to be maintained in conformance with ADA and GINA confidentiality requirements.
- (c) Supervisors and managers may be informed of necessary restrictions on work duties and necessary accommodations. First aid and safety personnel may be informed, as appropriate, if the employee's condition might require emergency treatment. Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 CFR 825.500(g)

39L SPECIAL RULES FOR SCHOOLS

39L00 General.

- (a) Certain special rules apply to employees of local educational agencies, which include public school boards and public and private elementary and secondary schools. The special rules do not apply to other kinds of educational institutions, such as colleges and universities, trade schools, and preschools.

- (b) Local educational agencies are covered by the FMLA (and these special rules). They are covered employers under the FMLA. The FMLA’s 50-employee coverage test does not apply. However, the usual requirements for employees to be eligible do apply, including employment at a worksite where at least 50 employees are employed within 75 miles. *See* FOH 39c.
- (c) The special rules affect instructional employees taking intermittent leave, leave on a reduced leave schedule, or leave near the end of an academic term. “Instructional employees” are those whose principal function is to teach and instruct students in a class, a small group, or an individual setting. This includes not only teachers, but also athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. It does not include teacher assistants or aides who do not have as their principal job actual teaching or instructing, nor does it include auxiliary personnel such as counselors, psychologists, curriculum specialists, cafeteria workers, maintenance workers, or bus drivers.
- (d) The special rules outlined below that apply to restoration to an equivalent position apply to all employees of local educational agencies.

29 USC 2618

29 CFR 825.600

39L01 Limitations on intermittent leave.

- (a) Leave taken by an instructional employee for a period that ends with the school year and begins the next semester is leave taken consecutively rather than intermittently. The period during the summer vacation when the employee would not have been required to report for duty is not counted against the employee’s FMLA leave entitlement.
- (b) An instructional employee who is on FMLA leave at the end of the school year must be provided with any benefits over the summer vacation that employees would normally receive if they had been working at the end of the school year.
- (c) When an instructional employee needs intermittent leave or leave on a reduced leave schedule to care for a family member with a serious health condition, to care for a covered servicemember with a serious injury or illness, or for the employee’s own serious health condition, any one of which is foreseeable based on planned medical treatment, and the employee would be on leave for more than 20 percent of the total number of working days over the period the leave would extend, the employer may require the employee to choose to either:
 - (1) take a block of leave for a particular period or periods not greater than the duration of the time needed for the planned treatment; *or*
 - (2) transfer temporarily to an available alternative position for which the employee is qualified, which has equivalent pay and benefits and which better accommodates the leave.
- (d) If an employee chooses to take a block of leave for the duration of time needed instead of transferring temporarily to an available alternative position, the entire period of leave taken will count as FMLA leave. *See* 29 CFR 825.603(a).

- (e) If an instructional employee does not give the required notice of foreseeable FMLA leave (*see* FOH 39f01) to be taken intermittently or on a reduced leave schedule, the employer may require the employee to take leave of a particular duration or to transfer temporarily to an alternative position. Alternatively, the employer may require the employee to delay the taking of leave until the notice provision is met.

29 USC 2618(c)

29 CFR 825.601

39L02 Limitations on leave taken near the end of an academic term.

- (a) Academic term means the school semester that typically ends near the end of the calendar year and the end of spring. Schools cannot have more than two academic terms each year for the purposes of the FMLA.
- (b) If an instructional employee begins leave more than five weeks before the end of an academic term, the employer may require the employee to continue taking leave until the end of the term if the leave will last at least 3 weeks, *and* the employee would return to work during the 3 week period before the end of the term.
- (c) If an instructional employee begins leave during the 5-week period before the end of the academic term and the leave is for the birth of a child or placement of a child for adoption or foster care; to care for a spouse, son, daughter or parent with a serious health condition; or to care for a covered servicemember with a serious injury or illness, the employer may require the employee to continue leave until the end of the term if the leave will last more than 2 weeks, *and* the employee would return to work during the 2-week period before the end of the term.
- (d) If an instructional employee begins leave during the 3-week period before the end of the academic term and the leave is for the birth of a child or placement of a child for adoption or foster care; to care for a spouse, son, daughter or parent with a serious health condition; or to care for a covered servicemember with a serious injury or illness the employer may require the employee to continue taking leave until the end of the term if the leave will last more than 5 working days.
- (e) In the case of an employee who is required to take leave until the end of an academic term, only the period of leave until the employee is ready and able to return to work can be charged against the employee's FMLA leave entitlement. The employer has the option not to require the employee to stay on leave until the end of the school term; therefore any additional leave required by the employer to the end of the school term is not counted as FMLA leave.

However, the employer must maintain the employee's group health insurance and restore the employee to the same or equivalent job including other benefits at the conclusion of the leave.

29 CFR 825.603(b)

29 USC 2618(d)

29 CFR 825.602

39L03 **Restoration to an equivalent position.**

- (a) The determination of how an employee is to be restored to an equivalent position upon return from FMLA leave will be made on the basis of established school board policies and practices, private school policies and practices, and collective bargaining agreements. Such policies or agreements must be in writing, must be made known to the employee prior to the taking of FMLA leave, and must clearly explain the employee's restoration rights upon return from leave.

- (b) The taking of FMLA leave shall not result in the loss of any employment benefit accrued prior to the date the leave begins. For example, a probationary teacher who takes a FMLA-qualifying leave cannot be required to begin the probationary period again upon return to work. The employer is not required to allow the accrual of any additional seniority or employment benefit during the period of unpaid leave, but must restore the employee to those benefits already earned.

29 USC 2618(e)

29 CFR 825.604

WHD Non-Administrator Opinion Letter FMLA-80 (April 24, 1996)

39m **SPECIAL RULES FOR AIRLINE FLIGHT CREW EMPLOYEES**

39m00 **General.**

- (a) The FMLA was amended by the Airline Flight Crew Technical Corrections Act (AFCTCA), which established a special hours of service eligibility provision for airline flight crew members and flight attendants (*i.e.*, airline flight crew employees). The AFCTCA also authorized DOL to provide a method of calculation of leave for airline flight crew employees and to establish special recordkeeping requirements for these provisions.

- (b) These special rules apply only to airline flight crew employees (*i.e.*, pilots, co-pilots, flight attendants and flight engineers). They do not apply to other employees of the airlines, such as those in positions in reservations and baggage departments.

- (c) This section addresses the special rules for airline flight crew employees including the special hours of service requirement for eligibility, the method for calculating leave usage, and special recordkeeping requirements applicable to these employees. All other FMLA provisions, including the additional FMLA eligibility criteria (*see* 29 CFR 825.110), apply to airline flight crew employees.

29 USC 2611(2)(D) and 29 USC 2612(a)(5)

29 CFR 825.800 -.803

39m01 **Eligibility: hours of service requirement.**

- (a) **Eligibility requirement**

An airline flight crew employee is eligible for FMLA leave if he or she works for an FMLA-covered employer, has been employed by the employer for at least 12 months, is employed at a worksite with 50 or more employees at that site or within 75 miles of the worksite, and meets the specified hours of service during the previous 12 months by:

- (1) having worked or been paid for not less than 60 percent of the employee's applicable monthly guarantee (or its equivalent), *and*
 - (2) having worked or been paid for not less than 504 hours.
- (b) The applicable monthly guarantee for an airline flight crew employee who is:
- (1) on *reserve status* is the minimum number of hours an employer has agreed to pay the employee for any given month as established by a CBA or, if none exists, employer policy.
 - (2) on non-reserve status (*i.e., line holder*) is the minimum number of hours an employer has agreed to schedule the employee for any given month.
- (c) For purposes of the 504-hours requirement:
- (1) Whether the employee has worked the 504 hours is assessed by reviewing the employee's duty hours during the previous 12-month period
 - (2) Whether the employee has been paid the 504 hours is assessed by reviewing the number of hours for which the employee received wages during the previous 12-month period
 - (3) The 504 hours do not include personal commute time or time spent on vacation, medical, or sick leave
- (d) An airline flight crew employee returning from USERRA-covered service shall be credited with the hours of service that would have been performed but for the period of absence from work due to or necessitated by USERRA-covered service. The employee's pre-service work schedule can generally be used to determine the hours that would have been worked or paid during the period of absence from work due to or necessitated by USERRA-covered service. *See* FOH 39n04.

29 USC 2611(2)(D)

29 CFR 825.801

39m02 **Calculation of leave.**

- (a) These special calculation of leave provisions apply to airline flight crew employees only. For employees other than airline flight crew employees, *see* FOH 39e.

The rules governing calculation of intermittent or reduced schedule FMLA leave set forth in 29 CFR 825.205 do not apply to airline flight crew employees except that such employees are subject to the physical impossibility rule. *See* FOH 39e01(d).

- (b) Airline flight crew employees are entitled to a fixed a number of days for taking leave for FMLA-qualifying reasons.

(1) *Leave for any FMLA-qualifying reason other than military caregiver leave*

An FMLA-eligible airline flight crew employee is entitled to 72 days of FMLA leave during any 12-month period for one or more of the FMLA-qualifying reasons other than military caregiver leave (*i.e.*, leave for the birth of a child and to care for the newborn child; placement with the employee of a child for adoption or foster care and to care for the newly-placed child; to care for the employee's spouse, child, or parent with a serious health condition; because of the employee's own serious health condition; or because of a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty). *See* 29 CFR 825.112(a)(1) -(5).

The 72-day entitlement is based on a uniform 6-day workweek for all airline flight crew employees, regardless of time actually worked or paid, multiplied by the statutory 12-workweek entitlement for FMLA leave. This number corresponds to the maximum 6-day workweek an airline flight crew employee can work under Federal Aviation Administration regulations (6-day workweek x 12 workweeks of FMLA leave = 72 days of FMLA leave entitlements). For example, if an employee took 3 weeks of FMLA leave for an FMLA-qualifying reason other than military caregiver leave, the employee would use 18 days (6 days x 3 weeks) of FMLA entitlement.

(2) *Military caregiver leave*

An FMLA-eligible airline flight crew employee is entitled to 156 days of military caregiver leave during a single 12-month period to care for a covered servicemember with a serious injury or illness (6-day workweek x 26 workweek entitlement for military caregiver leave = 156 days).

(3) *Intermittent or reduced schedule leave*

When an airline flight crew employee takes intermittent or reduced schedule FMLA-leave, the employer must account for the leave using an increment no greater than 1 calendar day. For example, if an airline flight crew employee needs to take FMLA leave for a 2-hour physical therapy appointment, the employer may require the employee to use a full day of FMLA leave.

29 CFR 825.802

39m03 **Special recordkeeping requirements.**

- (a) Covered employers of airline flight crew employees are required to make, keep, and preserve records pertaining to FMLA leave pursuant to 29 CFR 825.500. *See* FOH 39k.
- (b) Covered employers of airline flight crew employees must also maintain the following additional records and documents:
- (1) Documents containing information specifying the applicable monthly guarantee with respect to each category of employee to whom such guarantee applies, including

copies of any relevant collective bargaining agreements or employer policy documents

- (2) Records of hours worked and hours paid (*see* 29 CFR 825.801(b)(2))

29 CFR 825.803

39n INTERACTION WITH FEDERAL OR STATE LAWS

39n00 State family and medical leave laws.

- (a) Nothing in the FMLA supersedes any provision of state or local law that provides greater family and medical leave rights than those contained in the FMLA. The WHD does not enforce provisions of state family or medical leave laws, and states may not enforce the FMLA. Employees are not required to indicate whether the leave they are taking is FMLA leave or leave under state law, and an employer must comply with the applicable provisions of both. If leave qualifies for FMLA leave and leave under state law, the leave used counts against the employee's entitlement under both laws.
- (b) States that have enacted family and medical leave provisions include California, Connecticut, Hawaii, Maine, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, Washington, and Wisconsin, as well as DC.

29 USC 2651(b)

29 CFR 825.701

39n01 Federal and state anti-discrimination laws.

The purpose of the FMLA is to make leave available to eligible employees and employers within its coverage and not to limit already existing rights and protections. An employer who violates both the FMLA and a state or federal discrimination law may be subject to remedies under either or both statutes. Double relief may not be awarded for the same loss. When remedies coincide, a claimant may be allowed to utilize whichever avenue of relief is desired.

29 CFR 825.702(a)

(a) Americans with Disabilities Act (ADA)

- (1) The ADA's "disability" and the FMLA's "serious health condition" are different concepts and must be analyzed separately. The leave provisions of the FMLA are wholly distinct from the reasonable accommodation obligations of employers covered under the ADA, employers who receive federal financial assistance, employers who contract with the Federal Government, or the Federal Government itself. An employer must provide leave under whichever statutory provision provides the greater rights and protection.
- (2) The ADA is enforced by the EEOC (<http://www.eeoc.gov> or (800) 669-4000).

29 CFR 825.702(a) -(b)

WHD Non-Administrator Opinion Letter FMLA-29 (February 7, 1994)

WHD Non-Administrator Opinion Letter FMLA-97 (July 10, 1998)

(b) Pregnancy Discrimination Act (PDA)

- (1) The PDA amended Title VII of the Civil Rights Act of 1964 and requires employers to provide the same benefits for women who are pregnant as to other employees with short-term disabilities. An employee employed for less than 12 months by the employer (and therefore not an FMLA-eligible employee) may not be denied maternity leave if the employer normally provides short-term disability benefits to employees with the same tenure who are experiencing other short-term disabilities because Title VII does not require employees to be employed for a certain period of time to be protected.
- (2) The PDA is enforced by the EEOC (<http://www.eeoc.gov> or (800) 669-4000).

29 CFR 825.702(f)

39n02 Workers' compensation.

An employee may be on a workers' compensation absence due to an on-the-job injury or illness which also qualifies as a serious health condition under the FMLA. The workers' compensation absence and FMLA leave may run concurrently. Although an employer may offer a light duty position in the event the employee's health care provider who is providing medical care for the workers' compensation injury certifies that the employee is able to return to work in a light duty position, the employee may, but is not required to, accept the position. If the employee does not accept the light duty position, the employee is entitled to continue on FMLA-protected leave either until the employee is able to return to the same or equivalent job the employee left or until the employee's FMLA leave entitlement is exhausted. *See* FOH 39j07.

If the employee refuses a light duty assignment he or she may lose workers' compensation benefits. Such an employee, however, may not be subjected to any form of disciplinary action for having exercised his or her statutory rights to continue FMLA leave.

29 CFR 825.702(d)(2)

WHD Non-Administrator Opinion Letter FMLA-38 (July 21, 1994)

39n03 Consolidated Omnibus Budget Reconciliation Act (COBRA).

- (a) The COBRA provides for employees who would lose health care coverage because of reduced work hours or job termination to continue group health coverage for themselves and their families for limited periods of time. Such coverage may become applicable when it becomes known that an employee is not returning to employment and ceases to be entitled to FMLA leave.
- (b) Additional information regarding COBRA may be obtained from DOL's Employee Benefits Security Administration (<http://www.dol.gov/cobra> or (866) 444-3272).

39n04 Uniformed Services Employment and Reemployment Rights Act (USERRA).

- (a) The USERRA requires that returning servicemembers are entitled to receive all rights and benefits of employment that they would have obtained if they had been continuously employed.

Under the USERRA, a returning servicemember would be eligible for FMLA leave if the months and hours that he or she would have worked for the civilian employer during the absence from work due to or necessitated by USERRA-covered service, combined with the months employed and the hours actually worked, meet the FMLA eligibility threshold of 12 months and 1,250 hours of service with the employer. *See* 29 CFR 825.110(b)(2)(i), 29 CFR 825.110(c)(2), 29 CFR 825.801(c), and FOH 39c.

- (b) The USERRA is enforced by DOL’s Veterans Employment and Training Service (<http://www.dol.gov/vets> or (866) 487-2365).

29 CFR 825.702(g)

39n05 Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule.

- (a) The HIPAA Privacy Rule governs the privacy of an individual’s individually-identifiable health information. The Privacy Rule places restrictions on the use and disclosure of an individual’s protected health information by covered entities.
- (b) The requirements of HIPAA must be satisfied when individually-identifiable health information is shared with an employer by a HIPAA-covered health care provider.
- (c) The U.S. Department of Health and Human Services enforces the HIPAA (<http://www.hhs.gov/ocr> or (800) 368-1019).

29 CFR 825.307(a)

39o ADVERSE ACTIONS AND ENFORCEMENT

39o00 Interference with the right to take FMLA leave.

- (a) An employer is prohibited from interfering with an employee’s right to take leave under the FMLA. Such interference includes refusal to allow an employee to take FMLA leave, discouraging an employee from using FMLA leave, or manipulation by the employer to avoid responsibilities under the FMLA.
- (b) An employer is prohibited from discharging or in any other way discriminating or retaliating against any person, whether or not an employee, for exercising or attempting to exercise his or her rights under the FMLA.
- (c) Employers cannot use the taking of leave as a negative factor in employment actions, such as hiring, promotions, or discipline. Leave taken for any FMLA-qualifying reason may not be assessed points or counted against an employee in any manner under employer “no fault” attendance plans.
- (d) Any violations of the FMLA or its regulations constitute interfering with the rights provided by the FMLA. An employer may be liable for compensation and benefits lost by because of

the violation, for other actual monetary losses sustained as a direct result of the violation, and for equitable or other relief based upon the harm suffered.

- (e) Employees cannot waive, or be induced by employers to waive, their future rights under the FMLA. For example, employees (individually or through a CBA) cannot trade the right to take FMLA leave for some other benefit offered by the employer.
 - (1) However, this does not prevent the settlement or release of FMLA claims by employees based on past employer conduct. Such a settlement does not require approval of DOL or a court.
 - (2) This also does not prevent an employee's voluntary and uncoerced acceptance of a light duty assignment while recovering from a serious health condition. Such an acceptance cannot be a condition of employment and does not constitute a waiver of the employee's future rights, including the right to be restored to the same or equivalent position the employee held when the employee's FMLA leave began. However, the employee's right to restoration ceases at the end of the applicable 12-month FMLA leave year. *See* FOH 39j07.
- (f) No provision in the FMLA will diminish any protection or greater benefit provided by a CBA. On the other hand, no provision of the FMLA can be diminished by any provision of a CBA.

29 USC 2615(a)

29 CFR 825.220 and 29 CFR 825.700

39o01 Interference with proceedings or inquiries.

- (a) An employer is prohibited from discharging or in any other way discriminating against any person, whether or not an employee, for opposing or complaining about any unlawful practice under the FMLA.
- (b) All persons, whether or not an employer, are prohibited from discharging or in any other way discriminating against any person, whether or not an employee, because that person has filed a charge or instituted a proceeding under the FMLA, has given or is about to give information related to an FMLA proceeding or inquiry, or has testified or is about to testify in an FMLA proceeding or inquiry.

29 USC 2615(b)

29 CFR 825.220

39o02 Enforcement.

- (a) An employee who believes his or her rights under the FMLA have been violated has the choice of filing a complaint with the Secretary of Labor or filing a private lawsuit pursuant to section 107 of the FMLA.

29 USC 2617(a)

29 CFR 825.400

- (b) A complaint may be filed in person, by mail, or by telephone with any local office of the WHD. The FMLA provides a 2-year statute of limitations or 3 years in the case of a willful violation. The complaint should be filed within a reasonable time of when the employee discovers that his or her FMLA rights have been violated.

29 CFR 825.401

- (c) The FMLA also provides for enforcement procedures through the courts. An employee is not required to file a complaint with the WHD prior to bringing a private action in court. A state employee's private right of action may be limited by the sovereign immunity provision of the Eleventh Amendment.

29 USC 2617