THE IDC MONOGRAPH:

A Guide to the Family Medical Leave Act of 1993 and New FMLA Regulations

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Introduction

Fifteen years after the Family Medical Leave Act ("FMLA") took effect, the United States Department of Labor ("DOL") published its first amendments to the 1995 FMLA regulations. This was in response to the passage of the military family leave provisions in the National Defense Authorization Act for fiscal year 2008 ("NDAA"),[1] court cases invalidating portions of the DOL's regulations, and discussions with employers, employees, and interest groups regarding their experience with the FMLA. The new regulations took effect on January 16, 2009. The following monograph is intended to be a guide to the FMLA with a focus on the regulatory changes in the DOL's final rule.

The FMLA now includes two new leave entitlements: military caregiver leave and qualifying exigency leave to help families of members of the National Guard and Reserves manage their affairs while the member is on active duty in support of a contingency operation.[2] Other significant changes include a modification of the definition of a "serious health condition," changes to regulations pertaining to substitution of paid leave, and new requirements for employer notice obligations. The DOL has also revised the FMLA poster and issued new and revised forms for employers to use when employees request FMLA leave. Based on these new provisions, virtually all employers must revise existing FMLA policies.

I. Employer Coverage

Employer coverage under the new FMLA regulations remains the same. The following entities are "employers" under the FMLA[3]:

1. 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 (not necessarily consecutive workweeks) in the current or preceding calendar year. This includes any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and any successor in interest of an employer.[4]
2. Public agencies without regard to the number of employees employed.[5]

Public agency is defined as the Government of the United States, a government of a State or political subdivision thereof, any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State, or any interstate governmental agency.[6]

The term "industry affecting commerce" means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.[7] Employers who meet the 50-employee coverage test are engaged in commerce or an industry or activity affecting commerce.[8] Special rules apply for corporations with divisions, joint or integrated employers, successors in interest, public agencies, and federal agencies.[9]

All full and part-time employees whose names appear on the employer's payroll are considered employed each working day of the calendar week. These employees must be counted whether or not the employee receives any compensation for that week and even if the employee is on paid or unpaid leave – as long as the employer has a reasonable expectation that the employee will later return to active employment.[10] An employee who begins work after the first working day of a calendar week or terminates employment before the last working day of the calendar week is not considered employed on each working day of that calendar

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week.[11] Once a private employer meets the 50 employees/20 workweeks threshold, the employer remains covered until it no longer has 50 employees for 20 workweeks in the current and preceding calendar year.[12]

Normally, a corporation is a single employer, even if it has separate divisions.[13] Where one corporation has an ownership interest in another corporation, each corporation is a separate employer unless it meets the "joint employment" or "integrated employer" test.[14] Under the "integrated employer" test, courts will view the entire relationship between separate entities in its totality by considering: (1) common management; (2) interrelation between operations; (3) centralized control of labor relations; and (4) degree of common ownership/financial control.[15]

II. Employee Eligibility

Not all employees of a covered employer are entitled to FMLA leave. FMLA leave is available only to "eligible employees," defined as an employee of a covered employer who:

(1) has been employed for at least 12 months;
(2) has been employed for at least 1,250 hours of service during the previous 12-month period; and
(3) is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.[16]

The new regulations allow employees to total all time worked for an employer during the past seven years to reach the required 12 months of employment.[17] For example, a female employee who works for an employer for eight months, resigns to stay home with her children, then returns to work with the same employer six years later could be eligible for FMLA leave four months after her return to work once she meets the 1,250 hours of service requirement. Employees who have a break in service resulting from the employee's fulfillment of National Guard or Reserve military service obligations can use breaks in service of more than seven years to meet their 12 months of employment.[18] Similarly, employees who have written agreements with their employers, including collective bargaining agreements, expressing the employer's intention to rehire the employee after the break in service can also use breaks in service of more than seven years to meet their twelve months of employment.[19]

The FMLA requires that an employer maintain employment records for three years. If an employer retains records for less than seven years, it may base its initial determination of the employee's eligibility for leave on those records. The burden is on the employee to prove dates of employment for years four through seven to demonstrate eligibility.

The Uniformed Services Employment and Reemployment Rights Act requires that employees who return to work from military duty are entitled to all benefits of employment they would have obtained if they had remained continuously employed, except those benefits that are considered a form of short-term compensation, such as accrued paid vacation. The new regulations require employers to credit employees returning from National Guard or Reserve military obligations with the hours of work they would have performed but for the period of military service to determine whether the employee worked the 1,250 hours of service.[20] For example, an employee who normally works 40 hours per week who is deployed by the National Guard to active duty for six months would be credited with 1,040 hours upon return to work (40 hours per week multiplied by 26 weeks).

Employers may voluntarily allow employees to count breaks in service greater than seven years in order to reach the 12-month requirement. An employer must do so uniformly, allowing all employees with similar breaks in service to go beyond the seven years.[21]

The determination of whether an employee has worked for the employer for at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months is made as of the date the FMLA leave is to start.[22] Whether 50 employees are employed within 75 miles to determine the employee's eligibility for FMLA benefits is determined when the employee gives notice of the need for leave.[23] The regulations contain detailed guidelines to make that determination.[24] The only change to this regulation provides that for purposes of determining an employee's eligibility, the worksite of a jointly employed employee is the primary employer's office from which the employee is assigned or reports unless the employee has physically worked for at least one year at a facility of a secondary employer. In that situation, the employee's worksite is that location.[25]

Once an employee is determined to be eligible for leave in response to a notice of the need for leave, the employee is entitled to all leave needed for the qualifying reason whether the leave is taken all at once or on an intermittent basis, and the employee's eligibility is not affected by any subsequent change in the number of employees employed at or within 75 miles of the employee's worksite.[26] Similarly, an employer cannot terminate employee leave that has already started if the employee count drops below 50. For example, if a pregnant employee requests FMLA leave in August that will be-

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gin in December and the employee count drops below 50 employees in a 75 mile radius in December, the employee is still entitled to leave as long as she qualified for leave when she gave notice in August.

Importantly, the new regulations have deleted the "deeming" provisions of 29 C.F.R. §825.110(c) and (d) in light of the Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.*,[27] because the DOL believes that it lacks the regulatory authority to deem employees eligible for FMLA leave who do not meet the 12-month/1,250 hour requirements, even where the employer fails to provide the required eligibility notices to employees or provides incorrect information. On the other hand, such failures may have the effect of restraining or denying the employee the exercise of FMLA leave rights.

III. Qualifying Reasons for Leave

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

(1) For the birth of a son or daughter, and to care for the newborn child;
(2) For placement with the employee of a son or daughter for adoption or foster care;
(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition;
(4) Because of a serious health condition that makes the employee unable to perform the functions of the employee's job;
(5) Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation; and
(6) To care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the servicemember.[28]

The new regulations added the military leave entitlements in §§825.112(a)(5) and (6) of the regulations. The right to take FMLA leave applies equally to male and female employees. Consequently, a father or a mother, can take family leave for the birth, placement for adoption, or foster care of a child.[29] An employee who was laid off but was otherwise employed by a covered employer for 12 months and worked at least 1,250 hours must be recalled or otherwise re-employed before being eligible for FMLA leave. Under such circumstances, the employee is immediately entitled to further leave for a qualifying reason.[30]

Leave for the Birth of a Child, Adoption, or Foster Care

During the first 12 months after the child's birth or after the child's placement with the employee in cases of adoption or foster care, eligible employees are entitled to FMLA leave even if the child does not have a serious health condition.[31] State law or an employer's own policies may permit bonding leave to extend past 12 months, but such leave would not qualify as FMLA leave.[32] Spouses employed by the same employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for the birth of the employees' child, to care for the child during the first 12 months after birth, for placement of a child with the employee for adoption or foster care, or to care for the child after placement.[33] If either parent requests FMLA leave to care for a child with a serious health condition, their own serious health condition, or the serious health condition of the spouse, the combined 12-week rule does not apply.[34] For example, if each spouse took 6 weeks of leave to care for a healthy newborn, each could use an additional 6 weeks due to his or her own serious health condition or to care for a child with a serious health condition.[35] An employee awaiting the placement with the employee of a child for adoption or foster care may use leave to attend counseling sessions, appear in court, consult with attorneys or the birth mother's doctor, submit to physical examination, or travel to another country to complete an adoption.[36]

Leave to Employee or Family Member with a Serious Health Condition

FMLA leave is available for eligible employees who require leave to care for a spouse, parent, and son or daughter with a serious health condition. The FMLA defines spouse as a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including common law marriage in states where it is recognized.[37] Spouses employed by the same employer may be limited to a combined total of 12 weeks of leave during any 12-month period to care for the employee's parent with a serious health condition.[38] A 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.[39] Parents "in law" are not

included in this definition. The term "son or daughter" generally means a biological, adopted, or foster child, a stepchild, legal ward, or a child of a person standing *in loco parentis*, who is under age 18.

Employees may also take FMLA leave to care for a son or daughter age 18 or older who is incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence. This occurs when the son or daughter requires active assistance or supervision to provide daily self-care in three or more of the activities of daily living or instrumental activities of daily living. Examples include caring appropriately for one's grooming and hygiene, bathing, dressing, eating, cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, and using a post office.[40] A physical or mental disability is defined the same as in the Americans With Disabilities Act ("ADA")[41] – a physical or mental impairment that substantially limits one or more of the major life activities of an individual.

What is a Serious Health Condition?

The term "serious health condition" is defined by the Act as "an illness, injury, impairment or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility; or continuing treatment by a health care provider."[42] Over the years, courts and the DOL have debated the appropriate meaning of the term "serious health condition." Although the new regulations attempt to add some clarity, employers oppose the new regulations on the grounds that coverage has been expanded to include minor illnesses. In fact, the DOL acknowledges that the modified definitions will likely result in some employees qualifying for leave due to conditions that many believe should not be covered.[43] Rather than creating a per se list of covered conditions, the regulations define a serious health condition through an objective test while including a list of common ailments that ordinarily will not qualify for FMLA leave. Such common ailments include conditions for which cosmetic treatments are administered such as most acne treatments, or plastic surgery unless inpatient hospital care is required or complications develop.[44] Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraines, routine dental or orthodontia problems, and periodontal disease do not meet the definition of a serious health condition under the FMLA.[45]

The term "treatment" includes examinations to determine if a serious health condition exists and evaluations of the condition but does not include routine physical examinations or dental examinations.[46] A regimen of continuing treatment includes a course of prescription medication or therapy requiring special equipment to resolve or alleviate the health condition (*e.g.* oxygen). Continuing treatment that includes taking over-the-counter medications such as aspirin, antihistamines or salves, or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without the visit to a health care provider is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

The term "serious health condition" is defined by the Act as "an illness, injury, impairment or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility; or continuing treatment by a health care provider."

Provided all other conditions of the regulations are met, mental illness, allergies, restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions.[47] Substance abuse qualifies as a serious health condition only where leave is requested for treatment, not for an absence because of the employee's use of the substance.[48] An employer may not take disciplinary action against an employee because the employee exercised his right to take FMLA leave. If, however, the employer has an established policy, applied in a nondiscriminatory manner that has been communicated to all employees, providing that an employee may be terminated for substance abuse, the employee may be terminated whether or not the employee is presently taking FMLA leave.[49]

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Inpatient Care

The definition of "inpatient care" has retained the same meaning but has been divided into two regulations. The term means "an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity as defined in §825.113(b), or any subsequent treatment in connection with such inpatient care.[50] The term "incapacity" is still defined as "inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom."[51]

Continuing Treatment by a Health Care Provider

Under the new §825.115, a serious health condition involving continuing treatment by a health care provider includes at least one of the six conditions defined below. The term health care provider has been expanded to include physician assistants.[52]

(a) ***Incapacity and treatment.*** A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(1) Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral by, a health care provider; or
(2) Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.[53]

Despite requests from business groups to change the period of incapacity to a longer time period or measuring such periods by work days or business days rather than calendar days, the new regulations retain the basic requirements of a minimum period of incapacity of more than three consecutive days. They add that such days must be "full" calendar days and now require that the two visits to a health care provider must occur within 30 calendar days of the first day of incapacity, unless extenuating circumstances exist.[54] Extenuating circumstances must be beyond the employee's control and prevent the follow-up visit from occurring as planned by the health care provider, such as when the health care provider determines that a second in-person visit is needed within the 30-day period, but the provider has no availability during that time period.[55]

The regulations now provide that the requirements in (1) and (2) for treatment by a health care provider means an in-person visit to a health care provider. A phone call, letter, email, or text message to a health care provider does not qualify as a treatment. The first, or only, in-person treatment visit must take place within seven days of the first day of incapacity.[56] The Department added this requirement to address employer concerns that giving employees up to 30 days after the initial incapacity may result in an employee retroactively transforming a minor condition into a serious health condition. For example, the employee could go to a health care provider for the first time as many as 30 days after the initial incapacity in an effort to foreclose any proposed disciplinary action. Whether additional visits or a regimen of continuing treatment is necessary within the 30-day period shall be determined by the health care provider.[57] The health care provider may determine that a follow-up visit is necessary at the time of the initial treatment or within the initial 30-days where the condition does not resolve or deteriorates. However, an employee cannot unilaterally schedule the follow-up appointment himself simply to meet the test of a second visit. Only the health care provider can determine the need for the second visit. An employee whose initial in-person visit to a health care provider results in a regimen of continuing treatment such as a course of prescription medication would not be required to have a second visit to the health care provider within 30 days.

An employee may take FMLA leave for his or her own serious health condition when such condition makes the employee unable to perform the functions of the employee's job.[58] The health care provider must find 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.[59] 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.

(b) ***Pregnancy or prenatal care.*** Any period of incapacity due to pregnancy or for prenatal care qualifies as a serious health condition.[60] A pregnant employee may take FMLA leave before the birth of the child for prenatal care or if her condition makes her unable to work.[61] Such employee may take leave even if she does not receive treatment from a health care provider during the absence, and even if the absence does not last for more than three consecutive calendar days.[62] For example, if a pregnant eligible employee with severe

morning sickness misses work or comes in two hours late on occasion, she would be entitled to intermittent FMLA leave. A husband may use FMLA leave to care for a pregnant spouse who is incapacitated or if needed during her prenatal care, or following the birth of a child if his spouse has a serious health condition.[63]

(c) ***Chronic conditions.*** A chronic condition is any period of incapacity or treatment for such incapacity due to a chronic serious health condition.[64] A chronic serious health condition is one which (1) requires visits at least twice a year for treatment by a health care provider, or by a nurse under direct supervision of a health care provider; (2) continues over an extended period of time (including recurring episodes of a single underlying condition); and (3) may cause episodic rather than a continuing period of incapacity.[65] Chronic conditions include asthma, diabetes, and epilepsy. Thus, when an employee must receive treatment by a health care provider at least twice a year for the same medical condition and that condition has not resolved, the employee may use FMLA leave for time off due to that chronic medical condition, even if the employee does not see a health care provider during her absence. For example, an employee who is seen by a neurologist twice a year for migraine headaches may use FMLA leave to take one or more days off at a time due to a migraine headache, even though the employee does not go to the doctor while off work.

(d) ***Permanent or long-term conditions.*** Permanent or long-term conditions are periods of incapacity which are permanent or long-term due to a condition for which treatment may not be effective.[66] The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(e) ***Conditions requiring multiple treatment.*** Continuing treatment is defined as any period of absence to receive multiple treatments by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for (1) restorative surgery after an accident or other injury; or (2) for a condition that would likely result in a period of incapacity of more than three consecutive, full calendar days in the absence of medical intervention or treatment such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis).[67] For example, if an employee remains at work following a cancer diagnosis but will need leave for weekly chemotherapy or radiation treatments, the leave is considered FMLA qualifying leave. Additionally, an employee who is injured in a car accident and is treated by a health care provider may need time off months after the accident for surgery to repair a tear or break that could not be fixed until the employee's swelling decreased.

(f) ***Absences attributable to incapacity due to (b) or (c) without treatment from a health care provider during the absence and even if the absence does not last more than three consecutive, full calendar days.*** The regulations also permit eligible employees with chronic conditions or who are pregnant to take FMLA leave even though the employee does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive, full calendar days.[68] Eligible employees may also take leave to care for a covered family member with a chronic condition under the same circumstances. For example, an eligible employee may be unable to report to work or need to come in late or leave work early due to an asthma attack, allergy flare-ups, or morning sickness.[69]

Leave for Active Military Duty or to Care for a Covered Servicemember with a Serious Injury or Illness

The NDAA amended the FMLA to allow eligible employees to take up to 12 weeks job-protected leave in a 12-month period for any "qualifying exigency" arising out of the active duty or call to active duty status of a spouse, son, daughter, or parent. The law also amended the FMLA to allow eligible employees to take up to 26 weeks of job-protected leave in a single 12-month period to care for a covered servicemember with a serious injury or illness. These two new types of FMLA leave are known as the military family leave entititlements.[70]

In order to qualify for FMLA leave, the employee must otherwise satisfy the eligibility requirements of the FMLA: work for a covered employer; have worked for the employer for a total of 12 months; have worked at least 1,250 hours over the previous 12 months; and work at a location where at least 50 employees are employed within 75 miles. Employer coverage is the same as other types of FMLA leave.

Qualifying Exigency Leave

A major expansion of the FMLA allows employees to take FMLA leave because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on active duty or has been notified of an impending call or order to active duty in support of a contingency operation and to care for a servicemember with a serious injury or illness if the employee

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is the spouse, son, daughter, parent, or next of kin of the servicemember. Under the terms of the statute, qualifying exigency leave is available to family of a military member in the National Guard or Reserves; it does not extend to family members of servicemembers in the Regular Armed Forces.[71] The terms spouse, parent, son or daughter are defined the same as for employees seeking leave for a family member's serious health condition. However, an employee may take leave under this section regardless of the age of a son or daughter. A servicemember's next of kin is defined as the nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA.[72] When no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation is made, the designated individual shall be deemed to be the covered servicemember's only next of kin. An employer may require employees to confirm a family relationship by producing a child's birth certificate, a court document, or a simple statement from the employee.[73] Employees who submit documentation are entitled to the return of the official document.

The term "qualifying exigency" encompasses eight different situations:

(1) ***short-notice deployment*** where a servicemember is notified of an impending call or order to active duty in support of a contingency operation seven or less days prior to the date of deployment. In such circumstances, leave may be taken seven calendar days beginning on the date a covered military member is notified of an impending call or order to active duty in support of a contingency;

(2) ***military events and related activities*** such as attending official ceremonies, program or events sponsored by the military related to the active duty or call to active duty status of a covered military member and attending 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 active duty or call to active duty status of a covered member;

(3) ***childcare and school activities*** including arranging for alternative childcare, providing for childcare on an urgent, immediate need basis when the need arises from the active duty or call to active duty status, enrolling a child in or transferring to a new school or day care facility or attending meetings with staff at the school or child care center;

(4) ***to make or update financial and legal arrangements*** to address the covered servicemember's absence or act as the covered servicemember's representative before a governmental agency to obtain, arrange or appeal military service benefits while the servicemember is on active duty and 90 days following termination of active duty status;

(5) ***to attend counseling*** provided by someone other than a health care provider for oneself, the covered military member, or child of the military member;

(6) ***rest and recuperation*** which allows covered employees to take up to five days leave to spend time with a covered military member who is on short-term, temporary, rest and recuperation leave during the period of deployment;

(7) ***post-deployment activities*** to attend arrival ceremonies, reintegration briefings and events, and any other official ceremonies or programs sponsored by the military for 90 days following the termination of the covered member's active duty status, and addressing issues arising from the death of a covered military member; and

(8) ***additional activities*** – defined as leave to address other events that the employer and employee agree is a qualifying exigency.[74]

Leave to Care for a Covered Servicemember with a Serious Injury or Illness

The spouse, son, daughter, parent, or next of kin of a current member of the Armed Forces, including a member of the National Guard or Reserves, with a serious injury or illness is entitled to 26 workweeks of leave to care for the covered servicemember during a single 12-month period.[75] The terms son, daughter, parent, and next of kin are defined the

same as for qualifying exigency leave. A serious injury or illness must be incurred in the line of duty on active duty and may render the servicemember medically unfit to perform the duties of his or her office, grade, rank or rating. The servicemember must be undergoing medical treatment, recuperation, or therapy; or otherwise in outpatient status; or otherwise on the temporary disability retired list.

IV. Employee Leave Entitlements

Amount of Leave and Calculation of Leave

Eligible employees who work for covered employers are entitled to a total of 12 workweeks of leave during any 12-month period for all qualifying reasons for leave other than leave to care for a covered servicemember with a serious injury or illness.[76] In that case, leave is limited to a total of 26 workweeks during a single 12-month period.[77]

The regulations still permit employers to choose between four possible methods for determining the 12-month period in which 12 weeks of leave entitlement occurs: (1) the calendar year; (2) any fixed 12-month "leave year", such as a fiscal year or the employee's anniversary date; (3) the 12-month period measured forward from the date of any employee's first FMLA leave; or (4) a rolling 12-month period measured backward from the date an employee uses any FMLA leave.[78] Employers must notify employees of which of the four methods will be applied to all employees. Otherwise, employees are entitled to use whichever option provides the most beneficial outcome for the employee. An employer may subsequently chose a different method to determine the 12-month period by providing at least 60 days notice to all employees, and the transition must allow employees to retain the full benefit of 12 weeks of leave under whichever method affords them the greatest benefit.[79]

The single 12-month period for leave to care for a covered servicemember with a serious injury or illness begins on the first day the eligible employee takes FMLA leave to care for a covered servicemember and ends 12 months after that date, regardless of the method the employer used to determine the employee's 12 workweeks of leave entitlement for other FMLA-qualifying reasons.[80] An employee forfeits any portion of the 26 workweeks of leave not taken during the 12-month period. The 26 weeks of leave is applied on a per-covered-servicemember, per-injury basis such that an eligible employee may take more than one period of 26 workweeks of leave if needed to care for a different covered servicemember or to care for the same member with a subsequent injury or illness. However, no more than 26 workweeks of leave may be taken within any single 12-month period, even if the different illnesses or injuries overlap. Only 12 of the 26 weeks total may be for a FMLA-qualifying reason other than to care for a covered servicemember.[81] A husband and wife who are both eligible for FMLA leave and employed by the same employer may be limited to a combined total of 26 workweeks of leave during the single 12-month period.[82]

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

The new regulations clarify that for purposes of determining the amount of leave used by an employee, the fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave. However, if an employee is using FMLA leave in increments of less than one week, the holiday will not count against the employee's FMLA entitlement unless the employee was otherwise scheduled and expected to work during the holiday.[83] Further, if the employer's business is temporarily ceased and employees generally are not expected to work for one or more weeks (such as a school closing for the Christmas/New Year holiday or summer vacation, or an employer closing the plant for a specified period of time), the days the employer's activities have ceased do not count against the employee's FMLA leave entitlement.[84]

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Intermittent and Reduced Schedule Leave

FMLA leave may be taken intermittently or on a reduced leave schedule only under certain circumstances.[85] Intermittent leave is taken in separate blocks of time due to a single qualifying reason while reduced leave is a leave schedule that reduces the employee's usual number of working hours per workweek, or hours per workday. A reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time. The new regulations have reorganized this section and added a discussion of intermittent leave for military caregiver leave. The overall substance of the regulations on this type of leave remain the same.

An employee with a serious health condition or who requests leave to care for a covered family members with a serious health condition, or to care for a covered servicemember with a serious injury or illness, may take intermittent or reduced schedule leave when there is a medical need that can be best accommodated through an intermittent or reduced leave schedule.[86] Leave due to a qualifying exigency may also be taken on an intermittent or reduced leave schedule basis.[87] The employer may require that the treatment regimen and other information described in the certification of serious health condition or certification of serious injury or illness address the medical necessity of intermittent leave or leave on a reduced leave schedule. This type of leave can be taken for planned or unanticipated medical treatment of a serious health condition or of a covered servicemember's serious injury or illness, to provide care or psychological comfort to a covered family member with a serious health condition or a covered servicemember with a serious injury or illness.

Employees eligible for intermittent or reduced schedule leave may take such leave periodically, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks.[88] Examples include leave taken on an occasional basis for medical appointments; leave taken several days at a time spread over a period of six months, such as for chemotherapy; leave taken for periods of severe morning sickness; and employees recovering from a serious health condition who are not strong enough to work a full-time schedule. An employee (or family member) with a chronic serious health condition or a covered servicemember with a serious injury or illness may take intermittent or reduced schedule leave when incapacitated or unable to perform the essential functions of the position, even if the individual does not receive treatment by a health care provider.[89]

An eligible employee may use intermittent or reduced schedule leave after the birth to be with a healthy newborn child or the placement of a healthy child for adoption or foster care only if the employer agrees.[90] If the employer agrees to permit such leave for a new parent, the employer may require the employee to transfer temporarily during the period of intermittent or reduced schedule leave to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave. An employer must provide such leave to an eligible employee who seeks leave required by the serious health condition of the mother or the newborn child.

Employees eligible for intermittent or reduced schedule leave may take such leave periodically, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks.

Employees who are eligible for such leave are required to make a reasonable effort to schedule the treatment so as not to disrupt the employer's operations.[91] If the health care provider determines that there is a medical necessity for a particular treatment time, the medical determination prevails. Conversely, if it is just a matter of scheduling convenience for the employee, the employee must make a reasonable effort not to unduly disrupt the employer's business operations.

When intermittent or reduced schedule leave is foreseeable, the employer may require the employee to transfer temporarily to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position.[92] The DOL rejected attempts by employers to expand their right to transfer employees to include employees who take unforeseen intermittent leave. Before transferring an employee to a different position, an employer should consider applicable collective bargaining agreements, federal or state laws (such as the ADA), and whether an existing job can be altered to better accommodate the employee's needs. The alternative position must have equivalent pay and benefits but may have different duties as long as the new posi-

tion is not aimed at discouraging employees from taking leave or would otherwise cause a hardship. For example, employers cannot assign a white-collar employee to perform laborer's work, reassign a day shift employee to the night shift, or transfer the employee to location that is a significant distance from the employee's normal job location.[93] An employer may transfer an employee to a part-time job with the same hourly rate of pay and benefits as long as the employee is not required to take more leave than is medically necessary. A full-time employee temporarily working a part-time position does not lose benefits that otherwise would not be provided to part-time employees. However, an employer may proportionately reduce benefits such as vacation leave where the normal practice is to base such benefits on the number of hours worked. Once the employee is able to return to full-time work, the employee must be placed in the same or equivalent job as the job the employee left when the leave commenced.[94]

Increments of Intermittent or Reduced Schedule Leave

An employer must account for the intermittent or reduced schedule leave using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave provided it is not greater than one hour.[95] An employee's leave may not be reduced by more than the amount of the leave actually taken. While employers may choose to use a smaller increment to account for FMLA leave than they use to account for other forms of leave, employers may not use a larger increment for FMLA leave. The new regulations add a provision that where it is physically impossible for an employee using intermittent leave or working on a reduced leave schedule to begin or end work during a shift, such as where a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, the entire period that the employee is forced to be absent is designated as FMLA leave and counts against the employee's FMLA entitlement.[96]

In calculating the amount of leave taken, employers should use the actual workweek as the basis of leave entitlement. Thus, if a full-time employee takes off 8 hours, the employee is charged with 1/5 of a week of FMLA leave. Where a full-time employee who normally works 8-hour days is on a reduced leave schedule of 4-hour days, the employee is charged with half a week of FMLA leave.[97] When a part-time employee is on intermittent leave, the employer should convert the amount of leave to a fraction of the total hours normally worked in a week. For example, if an employee normally works 30 hours per week, but only works 20 hours a week while on reduced leave, the employee's ten hours of leave would constitute 1/3 of a week of FMLA leave for each week the employee works the reduced leave schedule. If the employer had made a permanent or long-term change in the employee's schedule prior to the notice of need for FMLA leave, the hours worked under the new schedule are to be used for making this calculation.[98] If the employee's schedule varies from week to week, the employer should calculate the employee's leave entitlement by determining a weekly average of the hours for which the employee was scheduled to work over the 12 months prior to the beginning of the leave period, including any hours for which the employee took leave of any type.[99]

If an employee on leave normally works overtime, but is unable to do so, the hours which the employee would have been required to work may be counted against the employee's FMLA entitlement.[100] This does not apply to employees who voluntarily work overtime, no matter how frequently. For example, if an employee normally works 48 hours per week and can only work 40 hours per week due to an FMLA qualifying condition, the employee would use eight hours of FMLA leave out of the 48-hour workweek, or 1/6 of a workweek.

Paid v. Unpaid Leave

Leave taken under FMLA may be unpaid, and allowing exempt employees under the Fair Labor Standards Act (FLSA) to take unpaid leave will not cause the employee to lose the FLSA exemption.[101] The regulations on interaction with the FLSA have not changed. They continue to provide that an eligible employee may choose to substitute accrued paid leave for unpaid FMLA leave.[102] The regulations also provide that if an employee does not choose to substitute accrued paid leave for unpaid FMLA leave, the employer may require it. The new regulations clarify this process. Section 825.207(a) now defines the term "substitute" to mean that the paid leave provided by the employer will run concurrently with the unpaid FMLA leave. Accordingly, even though an employee is on FMLA leave, the employee will still receive pay pursuant to the employer's applicable paid leave policy. When an employee chooses, or an employer requires substitution of accrued paid leave, the employer must inform the employee that the employee must satisfy any procedural requirements of the paid leave policy only in connection with receipt of payment.[103]

As under the prior regulations, if neither the employee nor the employer elects to substitute paid leave for unpaid FMLA leave, the employee will remain entitled to all paid leave which is earned or accrued under the terms of the

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employer's plan.[104] Similarly, if an employee uses paid leave for non-FMLA qualifying reasons, the leave will not count against the employee's FMLA leave entitlement.[105] If an employee is off work pursuant to a disability leave plan or due to an on-the-job injury covered by worker's compensation, such leave will generally qualify as FMLA leave. However, neither the employee nor the employer may require the substitution of paid leave, unless state law allows paid leave to supplement other benefits if they only replace a portion of the employee's regular salary.[106] If an employee's medical provider certifies the employee as able to return to a light duty job, but not the same or equivalent job, an employee may decline the employer's offer of a light duty job. While the employee may lose certain worker's compensation benefits as a result, the employee is entitled to remain on unpaid FMLA leave until it is exhausted and either the employee may elect or the employer may then require the use of accrued paid leave.[107] The FMLA, however, does not require an employer to provide employees with serious health conditions "light duty by altering essential job functions to accommodate an employee's limitations caused by a serious health condition."[108]

The new regulations enable public employers to require employees who receive compensatory time off to use compensatory time when they are eligible for FMLA leave if the employer requires such use pursuant to the FLSA.[109] Conversely, the employee may also request to use accrued compensatory time to receive pay for time taken off for an FMLA reason. Such time may be counted against the employee's FMLA leave entitlement.

Maintenance of Employee Benefits

The new regulations made few, if any, changes to the previous sections related to employee group health plan benefits. During FMLA leave, employers must still maintain the employee's coverage under any group health plan under the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period.[110] An employee must still pay any share of group health plan premiums which had been paid by the employee prior to the FMLA leave.[111] Where FMLA leave is unpaid, the employer has five options for obtaining payment from the employee as set forth in 29 C.F.R. §825.210(c). An employer may terminate an employee's health insurance coverage while the employee is on FMLA leave if the employee fails to pay his share of the premiums, the grace period has expired, and the employer provides sufficient and timely notice to the employee.[112] The new regulations make clear that if an employer allows an employee's health insurance to lapse due to the employee's failure to pay his or her share of the premium, the employer still has a duty to reinstate the employee's health insurance when the employee returns to work. The employer may be liable for harm suffered by the employee as a result of the violation if it fails to do so.[113] The regulations continue to allow an employer to recover its share of health plan premiums during a period of unpaid FMLA leave from an employee if the employee fails to return to work after the employee's FMLA leave has been exhausted or expires, unless the employee does not return due to a serious health condition of the employee, employee's family member, covered servicemember, or other circumstances beyond the employee's control.[114]

V. Notice Requirements

Employee Obligations

Typically, an employee must provide the employer at least thirty days advance notice before FMLA leave is to begin if the leave is foreseeable, such as an expected birth.[115] Also, If the leave is foreseeable based on planned medical treatment, the employee must make a reasonable effort to schedule the treatment so as not to disrupt the operations of the employer.[116]

If leave is not foreseeable, notice must be given as soon as practicable. The "as soon as practicable" standard means as soon as both possible and practical taking into account the individual facts and circumstances.[117]

While an employee giving notice of the need for leave does not need to expressly assert rights or even mention the FMLA, the employee must provide verbal notice sufficient to make the employer aware that the employee requires FMLA-qualifying leave and advise the employer of the anticipated timing and duration of the leave, if possible.[118] Such information might include whether a condition renders the employee unable to perform the functions of the job, if the employee is pregnant or has been hospitalized overnight, whether the employee or the employee's family member is under the continuing care of a health care provider, or that a covered military member is on active duty status.

Although the burden to notify the employer of a potential leave and reason for the leave is not considered onerous, nor should it be considered illusory.[119] It is the employee's burden to give sufficient notice. Along these lines, calling in sick without providing additional information does not provide sufficient notice under the FMLA. "'Sick' does not imply 'a serious health condition.'"[120] Typically, in the absence

of a direct request for medical leave by an employee or representative, notice will not be imputed to the employer. As the Seventh Circuit stated, "The FMLA does not require employers to play Sherlock Holmes, scanning an employee's work history for clues as to the undisclosed, true reason for an employee's absence."[121] However, a "dramatic" and "observable" change in an employee's behavior or conduct based on a "sudden change in circumstances" may be sufficient notice.[122]

An employer is permitted to inquire whether the leave should be covered under the FMLA. An employee has an obligation to respond to an employer's questions so as to allow the employer to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employer inquiries regarding the leave request may result in the denial of FMLA protection if the employer is unable to determine whether leave qualifies for the FMLA.[123]

An employer may also require that the employee comply with any of its policies and procedures regarding FMLA leave such as requiring the employee to contact a specific individual concerning leave or to provide written notice of the reasons for the requested leave, the anticipated duration of the leave and the anticipated start of the leave. An employee must comply with these procedures and circumstances unless there is some unusual circumstance.[124] An employer's policy, nevertheless, must be consistent with the Act and regulations. For example, an employer may not require that an employee give notice sooner than the regulations require.[125]

Medical Certifications

An employer may also require a medical certification by a health care provider verifying the condition of the employee or family member for whom the employee is acting as caretaker[126] or, in the case of a service member, an active duty order.[127] The request for certification should be furnished when the employee gives notice of leave, or within five business days thereafter (in the case of unforeseen leave, within five business days after the leave commences).[128] The employer may request certification at some later date if it later questions the appropriateness of the leave or its duration. The employee must provide the requested certification to the employer within fifteen calendar days after the employer's request, unless it is not practicable to so.[129] At the time certification is requested, the employer must advise the employee of any consequences that may result for failure to provide adequate certification.[130] Failure to do so results in non-compliance with the FMLA and waives an employer's right to deny leave on the basis of lack of medical certification. [131]

The content of the certification may vary depending on the type of leave that the employee is requesting. Generally, it should include the following: (1) name, address, telephone number, and fax number of the health care provider and type of medical practice/specialization; (2) the approximate date on which the serious health condition commenced, and its probable duration; (3) a statement or description of the appropriate medical facts regarding the patient's health condition; (4) if the employee is a patient, information sufficient to establish that the employee cannot perform the essential functions of the employee's job, as well as the nature of any other work restrictions, and the likely duration of such inability; and (5) if leave is for the care of a family member, information sufficient to establish the family member is in need of care and an estimate on the frequency and duration of the leave.[132] The employer is obligated to notify an employee of any deficiency in a certification and offer the employee the chance to cure the deficiency before denying leave.[133]

An employee who provides false certification or materially alters a valid certification is not entitled to FMLA leave.

An employee who provides false certification or materially alters a valid certification is not entitled to FMLA leave.[134] Likewise, if an employer doubts the validity of the certification provided by the employee, the employer may require, at the expense of the employer, that the eligible employee obtain the opinion of a second health care provider designated or approved by the employer. This health care provider cannot be employed on a regular basis by the employer. Should there be a conflict between the first and second opinion, the employer may require, again at its expense, that the employee obtain the opinion of a third health care provider approved jointly by the employer and the employee. The opinion of the third health care provider is final and binding.[135] An employer may require that the eligible employee obtain subsequent re-certifications on a reasonable basis subject to vari-

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ous limitations depending upon the FMLA-qualifying leave sought or if the employer receives information that calls into question the employee's asserted reason for leave.[136] If an employee's serious health condition may also be a disability within the meaning of the Americans With Disabilities Act (ADA), as amended, the FMLA does not prevent an employer from following the procedures under the ADA.[137]

Periodic Reports

An employer may also require that an employee on FMLA leave report periodically her status and intent to return to work. The employer's policy regarding such reports may not be discriminatory and must take into account all relevant facts and circumstances related to the individual employee's leave.[138] If an employee gives unequivocal notice of intent not to return to work, the employer's obligations under FMLA to maintain health benefits and to restore the employee cease. However, these obligations continue if the employee indicates that he or she may be unable to return to work but expresses a continuing desire to do so.[139]

The regulations recognize that it may be necessary for an employee to take more leave than originally anticipated. Likewise, an employee may discover after beginning leave that the circumstances have changed and the amount of leave originally anticipated is no longer necessary. An employee may not take more FMLA leave than necessary to resolve the circumstances that precipitated the need for leave. The employer may require the employee provide reasonable notice, *i.e*. within two business days, of the changed circumstances where foreseeable.[140]

The employer must be aware of state laws that may impact employee requirements regarding leave. Critically, the FMLA does not prevent the employer from following state worker's compensation provisions. Any prohibitions under worker's compensation statutes for requesting additional medical information should be followed.[141] Any information received through worker's compensation may be considered in determining an employee's entitlement to FMLA leave. Similarly, an employer may request additional information in accordance with the paid leave policy or disability plan that requires greater information to qualify for payments or benefits, provided that the employer informs the employee that the additional information only needs to be provided in connection with receipt of such payments or benefits. Any information received pursuant to such policy or plan may be considered in determining the employee's entitlement to FMLA protected leave.[142]

Failure to give proper notice of need for leave may result in certain penalties for the employee, typically a delay in FMLA coverage. In all cases, in order for the onset of an employee's FMLA leave to be delayed due to lack of required notice, it must be clear that the employee had actual notice of the FMLA notice requirements. This condition could be satisfied by the employer's proper posting of the required notice at the worksite where the employee is employed and provision of the required notice in either an employee handbook or employee distribution.[143] If there is a dispute between the employer and employee regarding whether leave qualifies under the FMLA, it should be resolved through discussions. Such discussions and any decisions reached must be documented.[144]

The employer's obligations under the new regulations are fairly extensive. Should an employer seek to deny leave to an employee for that employee's failure to provide notice, the employer must demonstrate that it has complied with the notice obligations under the regulations.

Employer Obligations

While the employee's burden is minimal, the employer's obligations under the new regulations are fairly extensive. Should an employer seek to deny leave to an employee for that employee's failure to provide notice, the employer must demonstrate that it has complied with the notice obligations under the regulations. Compliance demonstrates that the employee was aware of her rights under the FMLA and the established procedures to assert those rights. The final regulations create four separate notice obligations for the employer: General Notice, Eligibility Notice, Rights and Responsibilities Notice and Designation Notice.

Under the General Notice requirements effective January 16, 2009, covered employers must post the new DOL FMLA poster in a conspicuous place available both to em-

ployees and applicants. The poster, available at www.dol.gov, must be large enough to be easily read, contain fully legible text and explain the Act's provisions and provide information concerning the procedures for filing a complaint with the Wage and Hour Division.[145] An electronic posting that contains the required information will be sufficient to meet the general posting requirement.[146] Employers that violate this posting requirement will face a civil monetary penalty not to exceed $110 for each separate offense for failure to provide the General Notice. Employers must post the general notice even if no employees are eligible for FMLA leave.[147] Sensory impaired individuals must be accommodated as required under state and federal law.[148]

Additionally, the employer is required to provide a General Notice to each individual employee. An employer may publish this individual notice in employee handbooks or any manual or other written guidance distributed to employees that explains benefits and leave of absence rights.[149] The employer may also distribute a copy of the General Notice to a new employee upon hiring.[150] If the workforce of a covered employer is not literate in English, the General Notice must be supplied in a language in which the employees are literate.[151]

The employer's notice obligations do not end with the General Notice requirements. Within five business days (absent extenuating circumstances) of when an employee requests FMLA leave or when an employer acquires sufficient knowledge that an employee's absence may be for an FMLA qualifying reason, an employer is responsible for providing, orally or in writing, Eligibility Notice of FMLA leave.[152] The new regulations have extended the deadline from two to five business days for an employer to provide this Notice. The Eligibility Notice must state whether the employee meets the requirements for FMLA leave. If the employee is not eligible for FMLA leave, the Eligibility Notice must designate the specific reason(s).[153] Employee eligibility is determined at the commencement of the first instance of leave for each FMLA qualifying reason.[154] As in other notice requirements, the employer is obligated to provide the notice in a language in which its employees are literate.[155] In the event an employee subsequently requests FMLA leave for a different qualifying reason within the same twelve month period, an employer does not need to provide an additional Eligibility Notice if the employee's eligibility has not changed. If eligibility status has changed, the employer must notify the employee of the change within five business days (absent extenuating circumstances).[156]

The final regulations dropped the automatic penalty that an employee shall be deemed eligible for FMLA leave in the event of an employer's failure to issue a timely Eligibility Notice. However, there are still consequences when an employer fails to provide Eligibility Notice or accurately determine an employee's eligibility. Employers may face costly liquidated damages for failure to accurately determine employee eligibility or for providing only a cursory assessment of an employee's eligibility.[157] Employers must also clearly articulate the FMLA eligibility requirements in its Eligibility Notice or risk waiving such requirements, which would allot an employee leave to which she is not otherwise entitled or waive a defense of statutory ineligibility.[158]

Each time an employer provides Eligibility Notice, the employer must also issue a Rights and Responsibilities Notice. This notice details the expectations and obligations of the employee and explains any consequences of the employee's failure to meet these obligations.[159] Specifically, the Rights and Responsibilities notice should address the following: (1) whether the leave may be designated and counted against the employee's annual FMLA leave entitlement if qualifying and the applicable twelve-month period for FMLA entitlement; (2) any requirements for the employee to furnish certification of a serious health condition, serious injury or illness, or qualifying exigency arising out of the active duty or call to active duty status, and the consequences of failing to do so; (3) the employee's right to substitute paid leave, whether the employer will require the substitution of paid leave, the conditions related to any substitution and the employee's entitlement to take unpaid FMLA leave if the employee does not meet the conditions of a paid leave; (4) any requirement for the employee to make any premium payments to maintain health benefits; (5) the employee's status as "key employee" and any potential consequences due to that status; (6) the employee's rights to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return; and (7) the employee's potential liability for payment of health insurance premiums made by the employer during the employee's unpaid FMLA leave if the employee fails to return to work.[160]

The Notice of Rights and Responsibilities may include additional information such as whether the employer will require periodic reports of the employee's status and intent to return and may also be accompanied by any required certification form that must be completed by an employee.[161] If any specific information provided in the Notice of Rights and Responsibilities changes, the employer must, within five business days of receipt of the employee's first notice of need for leave subsequent to any change, provide written notice referencing the prior notice and setting forth any of the in-

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formation in the Notice of Rights and Responsibilities that has changed.[162] The Act requires that employers address any questions from employees concerning their Rights and Responsibilities promptly.[163] This is consistent with the general mandate in the regulations requiring employers and employees to engage in an open dialogue regarding FMLA leave requirements and attempt to resolve any disputes through discussion.[164]

Finally, the employer must provide Designation Notice, which is a notice formally designating the employee's leave as FMLA-qualifying. While this notice may initially be oral, the regulations require that it be confirmed in writing. This notice allows an employee to track the amount of leave he or she is entitled to or, in the alternative, the amount of leave counted against the employee's FMLA leave entitlement. The employer is required to give such notice to the employee when it has enough information to determine whether the leave is being taken for an FMLA-qualifying reason.[165] Absent extenuating circumstances, the employer must notify the employee in writing whether the leave will be designated as FMLA leave within five business days of obtaining the information necessary to determine whether the leave is being taken for a qualifying reason. [166] An employer's decision to designate leave as FMLA-qualifying must be based only on information received from the employee or the employee's spokesperson, such as the employee's spouse, adult child, parent, or doctor. If the employer does not have sufficient knowledge about the reason for the employee's use of leave, the employer should inquire further of the employee or employee's representative.[167]

Only one Designation Notice is required for each FMLA-qualifying reason for applicable twelve-month period.[168] The Designation Notice should provide the following: a determination on whether the leave is FMLA-qualifying; specific information on what paid time off benefits may run (or are being required by the employer to run) concurrently with FMLA leave; whether the employer will require a fitness for duty examination addressing the employee's fitness to perform the essential functions of the position (including a list of those functions); and the amount of leave counted against the employee's FMLA leave entitlement where known.[169]

If the amount of leave is initially unknown the employer must provide Designation Notice of the amount of FMLA leave taken upon an employee's request at a later date. The employer is not entitled to provide notice of leave entitlement more often than thirty days and only if leave is taken during the period or employee requests such notice.[170] The written notice of leave entitlement may be in any form such as the prototypes found at **http://www.wagehour.dol.gov** or even an employee pay stub.[171] If an employee exhausts FMLA leave entitlement or any information provided by the employer to the employee on the Designation Notice changes, the employer shall provide written notice of the change within five business of receipt of the employee's first notice of need for leave subsequent to any change.[172]

Essentially, the new notice regulations seek to ensure that an employee is well aware of her FMLA leave rights. Covered employers must clearly articulate rights guaranteed to employees under the FMLA.

Essentially, the new notice regulations seek to ensure that an employee is well aware of her FMLA leave rights. Covered employers must clearly articulate rights guaranteed to employees under the FMLA not only in general materials provided to its workforce, but also individually and upon general request from an employee seeking leave (or who may be deemed as seeking leave) or information regarding her rights and the leave available to her. An employer's policies and manuals must be consistent with these provisions or the employer may suffer consequences including liability for compensation, benefits lost by reason of the violation, actual monetary losses sustained as a direct result of the violation and appropriate equitable or other relief, including employment, reinstatement, promotion or any other relief tailored to the harm suffered.[173]

VI. Job Restoration

At the end of the leave, the employee can return to the job she held prior to taking leave with the same benefits she had when she left or an equivalent position with equivalent pay and terms and conditions of employment.[174] But this "right to reinstatement is . . . not absolute."[175] The employee only gets the same employment terms she had when she left – nothing more. In other words, the statute "set[s a] substan-

tive floor[]."[176] As the Seventh Circuit has noted, aside from the twelve weeks of leave, the FMLA does not confer "any right, benefit, or position of employment other than any right, benefit or position to which the employee would have been entitled had the employee not taken the leave."[177] An employer can deny reinstatement if there is a legitimate business justification for eliminating an employee's position.[178] However, if an employer simply replaces an employee on leave or restructures the position to accommodate the employee's absence, the employee is entitled to reinstatement to the same position.[179]

An equivalent position is "one that is virtually identical to the employee's position in terms of pay, benefits and working conditions, including privileges, perquisites and status."[180] It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility and authority.[181] The test for equivalence is strict.[182] Upon return from leave, the employee should receive the following: (1) reinstatement to the same or geographically proximate work site (i.e., one that does not involve a significant increase in commuting time or distance); (2) the same shift or same or equivalent work schedule; and (3) the same or equivalent opportunity for bonuses, profit sharing, and other similar discretionary and non-discretionary payments.[183] The prestige and visibility of the position are also factors that a court will look to in order to determine equivalence.[184] However, the employer is not prohibited from accommodating 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.[185] The right of employee to be restored to the same or equivalent job position with the same or equivalent pay does not extend to *de minimis* aspects of the job.[186]

A returning employee is entitled to equivalent pay which includes any bonus or payment made to employees.[187] An employee is entitled to any unconditional pay increases, which may have occurred during the leave, such as cost of living increases.[188] Likewise, if an employee departed from a position with overtime (and corresponding overtime pay) each week, an employee is generally entitled to such a position on return from FMLA leave.[189] However, if the bonus or other payment is conditioned on seniority, length of service or achievement of a specified goal (such as hours worked, products sold or perfect attendance) and the employee has not met the goal due to FMLA leave, then the payment may be denied.[190]

An employee is also entitled to "equivalent benefits" which 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 pension.[191] Any benefits accrued at the time that leave began (such as paid vacation, sick or personal leave to the extent not substituted for FMLA leave) must be available to an employee upon return from leave. Upon return from leave, an employee cannot be required to re-qualify for any benefits the employee had before taking leave.[192] Accordingly, employers may have to modify life insurance and other benefit programs in order to restore employees to equivalent benefits or make arrangements for continued payment of costs to maintain such benefits.[193] While benefits must be resumed in the same manner and at the same levels as provided when the leave began, they are subject to any changes in benefit levels that may have taken place during the period of FMLA leave affecting the entire work force.[194]

An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave.[195] While on unpaid leave, if an employee desires to continue life insurance, disability insurance, or other types of benefits for which he or she typically pays, the employer is required to follow established policies or practices for continuing such benefits for other instances of leave without pay. If there is no such policy, the employee and employer are encouraged to agree upon arrangements before the leave begins.[196]

With respect to pension and other retirement plans, any period of unpaid FMLA leave is not counted toward a break in service for purposes of vesting and eligibility to participate.[197] Also, if the plan requires an employee to be employed on a specific date in order to be credited with the year of service for vesting, contributions or participation purposes, an employee on unpaid FMLA leave on that date is considered to be employed on that date. However, unpaid FMLA leave need not be treated as credited service for purposes of benefit accrual, vesting and eligibility to participate.[198]

If an employee is no longer qualified as a result of the leave, the employee shall be given a reasonable opportunity to fulfill conditions upon return to work.[199] If upon return, the employee is unable to perform an essential job function of the position because of the physical or mental condition or continuation of such condition, the employee has no right to restoration to the other position. In such a situation, the employer's obligations would be governed by the ADA, state leave laws, or worker's compensation laws.[200]

An employee does not have a greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave.[201] As such, an employee is not entitled to re-

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turn to a prior position following FMLA leave if she would have been demoted or terminated regardless of whether she took leave.[202] If an employee is legitimately laid off during his FMLA leave, the employer's responsibility to continue FMLA leave, maintain group health benefits and restore the employee cease, provided the employer has no continuing obligations under any agreement. Likewise, if a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon restoration. However, if a position on a night shift, for example, has been filled by another employee, the employee is entitled to return to the same shift on which employed before taking leave.[203] The employer has the burden of proving that an employee would have been laid off during the leave, and therefore would not be entitled to restoration.[204] When an employer claims that the employee would have been laid off or his position would have been eliminated even if the employee had not taken leave and provides some evidence to that effect, the employee must convince the trier of fact that his position would not have been eliminated had he not taken leave.[205]

Another limitation on an employee's right to reinstatement is if an employee fraudulently obtains FMLA leave from an employer. Such an employee is not protected by the FMLA.[206] While an employer may resort to various tactics to determine fraud,[207] the FMLA regulations prefer communication with the employee or a representative of the employee.

Reinstatement may be limited if the employee falls into the category of "key employee."[208] A "key employee" is a salaried FMLA eligible employee who is among the highest paid 10 percent of all the employees employed by the employer within 75 miles of the employee's worksite. In order to deny restoration to a "key employee," an employer must determine that the restoration of the employee will cause a "substantial and grievous economic injury" to the operations of the employer, not whether the absence of the employee will cause such a substantial and grievous injury.[209] A precise test cannot be set for the level or hardship or injury to the employer. The reinstatement of the "key employee" must threaten the economic viability of the firm or cause substantial, long-term economic injury. However, minor inconveniences and costs that the employer would experience in the normal course of doing business would not constitute "substantial and grievous economic injury."[210] The "substantial and grievous economic injury" standard is more stringent than the "undue hardship" test under the ADA.[211]

"Key employees" are provided certain rights. If an employer believes reinstatement may be denied to a "key employee," that employer must give written notice to the employee at the time that the employee seeks leave that she qualifies as a "key employee."[212] If the notice cannot be given on the request for leave, it shall be given as soon as practicable after being notified of need for leave and in person or by certified mail. This notice should 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.[213] If the employer fails to provide such timely notice, it will lose its right to deny restoration even if a substantial and grievous economic injury will result from reinstatement.[214]

VII. Enforcement

If an employee believes that his or her FMLA rights have been violated, the employee may file a complaint with the local office of the Wage and Hour Division, Employment Standards Administration, Department of Labor by mail or by telephone.[215] The complaint must be filed within a reasonable time of when the employee discovers that his or her rights have been violated and no later than two years after the violation, three years if the violation was willful and wanton.[216]

The Secretary of Labor has investigative authority provided under §11(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 211(a)). The Act allots the Secretary of Labor subpoena power provided for under §9 of the Fair Labor Standards Act of 1938. An employer must be careful to make, keep, and preserve records pertaining to compliance with the FMLA. An employer is also required to submit books or records regarding compliance on an annual basis.[217] An employer or any plan, fund or program is not required to do so more than once a year, unless the Secretary of Labor has reasonable cause to believe that a violation of the FMLA or any regulation may exist or is investigating a charge.

An employee may also maintain a private right of action if an employer interferes with the exercise of that employee's rights under the FMLA.[218] It must be brought no later than two years after the date of the last event constituting the alleged violation for which the action is brought—extended in cases of a willful violation to three years.[219] When an employee alleges a deprivation of the substantive guarantees of the FMLA, the employee must establish, by a preponderance of the evidence, entitlement to the disputed leave.[220] To prevail on an FMLA interference claim, the employee must demonstrate that: (1) she was eligible for FMLA protection; (2) her employer was covered by the FMLA; (3) she was en-

titled to FMLA leave; (4) she provided sufficient notice of her intent to take leave; and (5) her employer denied her benefits to which she was entitled.[221] The employee need only demonstrate that her employer has denied her leave under the FMLA; discriminatory intent on the part of the employer is not an element of the claim.[222]

Moreover, for an employer to be liable to an individual employee under the FMLA the employee must show that she was prejudiced by the lack of compliance. For example, while the regulations require that an employer responsively answer questions from employees concerning the rights and responsibilities, interference will only be found where the employer's failure to answer requests for information prejudices the plaintiff.[223] Likewise, an employee is only prejudiced by a violation when she suffers damage. A plaintiff may not collect damages for periods of time in which she otherwise would have been unable to work for the employer.[224] A plaintiff is under the common law duty to mitigate any damages that may have resulted from a violation of the FMLA.[225]

If the employer seeks to show that it would have taken the alleged adverse action regardless of whether or not the employee took leave, it must present supporting evidence.[226] It is then the employee's burden to show that the adverse action occurred because she exercised the rights guaranteed to her under the FMLA. An employer is under no obligation to reinstate an employee who does not use leave "for the intended purposes of the leave." [227] An employer's "honest suspicion" that the employee was not using her medical leave for its intended purpose is enough to preclude an employee's substantive rights FMLA claim.[228]

In *Vail v. Raybestos Products Co.*,[229] the employer had an off-duty police officer follow an employee on leave to determine whether the employee was misusing her leave. During his "reconnaissance", the officer discovered that the employee was mowing the lawn for her husband's business, an abuse of her leave. The employee was subsequently terminated. While the Seventh Circuit indicated that "the use of an off-duty policy officer to follow an employee on leave may not be the preferred employer behavior," it also stated that "employers have certainly gone further."[230] The court found that the information received from the off duty officer gave the employer an "honest suspicion" that the employee was not using her leave "for the intended purpose." The *Vail* court appears to sanction the use of covert tactics to evaluate an employee's FMLA leave. Nevertheless, it must be noted that the regulations prefer communication between the employee and employer and that an employer rely on information (verbal, certifications etc.) received from an employee or employee representative.

Any employer who violates the Act is liable to any eligible employee for damages equal to the amount of any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of a violation, or in a case in which wages, salary, employment benefits, interest, or other compensation have not been denied or lost, any actual monetary losses the employee sustained as a direct result of the violation, such as the cost of providing care, up to a sum equal to twelve weeks of wages or salary for the employee and twenty-six weeks for any employee leaving to care for an injured service member.[231] Liquidated damages may be awarded in the amount equaling the sum of the above damages. However, the good faith of the employer may be taken into account when considering whether to award such damages.[232]

VIII. Anti-Retaliation

Not only can an employee maintain a cause of action for interference with the rights guaranteed to her under the FMLA, but an employee or any person may assert a cause of action against an employer who retaliates against that employee or person for exercising rights under the FMLA or opposing practices that impede the exercise of such rights. Section 105 of the Act provides that "it shall be unlawful for any employer to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under this title."[233] The Act further states, "it shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this title."[234] Specifically, the Act provides:

> It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual –
> (1) has filed any charge, or has instituted or caused to be instituted in any proceeding, under or related to this title;
> (2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this title; or
> (3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this title.[235]

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The Act specifies that its protections extend to any "individual" who opposes unlawful practices under the Act, or any practice the individual reasonably believes to be unlawful, not merely employees. There is no definition for reasonable belief.

Retaliation includes manipulation to prevent an employee or other person from asserting rights under the FMLA. Examples of manipulation include: (1) transferring employees from one worksite to another for the purpose of reducing worksites, or to keep worksites below the 50 employee threshold for employee eligibility under the Act; (2) changing the essential functions of the job in order to preclude the taking of leave; (3) reducing hours available to work in order to avoid employee eligibility. Retaliation could also include using the fact that an employee exercised her rights under the FMLA as a negative factor in hiring, promotions, or disciplinary actions.[236]

An individual retaliated against for asserting his or her FMLA rights may bring a private right of action. Similar to the Title VII method of proof and framework, the plaintiff can establish retaliation through the direct or indirect methods of proof.[237] To establish a *prima facie* case of retaliation under the direct method, a plaintiff is required to establish that: (1) she engaged in a protected activity; (2) the employer took an adverse employment action against her; and (3) there is a causal connection between the protected activity and the adverse employment action.[238] Basically, the employee must establish that her employer intended to punish her for requesting or taking leave.[239] Under the direct method "proof of discrimination is not limited to near admissions by the employer that it's decisions were based on a prescribed criterion," but rather, includes "circumstantial evidence which suggests discrimination albeit through a longer chain of inferences." [240]

Under the indirect method of proving retaliation, plaintiff may create a presumption of discrimination by establishing a *prima facie* case of discrimination. To do so, plaintiff must demonstrate: (1) she engaged in a statutorily protected activity; (2) she met her employer's legitimate expectations; (3) she suffered an adverse employment action; and (4) she was treated less favorably than similarly situated employees who did not engage in statutorily protected activity.[241] This presumption shifts the burden to the employer to produce a legitimate, non-invidious reason for its actions. If the employer satisfies its burden of production by rebutting the *prima facie* case of discrimination, the burden shifts back to the employee to show that the reasons are a pretext for discrimination.

Employees cannot waive, nor may an employer induce employees to waive, their prospective rights under the FMLA.[242] For example, employees or their bargaining units cannot trade the right to take FMLA leave against some other benefit offered by the employer. However, an employee may settle a past claim with an employer without approval of the Department of Labor or a court.[243] Furthermore, an employee is not prevented from voluntary and uncoerced acceptance (not as a condition of employment) of a light duty assignment while recovering from a serious health condition.[244]

IX. Conclusion

Covered employers must ensure that they revise their existing FMLA policies to account for changes in these regulations and disseminate the new policy to existing employees or make it available to employees. Employers should replace their original FMLA posters with the new posters and update their forms accordingly. Despite the DOL's best efforts to streamline and clarify the regulations to incorporate these new changes and court decisions interpreting the prior regulations, attorneys and employers should anticipate even more litigation in this area now that the scope of FMLA eligible employees has increased.

(Endnotes)

1 Public Law 110-181.

2 DOL Fact Sheet on the Final Regulations.

3 29 U.S.C. §2601.

4 29 C.F.R. §825.104(a).

5 *Id.*

6 29 C.F.R. §825.800.

7 29 C.F.R. §825.104(b); 29 U.S.C. §142(1).

8 29 C.F.R. §825.104(b).

9 29 C.F.R. §825.106; 29 C.F.R. §825.107; 29 C.F.R. §825.108; 29 C.F.R. §825.109.

10 29 C.F.R. §825.105(b) and (c).

11 29 C.F.R. §825.105(d).

12 29 C.F.R. §825.105(f).

13 29 C.F.R. §825.104(c).

14 29 C.F.R. §825.104(c)(1).

15 29 C.F.R. §825.104(c)(2).

[16] 29 U.S.C. §2601(2); 29 C.F.R. §825.110(a).

[17] 29 C.F.R. §825.110(b)(1).

[18] 29 C.F.R. §825.110(b)(2)(i).

[19] 29 C.F.R. §825.110(b)(2)(ii).

[20] 29 C.F.R. §825.110(c)(2).

[21] 29 C.F.R. §825.110(b)(4).

[22] 29 C.F.R. §825.110(d).

[23] 29 C.F.R. §825.110(e).

[24] 29 C.F.R. §825.111.

[25] 29 C.F.R. §825.111(a)(3).

[26] 29 C.F.R.§825.110(e).

[27] 535 U.S. 81 (2002).

[28] 29 C.F.R. §825.112(a).

[29] 29 C.F.R. §825.112(b).

[30] 29 C.F.R. §825.112(c).

[31] 29 C.F.R. §825.120(a)(2); 29 C.F.R. §825.121(a).

[32] *Id*.

[33] 29 C.F.R. §825.120(a)(2).

[34] 29 C.F.R.§825.120(a)(6).

[35] 29 C.F.R.§825.120(a)(3).

[36] 29 C.F.R. §825.121(a)(1).

[37] 29 C.F.R. §825.122(a).

[38] 29 C.F.R. §825.120(a)(3); 29 C.F.R. §825.201.

[39] 29 C.F.R. §825.122(b).

[40] 29 C.F.R. §825.122(c)

[41] 42 U.S.C. §12101.

[42] 29 U.S.C. §2601.

[43] Fed.Reg. Vol. 73, No. 222/Monday, November 17, 2008/Rules and Regulations at 67945.

[44] 29 C.F.R. 825.800.

[45] 29 C.F.R. 825.113(d).

[46] 29 C.F.R. §825.113(c).

[47] 29 C.F.R. §825.800.

[48] 29 C.F.R. §825.119.

[49] 29 C.F.R. §825.119(b).

[50] 29 C.F.R. §825.114.

[51] 29 C.F.R. §825.113(b).

[52] 29 C.F.R. §825.125.

[53] 29 C.F.R. §825.115(a)(1) and (2).

[54] 29 C.F.R. §825.115(a)(1).

[55] 29 C.F.R. §825.115(a)(5).

[56] 29 C.F.R. §825.115(a)(3).

[57] 29 C.F.R. §825.115(a)(4).

[58] 29 C.F.R. §825.112(a)(4).

[59] 29 C.F.R. §825.123(a).

[60] 29 C.F.R. §825.115(b).

[61] 29 C.F.R. §825.120(a)(4).

[62] *Id*.

[63] 29 C.F.R. §825.120(a)(5).

[64] 29 C.F.R. §825.115(c).

[65] *Id*.

[66] 29 C.F.R. §825.120(d).

[67] 29 C.F.R. §825.115(e).

[68] 29 C.F.R. §825.115(f).

[69] *Id*.

[70] U.S. Dept. of Labor, Employment Standards Administration, Wage and Hour Division, Fact Sheet #28A: The Family and Medical Leave Act Military Family Leave Entitlements.

[71] 29 C.F.R. §825.126(b)(2)(i).

[72] 29 C.F.R. §825.122(d).

[73] 29 C.F.R. §825.122(j).

[74] 29 C.F.R. §825.126(a).

[75] 29 C.F.R. §825.127.

[76] 29 C.F.R. §825.200(a).

[77] 29 C.F.R. §825.200(f).

[78] 29 C.F.R. §825.200(b).

[79] 29 C.F.R. §825.200(d) and (e).

[80] 29 C.F.R. §825.127(c)(1).

[81] 29 C.F.R. §825.200(g).

[82] 29 C.F.R. §825.127(d).

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[83] 29 C.F.R. §825.200(h).

[84] *Id*.

[85] 29 C.F.R. §825.202.

[86] 29 C.F.R. §825.202(b).

[87] 29 C.F.R. §825.202(d).

[88] 29 C.F.R. §825.202(b)(1).

[89] 29 C.F.R. §825.202(b)(2).

[90] 29 C.F.R. §825.120(b); 29 C.F.R. §825.121(b)..

[91] 29 C.F.R. §825.203.

[92] 29 C.F.R. §825.204.

[93] 29 C.F.R. §825.204(c) and (d).

[94] 29 C.F.R. §825.204(e).

[95] 29 C.F.R. §825.205.

[96] 29 C.F.R. §825.205(a)(2).

[97] 29 C.F.R. §825.205(b)(1).

[98] 29 C.F.R. §825.205(b)(2).

[99] 29 C.F.R. §825.205(b)(3).

[100] 29 C.F.R. §825.205(c).

[101] 29 C.F.R. §825.206.

[102] 29 C.F.R. §825.207(a).

[103] *Id*.

[104] 29 C.F.R. §825.207(b).

[105] 29 C.F.R. §825.207(c).

[106] 29 C.F.R. §825.207(d) and (e).

[107] 29 C.F.R. §825.207(e).

[108] *Hendricks v. Compass Group, USA, Inc.*, 496 F.3d 803 (7th Cir. 2007)("there is no such thing as 'FMLA light duty'").

[109] 29 C.F.R. §825.207(f).

[110] 29 C.F.R. §825.209.

[111] 29 C.F.R. §825.210.

[112] 29 C.F.R. §825.212.

[113] 29 C.F.R. §825.212(c).

[114] 29 C.F.R. §825.213.

[115] 29 C.F.R. §825.302.

[116] 29 C.F.R. §825.302(e).

[117] 29 C.F.R. §825.302 (a) and (b).

[118] 29 C.F.R. §825.301(b); 29 C.F.R. §825.302(c).

[119] *De La Rama v. Illinois Dept. Human Services*, 541 F.3d 681, 687 (7th Cir. 2008).

[120] *Collins v. NTN Bower Corp.*, 272 F.3d 1006, 1008 (7th Cir. 2001).

[121] *De La Rama*, *supra* n.119, 541 F.3d at 687.

[122] *Andonissamy v. Hewlett-Packard Company*, 547 F.3d 841, 852 (7th Cir. 2008).

[123] 29 C.F.R. §825.302(c)

[124] 29 C.F.R. §825.302(d); *See also*, 29 C.F.R. §825.700

[125] *Id*.

[126] 29 C.F.R. §825.305(a).

[127] 29 C.F.R. §825.309.

[128] 29 C.F.R. §825.305(b).

[129] *Id*.

[130] 29 C.F.R. §825.305(d).

[131] *Turner v. Adidas Promotional Retail Operations, Inc.,* 07 C 2511, 2009 WL 901487 (N.D. Ill. Mar. 31, 2009)(Pallmeyer, J.).

[132] 29 C.F.R. §825.306(a)(1)-(5). Additionally, if an employee requests leave on an intermittent or reduced scheduled basis for planned medical treatment of the employee or a covered family member's serious health condition the certification should contain information sufficient to establish medical necessity for such leave and duration; an estimate of the frequency and duration of episodes of incapacity; and a statement that such leave is medically necessary to care for the family member. 29 C.F.R. §825.306(6)-(8). Various forms are provided for such certifications at the Department of Labor website. 29 C.F.R. §825.306(b). Generally, the notice requirements for intermittent or reduced schedule leave will be the same and an employee will be seen to invoke her rights under the FMLA if the employer is aware that leave is needed, regardless of whether the specific type of leave is requested. *See, Ridings v. Riverside Medical Center*, 537 F.3d 755 (7th Cir. 2008). However, this may be a fact dependent analysis.

[133] 29 C.F.R. §825.305(c); *Darst v. Interstate Brands Corporation*, 512 F.3d 903, 910 (7th Cir. 2008).

[134] *Smith v. Hope School*, 560 F.3d 694 (7th Cir. 2009).

[135] 29 C.F.R. §825.307.

[136] 29 C.F.R. §825.308. This section sets forth the various time limits associated with requesting recertification.

[137] 29 C.F.R. §825.306(d).

[138] 29 C.F.R. §825.311(a).

[139] 29 C.F.R. §825.311(b).

[140] 29 C.F.R. §825.311(c).

[141] 29 C.F.R. §825.306(c); *See also*, 29 C.F.R. §825.701(a) (for interaction of FMLA with state laws).

[142] 29 C.F.R. §825.306(c).

[143] 29 C.F.R. §825.304. The regulations give examples of penalties an employee may face. When the leave for FMLA is foreseeable and the employee fails to give thirty day notice in advance with no reasonable excuse, the employer may delay FMLA coverage until 30 days after the date the employee provides notice. However, the need for the leave and the approximate date leave must have been clearly foreseeable to the employee thirty days in advance of the leave. When the need for FMLA leave is foreseeable fewer than thirty days in advance and an employee fails to give notice as soon as practicable under the particular facts and circumstances, the extent to which an employer may delay FMLA coverage for leave depends on the facts of the particular case. For example, if an employee reasonably should have given an employer two week's notice, but instead only provide one week notice, then the employer may delay FMLA protective leave for one week. The same goes for unforeseeable leave.

[144] 29 C.F.R. §825.301(c).

[145] 29 C.F.R. §825.300(a).

[146] *Id*.

[147] 29 C.F.R. §825.300(a)(2).

[148] 29 C.F.R. §825.300(a)(4).

[149] 29 C.F.R. §825.300(a)(3).

[150] 29 C.F.R. §825.300(a)(3). The regulations provide a sample General Notice form in Appendix C.

[151] 29 C.F.R. §825.300(a)(4). Prototypes of such notices are available from office of the Wage and Hour Division or at http://www.wagehour.dol.gov.

[152] 29 C.F.R. §825.300(b)(1).

[153] 29 C.F.R. §825.300(b)(2).

[154] 29 C.F.R. §825.300(b)(1).

[155] 29 C.F.R. §825.300(b)(1) and (2). The regulations provide a sample Eligibility Notice form in Appendix D.

[156] 29 C.F.R. §825.300(b)(3).

[157] *See Brown v. Nutrition Management Services*, No. 06-2034, 2009 U.S. Dist. LEXIS 4199, (E.D. Pa. Jan. 21, 2009). The court awarded liquidated damages in the amount of back pay and pre-judgment interest, finding that an employer did not have a good faith belief that employee was ineligible for FMLA leave as it only engaged in a cursory review of the employee's eligibility. Although decided under a prior framework, the rationale is still applicable under the new regulations.

[158] *Peters v. Gilead Sciences*, 533 F.3d 594 (7th Cir. 2008). The court found that although the employee did not qualify for FMLA leave, he could pursue a claim of promissory estoppel against the employer given that the leave policy contained various representations upon which he could have reasonably relied.

[159] 29 C.F.R. §825.300(c)(1). The regulations provide a sample Rights and Responsibilities Notice in Appendix D.

[160] 29 C.F.R. §825.300(c)(1)(i)-(vii).

[161] 29 C.F.R. §825.300(c)(2) and (3).

[162] 29 C.F.R. §825.300(c)(4). For example, if the initial leave was paid leave and the subsequent leave period would be unpaid leave, the employer may need to give notice of the arrangements for making premium payments.

[163] 29 C.F.R. §825.300(c)(5).

[164] 29 C.F.R. §825.301(c).

[165] 29 C.F.R. §825.300(d).

[166] 29 C.F.R. §825.300(d)(1).

[167] 29 C.F.R. §825.301(a). Case law suggests that an employer may obtain information through other means under certain circumstances, such as if it has a suspicion that an employee is fraudulently requesting leave. This is addressed further in section IX.

[168] 29 C.F.R. §825.301(d)(1).

[169] 29 C.F.R. §825.300(d)(2)-(6).

[170] 29 C.F.R. §825.300(d)(6).

[171] 29 C.F.R. §825.300(d)(6).

[172] 29 C.F.R. §825.300(d)(5).

[173] 29 C.F.R. §825.300(e).

[174] 29 C.F.R. §825.214; *Vail v. Raybestos Products Co.*, 533 F.3d 904, 909 (7th Cir. 2008).

[175] *Kohls v. Beverly Enterprises Wisconsin, Inc.*, 259 F.3d 799, 804 (7th Cir. 2001).

[176] *Diaz v. Ft. Wayne Foundry Corp.*, 131 F.3d 711, 713 (7th Cir. 1997).

[177] *Id*. at 713.

[178] *Breneisen v. Motorola, Inc.*, 512 F.3d 972, 978 (7th Cir. 2008).

[179] 29 C.F.R. §825.214.

[180] 29 C.F.R. §825.215(a).

[181] *Id*.

[182] *Breneisen, supra* n.178, 512 F.3d at 977.

[183] 29 C.F.R. §825.215(e)(1)-(3).

[184] *Breneisen, supra* n.178, 512 F.3d at 977.

[185] 29 C.F.R. §825.215(e)(4).

[186] 29 C.F.R. §825.215(f).

[187] 29 C.F.R. §825.215(c)(2).

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[188] 29 C.F.R. §825.215(c)(1).

[189] 29 C.F.R. §825.215(c) and (d).

[190] 29 C.F.R. §825.215(c)(2).

[191] 29 C.F.R. §825.215(d).

[192] 29 C.F.R. §825.215(d)(1).

[193] *Id*.

[194] *Id*.

[195] 29 C.F.R. §825.215(d)(2).

[196] 29 C.F.R. §825.215(d)(3).

[197] 29 C.F.R. §825.215(d)(4).

[198] *Id*.

[199] 29 C.F.R. §825.215(b).

[200] 29 C.F.R. §825.216(c).

[201] 29 C.F.R. §825.215(a).

[202] *Simpson v. Office of the Chief Judge of Circuit Court of Will County*, 559 F.3d 706, 712 (7th Cir. 2009). In *Simpson*, the employee's poor work performance (including inappropriate supervision of subordinates, fraudulent billing practices etc.), discovered in an internal audit released while the employee was on sick leave, constituted legitimate non pretextual reason for her termination and denial of reinstatement.

[203] 29 C.F.R. §825.216(a)(1)-(3).

[204] 29 C.F.R. §825.216(a)(1).

[205] *Breneisen, supra* n. 178, 512 F.3d at 978.

[206] 29 C.F.R. §825.216(d).

[207] *Vail v. Raybestos Products Co.*, 533 F.3d 904 (7th Cir. 2008).

[208] 29 C.F.R. §825.217(a).

[209] 29 C.F.R. §825.218(a).

[210] 29 C.F.R. §825.218(c).

[211] 29 C.F.R. §825.218(d).

[212] 29 C.F.R. §825.219(a).

[213] 29 C.F.R. §825.219(b).

[214] 29 C.F.R. §825.219(a).

[215] 29 C.F.R. §825.401(a).

[216] 29 C.F.R. §825.401(b).

[217] 29 C.F.R. §825.500.

[218] *Darst v. Interstate Brands Corporation*, 512 F.3d 903, 910 (7th Cir. 2008). (Court finds that, although an employer's contact with a health care provider of the plaintiff may be unauthorized and prohibited by other statutes, the FMLA provides no remedy unless the employer interfered, restrained, or denied plaintiff's exercise of his or her rights under the FMLA.)

[219] 29 C.F.R. §825.400(b).

[220] *Darst, supra* n.218, 512 F.3d at 908.

[221] *Smith, supra* n. 134, 560 F.3d at 699.

[222] *Id*.

[223] *Ridings, supra* n. 132, 537 F.3d at 764.

[224] *Franzen v. Ellis Corporation*, 543 F.3d 420 (7th Cir. 2008). After accident, which lead to leave, plaintiff admitted that he was unwilling or unable to work again. As such, employer's violation of FMLA caused no damage to the plaintiff.

[225] *Id*. at 430.

[226] *Breneisen, supra* n.178, 512 F. 3d at 978.

[227] *Crouch v. Whirlpool Corporation*, 447 F.3d 984, 986 (7th Cir. 2006).

[228] *Id*.

[229] *Vail, supra* n. 207.

[230] *Id*., 533 F.3d at 909.

[231] 29 C.F.R. §825.400(c).

[232] *Id*.

[233] 29 U.S.C.§2615(a)(1).

[234] 29 U.S.C. §2615(a)(2).

[235] 29 U.S.C. §2615(b).

[236] *Breneisen, supra* n. 178, 512 F.3d at 978-79; 29 C.F.R. §825.220(c).

[237] *Cracco v. Vitran Express, Inc.*, 559 F.3d 625, 633 (7th Cir. 2009).

[238] *Id*.

[239] *Smith v. Hope School*, 560 F.3d 694, 702 (7th Cir. 2009).

[240] *Cracco*, 559 F.3d at 633, *citing Luks v. Baxter Health Care Corp*., 467 F.3d 1049, 1052 (7th Cir. 2006).

[241] *Id*. at 634-35.

[242] 29 C.F.R. §825.220(d).

[243] *Id*.

[244] *Id*.