

FMLA Basics

Leonard B. Segal
Seiler Schindel Segal PLLC
Minneapolis

Minnesota CLE's Copyright Policy

Minnesota Continuing Legal Education wants practitioners to make the best use of these written materials but must also protect its copyright. If you wish to copy and use our CLE materials, you must first obtain permission from Minnesota CLE. Call us at 800-759-8840 or 651-227-8266 for more information. If you have any questions about our policy or want permission to make copies, do not hesitate to contact Minnesota CLE.

All authorized copies must reflect Minnesota CLE's notice of copyright.

MINNESOTA CLE is Self-Supporting

A not for profit 501(c)3 corporation, Minnesota CLE is entirely self-supporting. It receives no subsidy from State Bar dues or from any other source. The only source of support is revenue from enrollment fees that registrants pay to attend Minnesota CLE programs and from amounts paid for Minnesota CLE books, supplements and digital products.

© Copyright 2018

MINNESOTA CONTINUING LEGAL EDUCATION, INC.

ALL RIGHTS RESERVED

Minnesota Continuing Legal Education's publications and programs are intended to provide current and accurate information about the subject matter covered and are designed to help attorneys maintain their professional competence. Publications are distributed and oral programs presented with the understanding that Minnesota CLE does not render any legal, accounting or other professional advice. Attorneys using Minnesota CLE publications or orally conveyed information in dealing with a specific client's or other legal matter should also research original and fully quoted sources of authority.

TABLE OF CONTENTS

I.	Background	1
II.	Employer Coverage	1
III.	Employee Coverage	1
IV.	Qualifying Reasons for FMLA Leave	2
V.	Amount of Leave	2
VI.	Calculation of the 12-Month Period.....	3
VII.	Reinstatement.....	3
VIII.	FMLA Leave Usually is Unpaid	4
IX.	Parental Leave Under the FMLA.....	5
X.	Leave Due to a Serious Health Condition.....	5
XI.	Intermittent Leave/Reduced Schedule.....	9
XII.	Qualifying Exigency Leave.....	9
XIII.	Leave to Care for a Covered Servicemember	10
XIV.	Benefits While on FMLA Leave	11
XV.	Employer Notice Requirements.....	12
XVI.	Employee Notice Requirements.....	14
XVII.	Recordkeeping.....	15

* These materials are provided for educational and informational purposes only. They are not intended to constitute legal advice in any particular situation.

FMLA Basics

Prepared by Leonard B. Segal

I. Background

The Family and Medical Leave Act (“FMLA”) was enacted in 1993. Pursuant to the FMLA, eligible employees who work for a covered employer are allowed to take unpaid time off from work for any qualifying reason. 29 U.S.C. §2601, et seq. The National Defense Authorization Act (“NDAA”) for 2008 amended the FMLA to add FMLA leave for certain military-related reasons, which provisions were expanded by the NDAA for 2010.

II. Employer Coverage

Private sector employers (either alone or as an integrated employer with another entity/entities) with 50 or more employees in 20 or more calendar workweeks during the current or preceding calendar year are covered by the FMLA. Public agencies and public and private elementary and secondary schools are covered employers without regard to the number of employees. 29 C.F.R. §§ 825.104(a), 825.105 & 825.600.

Practice Pointer: When analyzing a potential FMLA issue, start by determining whether the employer is covered by the FMLA. For those employers that are not covered by the FMLA, it is a good idea to review the employer’s handbook or other policy manual to determine whether it may have nonetheless offered to provide FMLA benefits.

III. Employee Coverage

Not all employees are eligible for FMLA leave. To be eligible, an employee must have:

- A. Worked for a covered employer for at least 12 months **as of the date when the FMLA leave begins**. 29 C.F.R. § 825.110(a)(1). Note that the 12 month period does **not** need to be consecutive. When determining whether an employee meets the 12-month threshold, an employer does not have to count time worked prior to a break in service of seven years or more. **Exception:** If the break in service was due to the employee fulfilling Uniformed Services Employment and Reemployment Rights Act (“USERRA”) service obligations or the employer stated, in writing, its intent to rehire the employee following a break in service. 29 C.F.R. § 825.110 (b).
- B. Worked for the covered employer for at least 1,250 hours during the 12-month period **immediately preceding** the beginning of the FMLA leave. 29 C.F.R. § 825.110(a)(2). Note special hour requirements for airline flight crew employees. 29 C.F.R. § 825.801.
- C. Worked at a site where the employer has 50 or more employees within a 75-mile radius (measured by surface miles). This determination is made **at the time the employee gives notice** of the need for FMLA leave. 29 C.F.R. §§ 825.110(a)(3) and (e) & 825.111.

Practice Pointer: After determining an employer is covered by the FMLA, the next step is to determine whether the employee meets the employee eligibility requirements. Again, review any applicable employee handbook or policy manual.

IV. Qualifying Reasons for FMLA Leave

- A. For the birth or adoption of a child or placement of a child in foster care (this includes leave for prenatal care and for incapacity due to pregnancy), and to care for a newborn child.
- B. For the employee's own serious health condition that makes the employee unable to perform the functions of his/her position.
- C. To care for a family member (parent, spouse or child) with a serious health condition.
- D. For certain military-related leaves.
 - 1. Qualifying exigency leave.
 - 2. Military caregiver leave.

29 C.F.R. §§ 825.100(a) & 825.112-825.127.

V. Amount of Leave

The FMLA allows eligible employees to take up to 12 workweeks of unpaid leave within a 12-month period. **Exception:** An eligible employee who takes FMLA leave to care for a covered servicemember with a serious illness or injury ("military caregiver leave") is allowed 26 weeks of leave within a 12-month period beginning with the first day of such leave. During the 12-month period within which an eligible employee takes military caregiver leave, an employee is limited to a combined total of 26 workweeks of FMLA leave for all purposes. 29 C.F.R. §§ 825.200 & 825.127(e)(1).

Note Regarding Holidays: If a holiday occurs during a full week of FMLA leave, the holiday has no effect on counting the amount of FMLA time used. The week is counted as a full week of FMLA leave. If, however, an employee uses FMLA leave in increments of less than a full week, then the holiday counts as FMLA leave only if the employee was otherwise scheduled and expected to work on the holiday. Similarly, if the employer closes the business for one week or more, the days the employer is closed should not be counted as FMLA leave. 29 C.F.R. § 825.200(h).

Note Regarding an Employee Who Meets FMLA Eligibility Requirements While on Leave: If an employee is on a non-FMLA leave during which time he/she satisfies the above eligibility requirements, then any leave taken for an FMLA-qualifying reason **after** becoming eligible is considered FMLA leave. 29 C.F.R. § 825.110(d).

VI. Calculation of the 12-Month Period

The FMLA provides four possible 12-month periods during which the 12 weeks of FMLA must be taken. 29 C.F.R. §825.200(b). If an employer does not specify the 12-month period it uses, then the period that is most beneficial to an eligible employee will be used. 29 C.F.R. §825.200(e). The four possible 12-month periods are:

- a. The Calendar Year;
- b. Any fixed 12-month period, such as a fiscal year or a year starting on the employee's anniversary date;
- c. The 12-month period measured forward from the date an employee's first FMLA leave begins; or
- d. A rolling 12-month period measured backward from the date an employee uses FMLA leave.

Military Caregiver Leave: See mandatory 12-month period in Section XIII below.

VII. Reinstatement

Upon completion of FMLA leave, an employee is entitled to return to the same position he/she held when the FMLA leave began or to an equivalent job with equivalent pay, benefits and terms and conditions of employment, including privileges, perquisites and status. This is true even if the employee has been replaced or his/her position was restructured to accommodate the absence. 29 C.F.R. §§ 825.214 & 825.215. **Exception:** If an employee would not have been employed at the time of reinstatement (he/she was selected for and laid off during the FMLA leave), then reinstatement is not required. 29 C.F.R. § 825.216.

Practice Pointer: If an employee is unable to return to work following his/her FMLA leave, or otherwise suffers from a disability, an employer must be sure to comply with the Americans with Disabilities Act, Minnesota Human Rights Act, and any other applicable law.

Certain Key Employees May be Denied Reinstatement: An employer may deny job restoration to certain key employees if necessary to prevent substantial and grievous economic injury to the operations of the employer. 29 C.F.R. § 825.216(b). The key is whether restoration of the employee will cause substantial and grievous economic injury to the operations of the employer, **not** whether the absence of the employee will cause such substantial and grievous injury. 29 C.F.R. §825.218. A **key employee** is a salaried FMLA-eligible employee who is among the highest paid 10 percent of all employees – salaried and non-salaried, eligible and ineligible - employed by the employer within 75 miles of the employee's worksite. 29 C.F.R. §§ 825.217 & 825.102.

An employer who believes that reinstatement may be denied to a key employee must give written notice to the employee **at the time the employee gives notice of the need for**

FMLA leave (or when FMLA leave commences, if earlier) that he or she qualifies as a key employee. At the same time, the employer also must inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employer should determine that substantial and grievous economic injury to the employer's operations will result if the employee is reinstated from FMLA leave. If such notice cannot be given immediately because of the need to determine whether the employee is a key employee, it shall be given as soon as practicable after being notified of a need for leave (or the commencement of leave, if earlier). 29 C.F.R. §825.219(a).

Employers who seek to deny job restoration to a key employee need to tread **very carefully** and must comply with all of the required notice requirements. An employer that fails to provide timely notice will lose its right to deny restoration, even if substantial and grievous economic injury will result from reinstatement. 29 C.F.R. §825.219(a).

As soon as an employer makes a good faith determination that substantial and grievous economic injury will result if a key employee who has given notice of the need for FMLA leave or who is using FMLA leave is reinstated, the employer must notify the employee in writing of its determination, that it cannot deny FMLA leave, and that it intends to deny restoration to employment on completion of the FMLA leave. Ordinarily, an employer should be able to give this notice, which must be provided in person or by certified mail, prior to the employee starting leave. The notice must explain the basis for the employer's finding that substantial and grievous economic injury will result, and, if leave has commenced, must provide the employee a reasonable time within which to return to work. 29 C.F.R. §825.219(b).

If an employee on leave does not return to work in response to the employer's notification of intent to deny restoration, the employee continues to be entitled to maintenance of health benefits and the employer may not recover its cost of health benefit premiums. A key employee's rights under the FMLA continue unless and until the employee either gives notice that he or she no longer wishes to return to work or the employer actually denies reinstatement at the conclusion of the leave period. 29 C.F.R. §825.219(c).

Even if notices are properly provided, an employee is entitled to request reinstatement at the end of the leave period even if he/she did not return to work in response to the employer's notice. The employer must then again determine whether there will be substantial and grievous economic injury if the employee is reinstated. If it is determined that substantial and grievous economic injury will result, the employer must notify the employee in writing (in person or by certified mail) of the denial of restoration. 29 C.F.R. §825.219(d).

VIII. FMLA Leave Usually is Unpaid

FMLA leave usually is unpaid. An employer may, however, require employees to substitute accrued paid leave for unpaid FMLA leave. If an employer does not have such a requirement, then an eligible employee can ordinarily choose whether to substitute accrued paid time off for unpaid FMLA leave. 29 C.F.R. § 825.207. **Caution:** When the

serious health condition is due to a work injury, this gets more complicated. *See* 29 C.F.R. §825.207(e).

If an employee chooses, or if the employer requires, use of paid time off while on FMLA leave, an employer may require employees to follow its normal policies and procedures for the use of such time, provided the employer informed employees of those policies and procedures. If an employee does not follow such policies and procedures, the employer does not need to provide paid time off, although it must still allow an employee to take unpaid FMLA leave. 29 C.F.R. § 825.207.

Practice Pointer: If an employer intends to require the use of paid time off, it should make that clear in its FMLA policy and should be sure that doing so will not violate any other applicable law. In addition, except as may be prohibited by law, an employer should draft company policies so that FMLA and any other leave (such as the twelve weeks of leave under Minnesota’s Pregnancy and Parenting Leave Act) run concurrently. *See* Minn. Stat. § 181.943.

Practice Pointer: The FMLA regulations specifically allow an employer to deduct from an exempt employee’s salary for FMLA leave without losing the exemption under the Fair Labor Standards Act. 29 C.F.R. § 825.206.

IX. Parental Leave Under the FMLA

An eligible employee can take FMLA leave for the birth or adoption of a child, for the placement of a child in foster care, or to care for a newborn child. Parental leave under the FMLA is available to both women and men. The leave may start at any time following the birth or placement of the child, but must be completed within 12 months after the birth or placement. Employees can take FMLA leave for related pre-placement activities. 29 C.F.R. §§ 825.120 & 825.121.

Where spouses are employed by the same employer, the FMLA provides that they can be limited to a combined total of 12 workweeks of FMLA parental leave or to care for an employee’s parent with a serious health condition. 29 C.F.R. §§ 825.120(a)(3), 825.121(a)(3) & 825.201(b). ***Caution:*** This may violate laws against marital status discrimination, including the Minnesota Human Rights Act. As such, the safest approach in Minnesota (and other jurisdictions that prohibit marital status discrimination) is to allow each spouse to take 12 weeks of FMLA parental leave.

X. Leave Due to a Serious Health Condition

An eligible employee can take FMLA leave due to the employee’s own serious health condition or to care for an immediate family member (parent, spouse or child) with a serious health condition. It includes both physical and psychological care and such things as transporting the family member to a health care provider. 29 C.F.R. § 825.124.

Parent means a biological, adoptive, step or foster parent, or an individual who stood *in loco parentis* to an employee. It does **not** include parents-in-law. 29 C.F.R. §§ 825.102 & 825.122(c).

Child means “a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or 18 or older and ‘incapable of self-care because of a mental or physical disability’ at the time that FMLA leave is to commence.” “Incapable of self-care” means the individual requires active assistance or supervision to provide daily self-care in several of the “activities of daily living” or “instrumental activities of daily living.” Activities of daily living include caring for one’s grooming and hygiene, bathing, dressing and eating. 29 C.F.R. § 825.102. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc. 29 C.F.R. §§ 825.102 & 825.122(d).

In loco parentis means people who have “day-to-day responsibilities to care for and financially support a child or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.” 29 C.F.R. §§ 825.102 & 825.122(d)(3).

Spouse means “the other person with whom an individual entered into marriage as defined or recognized under state law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition includes an individual in a same-sex or common law marriage that either: (1) Was entered into in a State that recognizes such marriages; or (2) If entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.” 29 C.F.R. §§ 825.102 & 825.122(b). This is referred to as the “place of celebration” rule.

Practice Pointer: An employer may require that an employee requesting FMLA leave to care for a family member provide reasonable documentation, such as a child’s birth certificate, a court document, or even a statement from the employee, showing the family relationship. 29 C.F.R. § 825.122(k).

A. Serious Health Condition

A “serious health condition” means an illness, injury, impairment or physical or mental condition that involves inpatient care or continuing treatment by a health care provider. 29 C.F.R. § 825.113.

1. Inpatient care means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity or any subsequent treatment in connection with such inpatient care. 29 C.F.R. § 825.114. “Incapacity” means inability to work, attend school or perform other regular daily activities due to the

serious health condition, treatment therefore, or recovery therefrom. 29 C.F.R. § 825.113(b).

2. Continuing treatment by a health care provider means any one or more of the following (29 C.F.R. § 825.115):

a. 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 either:

- i. Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances beyond the employee's control prevent the follow-up visit, 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
- ii. Treatment by a healthcare provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.

The requirement of treatment by a health care provider means an in person visit. Also, the first (or only) in-person treatment visit must take place within seven days of the first day of incapacity. Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period shall be determined by the health care provider.

b. Any period of incapacity due to pregnancy or prenatal care.

c. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition has the following characteristics:

- i. Requires periodic visits (at least twice per year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;
- ii. Continues over an extended period of time (including recurring episodes of a single underlying condition); and
- iii. May cause episodic rather than a continuous period of incapacity (such as asthma, diabetes, epilepsy, etc.).

d. A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active

treatment by, a health care provider. Examples include Alzheimer's Disease, a severe stroke, or the terminal stages of a disease.

- e. Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for:
 - i. Restorative surgery after an accident or injury, or
 - ii. A condition that would likely result in a period of incapacity of more than three consecutive, full calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis).

Employers may – and should - obtain a medical certification from a health care provider for requested FMLA leave due to a serious health condition. The Department of Labor provides a sample medical certification form on its website at www.dol.gov. 29 C.F.R. § 825.305. Health care providers include medical doctors and others who are capable of providing health care services such as nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law. 29 C.F.R. § 825.125.

Absences attributable to incapacity due to pregnancy or prenatal care or due to a chronic serious health condition qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive, full calendar days. For example, an employee with asthma may be unable to report to work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. As another example, an employee who is pregnant may be unable to report to work because of severe morning sickness. 29 C.F.R. § 825.115(f).

B. NOT Serious Health Conditions

The common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraines, routine dental or orthodontia problems, periodontal disease, etc., are not serious health conditions and do not qualify for FMLA leave, unless there are complications.

Routine physical examinations, eye examinations, and dental examinations do not qualify for FMLA leave.

A regimen of 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 a visit to a health care provider, is

not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not serious health conditions unless inpatient hospital care is required or unless complications develop.

29 C.F.R § 825.113(c) & (d).

XI. Intermittent Leave/Reduced Schedule

FMLA leave taken due to one's own serious health condition, the serious health condition of a spouse, parent or child, or to care for a covered servicemember may be taken on an intermittent or part-time basis if there is a medical need that can best be accommodated through an intermittent or reduced work schedule. 29 C.F.R. § 825.202. An employer may require a medical certification of the medical need for the intermittent or part-time schedule. 29 C.F.R. § 825.202(b). Intermittent leave or a reduced schedule also may be taken due to a qualifying exigency. **If the employer agrees**, intermittent leave or a reduced schedule also may be available after the birth of a healthy newborn child or after the placement of a healthy child for adoption or foster care. 29 C.F.R § 825.202; 29 C.F.R. §§ 825.120(b) and 825.121(b).

An employee who needs leave on an intermittent basis or to work a reduced schedule due to planned medical treatments must make a reasonable effort to schedule such treatments so as not to disrupt unduly the employer's operations. 29 C.F.R. § 825.203. For intermittent leave or a reduced schedule that is foreseeable based on planned medical treatments, or for FMLA parental leave, an employer may transfer the employee temporarily to an available position of equivalent pay and benefits where the required schedule can be better accommodated. The alternative position for these purposes does not have to have equivalent duties. 29 C.F.R. § 825.204.

Employees must account for intermittent or reduced schedule leave using an increment no greater than the shortest period of time that the employer uses to account for the use of other forms of leave, provided that it is not greater than one hour. 29 C.F.R. § 825.205(a). Count the amount of leave taken against the 12 workweeks in fractions of a week based on the employee's regular weekly schedule. For example, an employee who regularly works 40 hours per week who takes eight hours of leave has used 1/5 of a week of FMLA leave. 29 C.F.R. § 825.205(b).

XII. Qualifying Exigency Leave

Eligible employees may take FMLA leave for a qualifying exigency involving the employee's spouse, child (of any age) or parent who is on covered active duty in a foreign country (or has been notified of an impending call or order to covered active duty in a foreign county) in the Armed Forces. 29 C.F.R. § 825.126.

Qualifying exigencies consist of the following:

- Short-notice deployment
- Military events and related activities
- Childcare and school activities
- Financial and legal arrangements
- Counseling
- Rest and Recuperation
- Post-deployment activities
- Parental care
- Additional activities if agreed to by the employer

XIII. Leave to Care for a Covered Servicemember

Eligible employees may take FMLA leave to care for a covered servicemember with a serious illness or injury. An eligible employee is one who is the spouse, son, daughter, parent, or next of kin of the covered servicemember. 29 C.F.R. §825.127. An employee taking leave to care for a covered servicemember is entitled to 26 workweeks of leave during a 12-month period to care for the injured servicemember. 29 C.F.R. § 825.127(e). The 12-month period begins on the first day of the leave and ends 12 months from that date, regardless of the 12-month period normally used by the employer to calculate FMLA leave. 29 C.F.R. § 825.127(e)(1).

A **covered servicemember** means (i) a current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness; or (ii) a covered veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness and who was a member of the Armed Forces (including a member of the National Guard or Reserves) and was discharged or released under conditions other than dishonorable at any time during the five year period prior to the date on which the eligible employee takes FMLA leave to care for the covered veteran. 29 C.F.R. § 825.127(b).

Serious injury or illness for the purposes of military caregiver leave is different than the definition of a “serious health condition.” “ Serious injury or illness” means (i) in the case of a current member of the Armed Forces, including a member of the National Guard or Reserves, means an injury or illness that was incurred by the covered servicemember in the line of duty on active duty in the Armed Forces or that existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces, and that may render the member medically unfit to perform the duties of the servicemember's office, grade, rank, or rating, and (ii) in the case of a covered veteran, means an injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) and manifested itself before or after the member became a veteran, and is:

- a. A continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; or
- b. A physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability ("VASRD") Rating of 50 percent or greater, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or
- c. A physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or
- d. An injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

29 C.F.R. § 825.127(c)

XIV. Benefits While on FMLA Leave

An employer must maintain group health plan benefits for an employee on FMLA leave on the same terms as if the employee continued to work, including any family coverage. 29 C.F.R. §§ 825.209 & 825.210. Except as required by COBRA, an employer's obligation to maintain group health benefits will cease if:

- The employment relationship would have ended even if the employee had not taken FMLA leave;
- The employee informs the employer of his/her intent not to return to work at the end of the FMLA leave;
- The employee fails to return from FMLA leave or continues on leave after exhausting his or her FMLA leave entitlement; or
- The employee's premium payment is more than 30 days late and the employer has given the employee written notice in accordance with 29 C.F.R. § 825.212.

In certain circumstances, if an employee fails to return to work following his/her FMLA leave or fails to work for at least 30 calendar days following the conclusion of his/her FMLA leave, an employer may be able to recover its share of the health insurance premiums it paid during employee's FMLA leave. For details, *see* 29 C.F.R. §§ 825.212 & 825.213.

An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. Benefits accrued at the time FMLA leave began (such as paid vacation or sick leave) that are not used during the FMLA leave must be available to an employee upon return from leave. 29 C.F.R. §825.215(d)(2).

XV. Employer Notice Requirements (29 C.F.R. §825.300)

1. Notice Requirements

Employers must provide notice of FMLA rights in the form of a prominent posting that can readily be seen by employees and applicants. The DOL provides a poster for this purpose, a copy of which is included at the end of these materials. Electronic posting is permissible, as long as all other notice requirements are met (query how applicants would be able to see an electronic posting). 29 C.F.R. §825.300(a). A covered employer must comply with this posting requirement, even if it does not have any eligible employees.

A covered employer with any eligible employees also must include the FMLA notice in its employee handbook and other written materials concerning employee benefits and leave rights. If those do not exist, an employer must provide FMLA notice to new employees upon hire. 29 C.F.R. § 825.300(a)(3). This may be done electronically.

2. Eligibility Notice (29 C.F.R. §825.300(b))/Rights and Responsibilities Notice (29 C.F.R. §825.300(c))

An employer generally must provide an employee with an Eligibility Notice within **five business days** of the employee's request for leave (or the employer's learning that an employee's leave may be for an FMLA-qualifying reason). The Eligibility Notice must state whether the individual is eligible for FMLA leave and, if not, must state at least one reason why the individual is not eligible.

At the same time, the employer also must provide the employee with a Rights and Responsibilities Notice that sets forth the expectations and obligations of the employee and any consequences for failing to meet those obligations. This notice can be provided electronically.

The required forms can be found on the DOL's website (www.dol.gov).

3. Request for Medical Certification (29 C.F.R. §§ 825.305 - 825.313)

An employer may request a medical certification, which certification the employee must return to the employer within **fifteen calendar days** (subject to limited exceptions). The DOL website provides certification forms for the various types of FMLA leave.

An employer's request for certification should be made to the employee and, ordinarily, should be made at the time the employee gives notice of the need for leave or within **five business days** thereafter (in the case of unforeseen leave, within **five business days** after the leave begins). The employee is responsible for giving the certification form to his/her health care provider and returning it to his/her employer. 29 C.F.R. § 825.306.

If a certification is incomplete or insufficient, an employer may state, in writing, what additional information is necessary to make it complete/sufficient. The employee then has **seven calendar days** (subject to exceptions) to cure the defect or risk having the FMLA leave be denied. 29 C.F.R. § 825.305(c).

If an employee submits a complete and sufficient certification signed by a health care provider, an employer may **not** request additional information from the health care provider. If the employer simply needs **clarification or authentication** of the certification, it may contact the employee's health care provider after first giving the employee an opportunity to cure any deficiencies. Note that this contact must be made by a health care provider, human resources professional, a leave administrator, or a management official – **NOT** the employee's direct supervisor. The employer must comply with the Health Insurance Portability and Accountability Act ("HIPAA"). 29 C.F.R. § 825.307(a).

If an employer doubts the validity of a certification, it may require a second opinion from a health care provider selected and paid by the employer (although it cannot be a provider who is employed by the employer or one with whom the employer regularly contracts with or uses). If an employee incurs any out of pocket travel expenses associated with getting the second opinion, the employer must reimburse the employee. 29 C.F.R. § 825.307(b).

If the first and second opinions differ, an employer may require an employee to obtain certification from a third health care provider, again at the employer's expense, who is designated or approved jointly by the employer and the employee. 29 C.F.R. § 825.307(c). The third opinion is final and binding.

Under certain circumstances, an employer may request recertification while an employee is on leave. *See* 29 C.F.R. § 825.308.

Practice Pointer: Have a procedure in place to handle FMLA requests before the need arises. Inform an employee, in writing, that he/she has fifteen calendar days to return the certification form to the employer. If the employee fails to do so, write a letter explaining to the employee that the certification is necessary for the FMLA to apply, provide a deadline for the employee to provide the certification, and explain the consequences of failing to do so.

4. Designation Notice (29 C.F.R. §825.300(d))

Employers are responsible for designating leave as an FMLA-qualifying leave. An employer generally must provide an employee with a Designation Notice stating whether the employee's leave will be counted as FMLA leave within **five business days** after gathering enough information to determine whether the leave is for an FMLA-qualifying reason (e.g., after the employer receives a requested medical certification). This notice must be in writing. The DOL has a sample form on its website.

The Designation Notice must state whether the leave will be designated as FMLA leave, the amount of leave counted against the employee's FMLA entitlement (if possible; if not, such notice must generally be provided upon the employee's request), whether the employee must substitute paid leave, and whether the employee will be required to present a fitness-for-duty certification prior to being reinstated.

A **fitness-for-duty certification** only should be requested for an employee who has taken FMLA leave for the employee's own serious health condition and only if the employer notified the employee on the Designation Notice that a fitness-for-duty certification would be required. An employer's policy and practice of requiring a fitness-for-duty certification must be uniformly applied. The fitness-for-duty certification form must only seek information that relates to the condition that caused the employee to take FMLA leave. If a fitness-for-duty certification will be required that addresses an employee's ability to perform his/her essential job functions, the employer **must** include a list of the employee's essential functions and specifically state that this type of fitness-for-duty certification is required. 29 C.F.R. §825.312.

Retroactive Notice: Employers should endeavor to properly and timely designate FMLA leave. Failure to follow FMLA notice requirements may constitute an interference with, restraint, or denial of the exercise of an employee's FMLA rights. 29 C.F.R. § 825.301(e). That said, as long as a failure to timely designate leave as FMLA leave does not cause harm or injury to an employee, an employer may retroactively designate leave as FMLA leave by providing appropriate notice to the employee. 29 C.F.R. §825.301(d).

XVI. Employee Notice Requirements

1. Notice Requirements (29 C.F.R. §§825.301 - 825.304)

If the need for leave is foreseeable, employees must provide at least **30 days** advance notice of the leave, which notice can be verbal. If doing so is not practicable, such as when the need for leave is not foreseeable, the employee must give notice as soon as practicable and, upon the employer's request, must explain why earlier notice was not practicable. An employee does not need to specifically reference the FMLA. Rather, the employer bears responsibility for inquiring further to determine whether the reason

for the requested leave may qualify for FMLA leave. That said, if an employee simply calls in sick, that does not trigger an employer's FMLA obligations.

Absent unusual circumstances, employees may be required to comply with the employer's usual and customary notice requirements for requesting leave, as long as they are not more strict than FMLA notice requirements. An employee's failure to follow such employer notice requirements, or failure to provide 30 days' notice for foreseeable leave when the employee had notice of that requirement, may result in a delay or denial of FMLA leave.

2. Employer Request for Further Information (29 C.F.R. §825.302(c))

If necessary to determine whether an employee's requested leave is for an FMLA-qualifying reason, an employer should inquire further. An employee must respond to questions designed to determine whether an absence may be for an FMLA-qualifying reason. Failure to do so may result in FMLA leave being denied if the employer cannot determine if it is for an FMLA-qualifying reason.

XVII. Recordkeeping (29 C.F.R. § 825.500)

FMLA-related records must be maintained for at least three years. Covered employers with eligible employees must maintain the following records:

- basic payroll and identifying employee data, including name, address, and occupation; rate or basis of pay and terms of compensation; daily and weekly hours worked per pay period; additions to or deductions from wages; and total compensation paid;
- dates FMLA leave is taken (leave must be designated in records as FMLA);
- the hours of the leave, if FMLA leave is taken in increments of less than one full day;
- copies of employee notices of leave furnished to the employer and copies of all notices given to employees;
- any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves;
- premium payments of employee benefits; and
- records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and for the disagreement.

Covered employers with no eligible employees must maintain the basic payroll and identifying employee data listed in the first bullet point above.

Records and documents containing medical information must be kept confidential, in separate files from the usual personnel files. Further, if the Genetic Information Nondiscrimination Act or Americans with Disabilities Act applies, such information must be kept confidential in accordance with the applicable Act. ***Exceptions:***

- supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- first aid and safety personnel may be informed, when appropriate, if the employee's physical or medical condition might require emergency treatment; and
- government officials investigating compliance with FMLA or other pertinent law shall be provided relevant information upon request.

Special recordkeeping requirements apply to employers of airline flight crew employees. 29 C.F.R. § 825.803.