

Family and Medical Leave Act ("FMLA")

- In November 2008 the U.S. Department of Labor ("DOL") issued revised regulations interpreting the FMLA of 1993, as amended.
- The Revised Regulations, aka the "Final Rule", went into effect on January 16, 2009.

This Presentation

- These materials provide highlights of the FMLA with a focus on some of the significant changes found in the Revised Regulations
- The entire text of the Revised Regulations, is at <http://www.dol.gov/whd/fmla/finalrule.htm>
- Review all of the Revised Regulations (Final Rule) for further details

Basic Leave Entitlement Under the FMLA

FMLA requires covered employers to provide up to 12 weeks -- now 26 weeks for certain military family leave -- of unpaid, job-protected leave to eligible employees for reasons set forth in the law.

(See below for additional time now required by new military family leave provisions).

29 CFR 825.100

Basic Qualifying Reasons

- The birth of a child and to care for the newborn child;
- The placement of a child with the employee for adoption or foster care;
- The employee is needed to care for a family member (child, spouse or parent) with a serious health condition;
- The employee's own serious health condition makes the employee unable to perform the functions of his/her job;

Basic Qualifying Reasons (Continued)

- 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;
- To care for a covered servicemember with a serious injury or illness - - 26 weeks.

2 New Military Family Leave Entitlements

“Qualifying Exigency Leave”

Qualifying Exigencies of Servicemember

Eligible employees with a spouse, son, daughter or parent on active duty or call to active duty status in the National Guard, Reserves or retired members of the Regular Armed Forces and members of the Retired Reserve, in support of a contingency operation may use their 12-week leave entitlement to address certain “Qualifying Exigencies”.

Note: This leave entitlement does not extend to family members of the Regular Armed Forces on active duty status.

29 CFR 825.126(b)(2)

“Qualifying Exigency Leave” (Continued)

May be taken on an intermittent or
reduced leave schedule basis

Qualifying Exigencies

Qualifying Exigencies may include leave related to short notice deployment, attending certain military events, arranging for alternative childcare and school activities, addressing certain financial and legal arrangements, attending certain counseling sessions, rest and recuperation, and attending post-deployment activities.

29 CFR 825.126

Qualifying Exigencies (Continued)

8 categories of Qualifying Exigencies:

- 1) Short-notice deployment:** Leave of 7 or less days to address any issue that arises as a result of a covered military member being notified of a call to active duty
- 2) Military events and related activities:** Leave to attend any official ceremony, program, event, family support or assistance programs and informational briefings related to the active duty call

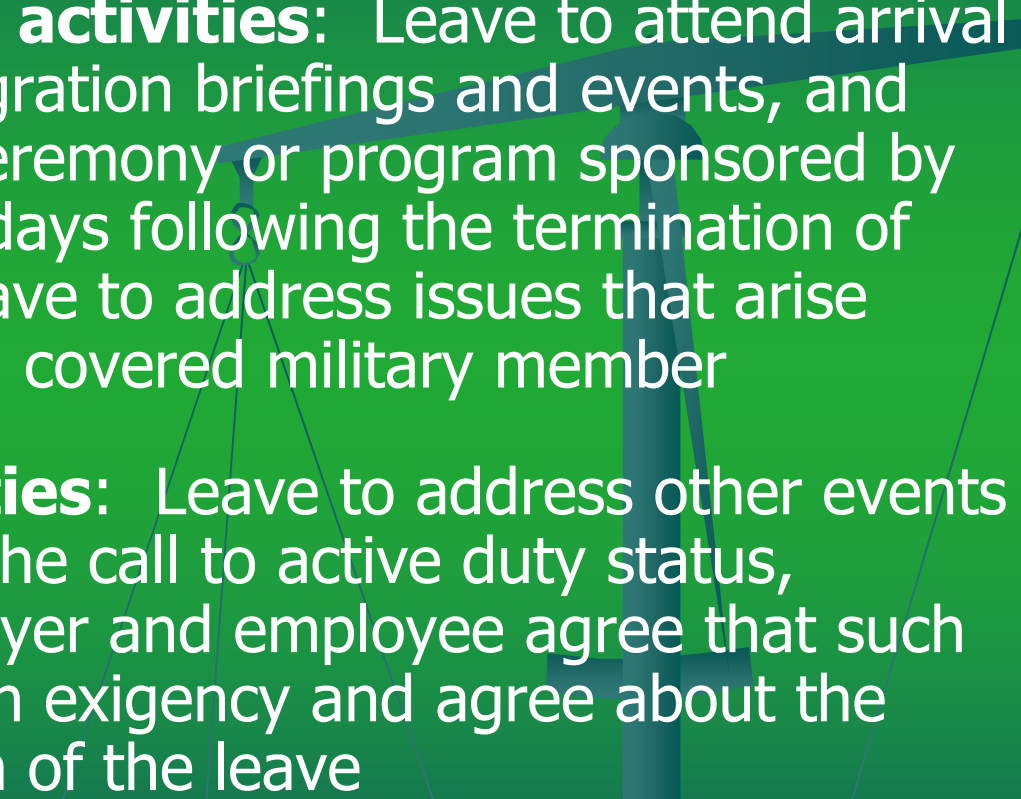
Qualifying Exigencies (Continued)

- 3) **Childcare and school activities:** Leave to arrange for alternative childcare, to provide childcare on an urgent, immediate need basis, to enroll in or transfer to a new school or daycare facility, to attend meetings with staff at a school or daycare facility
- 4) **Financial and legal arrangements:** Leave to make or update financial or legal arrangements such as powers of attorney, bank account signature authority, will and living trust; and leave to obtain, arrange or appeal military service benefits while the military member is on active duty and for 90 days following the termination of active duty

Qualifying Exigencies (Continued)

- 5) **Counseling:** Leave to attend counseling by someone other than a health care provider for the employee, the covered military member or a child of the covered military member
- 6) **Rest and recuperation:** Leave of up to 5 days to spend time with a covered military member who is on short-term, temporary, rest and recuperation leave; 5 days may be taken for each instance of rest and recuperation

Qualifying Exigencies (Continued)

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- 7) **Post-deployment activities:** Leave to attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military for 90 days following the termination of active duty; and leave to address issues that arise from the death of a covered military member
- 8) **Additional activities:** Leave to address other events which arise out of the call to active duty status, *provided* the employer and employee agree that such leave qualifies as an exigency and agree about the timing and duration of the leave

New Military Family Leave (Continued)

“Military Caregiver Leave”

Serious Injury or Illness of a Covered Servicemember

- Eligible employees, who are the spouse, son, daughter, parent or next of kin, are entitled to a special leave entitlement of up to 26 weeks to care for a covered servicemember during a single 12-month period

New Military Family Leave (Continued)

“Military Caregiver Leave”

- Covered Servicemember is a current member of the Armed Forces, including a member of the National Guard or Reserves, or a member of the Armed Forces, the National Guard or Reserves who is on the temporary disability retired list, who has a serious injury or illness incurred in the line of duty on active duty for which the servicemember is undergoing medical treatment, recuperation, or therapy; or in an outpatient status; or is on the temporary disability retired list

29 CFR 825.127

“Military Caregiver Leave” (Continued)

- May be taken on an intermittent or reduced leave schedule basis
- Husband and wife employed by the same employer are limited to a combined total of 26 weeks of leave during the single 12-month period defined in 29 CFR 825.127(c).
- The single 12-month period for Military Caregiver Leave is akin to the forward looking method defined in 29 CFR 825.200 (b)(3)

“Military Caregiver Leave” (Continued)

- In this context, a “serious injury or illness” means an injury or illness incurred by a covered servicemember in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank or rating.
- “Outpatient status,” with respect to a covered servicemember, means the status of a member of the Armed Forces assigned to either a military medical treatment facility as an outpatient; or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.

Next of Kin of a Covered Servicemember

The nearest blood relative other than the covered servicemember's spouse, parent, son or daughter, in the following order of priority:

1. blood relatives who have been granted legal custody;
2. brothers and sisters;
3. grandparents;
4. aunts and uncles; and
5. first cousins.

Covered Employer

- Employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year
- Includes any person or entity acting directly or indirectly in the interest of a covered employer
- Includes any successor in interest of the covered employer
- Includes any public agency and public and private elementary schools regardless of how many employees
- Public agency includes the government of a State or political subdivision of a State.

29 CFR 825.104

Coverage Issues: Joint Employer

- In some instances, otherwise separate entities with separate owners, managers and facilities will be considered one employer for purposes of determining FMLA coverage and responsibilities
- The Final Rule added a section that addresses joint employment in the context of a so-called Professional Employer Organization (“PEO”). PEO’s are not traditional placement or staffing agencies that supply temporary employees to clients. Rather, they typically provide payroll and administrative benefits services for the existing employees of an employer/client. Generally, PEO’s are not joint employers. However, if a PEO has the right to hire, fire, assign, direct and control a client’s employees, it may be a joint employer with the client employer.

29 CFR 825.106

Joint Employer

- In joint employment relationships, the “primary employer” is generally the employer responsible for giving required notices, providing leave, and maintaining health benefits.
- For employees of temporary placement agencies, the placement agency is most commonly the primary employer.
- If a PEO is a joint employer, the client employer (not the PEO) would most commonly be the primary employer.

Joint Employer (Continued)

- Regulations, however, place responsibilities on both employers involved in the joint employment relationship.
- Employees jointly employed by two employers must be counted by both employers, whether maintained on their payroll or not, for determining employer coverage and employee eligibility.
- Job restoration is the primary responsibility of the primary employer. However, the secondary employer is responsible for accepting the employee returning from FMLA leave if it continues to utilize an employee from a temporary placement agency and the employee is placed with the secondary employer

Eligible Employee

An employee of a covered employer who:

- Has been employed for at least 12 months, which need not be consecutive;
- Has been employed for at least 1250 hours during the 12-month period immediately preceding the commencement of the leave;
- Is employed at a worksite where there are 50 or more employees within 75 miles.

29 CFR 825.110

Eligible Employee: Revised Regulations

- The 12 months of employment need not be consecutive, provided-
- Employment periods prior to a break in service of seven years or more need not be counted, with 2 exceptions:
 - The employee was fulfilling his or her National Guard or Reserve military service obligations
 - A period of approved absences or unpaid leave, such as for education or child rearing, where a written agreement or CBA exists concerning the employer's intent to rehire the employee

Eligible Employee: Revised Regulations (Continued)

- Employees returning from National Guard or Reserve military service are credited with the hours of service they would have performed during the period of military service in determining whether they have met the 1250 hour requirement.
- An employee who was not eligible for FMLA protection at the beginning of his or her leave may begin FMLA once he/she has met eligibility requirements. An employee may apply time spent on unpaid leave towards the 12 month requirement, provided the employee remains on the payroll
- An employee may be on “non-FMLA leave” at the time he or she meets the eligibility requirements

Serious Health Condition Defined

A “serious health condition,” (which is more fully defined by applicable FMLA Regulations) for purposes of entitling an employee to FMLA leave means an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in 825.114 or continuing treatment by a health care provider as defined in 825.115

29 CFR 825.113

Serious Health Condition

- The DOL did not revamp the basic definition of serious health condition

The DOL provides greater clarity with respect to:

- The time period in which continuing treatment following a period of incapacity must take place; and
- The frequency of periodic treatment for chronic conditions

29 CFR 825.115(a) and (c)

Inpatient care

“Inpatient care 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.”

29 CFR 825.114

Continuing Treatment by a Health Care Provider

5 Categories

- 1) A period of incapacity of more than 3 consecutive, full calendar days and any subsequent treatment as defined in 825.115(a)(1)-(5)
- 2) Any period of incapacity due to pregnancy or for prenatal care as defined in 825.115(b)
- 3) Any period of incapacity due to a chronic serious health condition as defined in 825.115(c)(1)-(3)
- 4) A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective as defined in 825.115(d)
- 5) Any period of absence for conditions requiring multiple treatments as defined in 825.115(e)(1)-(2)

Incapacity and Treatment

. . . 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:

- Treatment by a health care provider two or more times **within 30 days of the first day of incapacity, unless extenuating circumstances exist** (one treatment must be an **in-person visit within seven days of the first day of incapacity**), or
- 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 (must include an **in-person visit to a health care provider within seven days of the first day of incapacity**)

29 CFR 825.115(a)

Pregnancy Or Prenatal Care

Any period of incapacity due to pregnancy or for prenatal care

- An expectant mother may take leave before the birth of her child for prenatal care or if her condition makes her unable to work
- A husband may take FMLA leave to care for his expectant spouse if she is incapacitated (includes providing psychological comfort and reassurance)
- The absence need not last more than 3 days and treatment from a health care provider during the absence is not required.

29 CFR 825.115(b), (f)

Chronic Conditions

- A chronic serious health condition is one which requires periodic visits for treatment by a health care provider, over an extended period of time, and which may cause episodic rather than continuing incapacity.
- Under new regulations, with a chronic serious health condition, the employee will be required to **visit a health care provider at least twice a year.**
- The absence need not last more than 3 days and treatment from a health care provider during the absence is not required.

29 CFR 825.115(c), (f)

Permanent or Long-Term Conditions

- A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective.
- Must be under continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, severe stroke, or terminal stages of a disease

29 CFR 825.115(d)

Conditions Requiring Multiple Treatments

- Period of absence to receive multiple treatments (including 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 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 such as cancer, severe arthritis, or kidney disease
- Also includes absences for restorative surgery after an accident or other injury.

29 CFR 825.115(e)

Leave for Treatment of Substance Abuse

- Substance abuse may be a serious health condition. FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider.
- Absence because of the use of the substance, as opposed to treatment, does not qualify for FMLA leave.
- Treatment for substance abuse does not prevent an employer from taking disciplinary action against an employee.
- An employee may take FMLA leave to care for a covered family member who is receiving treatment for substance abuse.

29 CFR 825.119

Leave for Pregnancy, Birth, Adoption or Foster Care

General rules:

- Both mother and father are entitled to leave for the birth or placement for adoption or foster care of their child.
- Both mother and father are entitled to leave to be with the healthy newborn or newly-placed child, i.e. bonding leave, during the 12-month period beginning on the date of birth or placement. FMLA entitlement for birth or placement expires at the end of the 12-month period beginning on the date of birth.
- A husband and wife employed by the same employer are limited to a combined total of 12 weeks of leave if the leave is taken for the birth of a child or to care for the child after birth, the placement of a son or daughter for adoption or foster care or to care for the child after placement, or to care for the employee's parent with a serious health condition.

29 CFR 825.120 and 825.121

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Leave for Pregnancy, Birth, Adoption or Foster Care (Continued)

- However, a husband and wife may each take 12 weeks of leave if needed to care for their newborn or newly-placed child with a serious health condition.
- An employer is not required to grant intermittent or reduced schedule leave after the birth or placement to be with a healthy newborn or newly-placed child. However, intermittent or reduced schedule leave may be required if the mother or the child has a serious health condition.

Leave for Adoption or Foster Care

- Employees may take leave before the actual placement or adoption of the child if an absence from work is required for the placement to proceed. Examples include counseling sessions, court appearances, legal and medical consultations, physical examination, or travel to complete the adoption.

29 CFR 825.121

Unable to Perform the Essential Functions of the Position

- Employer may require the health care provider to review the essential functions of the position and **specify what functions the employee is unable to perform.** Under the prior regulations, an employer could only require a statement that the employee is unable to perform the functions of the position.

29 CFR 825.123(b)

Caring For a Family Member or Covered Servicemember

New regulations clarify that an employee seeking leave to care for a family member or covered servicemember need not be the only individual available to care for the covered family member or covered servicemember

29 CFR 825.124 (b)

Health Care Provider

New regulations add *physicians assistants* to the list that already includes such health care providers as a doctor of medicine or osteopathy who is authorized to practice medicine or surgery, podiatrists, dentists, clinical psychologists, optometrists, chiropractors (limited to certain treatments), nurse practitioners, nurse midwives, clinical social workers, Christian Science Practitioners, any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification to support a claim for benefits.

29 CFR 825.125

Computing Leave During a Holiday Week

- An employee taking a full week of FMLA leave during a week containing a holiday will have the holiday counted against his or her FMLA time
- **An employee taking less than a full week of FMLA leave during a week containing a holiday will not have the holiday count against his or her FMLA time, unless an employee was otherwise scheduled or expected to work on the holiday.**
- If the employer's business activity has temporarily ceased and employees are not expected to return to work for one or more weeks, the days the employer is closed do not count against an employee's FMLA entitlement.

29 CFR 825.200

Intermittent or Reduced Schedule Leave

- Employees are not required to take FMLA in one block.
- Leave may be taken intermittently or on a reduced schedule when medically necessary (825.202(b))
- Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason, and may include leave of periods from an hour or more to several weeks.
- A reduced leave schedule reduces an employee's hours per workweek or workday, normally from full-time to part-time.
- Employee must make a **reasonable effort** to schedule leave for planned medical treatment so as to not unduly disrupt the employer's operations (825.203)
- In the new regulations, the term "reasonable effort" replaces the word "attempt".

Transferring Employee While Taking Intermittent or Reduced Schedule Leave

- DOL considered, *and rejected*, a proposed change that would allow an employer to transfer an employee to a different position when the need for intermittent or reduced leave is unforeseeable.
- As has been the case, the only occasion where an employee may be transferred while taking intermittent or reduced schedule leave is when such leave is foreseeable and based on planned medical treatment. (825.204)
- Employer may not use a transfer as a means of discouraging leave

Charging Intermittent or Reduced Schedule Leave

- New regulations permit an employer to charge more FMLA where employee is physically unable to access the worksite after a shift begins, such as a flight attendant or railroad conductor. 825.205(a)(2)
- An employee who is unable to work mandatory overtime can be charged FMLA for the hours the employee would have been required to work OT. 825.205(c)
- Change in rule for calculating an average workweek for an employee who works a variable schedule – 12 month (not week) look back. 825.205(b)(3)
- Employer must account for leave using increments no greater than shortest period of time employer uses to account for other forms of leave, provided it is not greater than one hour. 825.205(a)(1)

Substitution of Paid Leave

- Employee may substitute paid leave for otherwise unpaid leave
- Employer may require employee to substitute paid leave for otherwise unpaid leave, where proper notice is given.

29 CFR 825.207

Leave Pursuant to a Disability Leave Plan

- Because leave taken pursuant to a disability benefit plan is not unpaid, the regulations do not permit an employer or an employee to require the substitution of paid leave. (this is where leave is also FMLA qualifying)
- However, employers and employees may agree, where state law allows, to have paid leave supplement the disability plans benefits.

29 CFR 825.207

Workers Compensation

- Because workers compensation leave is not unpaid, the regulations do not permit an employer or an employee to require the substitution of paid leave (this is where leave is also FMLA qualifying)
- However, employers and employees may agree, where state law allows, to have paid leave supplement the workers compensation benefits.

29 CFR 825.207

Substitution of Paid Leave – Changes

- An employee who elects to take paid leave must follow the employer's paid leave policies with respect to that paid leave
- Employer must make employee aware of additional procedural requirements
- Employee may not be denied FMLA for failing to comply with procedures, may just be denied pay under the paid leave policy for that time period, where appropriate

29 CFR 825.207(a)

Substitution of Paid Leave - Changes

- On workers comp, an employee may refuse a light duty offer, and remain on unpaid FMLA (even if workers comp payments would stop). Also, at the time workers comp payments stop, employee can be required to substitute paid leave.
- Public Sector: new rule regarding use of accrued compensatory time. Employers can now require the substitution of accrued compensatory time for unpaid FMLA leave.

29 CFR 827.207(e) and (f)

Benefits While On Leave

- During FMLA Leave an employer must maintain the employee's health coverage under any group health plan on the same terms as if the employee had continued to work
- Employee is required to pay employee portion (as though employed) while on leave

29 CFR 825.209 and 825.210

Benefits While On Leave (Continued)

New regulations clarify that if an employee's health benefits lapse while on FMLA leave due to the employee's failure to pay employee portion of the premiums, the employer still has a duty to reinstate the employee's health benefits upon his or her return (w/no preexisting condition waiting period, or requirement to wait for an open season or pass a medical examination) and may be liable for harm suffered by employee as a result of such failure to reinstate benefits

29 CFR 825.212(c)

Perfect Attendance Bonus

New regulations allow employers to deny a “perfect attendance” award to an employee who does not have perfect attendance because of taking FMLA leave as long as it treats employees taking non-FMLA leave in an identical way.

29 CFR 825.215 (c)(2).

Light Duty More Open-Ended Right to Reinstatement

- New Regulations clarify that time spent performing “light duty” work does not count against an employee’s FMLA leave entitlement
- Employee’s right to restoration is held in abeyance during the period of time the employee performs light duty up to the end of the applicable 12-month leave year period the employer uses to calculate FMLA leave
- Right to restoration extends for 12 months, instead of 12 weeks
- An employee’s acceptance of light duty does not constitute a waiver of that employee’s prospective rights
- An employee can not be required to accept light duty where he or she is eligible for FMLA

29 CFR 825.220 and 825.207

Employer Notice Requirements

Under the new regulations, there are 4 notice requirements:

- 1) General notice
- 2) Eligibility notice
- 3) Rights and responsibilities notice
- 4) Designation notice

29 CFR 825.300(a) – (d)

Employer Notice Requirements (Continued)

The 4 notice requirements can be met with 3 DOL notices:

- General Notice – Appendix C (requirement 1)
- Eligibility Notice – Appendix D, Part A (requirement 2)
- Rights & Responsibilities Notice – Appendix D, Part B (requirement 3)
- Designation Notice – Appendix E (requirement 4)

General Notice

Appendix C

Covered Employers are required to post and distribute a general notice, even if its employees are not eligible for FMLA leave. Electronic posting and distribution may be sufficient.

29 CFR 825.300(a)

General Notice

Covered employers with eligible employees must distribute the general notice either by including it in the employee handbook or other policy guides if such written materials exist; or, if the employer does not maintain handbooks or policy guides, by providing the notice to new employees at the time of hire. Distribution can be accomplished electronically.

Eligibility Notice

Appendix D, Part A

- An employer is required to provide an eligibility notice within five business days of being advised that an employee needs to take FMLA leave, or has been made otherwise aware of the employee's need for FMLA leave.
- This is a change from the two day rule which existed.
- On the new notice form (published by DOL), if an employer tells an employee that he or she is not eligible for FMLA, the employer has to state the reason why the employee is not eligible.

Rights & Responsibilities Notice Appendix D, Part B

- Along with an eligibility (ineligibility) notice, an employer must provide the employee with a notice containing his or her FMLA rights or responsibilities

Rights & Responsibilities Notice (Continued)

- This notice **must** specify that the leave may count against FMLA
- This notice **must** specify how the 12-month leave year is defined

Rights & Responsibilities Notice (Continued)

- This notice **must** specify the requirement for certification and any consequences for failure to provide certification
- Include the certification form with the Rights & Responsibilities notice

Rights & Responsibilities Notice (Continued)

- There are 4 types of certification depending on the reason for the leave:
 - (i) Certification of Health Care Provider for Employee's Serious Health Condition (Appendix B)
 - (ii) Certification of Health Care Provider for Family Member's Serious Health Condition (Appendix B)
 - (iii) Certification of Qualifying Exigency for Military Family Leave (Appendix G)
 - (iv) Certification for Serious Injury or Illness of Covered Servicemember (Appendix H)

Rights & Responsibilities Notice (Continued)

- This notice **must** specify whether the employer will require substitution of paid leave and the employer's requirements for the substitution of paid leave
- This notice **must** specify the employee's requirement to make health insurance premium payments and the consequences for failure to make premium payments on timely basis

Rights & Responsibilities Notice (Continued)

- This notice **must** specify the employee's rights to maintenance of benefits and restoration to the same or equivalent job
- This notice **must** specify an employee's liability to repay health insurance premiums paid by the employer if the employee fails to return to work
- This notice **may** require an employee to report periodically on his/her status and intent to return to work

Designation Notice

Appendix E

- Once the employer obtains sufficient information to determine if an employee's leave is qualifying, the employer has five business days to provide the employee with a notice stating that the leave (including amount) has been designated as FMLA qualifying.
- If more information is needed to make this determination, the notice must identify what additional information is needed.

Designation Notice (Continued)

This notice must inform the employee:

- If leave is FMLA-qualifying or not;
- If yes, whether there is a requirement to substitute paid leave;
- If there is a requirement for fitness for duty certification upon return to work;

Designation Notice (Continued)

- If yes, if there is a requirement to address the ability to perform the essential functions;
- If yes, include list of essential functions of the job;
- Amount of leave which will be counted against FMLA, if known

Retroactive Designation of Leave

- An employer may in limited instances retroactively designate leave as FMLA qualifying unless the employee is able to demonstrate harm or injury from the employer's failure to timely designate
- Regulations provide examples of how an employee may suffer harm
- Be cautious and always carefully analyze any retroactive leave designation.

29 CFR 825.301(d)

Employee Notice Requirements

Foreseeable Leave: 30 days advance notice or as soon as practicable.

Unforeseeable Leave: Notice as soon as practicable.

29 CFR 825.302 and 825.303

Employee Notice Requirements (Continued)

- An employee's failure to comply with his or her employer's leave procedures can now be grounds for delaying or denying requests for FMLA qualifying leave, although it must be clear that the employee had actual notice of FMLA's notice requirements
- Employee seeking additional FMLA for a condition that was previously certified must specifically make reference to the need for FMLA leave for the previous condition for which leave was used

Medical Certifications

- Revised Regulations provide a new medical certification form
- Two forms: one for leave due to condition of employee and other for leave due to condition of family members
- Both forms are designated Appendix B, WH-380-E and WH-380-F.

Medical Certifications (Continued)

Employee has 15 days to
return medical certification

29 CFR 825.305

Medical Certifications (Continued)

On the medical certification, an employer may require:

- Name, address, telephone number, fax number and type of medical practice/specialization
- Date of commencement of serious health condition and probable duration
- Description of appropriate medical facts including information on symptoms, diagnosis, hospitalization, doctor visits, prescription medication, referrals for evaluation or treatment, regimen of continuing treatment

Medical Certifications (Continued)

- Information sufficient to establish employee cannot perform essential functions of job, nature of any work restrictions and likely duration
- Information sufficient to establish the medical necessity for intermittent or reduced schedule leave including an estimate of the dates and duration of treatment and any periods of recovery

29 CFR 825.306

Incomplete or Insufficient Medical Certification

- A certification is **incomplete** if one or more of the applicable entries have not been completed.
- A certification is **insufficient** if the information provided is vague, ambiguous, or non-responsive.

Incomplete or Insufficient Medical Certification (Continued)

Employer must state in writing what additional information is necessary to make certification **complete** and **sufficient**.

Employee has 7 days to provide additional information.

29 CFR 825.305

Medical Recertification

- Applies to leave taken for serious health condition of employee or family member
- Employer can only request recertification after –
 - (i) minimum duration of leave has expired
 - (ii) if no minimum duration of leave, every 30 days
 - (iii) but, in any event, once every 6 months

Medical Recertification (Continued)

- Employer can request recertification in less than 30 days only if -
 - (i) Employee requests an extension of leave
 - (ii) Changed circumstances, e.g. duration or frequency of absences changes, nature or severity of illness changes, complications increase
 - (iii) Employer receives information that casts doubt on the employee's continued need for leave

Medical Recertification (Continued)

- No second or third opinions on recertification are allowed
- Recertification does not apply to Qualifying Exigency Leave or Military Caregiver Leave

29 CFR 825.308, 825.313

Fitness-for-Duty Certification

- Designation notice must inform employee that fitness-for-duty certification is a condition of returning to work and that such certification must address employee's ability to perform essential job functions
- No second or third opinions on fitness-for-duty certifications are allowed
- Employer cannot require fitness-for-duty certificate for each intermittent or reduced leave schedule absence, but

Fitness-for-Duty Certification (Continued)

- Employer is entitled to fitness-for-duty certificate for intermittent or reduced leave schedule absences up to once every 30 days, if reasonable safety concerns exist about the employee's ability to perform his/her duties
- Employer may not terminate employee while awaiting fitness-for-duty certification for intermittent or reduced leave schedule absences

29 CFR 825.312

Authentication

Authentication means requesting verification from the health care provider that the information contained in the certification was completed or authorized by the health care provider who signed the document. No additional medical information can be requested.

29 CFR 825.307

Clarification

Clarification means contacting the health care provider to understand the handwriting on the certification or to understand the meaning of a response. No additional medical information can be requested. Clarification cannot be sought without authorization from the employee.

29 CFR 825.307

Authentication and Clarification (Continued)

- In contacting a health care provider for purposes of clarification and authentication, an employer can only use a health care provider, a human resources professional, a leave administrator, or a management official.
- Under no circumstances may an employee's direct supervisor contact the employee's health care provider.

Hypotheticals



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In Hypos 1-3, the following is the background

- You are employed as a Human Resources Specialist
- The Company you work for is at a pivotal time where it is watching costs and cutting-back wherever necessary
- The Company has a policy of conducting lay-offs in accordance with a RIF policy that allows for consideration of seniority and performance evaluations

For Hypos 1-3, how would you advise the Company and the Supervisor?

What do you see as the legal issues, if any?

HYPO #1

- John's wife is pregnant. John's supervisor comes to you to tell you that John has been out a lot the last six months, and that he is now asking for 12 weeks off after the baby is born. Under Company policy, paternity leave is paid for the first 4 weeks.
- John's supervisor tells you that he can not take any more of these "antics" by John. He tells you that John knows full-well that providing him a paternity leave right now puts too much strain on the department. The supervisor tells you that due to lay-offs, everyone is already stretched too thin.
- The supervisor asks you to lay-off John, because he claims that John is not really interested in working right now anyways.

HYPO #2

- Using the previous example, would it change your analysis if the supervisor told you that in the last six months, John had taken time off due to his own serious health condition?
- Do you think John would be entitled to time off after the birth of the child if he had already used up all of his available FMLA?

HYPO #3

Using the example of “John”, how would it impact your analysis if John was never notified of his rights under FMLA, and his leave was never designated as FMLA?

HYPO #4

- Kathy is out of work due to an injury she sustained at work. She is currently being paid by workers compensation.
- Can Kathy be required to use her available PTO while on workers comp leave?
- Assuming Kathy does not use her PTO while on leave due to the workers comp injury, how long must she wait after she returns to work to take accrued unused vacation?

HYPO #5

- Kathy was hired in May of 2008. In January 2009 she asks for time off due to a health condition. The company has a personal leave policy, and recognizes its actual or potential obligations to accommodate under the ADA and Massachusetts Handicap Discrimination Laws. Therefore, Kathy is denied FMLA but is provided a leave of absence.
- In May of 2009, Kathy is still out of work. She calls and requests forms to complete for an FMLA leave.

HYPOTHESIS #6

Jim is unable to perform his job functions due to a serious health condition. Can you require Jim to accept a light duty position instead of time off under the FMLA?

HYPO #7

- While Kathy is out on leave, her supervisor realizes that they really do not need her in the department. The supervisor tells you that the good news is that Kathy has called her and said that if there is a lay-off, she would like to be laid off.
- The supervisor comes to you and tells you that in the next RIF, Kathy should be laid off.

HYPOTHESIS #8

A poor performer, who has had repeated warnings and has exhausted all PTO, calls in sick because of the serious health condition of his child. The supervisor tells you she is aware that this “poor performer’s” wife is at home and able to take care of the child.