ADVANCED FMLA REGIONAL WORKSHOP 2018

SCHOOL OF GOVERNMENT

Chapel Hill, NC
January 10-11, 2018

Appendix

- **DOL Administrator's Interpretation No. 2010-3 re "in loco parentis"**
- **DOL Notice of Eligibility and Rights and Responsibilities**
- **DOL Medical Certification for Employee's Own Serious Health Condition**
- **DOL Medical Certification for Family Member's Serious Health Condition**
- **Designation Notice**
- **Fit-for-Duty Certification**

Diane Juffras
juffras@sog.unc.edu
(919) 843-4926

Bob Joyce
joyce@sog.unc.edu
(919) 966-6860

A. REASONS FOR WHICH FMLA LEAVE MAY BE GRANTED

The Family and Medical Leave Act (the FMLA) requires employers to grant eligible employees a total of twelve workweeks of job-protected, **unpaid** leave during any twelve-month period for one or more of the following reasons:

- the **birth** of a son or daughter of the employee or of a child for whom the employee will assume day-to-day care or financial support and to care for the child;
- the **adoption** of a son or daughter by the employee or placement of a child with the employee for foster care or the placement with an employee of a child for whom the employee will assume day-to-day care or financial support;
- the need for the employee **to care for a spouse, child, or parent with a serious health condition**;
  - Parent means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee. This term does not include in-laws. *See* 29 CFR § 825.122(c).
  - *See Coutard v. Municipal Credit Union*, 848 F.3d 102 (2d Cir. 2017) (Employee was denied leave to care for his seriously ill grandfather who had served as in loco parentis to him; employee's mere mention of the grandparent relationship when requesting FMLA was sufficient notice that FMLA might apply).
  - An employer may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This may take the form of a simple statement from the employee, or a child's birth certificate, a court document, etc. The employer is entitled to examine documentation such as a birth certificate, but must return it to the employee. *See* 29 CFR § 825.122(k). Note that if an employee has already provided documentation of a family relationship for other purposes, such as to show eligibility for health insurance benefits, the earlier documentation is deemed sufficient for FMLA purposes and may not be required to be produced a second time.
  - For adult children of an employee, FMLA leave may only be taken to care for them while they have a serious health condition when the child is age 18 or older and "incapable of self-care because of a mental or physical disability" at the time that FMLA leave is to commence. *See* 29 CFR § 825.122(d).
  - *See also* US DOL Wage and Hour Division Administrator's Interpretation No. 2010-3 (June 22, 2010), *Clarification of the definition of "son or daughter" under Section 101(12) of the Family and Medical Leave Act (FMLA) as it applies to an employee standing "in loco parentis" to a child*. (attached)
- **the employee's own serious health condition** where the condition makes the employee unable to perform his or her job.

The FMLA also include two additional forms of job-protected leave for the family members of American servicemen: qualifying exigency (QE) leave and military caregiver (MCG) leave. QE leave and MCG leave are discussed in a separate outline.

B. WHAT IS A SERIOUS HEALTH CONDITION? 29 CFR §§ 825.112, 825.114 and 825.11**5**

***A serious health condition means an illness, injury or impairment, or physical or mental condition* that involves any period of incapacity or treatment:**

- requiring an absence from work of **more than three full, consecutive calendar days** that also involves **continuing treatment** by a health care provider;
  - ~ ***continuing treatment means*** *one in-person visit to a health care provider* within the first seven (7) days *of incapacity and either* ***a second visit*** *within the first thirty days* ***or a regimen of continuing treatment*** *under the supervision of a heath care provider.*
- connected with inpatient care;
- due to pregnancy;
- due to a chronic health condition such as asthma, diabetes, epilepsy;
- that is long-term or permanent due to a condition for which treatment may not be effective (e.g., cancer; AIDS); or
- involving multiple treatments (and recovery from the treatments) for a condition that would likely result in an incapacity for more than three consecutive days if left untreated (e.g., physical therapy, chemotherapy, dialysis).

FMLA leave is not available for colds, stomach viruses, the flu or similar conditions unless they require inpatient care or continuing treatment by a healthcare provider. *See* 29 CFR § 825.113.

Substance abuse may be a serious health condition if it meets the statutory definition set forth above. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

Some cases that address the meaning of serious health condition:

Victoriana v. Internal Med. Clinic of Tangipahoa, 2016 WL 5404653 (E.D.La. 2016) (in vitro fertilization not a serious health condition because it is not inpatient care and is not continuing treatment for an incapacity lasting three consecutive days).

Justice v. Renasant Bank, 2016 WL 6635638 (N.D. Miss. 2016) (migraines not a chronic serious health condition because employee did not provide evidence showing she visited a health care provider at least twice a year for treatment; instead, her ex-husband had treated her 3 – 5 times over preceding five years).

Jallow v. Kraft Foods Global, Inc., 2016 WL 3893181 (W.D.Wis. 2016) (fact of HIV-status alone does not establish serious health condition in absence of evince of twice a year doctor visits or of episodic incapacity due to HIV status).

C. EMPLOYEE REQUESTS FOR FMLA LEAVE: EMPLOYEE NOTICE REQUIREMENTS

- **An employer may require an employee to give notice of the need for FMLA leave:**
- 30 days in advance, w**hen the need for FMLA leave is foreseeable**. 29 CFR §§ 825.302(a).
- If 30 days' notice is not possible, because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable.
- An employee may be required by an employer's policy to contact a specific individual or a third-party FMLA administrator.
- **Failure to comply with notice requirements** is only excused in unusual circumstances, such as when an employee is unable to comply with the employer's policy that requests for leave should be made by contacting a specific number because on the day the employee needs to provide notice of his or her need for FMLA leave there is no one to answer the call-in number and the voice mail box is full.
- An employer may require an employee to give notice of the need for FMLA leave either the same day or the next business day, **when the need for FMLA leave was not foreseeable**. Notice should generally be given within the usual and customary time notice requirements applicable to such leave. 29 CFR §§ 825.302(a) and (b); 825.303(a).

  > Waiting eight days to give notice of wife's back injury and need for treatment is not "as soon as practicable under the facts and circumstances. *Torres v. Inspire Development Center*, 2014 WL 3697816 (E.D. Wash. 2014) (upholding termination on this and other FMLA-related grounds).

- An employer may delay the start of leave for an employee who fails to provide timely notice of the need for FMLA leave without a reasonable excuse. 29 CFR § 825.304.
- An employer may require employees requesting FMLA leave to use its usual and customary notice and procedural requirements for requesting leave. If an employee fails to do so without a reasonable justification, the employer may delay or deny FMLA leave. This is true both with respect to foreseeable leave, unforeseeable leave and intermittent leave. 29 CFR § 825.302(d).
- **When an employee requests leave for planned medical treatment**, the employee must consult with the employer before scheduling the treatment in order to work out a schedule that meets the needs of both employee and employer, subject to the approval of the health care provider. 29 CFR § 825.302(e).
- These notice requirements apply both to traditional FMLA leave and military caregiver leave. Notice of the need for qualifying exigency leave must be as soon as practicable. 29 CFR § 825.302 See below for outline coverage of MCG and QE leave.

D. EMPLOYER NOTICE AND DESIGNATION REQUIREMENTS:

An employer must notify an employee that s/he is eligible for FMLA leave within five business days after receiving a request for FMLA leave or within five days of acquiring knowledge than an employee is absent for an FMLA-qualifying reason.

- The employer notice of eligibility should be in writing.
- At the same time that the employer notifies an employee that s/he is eligible for FMLA leave, it must also give the employee a notice that details the specific rights and the specific expectations and obligations of the employee on FMLA leave.

The rights and responsibilities notice must also include the following information:

- **whether the employee must provide a medical certification**;
- whether the leave will count against the employee's 12-week FMLA entitlement;
- **whether the employer requires the use of accrued paid leave in lieu of unpaid leave**;
- that the employee may elect to use accrued paid leave in place of unpaid leave and any conditions related to the substitution of paid leave for unpaid leave (for example, that per the employer's policy, sick leave may only be used for an employee's own illness);
- whether the employee needs to make contributions toward health insurance premium payments and, if so, what arrangements the employee needs to make, as well as the consequences of a failure to make contribution payments and that the employee is liable for reimbursing the employer for the employer's health insurance contributions if the employee fails to return to work upon the conclusion of FMLA leave;
- that the employee has the right to return to the same or an equivalent job.

The notice may – but does not have to include other information, such as:

- whether the employee must provide periodic updates on his/her condition during the period of FMLA leave;
- whether the employee must provide a fitness-for-duty certification before returning too work. 29 CFR § 825.300(c)
- **Use US DOL's WH 381 to respond to employee requests for FMLA leave.** http://www.dol.gov/whd/fmla/finalrule/WH381.pdf . A copy is attached to this outline.
- **If an employee who has requested FMLA leave is not eligible,** the eligibility notice must give at least one reason why the employee is not eligible (for example, the employee has not yet worked for the employer for 12 months). 29 CFR § 825.300(b).

E. MEDICAL CERTIFICATION OF THE NEED FOR FMLA LEAVE

An employer may require employees to provide medical certification of the need for FMLA leave from the employee's health care provider subject to the following rules:

- The employer must request the certification in writing **within five days of the employee's request** for FMLA leave (where the need for leave has been foreseeable) or within five days after the leave has begun (where the need for leave has not been foreseeable).
- The employer must allow the employee 15 calendar days to obtain the certification.
- If the employee does not return the certification within the 15-day window, the employee loses his or her right to FMLA leave and to return to the same or a substantially equivalent job. It would not be a violation of the FMLA to either deny FMLA leave or to fire an employee who has not returned a medical certification after 15 days, **although the regulations require an employer to make an exception when it has not been "practicable" for the employee to obtain the certification despite his/her diligent, good faith efforts to do so.** 29 CFR § 825.305(b)
- An employer is entitled to a complete and sufficient certification. For a certification to be complete, all of the applicable entries must be filled out. A complete certification may still be insufficient if the information provided is vague, ambiguous or non-responsive.
- If an employer receives an incomplete or insufficient certification, it must advise the employee in writing what additional information must be provided. The employee has seven (7) calendar days in which to provide the required information.
- FMLA leave may be denied to any employee requesting leave who fails to return a medical certification or who fails to return a complete and sufficient certification after being given seven days to resubmit it. 29 CFR § 825.305(c) and (d)
- The employer may require the employee to undergo an examination for a second opinion with a health care provider of the employer's choice at the employer's cost. If the employee's and the employer's healthcare provider disagree, the employee must obtain a certification from a third provider (jointly agreed upon by the employer and employee), again at the employer's cost. The decision of the third provider is binding. 29 CFR § 825.307(b) and (c).
- The employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration. 29 CFR § 825.305(b).
- At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. 29 CFR § 825.305(d).

Who qualifies as a health care provider for FMLA certification purposes?
See 29 CFR § 825.800 ("Definitions).

– licensed MDs and ODs
– clinical psychologists
– nurse-midwives
– optometrists
– chiropractors (in certain cases)
– dentists
– clinical social workers
– nurse practitioners
– podiatrists
– official Christian Science practitioners

Recertifications:

Normally, an employer may not ask for recertification any more frequently than every 30 days.
29 CFR § 825.308

- If the initial certification is for more than 30 days, the employer must wait for the initial leave period set forth in the certification to run before asking for recertification.
- Recertification may only be required when employees are taking leave for their own serious health condition.

Medical Certification Forms: Use the US DOL Forms WH-380-E and 380-F.

- **http://www.dol.gov/whd/forms/WH-380-E.pdf (employee's own serious health condition)**
- **http://www.dol.gov/whd/forms/WH-380-F.pdf (family member's serious health condition)**

Copies are attached to this outline.

What's a "Sufficient Certification?"
Here's what the statute says at 29 USC 2613(b):

Sufficient Certification
Certification provided under subsection (a) shall be sufficient if it states—

(1) the date on which the serious health condition commenced;

(2) the probable duration of the condition;

(3) the appropriate medical facts within the knowledge of the health care provider regarding the condition;

(4)
(A) for purposes of leave under section 2612(a)(1)(C) of this title, a statement that the eligible employee is needed to care for the son, daughter, spouse, or parent and an estimate of the amount of time that such employee is needed to care for the son, daughter, spouse, or parent; and

(B) for purposes of leave under section 2612(a)(1)(D) of this title, a statement that the employee is unable to perform the functions of the position of the employee;

(5) in the case of certification for intermittent leave, or leave on a reduced leave schedule, for planned medical treatment, the dates on which such treatment is expected to be given and the duration of such treatment;

(6) in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 2612(a)(1)(D) of this title, a statement of the medical necessity for the intermittent leave or leave on a reduced leave schedule, and the expected duration of the intermittent leave or reduced leave schedule; and

(7) in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 2612(a)(1)(C) of this title, a statement that the employee's intermittent leave or leave on a reduced leave schedule is necessary for the care of the son, daughter, parent, or spouse who has a serious health condition, or will assist in their recovery, and the expected duration and schedule of the intermittent leave or reduced leave schedule.

Confidentiality of Medical Certification Information:
Keep all FMLA-related medical information in a separate file. Wherever it is located, the medical information will be considered confidential under North Carolina's personnel records acts, but it will be easier to ensure that confidential medical information is not seen by persons reviewing an employee's personnel file for other legitimate reasons.

F. THE DESIGNATION NOTICE

Once an employer has received a completed medical certification form, **the employer must give the employee a separate Designation Notice** advising the employee that the leave is being designated FMLA leave **within five business days**. Regardless of whether the information was included in the eligibility and rights and responsibilities notice, **an employer must include the following information in the designation notice**:

- whether accrued paid leave will be substituted for unpaid leave;
- **whether the employee must provide a fitness-for-duty certification before returning to work**;
- **a list of the employee's essential job functions,** if the fitness-for-duty certification must address the employee's ability to perform essential job functions;
  - **If details about the fitness-for-duty certification requirement are not included on the Designation Notice, the employer forfeits its right to a fit-for-duty certification.**
- And notice of the amount of leave that will be counted against the employee's FMLA entitlement. *See* 29 CFR § 825.300(d).

US DOL's Designation Notice may be found at: www.dol.gov/whd/forms/WH-382.pdf. A copy is attached to this outline.

G. INTERMITTENT OR REDUCED SCHEDULE LEAVE

Some serious health conditions do not require an employee to be absent from work for continuous blocks of time. Treatments for chemotherapy, for example, usually take place periodically during regular business hours. Similarly, employees recovering from an illness or a surgical procedure may not be able to work a full day upon their initial return to work.
Requests for intermittent or reduced-schedule leave must be granted when they are medically necessary.

- Intermittent leave is leave taken in separate blocks of time for a single qualifying reason.
- A reduced leave schedule is a temporary reduction in the number of hours that an employee works during the week.
- When the need for intermittent or reduced-schedule leave is foreseeable based upon a planned course of medical treatment, the employer and employee are to attempt to work out a treatment schedule that does not unduly disrupt the employer's operations, subject to the approval of the medical provider. 29 CFR 825.302(f).

Measuring Intermittent or Reduced Schedule Leave

The actual workweek is the basis of leave entitlement. 29 CFR § 825.205(b)(1).

- If an employee who would otherwise work 40 hours a week takes off eight hours, the employee would use one-fifth (1/5) of a week of FMLA leave.
- If a full-time employee who would otherwise work eight hour days works four-hour days under a reduced leave schedule, the employee would use one-half (1/2) week of FMLA leave.
- If an employee who would otherwise work 30 hours per week, works only 20 hours a week under a reduced leave schedule, the employee's 10 hours of leave would constitute one-third (1/3) of a week of FMLA leave.
- Employers may convert these fractions to their hourly equivalent so long as the conversion equitably reflects the employee's total normally scheduled hours.
- An employer must account for intermittent or reduced leave using the shortest period of time that it uses to account for other forms of leave (for example, sick, vacation, personal), but the period of time used to account for intermittent or reduced leave *cannot be greater than 1 hour increments*. 29 CFR § 825.205(a).
- An employer may not require the employee to take more time off than is necessary to accommodate the need for the intermittent or reduced-schedule leave — if an employee only needs to be away from work for two hours a day, the employer may not require the employee to take a half-day off. 29 CFR § 825.203.
- If an employee's schedule varies from week to week to such an extent that an employer is unable to determine with any certainty how many hours the employee would otherwise

have worked if he or she were not on FMLA leave, a weekly average of the hours scheduled over the 12 months prior to the beginning of the leave period (including any hours for which the employee took leave of any type) would be used for calculating the employee's leave entitlement. 29 CFR § 825.205(b)(3).

- If an employee would normally be required to work overtime, but is unable to do so because of their FMLA-qualifying condition, the hours that the employee would have been required to work may be counted against the employee's FMLA entitlement. This would be considered an intermittent or reduced schedule leave. 29 CFR § 825.205(c).
    - For example, if an employee would normally be required to work for 48 hours in a particular week, but due to a serious health condition the employee is unable to work more than 40 hours that week, the employee would utilize eight hours of FMLA-protected leave out of the 48-hour workweek, or one-sixth (1/6) of a week of FMLA leave.
    - Voluntary overtime hours that an employee does not work due to an FMLA-qualifying reason may not be counted against the employee's FMLA leave entitlement.

Reporting Absences Taken as Part of an Intermittent or Reduced Schedule FMLA Leave

Employees on intermittent leave may still be required to comply with the employer's usual notice and procedure requirements for reporting absences, unless unusual circumstances prevent notification. 29 CFR § 825.302(d). Failure to comply with the employer's call-in or reporting policy may be cause for termination.

> *See, for example*, *Ritenour v. Tennessee Dep't of Human Services*, 497 Fed.Appx. 521 at **7 (6th Cir. 2012); *Bacon v. Hennepin County Medical Center*, 550 F.3d 711, 714-15 (8th Cir. 2008). See also *Lewis v. Holsum of Fort Wayne, Inc.*, 278 F.3d 706, 710-11 (7th Cir. 2002) (employee failed to call in after requesting indefinite leave to spend time with newborn child).

While employers may not ask an employee on intermittent leave to return a **medical certification or medical fit-for-duty certification** (see below) each time they take leave, they may ask employees themselves to certify that leave was taken for already approved FMLA intermittent leave.

H. COMPENSATION AND BENEFITS DURING FMLA LEAVE

Compensation

FMLA leave is unpaid, but FMLA leave may run concurrently with accrued sick or vacation leave and with absences taken in connection with workers' compensation claims. FLSA compensatory time off may also run concurrently with FMLA leave. 29 CFR § 825.207.

- Employers may **require** employees to substitute as much paid leave as they have accrued to date for unpaid leave.
- Even if it not required by the employer, employees may choose to substitute as much paid leave as they have accrued to date for unpaid leave.

Workers' compensation leave and short- or long-term disability leave are paid leaves, rather than unpaid leaves, although they usually pay only 2/3 of an employee's regular weekly wage. Neither the employer nor the employee may unilaterally insist on the use of accrued paid leave to supplement the workers' comp or disability benefits when leave runs concurrently with FMLA leave. They may, however, mutually agree to use paid accrued leave to supplement these benefits.

Compensation on Intermittent or Reduced Schedule Leave

Deductions taken from the salary of a FLSA-exempt employee taking unpaid intermittent FMLA leave will not jeopardize the employee's exemption.

Benefits

Health Insurance

An employer must cover an employee on FMLA leave under its group health insurance policy on the same terms as if the employee were working.

- If the employer pays the entire premium for the employee, it must continue to do so. Similarly, if the employer pays any portion of family coverage, it must continue to do so.
- The employee is responsible for making any contributions toward payment of the premium that s/he is normally required to make, even though the leave may be unpaid. Any employee who fails to make his/her contributions on time may be dropped from coverage. 29 CFR §§ 825.210 and 825.212.

An employer may seek reimbursement for its health insurance premium contributions if the employee fails to return to work after FMLA leave, unless the employee fails to return to work because the serious health condition has not resolved or the employee has developed an additional serious health condition that makes him or her unable to work. 29 CFR 825.213.

Other Employee Benefits

Employers are not required to maintain any other benefits during the period of FMLA leave, although they may choose to do so.

I. FITNESS FOR DUTY CERTIFICATION

Remember: There is one chance and only one chance to ask the employee to provide a fit-for-duty certification when s/he returns from FMLA leave and that is on the Designation Notice provided after the employee requests FMLA leave and, if required, provides a medical certification. If you don't ask for it on the Designation Notice, you are out of luck!

1. An employer may only require an employee to return a fitness-for-duty certification if it has a uniformly-applied policy or practice that requires all similarly-situated employees (same occupation, for example, or same serious health condition) to present s certification from the employee's health care provider that the employee is able to resume work.

2. The fitness for duty certification may only ask for information related to the particular health condition for which the employee is taking FMLA leave.

3. The fitness for duty certification does not have to provide any more information than that the employee is able to resume work. *See Budhun v. Reading Hospital and Medical Center*, 765 F.3d 245, 252-53 (3d Cir. 2014).

4. An employer may require that the certification ***specifically*** address the employee's ability to perform the essential functions of the employee's job. ***The employer must provide the employee with a list of the essential functions with the designation notice required and must indicate in the designation notice that the certification must address the employee's ability to perform those essential functions.*** If the employer does not tell the employee that the certification must address the employee's ability to perform his or her essential job duties and does not provide a list of essential job duties, the employee is only required to provide a simple statement of fitness to return to work for the treating physician. *See Budhun v. Reading Hospital and Medical Center*, 765 F.3d 245, 252-53 (3d Cir. 2014).

    - If the employer satisfies these requirements, the employee's health care provider must certify that the employee can perform the identified essential functions of his or her job. The employer may contact the employee's health care provider for purposes of clarifying and authenticating the fitness-for-duty certification under the same conditions as govern clarifying and authenticating a medical certification.

    - The employer may not delay the employee's return to work while contact with the health care provider is being made.

    - No second or third opinions on a fitness-for-duty certification may be required.

5. An employer may delay restoration to employment until an employee submits a required fitness-for-duty certification. An employee who does not provide a fitness-for-duty certification or request additional FMLA leave is no longer entitled to reinstatement under the FMLA (unless the employer did not give the employee notice of the fit-for-duty requirement in the designation notice). But once an employee submits a statement from her health care provider which indicates that she may return to work, the employer's duty to

reinstate her has been triggered under the FMLA. *See Brumbalough v. Camelot Care Centers, Inc*., 427 F.3d 996, 1004 (6th Cir. 2005).

6. If the fitness for duty certification includes restrictions, then the employer's duty to reinstate the employee is **not** triggered. *See Budhun v. Reading Hospital and Medical Center*, 765 F.3d 245, 252-53 (3d Cir. 2014); *James v. Hyatt Regency Chicago*, 707 F.3d 775, 781 (7th Cir. 2013).
7. The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or providing sufficient authorization to the health care provider to provide the information directly to the employer) in the fitness-for-duty certification process as in the initial certification process.
8. Employees are responsible for the cost of the fitness-for-duty certification just as they are responsible for the cost of obtaining the initial medical certification.

Fitness-for-Duty Certifications and Intermittent or Reduced FMLA Leave

An employer is not entitled to a certification of fitness to return to duty for each absence taken on an intermittent or reduced leave schedule.

- An employer may request a fitness for duty certification for intermittent or reduced leave absences once every 30 days **if** reasonable safety concerns exist regarding the employee's ability to perform his or her duties, based on the serious health condition for which the employee took such leave.
- As with extended leave FMLA, the employer must inform the employee at the same time it issues the designation notice that for each subsequent instance of intermittent or reduced schedule leave, the employee will be required to submit a fitness-for-duty certification unless one has already been submitted within the past 30 days.
- An employer can set a different interval for requiring a fitness-for-duty certification as long as it does not exceed once every 30 days and as long as the employer advises the employee of the requirement in advance of the employee taking leave.
- An employer may not terminate the employment of the employee while awaiting such a certification of fitness to return to duty for an intermittent or reduced schedule leave absence.

Fitness for Duty Certification Once an Employee Returns to Work

Whether or not an employer has required a fit-for-duty certification, it sometimes happens that after an employee returns to work the employer has reason to question whether the same condition for which the employee took FMLA leave is limiting the employee's ability to perform his or her job functions. Now the Americans with Disabilities Act applies. In such a case, the ADA allows an employer may ask the employee to undergo a fitness for duty exam related to the employee's ability to perform essential job duties. In this case, the exam will be at the employer's expense and may be done by a medical provider of the employer's choosing.

J. DO YOU SUSPECT FMLA FRAUD?

Working a Second Job: 29 CFR § 825.216 (e)

Employers sometimes learn to their dismay that an employee is working another job while on FMLA leave. This is not necessarily evidence of FMLA fraud, however, as the second job may not involve the same kinds of duties and the employee's condition may allow him or her to perform the second job's duties. But an employer may restrict the activities of employees on FMLA leave nonetheless.

- Employers may only restrict the kinds of activities that an employee on FMLA leave may engage in if there is **a uniform policy applicable to all employees on leave of whatever kind**. Thus, an employer may have a policy that says no employee on a leave of absence may be employed in any capacity during the leave and that violation of this policy may result in immediate termination of both the leave of absence (including FMLA leave) and employment.

Engaging in Activities Inconsistent with the Medical Certification: 29 CFR § 825.216 (d)

If an employer discovers that an employee is engaging in an activity that would appear impossible or prohibited if the reason for FMLA leave were true (for example, the medical certification form indicates that the employee needs complete bed rest for a month and the employee is seen playing in a softball game), the employer may terminate the FMLA leave and/or the employee.

Even where an employer is ultimately wrong about whether the employee was abusing leave, if the employer terminates an employee on FMLA leave based on **an honest belief** that the employee took leave fraudulently, the termination will be upheld.

The ways in which some employees have abused FMLA leave are many and varied. Here are a few examples:

Capps v. Mondelez Global, LLC., LLC, 847 F.3d 144, 152-55 (3d Cir. 2017) (employer had **honest belief** employee misused FMLA leave and was dishonest in violation of employer's policies; employee had been continuously recertified for FMLA leave about every six months and was returned to same position with same benefits each time he returned from leave, until employer found that criminal court docket in employee's drunk-driving case reflected that his arrest and court dates appeared to coincide with days on which he had taken FMLA leave).

Sharif v. United Airlines, Inc., 841 F.3d 199, 204-06 (4th Cir. 2016) (employee's termination was justified where he fraudulently claimed the need for FMLA leave in order not to interrupt his vacation for a scheduled work obligation).

Scruggs v. Carrier Corp., 688 F.3d 821, 826 (7th Cir. 2012) (employer had an "**honest belief**" that employee misused his FMLA leave; employer suspected employee was misusing his FMLA leave based upon prior absenteeism, and, accordingly, hired a private investigator to observe employee on a day that he requested FMLA leave to care for his mother. Video surveillance on that day then revealed that employee did not appear to leave his house that day, and when employer questioned employee, the employee could not recall what he did on that day, but stated that he did not misuse his FMLA leave, and, although employee later provided documentation from his mother's nursing home and doctor's office, the paperwork only raised further questions for the employer, as the documents employee produced were facially inconsistent and conflicted with employer's internal paperwork).

Parker v. Verizon Pennsylvania, Inc., 309 Fed. Appx. 551, 557 (3d Cir. 2009) (employee's denial that he performed any work while at the construction site does not contradict Verizon's decision that he misrepresented his health by claiming he could not be at work but could be at the construction site of his home. Any material issue that the evidence of his denial creates goes solely to whether the decision to terminate him was poor management, not discriminatory).

Hyldahl v. AT & T, 2008 WL 5111910 (E.D. Mich. 2008) (employee not discharged in retaliation for taking FMLA leave because her employer had an **honest belief** she was abusing her leave. The employer continuously granted the employee's leave requests without incident for a number of years. The employee suffered from post-traumatic stress disorder, causing her to experience panic attacks and depression. The employer initiated an investigation after suspecting the employee was potentially abusing her FMLA leave, which revealed the employee went to a pre-scheduled dentist appointment, visited a restaurant with a friend, and had her hair done while on leave).

Vail v. Raybestos Products Co., 533 F.3d 904, 909-10 (7th Cir. 2008) (employer police officer provided employer with **honest belief** that employee was not using her medical leave for intended purpose of leave due to her migraine headaches, precluding employee's claim that employer interfered with her FMLA rights by terminating her for abuse of leave, where officer saw employee working for her husband's lawn-mowing business the next morning after she had taken medical leave for her evening shift).

Crouch v. Whirlpool Corp., 447 F.3d 984, 984–85 (7th Cir. 2006) (Crouch and his fiancée both worked for Whirlpool and tried unsuccessfully to coordinate vacation time. The dates Crouch requested for disability and FMLA leave corresponded to the dates for which he was denied, and his fiance was granted, vacation time).

K. RETURN TO WORK

Under the FMLA, employees have the right to return to **the same or an equivalent job** upon the conclusion of FMLA leave.

Equivalent means: virtually identical to the original job in terms of pay, benefits and other employment terms and conditions. 29 CFR §§ 825.214 and 825.215(a).

Employers are not required to continue an FMLA leave or to return a person to work if the employee would have been terminated had they continued to work — if, for example, the employee's position were being eliminated as part of a restructuring or a reduction-in-force or if misconduct or performance issues are discovered while the employee is on leave. 29 CFR § 825.216(a).

- See, for example, *Yashenko v. Harrah's NC Casino Co., LLC*, 446 F.3d 541, 549-550 (4th Cir. 2006) (even though employee on FMLA leave was only employee to lose his position during reorganization, employee ignored employer's requests that he apply for an another position); *Mercer v. Arc of Prince Georges County, Inc.*, 532 Fed.Appx. 392, 398-99 (4th Cir. 2013) (discovery that social services employee's failure to file clients' food stamp applications justified her termination at the conclusion of FMLA leave).

L. USING A THIRD-PARTY ADMINISTRATOR TO HANDLE FMLA LEAVE

From a legal perspective, the most important thing to keep in mind is that an employer who uses an outside company to manage its employees' FMLA leave is entitled to require employees to contact the TPA for all matters related to leave. Employers really can pretty much "wash their hands" of FMLA paperwork and tracking. More importantly, employees who do not follow instructions about contacting the TPA are not entitled to FMLA leave and may be terminated, as the following cases make clear:

McKenzie v. Seneca Foods Corp., 2017 WL 1155966, at *6 (W.D. Wis. 2017) (termination of employee for absenteeism was not FMLA interference where employee on intermittent FMLA leave informed employer of days on which she was taking FMLA leave but did not inform TPA FMLA administrator).

Scales v. FedEx Ground Package Sys., Inc., 2017 WL 345576, at *6 (N.D. Ill. 2017) (employer did not retaliate or interfere with employee's right to FMLA leave where HR told employee that he needed to contact TPA to initiate leave and employee, who evidence showed knew of TPA policy, failed to do so).

Alexander v. Kellogg USA, Inc., 674 Fed. Appx. 496,for failing to notify FMLA program administrator that he intended to be absent on certain dates under his approved FMLA leave did not constitute interference with employee's FMLA rights; employee admitted that he did not report absences to administrator within 48 hours of missing work, as required by employer's policy, and that there were no unusual circumstances that excused employee's failure to comply with internal notice requirements).

M. PREPARING FOR AN AUDIT BY THE U.S. DEPARTMENT OF LABOR

1. Review your written FMLA policy. Make sure it is up-to-date!
2. Make sure that you have DOL's FMLA poster posted in a place where it will easily be seen by employees.
3. Make sure that you are using DOL's FMLA forms and that the forms you are using are the most recent forms.
4. Make sure that you have easily accessible FMLA records, including the names of employees who have taken FMLA leave, the dates on which they have taken FMLA leave and copies of all of the forms that you have received from the employees (for example, medical certifications) and that you have given employees (Notices of Rights and Responsibilities and Designation Notices). All of this information should be kept separately from the rest of the personnel file and available only on a need-to-know basis and should go back at least three years.
5. Make sure that you can answer the following questions if asked by DOL:
    a. Does the organization have a procedure for managers to follow when employees report absences that could be FMLA-qualified?
    b. Is there a procedure for making sure that the human resources department is made aware of employees who are out on or who may qualify for FMLA leave?
    c. How do you calculate increments of FMLA leave for those persons on intermittent or reduced schedule leave?
    d. When do you require fitness-for-duty examinations and how do you notify employees of the requirement?
    e. Do you have a policy or practice with respect to re-certification of FMLA leave?

Wage and Hour Division (WHD)

Administrator's Interpretation No. 2010-3

June 22, 2010

Issued by DEPUTY ADMINISTRATOR NANCY J. LEPPINK

SUBJECT: Clarification of the definition of "son or daughter" under Section 101(12) of the Family and Medical Leave Act (FMLA) as it applies to an employee standing "in loco parentis" to a child.

The Administrator has determined that additional clarification is needed on the definition of "son or daughter" as it applies to an employee taking FMLA-protected leave for the birth or placement of a child, to care for a newborn or newly placed child, or to care for a child with a serious health condition. Based on the Wage and Hour Division's experience in administering the FMLA, it is evident that many employees and employers are unsure of how the FMLA applies when there is no legal or biological parent-child relationship. The Administrator is issuing this interpretation to provide needed guidance on this important area of law.

Background

The FMLA entitles an eligible employee to take up to 12 workweeks of job-protected leave, in relevant part, "[b]ecause of the birth of a son or daughter of the employee and in order to care for such son or daughter," "[b]ecause of the placement of a son or daughter with the employee for adoption or foster care," and to care for a son or daughter with a serious health condition. *See* 29 U.S.C. § 2612(a)(1)(A) - (C); 29 C.F.R. § 825.200. The FMLA defines a "son or daughter" as a "biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is— (A) under 18 years of age; or (B) 18 years of age or older and incapable of self-care because of a mental or physical disability." 29 U.S.C. § 2611(12). *See also* 29 C.F.R. §§ 825.122(c), 825.800.[1]

The Wage and Hour Division has received several requests for additional guidance regarding whether employees who do not have a biological or legal relationship with a child may take FMLA leave for birth, bonding, and to care for the child.

In Loco Parentis

The FMLA entitles an employee to 12 workweeks of leave for the birth or placement of a son or daughter, to bond with a newborn or newly placed son or daughter, or to care for a son or daughter with a serious health condition. 29 U.S.C. § 2612(a)(1)(A) - (C). The definition of "son or daughter" under the FMLA includes not only a biological or adopted child, but also a "foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis." 29 U.S.C. § 2611(12). *See also* 29 C.F.R. §§ 825.122(c), 825.800.

Congress intended the definition of "son or daughter" to reflect "the reality that many children in the United States today do not live in traditional 'nuclear' families with their biological father and mother. Increasingly, those who find themselves in need of workplace accommodation of their child care responsibilities are not the biological parent of the children they care for, but their adoptive, step, or foster parents, their guardians, or sometimes simply their grandparents or other relatives or adults." *See* S. Rep. No. 103-3, at 22. Congress stated that the definition was intended to be "construed to ensure that an employee who actually has day-to-day responsibility for caring for a child is entitled to leave even if the employee does not have a biological or legal relationship to that child." *Id.*

In loco parentis is commonly understood to refer to "a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption. It embodies the two ideas of assuming the parental status and discharging the parental duties." *Niewiadomski v. U.S.,* 159 F.2d 683, 686 (6th Cir. 1947) (quotations omitted). *Black's Law Dictionary* defines the term in loco parentis as "in the place of a parent." *Black's Law Dictionary* 803 (8th ed. 2004). "The key in determining whether the relationship of in loco parentis is established is found in the *intention* of the person allegedly in loco parentis to assume the status of a parent toward the child. The intent to assume such parental status can be inferred from the acts of the parties." *Dillon v. Maryland-National Capital Park and Planning Comm'n*, 382 F. Supp. 2d 777, 787 (D. Md. 2005), *aff'd* 258 Fed. Appx. 577 (4th Cir. 2007) (citations omitted; emphasis in original).

Whether an employee stands in loco parentis to a child is a fact issue dependent on multiple factors. *Megonnell v. Infotech Solutions, Inc.*, 2009 WL 3857451, *9 (M.D. Pa. 2009). Courts have enumerated factors to be considered in determining in loco parentis status; these factors include the age of the child; the degree to which the child is dependent on the person claiming to be standing in loco parentis; the amount of support, if any, provided; and the extent to which duties commonly associated with parenthood are exercised. *Dillon*, 382 F. Supp. 2d 777, 786 -787 (D. Md. 2005). [2]

The FMLA regulations define in loco parentis as including those with day-to-day responsibilities to care for and financially support a child. 29 C.F.R. § 825.122(c)(3). Employees who have no biological or legal relationship with a child may nonetheless stand in loco parentis to the child and be entitled to FMLA leave. *Id.* It is the Administrator's interpretation that the regulations do not require an employee who intends to assume the responsibilities of a parent to establish that he or she provides both day-to-day care and financial support in order to be found to stand in loco parentis to a child. For example, where an employee provides day-to-day care for his or her unmarried partner's child (with whom there is no legal or biological relationship) but does not financially support the child, the employee could be considered to stand in loco parentis to the child and therefore be entitled to FMLA leave to care for the child if the child had a serious health condition. The same principles apply to leave for the birth of a child and to bond with a child within the first 12 months following birth or placement. For instance, an employee who will share equally in the raising of a child with the child's biological parent would be entitled to leave for the child's birth because he or she will stand in loco parentis to the child. Similarly, an employee who will share equally in the raising of an adopted child with a same sex partner, but who does not have a legal relationship with the child, would be entitled to leave to bond with the child following placement, or to care for the child if the child had a serious health condition, because the employee stands in loco parentis to the child.

It should be noted that the fact that a child has a biological parent in the home, or has both a mother and a father, does not prevent a finding that the child is the "son or daughter" of an employee who lacks a biological or legal relationship with the child for purposes of taking FMLA leave. Neither the statute nor the regulations restrict the number of parents a child may have under the FMLA. For example, where a child's biological parents divorce, and each parent remarries, the child will be the "son or daughter" of both the biological parents and the stepparents and all four adults would have equal rights to take FMLA leave to care for the child. Where an employer has questions about whether an employee's relationship to a child is covered under FMLA, the employer may require the employee to provide reasonable documentation or statement of the family relationship. A simple statement asserting that the requisite family relationship exists is all that is needed in situations such as in loco parentis where there is no legal or biological relationship. *See* 29 C.F.R. § 825.122(j); 73 Fed. Reg. 67,952 (Nov. 17, 2008).

Examples of situations in which an in loco parentis relationship may be found include where a grandparent takes in a grandchild and assumes ongoing responsibility for raising the child because the parents are incapable of providing care, or where an aunt assumes responsibility for raising a child after the death of the child's parents. Such situations may, or may not, ultimately lead to a legal relationship with the child (adoption or legal ward), but no such relationship is required to find in loco parentis status. In contrast, an employee who cares for a child while the child's parents are on vacation would not be considered to be in loco parentis to the child.

Conclusion

Based upon a thorough examination of the relevant factors, it is the Administrator's interpretation that either day-to-day care or financial support may establish an in loco parentis relationship where the employee intends to assume the responsibilities of a parent with regard to a child. In all cases, whether an employee stands in loco parentis to a child will depend on the particular facts.

---

[1] This Administrator's Interpretation does not address an employee's entitlement to take military FMLA leave for a son or daughter, which is determined by separate definitions. *See* 29 C.F.R. § 825.122(g), (h).

[2] There is no specific set of factors that, if present, will be considered to be dispositive in determining in loco parentis status. *See e.g., Martin v. Brevard County Public Schools*, 543 F.3d 1261 (11th Cir. 2008) (fact issue whether employee stood "in loco parentis" to his granddaughter, though the employee provided financial support, shelter, food and health insurance); *Dillon,* 382 F. Supp. 2d at 787 (genuine issue of material fact as to whether grandmother stood *in loco parentis* to employee, although grandmother had provided a home and financial support); *Brehmer v. Xcel Energy, Inc.,* No. 06-3294, 2008 WL 3166265, at *7 (D. Minn. 2008) (finding genuine issue of material fact on *in loco parentis* issue where employee helped his girlfriend's son eat, dress, get ready for bed, took child to doctor appointments and to school, went to child's softball games, and contributed more than half of child's financial support).

Notice of Eligibility and Rights & Responsibilities (Family and Medical Leave Act)

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

U.S. Wage and Hour Division

OMB Control Number: 1215-0181
Expires: 12/31/2011

In general, to be eligible an employee must have worked for an employer for at least 12 months, have worked at least 1,250 hours in the 12 months preceding the leave, and work at a site with at least 50 employees within 75 miles. While use of this form by employers is optional, a fully completed Form WH-381 provides employees with the information required by 29 C.F.R. § 825.300(b), which must be provided within five business days of the employee notifying the employer of the need for FMLA leave. Part B provides employees with information regarding their rights and responsibilities for taking FMLA leave, as required by 29 C.F.R. § 825.300(b), (c)**.**

[Part A – NOTICE OF ELIGIBILITY]

TO: _____
Employee

FROM: _____
Employer Representative

DATE: _____

On _____, you informed us that you needed leave beginning on _____ for:

_____ The birth of a child, or placement of a child with you for adoption or foster care;

_____ Your own serious health condition;

_____ Because you are needed to care for your ____ spouse; _____child; _____ parent due to his/her serious health condition.

_____ Because of a qualifying exigency arising out of the fact that your ____ spouse; _____son or daughter; _____ parent is on active duty or call to active duty status in support of a contingency operation as a member of the National Guard or Reserves.

Because you are the ____ spouse; _____ son or daughter; _____ parent; _____ next of kin of a covered servicemember with a serious injury or illness.

This Notice is to inform you that you:

_____ Are eligible for FMLA leave (See Part B below for Rights and Responsibilities)

_____ Are **not** eligible for FMLA leave, because (only one reason need be checked, although you may not be eligible for other reasons):

_____ You have not met the FMLA's 12-month length of service requirement. As of the first date of requested leave, you will have worked approximately ___ months towards this requirement.
_____ You have not met the FMLA's 1,250-hours-worked requirement.
_____ You do not work and/or report to a site with 50 or more employees within 75-miles.

If you have any questions, contact _____ or view the FMLA poster located in _____.

[PART B-RIGHTS AND RESPONSIBILITIES FOR TAKING FMLA LEAVE]

As explained in Part A, you meet the eligibility requirements for taking FMLA leave and still have FMLA leave available in the applicable 12-month period. **However, in order for us to determine whether your absence qualifies as FMLA leave, you must return the following information to us by _____.** (If a certification is requested, employers must allow at least 15 calendar days from receipt of this notice; additional time may be required in some circumstances.) If sufficient information is not provided in a timely manner, your leave may be denied.

____ Sufficient certification to support your request for FMLA leave. A certification form that sets forth the information necessary to support your request **is**/ **is not** enclosed.

Sufficient documentation to establish the required relationship between you and your family member.

____ Other information needed: _____

_____

_____

No additional information requested

If your leave does qualify as FMLA leave you will have the following **responsibilities** while on FMLA leave (only checked blanks apply):

____ Contact _____ at _____ to make arrangements to continue to make your share of the premium payments on your health insurance to maintain health benefits while you are on leave. You have a minimum 30-day (or, indicate longer period, if applicable) grace period in which to make premium payments. If payment is not made timely, your group health insurance may be cancelled, provided we notify you in writing at least 15 days before the date that your health coverage will lapse, or, at our option, we may pay your share of the premiums during FMLA leave, and recover these payments from you upon your return to work.

You will be required to use your available paid _____ **sick**, _____ **vacation**, and/or _____**other leave** during your FMLA absence. This means that you will receive your paid leave and the leave will also be considered protected FMLA leave and counted against your FMLA leave entitlement.

____ Due to your status within the company, you are considered a "key employee" as defined in the FMLA. As a "key employee," restoration to employment may be denied following FMLA leave on the grounds that such restoration will cause substantial and grievous economic injury to us. We **have**/ **have not** determined that restoring you to employment at the conclusion of FMLA leave will cause substantial and grievous economic harm to us.

____ While on leave you will be required to furnish us with periodic reports of your status and intent to return to work every _____. (Indicate interval of periodic reports, as appropriate for the particular leave situation).

If the circumstances of your leave change, and you are able to return to work earlier than the date indicated on the reverse side of this form, you will be required to notify us at least two workdays prior to the date you intend to report for work.

If your leave does qualify as FMLA leave you will have the following **rights** while on FMLA leave:

- You have a right under the FMLA for up to 12 weeks of unpaid leave in a 12-month period calculated as:

  _____ the calendar year (January – December).

  a fixed leave year based on _____.

  the 12-month period measured forward from the date of your first FMLA leave usage.

  a "rolling" 12-month period measured backward from the date of any FMLA leave usage.

- You have a right under the FMLA for up to 26 weeks of unpaid leave in a single 12-month period to care for a covered servicemember with a serious injury or illness. This single 12-month period commenced on _____
- Your health benefits must be maintained during any period of unpaid leave under the same conditions as if you continued to work.
- You must be reinstated to the same or an equivalent job with the same pay, benefits, and terms and conditions of employment on your return from FMLA-protected leave. (If your leave extends beyond the end of your FMLA entitlement, you do not have return rights under FMLA.)
- If you do not return to work following FMLA leave for a reason other than: 1) the continuation, recurrence, or onset of a serious health condition which would entitle you to FMLA leave; 2) the continuation, recurrence, or onset of a covered servicemember's serious injury or illness which would entitle you to FMLA leave; or 3) other circumstances beyond your control, you may be required to reimburse us for our share of health insurance premiums paid on your behalf during your FMLA leave.
- If we have not informed you above that you must use accrued paid leave while taking your unpaid FMLA leave entitlement, you have the right to have **____ sick, vacation,** and/or ___ **other leave** run concurrently with your unpaid leave entitlement, provided you meet any applicable requirements of the leave policy. Applicable conditions related to the substitution of paid leave are referenced or set forth below. If you do not meet the requirements for taking paid leave, you remain entitled to take unpaid FMLA leave.

  ____For a copy of conditions applicable to sick/vacation/other leave usage please refer to _____ available at: _____.

  ____Applicable conditions for use of paid leave:_____

  _____

  _____

  _____

  _____

Once we obtain the information from you as specified above, we will inform you, within 5 business days, whether your leave will be designated as FMLA leave and count towards your FMLA leave entitlement. If you have any questions, please do not hesitate to contact:

_____at _____.

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

It is mandatory for employers to provide employees with notice of their eligibility for FMLA protection and their rights and responsibilities. 29 U.S.C. § 2617; 29 C.F.R. § 825.300(b), (c). It is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 10 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION.**

Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act)

U.S. Department of Labor

Wage and Hour Division

DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR; RETURN TO THE PATIENT

OMB Control Number: 1235-0003
Expires: 5/31/2018

SECTION I: For Completion by the EMPLOYER

INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave due to a serious health condition to submit a medical certification issued by the employee's health care provider. Please complete Section I before giving this form to your employee. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies, and in accordance with 29 C.F.R. § 1635.9, if the Genetic Information Nondiscrimination Act applies.

Employer name and contact: _____

Employee's job title: _____ Regular work schedule: _____

Employee's essential job functions: _____

_____

Check if job description is attached:

SECTION II: For Completion by the EMPLOYEE

INSTRUCTIONS to the EMPLOYEE: Please complete Section II before giving this form to your medical provider. The FMLA permits an employer to require that you submit a timely, complete, and sufficient medical certification to support a request for FMLA leave due to your own serious health condition. If requested by your employer, your response is required to obtain or retain the benefit of FMLA protections. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to provide a complete and sufficient medical certification may result in a denial of your FMLA request. 29 C.F.R. § 825.313. Your employer must give you at least 15 calendar days to return this form. 29 C.F.R. § 825.305(b).

Your name: _____
First Middle Last

SECTION III: For Completion by the HEALTH CARE PROVIDER

INSTRUCTIONS to the HEALTH CARE PROVIDER: Your patient has requested leave under the FMLA. Answer, fully and completely, all applicable parts. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Limit your responses to the condition for which the employee is seeking leave. Do not provide information about genetic tests, as defined in 29 C.F.R. § 1635.3(f), genetic services, as defined in 29 C.F.R. § 1635.3(e), or the manifestation of disease or disorder in the employee's family members, 29 C.F.R. § 1635.3(b). Please be sure to sign the form on the last page.

Provider's name and business address: _____

Type of practice / Medical specialty: _____

Telephone: (_____)_____ Fax:(_____)_____

PART A: MEDICAL FACTS

1. Approximate date condition commenced: _____

   Probable duration of condition: _____

   Mark below as applicable:
   Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility?
   ___No ___Yes. If so, dates of admission:

   _____

   Date(s) you treated the patient for condition:

   _____

   Will the patient need to have treatment visits at least twice per year due to the condition? ___No ___ Yes.

   Was medication, other than over-the-counter medication, prescribed? ___No ___Yes.

   Was the patient referred to other health care provider(s) for evaluation or treatment (e.g., physical therapist)?
   ____No ____Yes. If so, state the nature of such treatments and expected duration of treatment:

   _____

2. Is the medical condition pregnancy? ___No ___Yes. If so, expected delivery date: _____

3. Use the information provided by the employer in Section I to answer this question. If the employer fails to provide a list of the employee's essential functions or a job description, answer these questions based upon the employee's own description of his/her job functions.

   Is the employee unable to perform any of his/her job functions due to the condition: ____ No ____ Yes.

   If so, identify the job functions the employee is unable to perform:

   _____

4. Describe other relevant medical facts, if any, related to the condition for which the employee seeks leave (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment):

   _____

   _____

   _____

   _____

   _____

   _____

   _____

PART B: AMOUNT OF LEAVE NEEDED

5. Will the employee be incapacitated for a single continuous period of time due to his/her medical condition, including any time for treatment and recovery? ___No ___Yes.

   If so, estimate the beginning and ending dates for the period of incapacity: _____

6. Will the employee need to attend follow-up treatment appointments or work part-time or on a reduced schedule because of the employee's medical condition? ___No ___Yes.

   If so, are the treatments or the reduced number of hours of work medically necessary? ___No ___Yes.

   Estimate treatment schedule, if any, including the dates of any scheduled appointments and the time required for each appointment, including any recovery period:

   _____

   Estimate the part-time or reduced work schedule the employee needs, if any:

   _____ hour(s) per day; _____ days per week from _____ through _____

7. Will the condition cause episodic flare-ups periodically preventing the employee from performing his/her job functions? ____No ____Yes.

   Is it medically necessary for the employee to be absent from work during the flare-ups? ____ No ____Yes. If so, explain:

   _____

   _____

   Based upon the patient's medical history and your knowledge of the medical condition, estimate the frequency of flare-ups and the duration of related incapacity that the patient may have over the next 6 months (e.g., 1 episode every 3 months lasting 1-2 days):

Frequency : _____ times per _____ week(s) _____ month(s)

Duration: _____ hours or ___ day(s) per episode

ADDITIONAL INFORMATION: IDENTIFY QUESTION NUMBER WITH YOUR ADDITIONAL ANSWER.

_____

_____

_____

_____

_____

_____

Signature of Health Care Provider **Date**

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210. **DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR; RETURN TO THE PATIENT.**

Certification of Health Care Provider for Family Member's Serious Health Condition (Family and Medical Leave Act)

U.S. Department of Labor
Wage and Hour Division

DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR; RETURN TO THE PATIENT.

OMB Control Number: 1235-0003
Expires: 5/31/2018

SECTION I: For Completion by the EMPLOYER

INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave to care for a covered family member with a serious health condition to submit a medical certification issued by the health care provider of the covered family member. Please complete Section I before giving this form to your employee. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees' family members, created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies, and in accordance with 29 C.F.R. § 1635.9, if the Genetic Information Nondiscrimination Act applies.

Employer name and contact: _____

_____

SECTION II: For Completion by the EMPLOYEE

INSTRUCTIONS to the EMPLOYEE: Please complete Section II before giving this form to your family member or his/her medical provider. The FMLA permits an employer to require that you submit a timely, complete, and sufficient medical certification to support a request for FMLA leave to care for a covered family member with a serious health condition. If requested by your employer, your response is required to obtain or retain the benefit of FMLA protections. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to provide a complete and sufficient medical certification may result in a denial of your FMLA request. 29 C.F.R. § 825.313. Your employer must give you at least 15 calendar days to return this form to your employer. 29 C.F.R. § 825.305.

Your name: _____
First Middle Last

Name of family member for whom you will provide care:_____
First Middle Last

Relationship of family member to you: _____

If family member is your son or daughter, date of birth:_____

Describe care you will provide to your family member and estimate leave needed to provide care:

_____

_____

_____

_____ ____ _____
Employee Signature Date

CONTINUED ON NEXT PAGE

SECTION III: For Completion by the HEALTH CARE PROVIDER

INSTRUCTIONS to the HEALTH CARE PROVIDER: The employee listed above has requested leave under the FMLA to care for your patient. Answer, fully and completely, all applicable parts below. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Limit your responses to the condition for which the patient needs leave. Do not provide information about genetic tests, as defined in 29 C.F.R. § 1635.3(f), or genetic services, as defined in 29 C.F.R. § 1635.3(e). Page 3 provides space for additional information, should you need it. Please be sure to sign the form on the last page.

Provider's name and business address:_____

Type of practice / Medical specialty: _____

Telephone: (_____)_____ Fax:(_____)_____

PART A: MEDICAL FACTS

1. Approximate date condition commenced: _____

   Probable duration of condition: _____

   Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility?
   ___No ___Yes. If so, dates of admission: _____

   Date(s) you treated the patient for condition: _____

   Was medication, other than over-the-counter medication, prescribed? ___No ___Yes.

   Will the patient need to have treatment visits at least twice per year due to the condition? ___No ____ Yes

   Was the patient referred to other health care provider(s) for evaluation or treatment (e.g., physical therapist)?
   ____ No ____Yes. If so, state the nature of such treatments and expected duration of treatment:

   _____

   _____

2. Is the medical condition pregnancy? ___No ___Yes. If so, expected delivery date: _____

3. Describe other relevant medical facts, if any, related to the condition for which the patient needs care (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment):

_____

_____

_____

_____

PART B: AMOUNT OF CARE NEEDED: When answering these questions, keep in mind that your patient's need for care by the employee seeking leave may include assistance with basic medical, hygienic, nutritional, safety or transportation needs, or the provision of physical or psychological care:

4. Will the patient be incapacitated for a single continuous period of time, including any time for treatment and recovery? ___No ___Yes.

   Estimate the beginning and ending dates for the period of incapacity: _____

   During this time, will the patient need care? __ No __ Yes.

   Explain the care needed by the patient and why such care is medically necessary:

   _____

   _____

   _____

   _____

   _____

5. Will the patient require follow-up treatments, including any time for recovery? ___No ___Yes.

   Estimate treatment schedule, if any, including the dates of any scheduled appointments and the time required for each appointment, including any recovery period:

   _____

   Explain the care needed by the patient, and why such care is medically necessary: _____

   _____

6. Will the patient require care on an intermittent or reduced schedule basis, including any time for recovery? __ No __ Yes.

   Estimate the hours the patient needs care on an intermittent basis, if any:

   _____ hour(s) per day; _____ days per week from _____ through _____

   Explain the care needed by the patient, and why such care is medically necessary:

   _____

   _____

   _____

   _____

7. Will the condition cause episodic flare-ups periodically preventing the patient from participating in normal daily activities? ____No ____Yes.

   Based upon the patient's medical history and your knowledge of the medical condition, estimate the frequency of flare-ups and the duration of related incapacity that the patient may have over the next 6 months (e.g., 1 episode every 3 months lasting 1-2 days):

   Frequency: _____ times per _____ week(s) _____ month(s)

   Duration: _____ hours or ___ day(s) per episode

   Does the patient need care during these flare-ups? ____ No ____ Yes.

   Explain the care needed by the patient, and why such care is medically necessary: _____

_____

_____

_____

_____

ADDITIONAL INFORMATION: IDENTIFY QUESTION NUMBER WITH YOUR ADDITIONAL ANSWER.

_____

_____

_____

_____

_____

_____

_____ _____

Signature of Health Care Provider **Date**

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210.
DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR; RETURN TO THE PATIENT.

Designation Notice (Family and Medical Leave Act)

U.S. Department of Labor
Wage and Hour Division

U.S. Wage and Hour Division

OMB Control Number: 1235-0003
Expires: 5/31/2018

Leave covered under the Family and Medical Leave Act (FMLA) must be designated as FMLA-protected and the employer must inform the employee of the amount of leave that will be counted against the employee's FMLA leave entitlement. In order to determine whether leave is covered under the FMLA, the employer may request that the leave be supported by a certification. If the certification is incomplete or insufficient, the employer must state in writing what additional information is necessary to make the certification complete and sufficient. While use of this form by employers is optional, a fully completed Form WH-382 provides an easy method of providing employees with the written information required by 29 C.F.R. §§ 825.300(c), 825.301, and 825.305(c).

To: _____

Date: _____

We have reviewed your request for leave under the FMLA and any supporting documentation that you have provided. We received your most recent information on _____ and decided:

_____ **Your FMLA leave request is approved. All leave taken for this reason will be designated as FMLA leave.**

The FMLA requires that you notify us as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown. Based on the information you have provided to date, we are providing the following information about the amount of time that will be counted against your leave entitlement:

_____ Provided there is no deviation from your anticipated leave schedule, the following number of hours, days, or weeks will be counted against your leave entitlement: _____

_____ Because the leave you will need will be unscheduled, it is not possible to provide the hours, days, or weeks that will be counted against your FMLA entitlement at this time. You have the right to request this information once in a 30-day period (if leave was taken in the 30-day period).

Please be advised (check if applicable):

_____ You have requested to use paid leave during your FMLA leave. Any paid leave taken for this reason will count against your FMLA leave entitlement.

_____ We are requiring you to substitute or use paid leave during your FMLA leave.

_____You will be required to present a fitness-for-duty certificate to be restored to employment. If such certification is not timely received, your return to work may be delayed until certification is provided. A list of the essential functions of your position ___ **is** ___ **is not** attached. If attached, the fitness-for-duty certification must address your ability to perform these functions.

___ **Additional information is needed to determine if your FMLA leave request can be approved:**

_____ The certification you have provided is not complete and sufficient to determine whether the FMLA applies to your leave request. You must provide the following information no later than _____, unless it is not
(Provide at least seven calendar days)
practicable under the particular circumstances despite your diligent good faith efforts, or your leave may be denied.

_____
(Specify information needed to make the certification complete and sufficient)

_____

_____ We are exercising our right to have you obtain a second or third opinion medical certification at our expense, and we will provide further details at a later time.

_____ Your FMLA Leave request is Not Approved.
_____ The FMLA does not apply to your leave request.
_____ You have exhausted your FMLA leave entitlement in the applicable 12-month period.

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

It is mandatory for employers to inform employees in writing whether leave requested under the FMLA has been determined to be covered under the FMLA. 29 U.S.C. § 2617; 29 C.F.R. §§ 825.300(d), (e). It is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 10 – 30 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION.**

FMLA FITNESS FOR DUTY CERTIFICATION

Employee Name_____ Employee Department_____
Home Address_____ Employee Position_____
_____ Work phone_____
Home phone_____ Cell phone_____

Date FMLA leave began_____

Medical Return to Work Certification to Be Completed by Health Care Provider

---

Name of Health Care Provider_____
Name of Health Care Practice_____
Address_____
Phone_____
Name of Patient_____
Date of Examination_____

Date employee is released to return to work_____

Is the employee able to perform the essential functions of his or her position (see attached list of essential functions) as of the return to work date? YES____ NO_____

Additional comments_____
_____
_____

Certification:
I affirm that the information provided above is true and accurate to the best of my knowledge.

Healthcare Provider's Signature

The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this certification of fitness for return to duty. "Genetic information" as defined by GINA includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member of an embryo lawfully held by an individual or family member receiving assistive reproductive services.