

Section 300

Leave Circumstances

THE LEAVE REQUIREMENT

The federal Family and Medical Leave Act (FMLA) grants eligible employees up to 12 weeks of unpaid leave in a 12-month period, for the birth, adoption or foster care placement of a child, the employee's or a family member's serious health condition, or a qualifying exigency related to a covered family member's covered active duty or call to covered active duty. FMLA's military family leave rules also allow up to 26 weeks of unpaid leave in a single 12-month period for eligible employees to care for a covered family member recovering from a serious injury or illness incurred while on covered active duty in the armed forces, or which existed before the beginning of the member's covered active duty and was aggravated by service in the line of duty on covered active duty in the armed forces, or that manifested itself before or after the member became a veteran.

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REASONS FOR LEAVE

There are six basic qualifying events that entitle employees to take leave under FMLA:

1. The birth of a son or daughter, and in order to care for that newborn child
2. The placement of a child under the age of 18 with the employee for adoption or foster care, and to care for that child

3. To care for a spouse, daughter, son, or parent of the employee, if that person has a serious health condition
4. An employee's own serious health condition that makes the employee unable to perform the essential functions of his or her job
5. Because of any qualifying exigency arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the armed forces.
6. Up to 26 weeks of leave during any single 12-month period if the employee is the spouse, son, daughter, parent, or next of kin caring for a covered military servicemember or veteran recovering from an injury or illness suffered while on active duty in the armed forces, that existed before the beginning of the member's active duty and was aggravated by service, or that manifested itself before or after the member became a veteran.

As will be discussed later, leaves taken for the first two reasons just listed (birth and foster/adoptive placement) are leaves intended to give the new parents time to “bond” with their child. The FMLA draws several distinctions between leave for “bonding” and leave for serious health conditions, or military family leaves.

LEAVE FOR BIRTH AND BONDING

Under FMLA, eligible employees can take a full 12 weeks of FMLA leave (assuming that they have had no other leave-qualifying events during the 12-month period) for the birth, and to be with a healthy newborn child (so-called “bonding leave”). Bonding leave is available to either men or women, and no medical certification is required. However, bonding leave must be completed within 12 months of the date of birth or placement. When both husband and wife work for the same employer, the full amount of leave is limited to an aggregate of 12 weeks.

Note: The courts have expressed a clear intent that both men and women be eligible for FMLA leave to care for a newborn child. Employers should not under any circumstances question the right of a male parent to take FMLA leave for bonding.

Intermittent leave for bonding. An eligible employee may use intermittent or reduced schedule leave after the birth to be with a healthy newborn child only if the employer agrees. (Note, however, that the employer's agreement is *not* required for intermittent leave required by the serious health condition of the mother or newborn child.)

If the employer agrees to permit intermittent or reduced schedule leave for the birth of a child, the employer may require the employee to transfer temporarily to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, federal law (such as the Americans with Disabilities Act (ADA)), and state law. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave.

Unmarried or same-sex partners. In its Administrator Interpretation #2010-3 (June 22, 2010), DOL notes that “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.”

DOL has stated that 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. According to DOL, an employee who will share equally in raising 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 raising 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.

LEAVE FOR ADOPTION AND FOSTER CARE PLACEMENT

Eligible employees are entitled to up to 12 weeks of FMLA leave for placement with the employee of a son or daughter for adoption or foster care.

Employees may take FMLA leave before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed. For example, the employee may need leave time to attend required counseling sessions, appear in court, consult with his or her attorney or the doctor(s) representing the birth parent, submit to a physical examination, or travel to another country to complete an adoption.

Note: *The source of an adopted child (e.g., whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for leave for this purpose.*

Foster care placement must be made by an agreement of the state as a result of either (1) an agreement between the parent or guardian that the child be removed from the home; or (2) a judicial determination of the need for foster care (29 CFR 825.122(f)). The foster parent may be the biological relative of the child, but state action must be involved in the removal of the child from parental custody.

Although foster care may be with relatives of the child, state action is involved in the removal of the child from parental custody.

An employer may require an employee to provide reasonable documentation of the family relationship, such as a court document; sworn, notarized statement; signed tax return; or something similar. The employer must return the official document to the employee (29 CFR 825.122(j)).

Expiration of leave. An employee’s entitlement to leave for adoption or foster care expires at the end of the 12-month period beginning on the date of the placement. If state law allows, or the employer permits, leave for adoption or foster care to be taken beyond this period, such leave will not qualify as FMLA leave. The employee is entitled to FMLA leave even if the adopted or foster child does not have a serious health condition.

Husband and wife employed by same employer. A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for the placement of the employee’s son or daughter or to care for the child after placement.

Use of intermittent and reduced schedule leave. An eligible employee may use intermittent or reduced schedule leave after the placement of a healthy child for adoption or foster care only if the employer agrees. Thus, for example, the employer and employee may agree to a part-time work schedule after the placement for bonding purposes.

If the employer agrees to permit intermittent or reduced schedule leave for the placement for adoption or foster care, the employer may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position.

SERIOUS HEALTH CONDITIONS

Much of the leave taken under the FMLA relates in some way to serious health conditions—either the employee's own or those of family members. The FMLA and 2009 final FMLA regulations provide guidelines on what constitutes a serious health condition. At times the FMLA's guidelines will not provide clear answers as to what constitutes such a condition. Ultimately, decisions as to whether, in a close situation, a condition falls under the FMLA's protection must be made on a case-by-case basis.

The definition of a "serious health condition" includes:

1. An illness, injury, impairment, or physical or mental condition that involves either inpatient care (i.e., an overnight stay in a hospital, hospice, or residential care facility); *or*
2. Continuing treatment by a healthcare provider.

Continuing Treatment

The 2009 final FMLA regulations changed the definition of what qualifies as "continuing treatment" by a healthcare provider. Under the regulations, to qualify as "continuing treatment," the condition must involve:

- A period of incapacity of more than 3 consecutive, full calendar days, and any subsequent treatment or period of incapacity for the same condition that also involves either:
 - Treatment by a healthcare provider two or more times within 30 days of the first day of incapacity, unless extenuating circumstances exist; *or*
 - Treatment by a healthcare provider at least once that results in a regimen of continuing treatment under the supervision of the healthcare provider (The requirement for treatment by a healthcare provider means an in-person visit to that healthcare provider. The first (or only) in-person treatment visit must take place within 7 days of the first day of incapacity).
- Any period of incapacity because of pregnancy or prenatal care.
- Any period of incapacity because of a chronic, serious condition. A chronic, serious health condition is one that requires periodic visits, at least twice a year, for treatment by a healthcare provider or by a nurse under direct supervision of a healthcare provider, which continues over an extended period of time (including recurring episodes of a single underlying condition), and which may cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy).
- A period of incapacity that is permanent or long-term because of a condition for which treatment may not be effective (e.g., Alzheimer's disease)

- Any period of absence to receive multiple treatments by a healthcare provider (e.g., for reconstructive surgery after an accident or injury) or for a condition that would likely result in a period of incapacity of more than 3 consecutive, full days if untreated, such as for cancer (chemotherapy) or kidney disease (dialysis)

Absences due to pregnancy, prenatal care, or chronic conditions qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a healthcare provider during the absence, and even if the absence does not last more than 3 consecutive, full calendar days.

For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's healthcare provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

Incapacity. The term "incapacity" means inability to work, attend school, or perform other regular daily activities due to the serious health condition, treatment, or recovery.

Treatment. Covered "treatment" includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does *not* include routine physical examinations, eye examinations, or dental examinations. A regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen).

A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a healthcare provider, is *not*, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave. See requirements for **Continuing Treatment** above.

Healthcare provider. The FMLA's final 2009 regulations define a "healthcare provider" as a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the state in which the doctor practices or any other person determined by the U.S. Department of Labor (DOL) to be capable of providing healthcare services.

Others "capable of providing healthcare services" include podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as shown by X ray to exist) who are authorized to practice in the state and perform within the scope of their practices as defined under state law.

Also included are nurse practitioners, nurse-midwives, clinical social workers, and physician assistants who are authorized to practice under state law and who perform within the scope of their practices as defined under state law, and Christian Science practitioners listed with The Church of Christ, Scientist, in Boston, Massachusetts.

Finally, the FMLA's definition of a covered healthcare provider includes any healthcare provider from whom an employer or the employer's group health plan's benefits manager will accept certification to substantiate a claim for benefits. For employees or their covered family members who are located outside of the United States, the FMLA allows certification by healthcare providers previously listed who practice in a country other than the United States, who are authorized to practice in accordance with the law of that country, and who are performing within the scope of their practice as defined under such law.

Definitions: Family Members—Serious Health Conditions

Depending on the type of FMLA leave taken, the definition of a covered family member, serious health condition, healthcare provider, and other critical terminology will differ. For example, for the purpose of most FMLA leave for a serious health condition, a covered son or daughter is a person under the age of 18 (or over the age of 18 and incapable of self-care). However, for military family leave the covered son or daughter may be “of any age” (since a person must be 18 or older to serve in the military). Employers that administer leave programs must be aware of these critical differences in definitions.

Documentation may be required. The FMLA’s 2009 final regulations allow that an employer may require the employee giving notice of the need for leave to provide reasonable documentation of family relationships or a statement of family relationships. The documentation may take the form of a statement from the employee, a birth certificate, a marriage license, etc. The employer may review such documentation, but the employee is entitled to have any official documents returned to him or her.

Spouse. “Spouse” means a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including common law marriage in states where it is recognized.

The 2009 final FMLA regulations clarify that a *husband* is entitled to FMLA leave if needed to care for his pregnant spouse who is incapacitated or if needed to care for her during her prenatal care, or if needed to care for the spouse following the birth of a child if the spouse has a serious health condition.” According to the preamble to the final regulations, this clears up prior confusion as to whether boyfriends or fiancés were eligible for such leave—they *are not*.

***Policy issue—domestic partners:** A growing number of organizations are offering benefits such as healthcare coverage to domestic partners. Such an organization will have to determine whether it also wants to offer leave comparable to FMLA leave to domestic partners. In addition, a number of jurisdictions have antidiscrimination laws based on sexual orientation. In those states, employees may raise claims of discrimination if they are excluded from leave because of sexual orientation. If this situation occurs, consult legal counsel.*

Parent. “Parent” means a biological, adoptive, step or foster father or mother, or any other individual who stood *in loco parentis* to the employee when the employee was a child. This term does not include parents-in-law. Note, however, that some state FMLA laws do expand the definition of parent to include parents-in-law.

***Policy issue:** The FMLA does not cover parents-in-law for care of a serious health condition. If you do extend coverage to parents-in-law, be careful. Pay docking, which is discussed in **Section 500** of this guide, only protects employers who grant leave within the legal definitions of coverage. Accordingly, if you dock an exempt employee for time off to care for a parent-in-law you may be jeopardizing that employee’s exempt status.*

Son or daughter. For purposes of FMLA leave taken to care for a family member with a serious health condition, “son or daughter” means a biological, adopted, step, or foster child; a legal ward; or a child of a person standing *in loco parentis* who is either under age 18, or 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.

In loco parentis. The FMLA’s definition of a “parent” or “son or daughter” 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.

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.” According to an Administrator Interpretation issued by DOL (#2010-3, dated June 22, 2010), “[t]he 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.”

Whether an employee stands *in loco parentis* to a child is a fact issue dependent on multiple factors. 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 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)).

The FMLA regulations define *in loco parentis* as including those with day-to-day responsibilities to care for and financially support a child (29 CFR 825.122(c)(3)).

According to DOL’s Administrator Interpretation #2010-3, “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” [emphasis added].

Also according to DOL, 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.

Note that this interpretation by DOL differs from the literal interpretation of the regulations, requiring “day-to-day responsibilities to care for and financially support a child.” DOL’s interpretation will be subjected to judicial scrutiny in the future, but as an agency opinion, will receive deference from the courts.

Unmarried or same-sex partners. In its Administrator Interpretation #2010-3, DOL notes that “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.”

DOL has stated that 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. According to DOL, 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, as noted in the previous section on **Leave for Birth and Bonding**, 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.

DOL has interpreted the FMLA to say 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. According to DOL, “neither the statute nor the regulations restrict the number of parents a child may have under the FMLA” (Administrator Interpretation #2010-3).

For example, DOL states, “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.” DOL advises that 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 CFR 825.122(j); 73 Fed. Reg. 67,952 (Nov. 17, 2008).

It is important to note DOL’s interpretation of *in loco parentis* determinations is relevant only where the FMLA leave is sought for a son or daughter. Unmarried employees remain ineligible to take federal FMLA leave for their partners’ serious health conditions, including pregnancy and prenatal care, even where the unmarried partner is the father.

DOL’s Administrator Interpretation does not have the binding force of a statute or court opinion. However, agency opinions like this one typically receive deference from courts, and employers should give them careful consideration in structuring FMLA policies.

Grandparents. 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, for example, where a grandparent 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 for *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.

Incapable of self-care. “Incapable of self-care” means that the individual requires active assistance or supervision to provide daily self-care in three or more of the “activities of daily living” (ADLs) or “instrumental activities of daily living” (IADLs). ADLs include adaptive activities such as caring appropriately for one’s grooming and hygiene, bathing, dressing, and eating. IADLs include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc. “Physical or mental disability” has the same meaning as is defined by the ADA.

Needed to care for. The medical certification provision that an employee is “needed to care for” a family member with a serious health condition encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety or is unable to transport himself or herself to the doctor, etc.

Covered care. “Covered care” also includes providing psychological comfort and reassurance, which would be beneficial to a covered child, spouse, or parent with a serious health condition who is

receiving inpatient or home care. The term also includes situations in which the employee may be needed to fill in for others who are caring for the family member or to make arrangements for changes in care, such as transfer to a nursing home.

The 2009 final FMLA regulations state that the term “needed to care for” does not mean that the employee must be the only individual or family member available to care for the family member or covered servicemember (29 CFR 825.124). However, the preamble to the final rules does indicate an intention by DOL to limit the type of care that can be given, stating “... FMLA leave may only be taken to care for the family member with a serious health condition or the covered servicemember with a serious illness or injury. An employee may not use FMLA leave to work in a family business, for example ...” (73 *Fed. Reg.* 67,953 (November 17, 2008)).

This revision to the regulations allows for a more expansive reading of which employees are “needed to care for” covered family members. Although DOL intended on limiting the type of care to be given, it may be difficult for employers to regulate what, exactly an employee on leave is doing.

Leave for Treatment of Substance Abuse

Substance abuse may be a serious health condition if one of the tests for establishing a “serious health condition” is met. However, FMLA leave may be taken only for treatment of substance abuse by a healthcare provider or by a provider of healthcare services on referral by a healthcare provider. Absence because of the employee’s use of the substance, rather than for treatment, does *not* qualify for FMLA leave. This distinction is important.

Treatment for substance abuse does not prevent an employer from taking employment action against an employee. However, an employer may not take action against an employee because the employee has exercised his or her right to take FMLA leave for treatment. If the employer has an established policy, applied in a nondiscriminatory manner, communicated to all employees, and that provides under certain circumstances an employee may be terminated for substance abuse, the employee may be terminated pursuant to that policy even if the employee is presently taking FMLA leave. An employee may also take FMLA leave to care for a covered family member who is receiving treatment for substance abuse.

Pregnancy

A mother is entitled to FMLA leave for incapacity due to pregnancy, for prenatal care, or for her own serious health condition following the birth of the child. Circumstances may require that FMLA leave begin before the actual date of birth of a child. An expectant mother may take FMLA leave before the birth of the child for prenatal care or if her condition makes her unable to work. Some state laws also provide special leave for pregnant employees who are disabled by their pregnancy (e.g., California). Check your state maternity and pregnancy leave laws in **Section 800** of this guide to see if your state has such requirements.

Under FMLA, a mother is entitled to leave for incapacity due to pregnancy even though she does not receive treatment from a healthcare provider during the absence, and even if the absence does not last for more than 3 consecutive calendar days (29 CFR 825.120(4)). A husband is also entitled to FMLA leave if needed to care for his pregnant spouse who is incapacitated, if needed to care for her during her prenatal care, or if needed to care for the spouse following the birth of a child if the spouse has a serious health condition.

Practice tip regarding pregnancy: Many courts have noted that pregnancy-related conditions are treated differently under the FMLA than other medical conditions, and have declined to require employees to provide medical documentation that morning sickness and other pregnancy-related conditions are incapacitating. However, in cases where the employee's physician specifically states that the employee's morning sickness is not severe enough to prevent her from working, courts have upheld the employer's decision to deny leave. Employers facing requests for leave from pregnant employees should not deny leave if the employee refuses to provide a medical certification. However, in cases where the employee volunteers the certification, and the certification states that the employee can work, it is probably appropriate to deny the leave.

Pandemic Illness

According to the Health and Human Services (HHS) Interagency Public Affairs Group on Influenza Preparedness and Response and a consortium of federal agencies, including DOL, employers may take specific measures to combat the spread of illness during a pandemic illness. (See PandemicFlu.gov for more information on HHS' pandemic guidance.)

The following is a summary of some of the guidance given by HHS on managing employee medical certification and leave during a pandemic.

Practice tip—Note that overall, employers should be guided in their relationship with their employees not only by federal employment law, but also by their own employee handbooks, manuals, and contracts (including bargaining agreements), and by any applicable state or local laws.

Preparing a pandemic plan. Employers must prepare a plan of action specific to the workplace, given that a pandemic influenza outbreak could affect many employees. It would also be prudent to notify employees (and if applicable, their bargaining unit representatives) about decisions made under this plan or policy at the earliest feasible time. Also, remember that any employment decision mandating that certain employees stay home must comply with federal laws prohibiting discrimination in the workplace on the basis of race, sex, age (40 and over), color, religion, national origin, disability, or veteran status.

Leave for caregivers. Covered employers must abide by the FMLA as well as any applicable state FMLA laws giving leave to employees to care for sick children or family members. The FMLA entitles eligible employees to leave for specified family and medical reasons, *which may include the flu where complications arise that create a "serious health condition" as defined by the FMLA.*

There is currently no federal law covering employees who take off from work to care for healthy children, and employers are not required by federal law to provide leave to employees caring for dependents that have been dismissed from school or child care. However, given the potential for significant illness under some pandemic influenza scenarios, employers should review their leave policies to consider providing increased flexibility to their employees and their families.

Documenting illness. An employer may require an employee who is out sick with pandemic influenza to provide a doctor's note, submit to a medical exam, or remain symptom-free for a specified amount of time before returning to work. However, employers should consider that during a pandemic, healthcare resources may be overwhelmed, and it may be difficult for employees to get appointments with doctors or other healthcare providers to verify they are well or no longer contagious.

During a pandemic health crisis, under the ADA, an employer would be allowed to require a doctor's note, a medical examination, or a time period during which the employee has been symptom-free before it allows the employee to return to work. Specifically, an employer may require the described actions of an employee where it has a reasonable belief—based on objective evidence—that the employee's present medical condition would:

- Impair his or her ability to perform essential job functions (i.e., fundamental job duties) with or without reasonable accommodation; *or*
- Pose a direct threat (i.e., significant risk of substantial harm that cannot be reduced or eliminated by reasonable accommodation) to safety in the workplace.

In situations in which an employee's leave is covered by the FMLA, the employer may have a uniformly applied policy or practice that requires all similarly situated employees to obtain and present certification from the employee's healthcare provider that the employee is able to resume work.

Employers are required to notify employees in advance if the employer will require a fitness-for-duty certification to return to work. If state or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied. Employers should be aware that fitness-for-duty certifications may be difficult to obtain during a pandemic.

Tracking illness. During a pandemic, the ADA permits employers to require employees to disclose whether they have or have been exposed to pandemic influenza. Employers also may ask about employees' family members and associates. Employers should be aware, however, that treating an employee adversely because of a family member's or associate's disability is prohibited by the ADA. To protect privacy rights, the ADA requires employers to keep medical information confidential (i.e., maintained on a separate form and in a separate medical file).

Mandatory confinement. According to HHS, employers may mandate that employees stay home if they or members of their family are known or suspected to have pandemic influenza or have been exposed to someone with pandemic influenza. Even if an employer believes that individual would pose a direct threat in the workplace due to a disability, the employer would not violate the ADA if it required a qualified individual with a disability to stay home. A determination of direct threat must be based on the most recent and reputable medical information. If a pandemic illness did not rise to the level of a disability, a decision to require infected employees to stay home would not implicate the ADA.

Employee refusal to work. The circumstances under which employees have a right to refuse to work are very limited. Refusing to do a job because of potentially unsafe workplace conditions is not ordinarily an employee right under the Occupational Safety and Health Act (OSH Act). (A union contract or state law may, however, provide for such rights.)

Employees may refuse an assignment only if:

1. They reasonably believe that doing the work would put them in serious and immediate danger;
2. They have asked their employer to fix the hazard;
3. There is no time to call the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA); *and*
4. There is no other way to do the job safely. Employees are not protected for simply walking off the job.

An employer can impose disciplinary action for refusing to work. However, employees do have the right to refuse to do a job if they believe in good faith that they are exposed to an imminent danger. “Good faith” means that even if an imminent danger is not found to exist, the worker had reasonable grounds to believe that it did exist.

As a practical matter, employers will likely want to be flexible regarding attendance during a pandemic. It would also be prudent to notify employees and, if applicable, their bargaining unit representatives about decisions made at the earliest feasible time.

To see the full list of Q&As on the PandemicFlu.gov website, go to <http://answers.flu.gov>.

Cosmetic Treatments and Minor Illnesses

Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not “serious health conditions” unless inpatient hospital care is required or unless complications develop so that the requirement for a “serious health condition” is met.

Ordinarily, unless complications arise, the common cold, the flu, earaches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontic problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. According to DOL’s FMLA regulations, restorative dental or plastic surgery after an injury or removal of cancerous growths *are* serious health conditions, provided all the other conditions of a “serious health condition” are met. Mental illness or allergies may be serious health conditions, but only if all the requirements for a “serious health condition” are met.

FMLA and ADA Interaction for Serious Health Conditions

If an employee is a qualified individual with a disability within the meaning of the ADA, the employer must make reasonable accommodations, barring undue hardship, in accordance with the ADA. At the same time, the employer must afford an employee his or her FMLA rights. ADA’s “disability” and FMLA’s “serious health condition” are different concepts and must be analyzed separately.

If the employee qualifies for leave protection under both the ADA and the FMLA, an employer must ensure that both laws are complied with, and that any greater rights are given to the employee.

Example

A qualified individual with a disability who is also an “eligible employee” entitled to FMLA leave requests 10 weeks of medical leave as a reasonable accommodation. The employer grants the leave because it is not an undue hardship. The employer advises the employee that the 10 weeks of leave is also being designated as FMLA leave and will count towards the employee’s FMLA leave entitlement.

This designation does not prevent the parties from also treating the leave as a reasonable accommodation and reinstating the employee into the same job, as required by the ADA, rather than an equivalent position under FMLA, if that is the greater right available to the employee. At the same time, the employee would be entitled under FMLA to have the employer maintain group health plan coverage during the leave, as that requirement provides the greater right to the employee.

For more information on ADA and FMLA interaction, see **Section 2400** of this guide.

FAMILY MILITARY LEAVE

On October 28, 2009, President Obama signed the **National Defense Authorization Act (NDAA)**, which made the following changes to the family military leave provisions of the FMLA:

- 1. Exigency leave.** The NDAA expanded an employee's right to family military leave for an "exigency" associated with a family member's covered service or call to covered service. Under the NDAA, leave benefits are available to employees with covered servicemembers in the regular component of the armed forces, as well as the reserves. Under the "old" law, only family members of National Guard and reservists were eligible for "exigency leave."

The NDAA also expanded the type of duty covered by FMLA to all deployments and calls to active duty to a foreign country. The "old" law only covered "contingency operations," specifically defined by regulation.

- 2. Servicemember Caregiver Leave.** The NDAA expanded the servicemember caregiver leave provision to include veterans who are undergoing medical treatment, recuperation, or therapy for serious injury or illness that occurred any time during the 5 years preceding the date of treatment. The "old" law covered only active military servicemembers.

The NDAA also extended employees' access to servicemember caregiver leave to care for veterans for up to 5 years after a veteran leaves service, if he or she develops a service-related injury or illness that was incurred or aggravated while on active duty, or that manifested itself before or after the member became a veteran.

LEAVE FOR A QUALIFYING EXIGENCY

The FMLA provision for "qualifying exigency" leave grants up to 12 weeks of FMLA leave to qualified employees for any "qualifying exigency" arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the armed forces.

Covered active duty. "Covered active duty" means duty during deployment with the armed forces to a foreign country (for a member of a regular component of the armed forces); and duty during deployment with the armed forces to a foreign country under a call or order to active duty (for a member of a reserve component of the armed forces).

Spouse. "Spouse" means a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including common law marriage in states where it is recognized.

Parent. "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 parents-in-law.

Son or daughter on covered active duty or call to covered active duty status. "Son or daughter on active duty or call to covered active duty status" means the employee's biological, adopted, step or foster child; legal ward; or a child for whom the employee stood *in loco parentis*. The child must be on covered active duty or call to covered active duty status but *may be any age*.

Generally, the active duty orders or other documentation issued by the military will indicate that the covered military member is on covered active duty or call to covered active duty status and the dates of the covered military member's covered active duty service. This documentation may be requested by the employer to support a request for qualifying exigency leave. See **Section 400** of this guide for more information on leave notice and certification.

'Qualifying Exigency' Defined

The term "qualifying exigency" is defined in DOL's final 2009 FMLA regulations as one of eight of the following situations:

- 1. Short-notice deployment.** To address any issue that arises from the fact that a covered military member is notified of an impending call or order to covered active duty in support of a contingency operation 7 or less calendar days prior to the date of deployment. Leave taken for this purpose *can be used for a period of 7 calendar days* beginning on the date a covered military member is notified of an impending call or order to covered active duty in support of a contingency operation.
- 2. Military events and related activities.** To attend any official ceremony, program, or event sponsored by the military that is related to the covered active duty or call to covered active duty status of a covered military member. To attend family support or assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross that are related to the covered active duty or call to covered active duty status of a covered military member.
- 3. Child care and school activities.** To arrange for alternative child care when the covered active duty or call to covered active duty status of a covered military member necessitates a change in the existing childcare arrangement for a covered child of a military member, or a child for whom a covered military member stands *in loco parentis*.

To provide child care for a covered child on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the need to provide such care arises from the covered active duty or call to covered active duty status of a covered military member.

To enroll in or transfer to a new school or daycare facility a covered child, when enrollment or transfer is necessitated by the covered active duty or call to covered active duty status of a covered military member.

To attend meetings with staff at a school or a daycare facility, such as meetings with school officials regarding disciplinary measures, parent-teacher conferences, or meetings with school counselors, for a covered child, when such meetings are necessary due to circumstances arising from the covered active duty or call to covered active duty status of a covered military member.

- 4. Financial and legal arrangements.** To make or update financial or legal arrangements to address the covered military member's absence while on covered active duty or call to covered active duty status, such as preparing and executing financial and healthcare powers of attorney, transferring bank account signature authority, enrolling in the Defense Enrollment Eligibility Reporting System (DEERS), obtaining military identification cards, or preparing or updating a will or living trust. To act as the covered military member's representative before a federal, state, or local agency for purposes of obtaining,

arranging, or appealing military service benefits while the covered military member is on covered active duty or call to covered active duty status, and for a period of 90 days following the termination of the covered military member's covered active duty status.

5. **Counseling.** To attend counseling provided by someone other than a healthcare provider for oneself, for the covered military member, or for a covered child provided that the need for counseling arises from the covered active duty or call to covered active duty status of a covered military member.
6. **Rest and recuperation.** To spend time with a covered military member who is on short-term, temporary, rest and recuperation leave during the period of deployment. Eligible employees *may take up to 5 days of leave* for each instance of rest and recuperation.
7. **Post-deployment activities.** For up to 90 days after termination of the covered military member's covered active duty status, to attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following the termination of the covered military member's covered active duty status.

To address issues that arise from the death of a covered military member while on covered active duty status, such as meeting and recovering the body of the covered military member and making funeral arrangements.

8. **Additional activities.** To address other events that arise out of the covered military member's covered active duty or call to covered active duty status provided that the employer and employee agree that such leave qualifies as an exigency and agree to both the timing and duration of such leave.

Note: Several states have passed legislation allowing employees leave to spend time with deployed or recovering family members in the military. Therefore, it is important to review the rules in your states whenever there is a request for military family leave.

SERVICEMEMBER CAREGIVER LEAVE

Eligible employees are entitled to 26 weeks of leave during any single 12-month period if the employee is the spouse, son, daughter, parent, or next of kin caring for a covered military servicemember recovering from an injury or illness suffered while on active duty in the armed forces, that existed before the beginning of the member's active duty and was aggravated by service, or that manifested itself before or after the member became a veteran.

A "covered service member" is:

1. A member of the armed forces (including a member of the National Guard or reserves) who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness; *or*
2. A veteran who is undergoing medical treatment, recuperation, or therapy, for a serious injury or illness and who was a member of the armed forces (including a member of the National Guard or reserves) at any time during the period of 5 years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy.

A “serious injury or illness” means:

1. For a member of the armed forces (including a member of the National Guard or reserves), an injury or illness that was incurred by the member in the line of duty on active duty in the armed forces (or existed before the beginning of the member’s active duty and was aggravated by service in line of duty on active duty in the armed forces) and that may render the member medically unfit to perform the duties of the member’s office, grade, rank, or rating; *or*
2. For a veteran who was a covered servicemember of the armed forces (including a member of the National Guard or reserves), means an injury or illness that was incurred by the member in the line of duty on active duty in the armed forces (or existed before the beginning of the member’s active duty and was aggravated by service in the line of duty on active duty in the armed forces) and that manifested itself before or after the member became a veteran.

Definitions: Servicemember Caregiver Leave

Spouse. “Spouse” means a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including common law marriage in states where it is recognized.

Son or daughter of a covered servicemember. A “son or daughter of a covered servicemember” means the servicemember’s biological, adopted, step, or foster child; legal ward; or a child for whom the covered servicemember stood *in loco parentis* and who is *of any age*.

Parent of a covered servicemember. “Parent of a covered servicemember” means a covered servicemember’s biological, adoptive, step, or foster father or mother, or any other individual who stood *in loco parentis* to the covered servicemember. This term *does not* include parents-in-law.

Next of kin. “Next of kin” is defined as the nearest blood relative other than the covered servicemember’s spouse, parent, son, or daughter, in the following order of priority:

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

This order of priority does not apply if the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members are considered the covered servicemember’s next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual must be deemed to be the covered servicemember’s only next of kin.

Documenting relationships. For purposes of confirmation of family relationship, the employer may require the employee to provide reasonable documentation or statement of family relationship.

This documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, etc. The employer is entitled to examine documentation but must return the documentation to the employee.

Included healthcare provider. Any one of the following healthcare providers is an "included healthcare provider" for the purpose of servicemember caregiver leave and may complete medical certification:

1. U.S. Department of Defense (DOD) healthcare provider;
2. U.S. Department of Veterans Affairs (VA) healthcare provider;
3. DOD TRICARE network authorized private healthcare provider; *or*
4. DOD nonnetwork TRICARE authorized private healthcare provider.

Amount of Servicemember Caregiver Leave

An eligible employee is entitled to 26 workweeks of leave to care for a covered servicemember with a serious injury or illness during a "single 12-month period." The "single 12-month period" begins on the first day the eligible employee takes FMLA leave to care for a covered servicemember and ends 12 months after that date, regardless of the method used by the employer to determine the employee's 12 workweeks of leave entitlement for other FMLA-qualifying reasons.

No carryover of leave. If an eligible employee does not take all of his or her 26 workweeks of leave entitlement to care for a covered servicemember during the "single 12-month period," the remaining part of his or her 26 workweeks of leave entitlement to care for the covered servicemember is forfeited.

Servicemember Caregiver Leave Limits

The 2009 FMLA regulations set forth various limits on employees who wish to take servicemember caregiver leave. Those limits are:

1. **Per-covered-servicemember, per-injury basis.** Servicemember caregiver leave must be applied on a per-covered-servicemember, per-injury basis. As a result, an eligible employee may be entitled to take more than one period (26 workweeks) of leave if the leave is to care for *different* covered servicemembers or to care for the same servicemember with a subsequent serious injury or illness. However, the FMLA regulations limit available leave so that no more than 26 workweeks of leave may be taken within any "single 12-month period."

***Exception:** An eligible employee may take more than one period of 26 workweeks of leave to care for a covered servicemember with more than one serious injury or illness only when the serious injury or illness is a subsequent serious injury or illness.*

2. **Overlapping single 12-month periods.** When an eligible employee takes leave to care for more than one covered servicemember or for a subsequent serious injury or illness of the same covered servicemember, and the "single 12-month periods" corresponding to the different military caregiver leave entitlements overlap, the employee is limited to taking no more than 26 workweeks of leave in each "single 12-month period."

- 3. Combined leave limited to 26 weeks.** An eligible employee is entitled to a combined total of 26 workweeks of leave for any FMLA-qualifying reason during the “single 12-month period,” provided that the employee is entitled to no more than 12 weeks of leave for other types of FMLA leave (i.e., serious health condition, bonding, or qualifying exigency).

This means, for example, that an eligible employee may take 16 weeks of FMLA leave to care for a covered servicemember and 10 weeks of FMLA leave to care for a newborn child during the “single 12-month period.” However, the employee may not take more than 12 weeks of FMLA leave to care for the newborn child during the “single 12-month period,” even if the employee takes fewer than 14 weeks of FMLA leave to care for a covered servicemember.

If leave qualifies as both military caregiver leave and FMLA medical leave to care for a family member with a serious health condition, it must be counted as caregiver leave (it may not be counted as both caregiver leave and FMLA medical leave). An employer can retroactively change the designation from one type to the other if otherwise permitted for retroactive designations in general, but is not required to do so.

- 4. Husband and wife employed by same employer.** A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 26 workweeks of leave during the “single 12-month period” if the leave is taken for bonding, foster care, adoption, a serious health condition, or to care for a covered servicemember with a serious injury or illness. If one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 26 workweeks of FMLA leave.

TYPES OF LEAVE: REGULAR, REDUCED LEAVE SCHEDULE, AND INTERMITTENT LEAVE

There are three basic types of leave—regular, reduced leave schedule, and intermittent.

Regular Leave

Regular leave occurs when the employee takes off from work for a continuous uninterrupted block of time. An employee, for example, who takes leave and does no work from October 1 to December 1, would be on a regular leave.

Reduced Leave Schedule and Intermittent Leave

FMLA leave may be taken “intermittently or on a reduced leave schedule” under certain circumstances. Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason. A reduced leave schedule is a leave schedule that reduces an employee’s usual number of working hours per workweek, or hours per workday. Reduced leave schedule is a change in the employee’s schedule for a period of time, normally from full-time to part-time. An example of an employee taking leave on a reduced leave schedule is an employee who is recovering from a serious health condition and is not strong enough to work a full-time schedule.

Reasons to Take Intermittent or Reduced Leave Schedule

The 2009 final FMLA regulations set forth a number of circumstances under which an employee would be entitled to take intermittent or reduced schedule leave. Those circumstances include:

Medical need. For intermittent leave or leave on a reduced leave schedule taken because of an employee's or covered family member's own serious health condition, or to care for a covered servicemember with a serious injury or illness, there must be a medical need for leave (as distinguished from voluntary treatments and procedures). In addition, the medical need must be one that is best accommodated through an intermittent or reduced leave schedule.

Leave may be taken intermittently or on a reduced leave schedule when medically necessary for planned and/or unanticipated medical treatment of a serious health condition or of a covered servicemember's serious injury or illness, or for recovery from treatment or recovery from a serious health condition or a covered servicemember's serious injury or illness. It may also be taken to provide care or psychological comfort to a covered family member with a serious health condition or a covered servicemember with a serious injury or illness.

Periodic treatment by a healthcare provider. Intermittent leave may be taken for an employee's or covered family member's own serious health condition, or a serious injury or illness of a covered servicemember which requires treatment by a healthcare provider periodically, rather than for one continuous period of time.

Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of 6 months, such as for chemotherapy.

Pregnant employees. A pregnant employee may take leave intermittently for prenatal examinations or for her own condition, such as for periods of severe morning sickness.

Chronic serious health conditions/serious illness or injury. Intermittent or reduced schedule leave may be taken for absences where the employee or family member is incapacitated or unable to perform the essential functions of the position because of a chronic serious health condition or a serious injury or illness of a covered servicemember, even if he or she does not receive treatment by a healthcare provider.

Birth or placement. When leave is taken after the birth of a healthy child or placement of a healthy child for adoption or foster care, an employee may take leave intermittently or on a reduced leave schedule only if the employer agrees. The employer's agreement is not required, however, for leave during which the mother has a serious health condition in connection with the birth of her child or if the newborn child has a serious health condition.

Qualifying exigency. Leave due to a qualifying exigency may be taken on an intermittent or reduced leave schedule basis.

Limits on Intermittent and Reduced Schedule Leave

Reasonable efforts. The 2009 FMLA regulations state that employees who take intermittent leave for planned medical treatment have an obligation to make a *reasonable effort* to schedule such treatment so as to not disrupt unduly the employer's operations. The previous version of the regulations had said only that the employee had to "attempt" to do so.

Tracking. The 2009 final FMLA regulations changed the way in which employers are required to track intermittent and reduced schedule leave. Under the 2009 FMLA regulations, the employer must account for the leave using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave. However, the increment of time may not be greater than 1 hour.

Leave taken. The 2009 final FMLA regulations also clarify that an employee's FMLA leave entitlement may not be reduced by more than the amount of leave actually taken. So, for example, if an employee leaves during the last half-hour of his or her shift for an FMLA-covered event, the employee may not be "docked" a full hour of FMLA leave (even if this is the shortest period of time that the employer uses to account for use of other forms of leave) (29 CFR 825. 205).

Physically inaccessible workplaces. The 2009 final FMLA regulations also placed a limit on intermittent leave when it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to commence or end work mid-way through a shift. This might occur in situations such as when a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, or a laboratory employee is unable to enter or leave a sealed "clean room" during a certain period of time. In these situations, the regulations say that the entire period that the employee is forced to be absent is designated as FMLA leave and counts against the employee's FMLA entitlement. This exception is applied narrowly, and only when an employee is physically unable to enter worksite midshift.

Temporary Transfer During Reduced Leave Schedule or Intermittent Leave

It is important to point out that employers are given a little more leeway with job transfers during foreseeable reduced leave schedule and intermittent leave than they are with respect to employees returning from regular leave. With the returning employee, the employer is obligated to provide the same position or a position that is equivalent in "pay, benefits, and duties." See **Section 500** of this guide for a full discussion of reinstatement from regular leave.

Available alternate positions. During a period when intermittent or reduced leave schedule is required, an employer may require an employee to transfer temporarily, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. Unlike a "light duty" assignment, a transfer to an alternative position does not require the employee's consent. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced schedule leave.

The employer may require a temporary transfer if an employee needs intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment for the employee, a family member, or a covered servicemember, or if the employer agrees to permit intermittent or reduced schedule leave for the birth of a child, adoption, or foster care.

Compliance. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, federal law (such as the ADA), and state law.

Duties and benefits during transfer. The alternative position must have equivalent pay and benefits, but does *not* have to have equivalent duties. The employer may increase the pay and benefits of an existing alternative position, so as to make them equivalent to the pay and benefits of the employee's regular job.

The employer may also transfer the employee to a part-time job with the same hourly rate of pay and benefits, provided the employee is not required to take more leave than is medically necessary. For example, an employee desiring to take leave in increments of 4 hours per day could be transferred to a half-time job, or could remain in the employee's same job on a part-time schedule, paying the same hourly rate as the employee's previous job and enjoying the same benefits.

The employer may not eliminate benefits which otherwise would not be provided to part-time employees; however, an employer may proportionately reduce benefits (e.g., vacation leave) where an employer's normal practice is to base such benefits on the number of hours worked.

Reinstatement. When an employee who is taking leave intermittently or on a reduced leave schedule and has been transferred to an alternative position no longer needs to continue on leave and is able to return to full-time work, the employee must be placed in the same or equivalent job as the job he or she left when the leave commenced. An employee may not be required to take more leave than necessary to address the circumstance that precipitated the need for leave.

Employer limitations. An employer may not transfer an employee to an alternative position in order to discourage the employee from taking leave or otherwise work a hardship on the employee. For example, a white collar employee may not be assigned to perform laborer's work, or an employee working the day shift may not be reassigned to the graveyard shift. Any such attempt on the part of the employer to make such a transfer will be deemed a violation of the FMLA.

Limits on transfers. Transferring an employee while on reduced leave is not permissible when it violates any applicable collective bargaining agreement, ADA, or state law. Employers should review any applicable collective bargaining agreement carefully before implementing a transfer, and consult **Sections 1000 to 1700** and **Section 800** of this guide regarding the ADA and state law.

PREVENTING INTERMITTENT LEAVE ABUSE

In order to curb FMLA abuse and abuse of intermittent leave, the employer must first understand the rights and limits imposed on an employee by FMLA. The previous pages in this section explain intermittent leave rules under FMLA.

Tracking and training. The employer should create or obtain a timekeeping system that has the capacity to track intermittent leave in the minimum increment and "tag" and tabulate such leave as FMLA/intermittent. Ideally, the system would also notify the employer when the employee's 12-week FMLA leave entitlement is nearly exhausted (e.g., when 3 to 5 days are remaining). For sample tracking forms, see the **Forms & Policies** appendix of this guide.

In order to properly document all intermittent leave taken, the employer must train supervisors or other timekeepers regarding FMLA eligibility, notice, and recordkeeping.

Medical certification. One of the most powerful tools for managing intermittent leave and controlling abuse is the initial certification of such leave. In order to manage intermittent leave, supervisors or other individuals charged with managing leave must be vigilant in requiring that the employee requesting intermittent leave provide certification of the specific need for intermittent leave.

The DOL's medical certification forms (found in the **Forms & Policies** appendix of this Guide) enable the employer to specifically ask the employee's healthcare provider about:

- Intermittent/reduced schedule leave for planned treatment, and why there is medical necessity for leave and estimate of dates and duration of treatment/recovery periods;
- Likelihood of unforeseeable episodes of incapacity, why there is medical necessity for leave and estimate of frequency and duration of episodes of incapacity; *and*
- Continuing treatment, the schedule of such treatment, whether episodic flare-ups are anticipated, the frequency of those flare-ups, and whether the employee will be absent from work during those flare-ups.

The medical certification forms specifically instruct the healthcare provider to:

“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.”

As a result, the healthcare practitioner is forced by DOL's certification form to estimate the frequency and duration of the condition in terms of times per week or month, and hours or days per episode. Answers of an indeterminate nature may be deemed insufficient and require the employee to secure certification. For more information, see “Authentication and Clarification of Medical Certification” in **Section 400** of this Guide.

Note: If an employer is going to require medical certifications, it is required to provide the employee with written notice of such a requirement and the consequences of failing to provide requested medical certification. This notice may be given in the form of the DOL's *Notice of Eligibility and Rights & Responsibilities* (Form WH-381, Part B), or a similar document provided by the employer.

Pregnant employees. Curbing abuse of intermittent leave for pregnant employees can be difficult due to the permissive approach taken by DOL to FMLA leave during pregnancy. According to FMLA regulations, a mother is entitled to FMLA leave for incapacity due to pregnancy, for prenatal care, or for her own serious health condition following the birth of the child.

Many courts have noted that pregnancy-related conditions are treated differently under the FMLA than other medical conditions, and have declined to require employees to provide medical documentation that morning sickness and other pregnancy-related conditions are incapacitating.

However, in cases where the employee's physician specifically states that the employee's morning sickness is not severe enough to prevent her from working, courts have upheld the employer's decision to deny leave. Employers facing requests for leave from pregnant employees should not deny leave if the employee refuses to provide a medical certification. However, in cases where the employee volunteers the certification, and the certification states that the employee can work, it is probably appropriate to deny the leave.

Qualifying exigency. Leave due to a qualifying exigency (family military leave) may be taken on an intermittent or reduced leave schedule basis. This 2008 provision is relatively new and the limits are untested. However, due to the permissive wording of FMLA regulations, it is anticipated that qualified employees will be granted liberal use of intermittent leave for qualifying exigencies.

In order to curb abuse of leave for a qualifying exigency, the employer should obtain documentation of the need for intermittent leave for the qualifying exigency and carefully document all leave taken. Employers may use the Form WH-384, Certification of Qualifying Exigency for Military Family Leave, for certification. A copy of the WH-384 is included in the **Forms & Policies** appendix of this guide.

Using Certification Policies to Manage Intermittent FMLA Leave

As mentioned above, one of the most powerful tools in curbing intermittent FMLA leave abuse is the use of the medical certification form. Therefore, a strongly worded medical certification policy will empower HR and/or supervisors managing FMLA intermittent leave.

Some critical elements of a policy addressing medical certification of FMLA leave include:

- **Circumstances requiring certification.** Whether the employer will require certification, and under what circumstances. Many employers choose to word this provision generally to allow for cases of employer discretion.
- **Making certification forms available.** Instructing employees where they may obtain medical certification forms (usually from the Human Resources office/manager).
- **Notice of need for certification.** Explaining when the employer will notify the employee of the requirement for medical certification and when it is due (no more than 15 days after the request for leave).
- **Consequences of failure to provide requested medical certification.** Generally, this will result in the denial of leave until it is provided, or action under the employer's established policy for unapproved leave.
- **Procedures for second and third opinions.** This provision should notify employees that the employer may require an examination by a second healthcare provider or a third healthcare provider's opinion, if the second opinion conflicts with the original medical certification. The third opinion is final and binding on both parties.
- **Recertification.** Notifying employees that the employer may require subsequent medical recertification.
- **Fitness for duty.** Notifying employees that they may also be required to provide a fitness-for-duty certification upon return to work, or during intermittent leave, as required.

To see an example of these policy terms, refer to the sample FMLA Policy in the **Forms & Policies** appendix of this Guide.

Finally, the employer should establish reasonable and compliant employee notice requirements for all types of FMLA leave (foreseeable and unforeseeable). The 2009 FMLA regulations place specific limitations on employee notice requirements. A discussion of these requirements is included in **Section 400** of this guide.

COORDINATING THE ADA AND FMLA FOR INTERMITTENT OR OCCASIONAL LEAVE

As discussed earlier in this section, under the FMLA, an "eligible" employee may take leave intermittently or on a part-time basis for his or her own "serious health condition" when medically necessary for treatment or recovery, until he or she has taken the equivalent of 12 workweeks in a 12-month

period. When such leave is foreseeable on the basis of planned medical treatment, an employer may require the employee to temporarily transfer (for the duration of the leave) to an available alternative position for which the employee is qualified and which better suits his or her reduced hours.

Under the ADA, a qualified individual with a disability may work part-time in his or her current position, or occasionally take time off, as a reasonable accommodation if it would not impose an undue hardship on the employer. (See **Section 1200** of this guide for more information on ADA accommodation.) If (or when) reduced hours create an undue hardship in the current position, the employer must determine if there is a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned without undue hardship while working a reduced schedule. If an equivalent position is not available, the employer must look for a vacant position at a lower level for which the employee is qualified. Continued accommodation is not required if a vacant position at a lower level is also unavailable.

The ADA does not prohibit an employer and an employee from agreeing on another mutually acceptable accommodation. For example, an employer and employee may agree to a transfer, on either a temporary or a permanent basis, if both parties believe that such a transfer is preferable to accommodating the employee in his or her current position.

CALCULATING AND TRACKING THE 12-MONTH AND 12-WEEK LIMIT

Employees are entitled to a total of 12 weeks of FMLA leave per year for bonding leave, serious health conditions, and qualifying exigency leave. In other words, an employee is not entitled to 12 weeks for care of a newborn, another 12 weeks for serious health conditions, and so on. The employee is limited to a total of 12 weeks per 12-month period, regardless of the number of FMLA-covered events the employee experiences during the year.

The 12-Month Period

FMLA regulations allow employers to use any one of four different methods to determine the 12-month period for counting and tracking leave. Employers may choose any one of the four methods, but the regulations say the method selected must be used consistently and uniformly for all employees nationwide. The only exception to this rule is when a state FMLA law requires a particular method. The employer must then comply with that law, but it may select another method for its employees in other states. If an employer fails to select one of the options for measuring the 12-month period, the option that provides the most beneficial outcome for the employee is used.

Methods of calculation. The methods for calculating the FMLA 12-week limit may be based on:

1. The calendar year;
2. Any fixed 12-month period (such as a fiscal year, year required by state law, or year that begins with an employee's anniversary date);
3. A 12-month period, measured forward, that begins on the date an employee first starts the FMLA leave; *or*
4. A "rolling" 12-month period, measured backward, from the date an employee last used any FMLA leave.

A primary advantage shared by the first two methods is that recordkeeping and administration may be easier. This is because the methods used are consistent for all employees and may easily be linked with other systems, such as attendance, that are on the same schedule.

A major disadvantage to employers that use the first three methods just described is that each allows “stacking” of leave time by employees. This means that employees theoretically could take 24 weeks in a row; for example, the last 12 weeks of a calendar year and the first 12 weeks of the next calendar year. Such a protracted leave is not allowed under the fourth method, rolling calculation of leave. This method avoids any possibility of stacking, but may be more difficult to administer.

***Note:** Under the rolling 12-month method, each time the employee takes FMLA leave, the remaining balance in the leave entitlement is equal to the portion of the 12-week leave entitlement that was not used in the immediately preceding 12 months. The rolling period provides a snapshot that changes daily of the preceding 12-month period.*

In order to track FMLA leave under the rolling method, the employer must ensure that on each day of the year, an eligible employee’s FMLA leave entitlement is determined by the amount of leave he or she used in the 12 months before. As each new day is added, 1 day from 12 months ago is eliminated. If on that date 12 months ago the employee took FMLA leave, 1 day of leave entitlement is created for the next 12 months.

Notice required for change. An employer wishing to change to *another* method of calculating the 12-month period is required to give at least 60 days’ notice to all employees. The transition must take place in such a manner so as not to disadvantage any employee currently on leave. In such cases, employees must be allowed to retain the full benefit of 12 weeks of leave, using whatever method provides the employee with the greatest benefit until the 60-day notification period ends. Under no circumstances may a new method be implemented in order to avoid the FMLA’s leave requirements.

Leave for a qualifying exigency. Leave for a qualifying exigency is counted during whichever 12-month period the employer uses to calculate other types of FMLA leave (e.g., calendar year, rolling 12-month period).

Calculating servicemember caregiver leave. The “single 12-month period” for servicemember caregiver leave begins on the first day the eligible employee takes FMLA leave to care for a covered servicemember and ends 12 months after that date, regardless of the method used by the employer to determine the employee’s 12 workweeks of leave entitlement for other FMLA-qualifying reasons. See **Section 300** of this guide for additional information on servicemember caregiver leave and the “single 12-month period.”

The 12-Week and 26-Week Period

An eligible employee’s FMLA leave entitlement is limited to a total of 12 workweeks of leave during any 12-month period. FMLA-eligible employees are also entitled to 26 workweeks of leave in any single 12-month period to care for a covered family member who is recovering from a serious illness or injury sustained during active military duty.

What’s a Week?

A “week” is determined by an employee’s regular workweek. For example, an employee who works Monday through Friday has a 5-day workweek. An employee, who works Monday, Wednesday, and Friday, has a 3-day workweek.

What's a Day?

Where leave is taken on an intermittent or reduced leave basis, it is important to ascertain the number of “days” of leave an employee may take. An employee who has a 5-day workweek is entitled to 60 days’ leave in a 12-month period: 5 days x 12 weeks. An employee who works a 3-day workweek is entitled to only 36 days’ leave in a 12-month period: 3 days x 12 weeks.

What's an Hour?

It is important to be able to calculate how many “hours” of leave an employee on reduced leave is entitled to. This calculation is based on an employee’s regular workweek. For example, an employee who regularly works a 5-day week and 8 hours a day, is entitled to 480 hours of leave: (5 days x 12 weeks) x 8 hours. Similarly, an employee who works a 3-day week and 8 hours each day is entitled to 288 hours of leave: (3 days x 12 weeks) x 8 hours.

Where an employee’s hours fluctuate, employers may take an average of the preceding 12 weeks to establish the regular weekly hours of an employee.

Establishing the number of hours worked each week for exempt employees may be difficult where the employer does not maintain such records. In these cases the burden of proof is on the employer to disprove the number of hours worked by the employee. Employers may wish to obtain a statement from exempt employees before an intermittent or reduced leave, setting forth their regular workweek and hours for the preceding 12 weeks.

Holidays During FMLA Leave

According to DOL’s 2009 final FMLA regulations, for purposes of determining the amount of leave used by an employee, the fact that a holiday may occur within the week taken as FMLA leave has no effect, and the week is counted as a week of FMLA leave. However, if an employee is using FMLA leave in increments of less than 1 week, the holiday will not count against the employee’s FMLA entitlement unless the employee was otherwise scheduled and expected to work during the holiday.

Similarly, if for some reason the employer’s business activity has temporarily ceased and employees generally are not expected to report for work for 1 or more weeks (e.g., a school closing of 2 weeks for the Christmas/New Year holiday or the summer vacation or an employer closing a plant for retooling or repairs), the days on which the employer’s activities have ceased do not count against the employee’s FMLA leave entitlement.

Overtime Hours During FMLA Leave

DOL’s final 2009 FMLA regulations also address the issue of overtime hours and the 12-week calculation. According to the regulations, if an employee would *normally* be required to work overtime but is unable to do so because of an FMLA-qualifying reason, the hours that the employee would have been required to work may be counted against the employee’s FMLA entitlement. In such a case, the employee is using intermittent or reduced schedule leave.

Example

An employee is normally 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 use 8 hours of FMLA-protected leave out of the 48-hour workweek (8 divided by 48 equals 1/6 workweek). Voluntary overtime hours that an employee does not work due to a serious health condition may not be counted against the employee’s FMLA leave entitlement.

Servicemember Caregiver Leave

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

As discussed in the section on servicemember caregiver leave above, the leave entitlement for servicemember caregivers is to be applied on a per-covered-servicemember, per-injury basis. Thus, an eligible employee may be entitled to take more than one period of 26 workweeks of leave if the leave is to care for different covered servicemembers or to care for the same servicemember with a subsequent serious injury or illness. Note, however, that no more than 26 workweeks of leave may be taken within any “single 12-month period.”

When an eligible employee takes leave to care for more than one covered servicemember or for a subsequent serious injury or illness of the same covered servicemember, and the single 12-month periods corresponding to the different military caregiver leave entitlements overlap, the employee is limited to taking no more than 26 workweeks of leave in each single 12-month period.

Intermittent or Reduced Schedule Leave

If an employee takes leave on an intermittent or reduced schedule leave, only the amount of leave actually taken may be counted toward the 12 weeks of leave to which an employee is entitled. For example, if an employee who normally works 5 days a week takes off 1 day, the employee would use one-fifth of a week of FMLA leave. Similarly, if a full-time employee who normally works 8-hour days works 4-hour days under a reduced leave schedule, the employee would use one-half of a week of FMLA leave each week.

Part-Time Schedules

Where an employee normally works a part-time schedule or variable hours, the amount of leave to which an employee is entitled is determined on a *pro rata* or proportional basis by comparing the new schedule with the employee’s normal schedule. For example, if an employee who normally works 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 of a week of FMLA leave for each week the employee works the reduced leave schedule. An employer may convert these fractions to their hourly equivalent so long as the conversion equitably reflects the employee’s normally scheduled hours.

Changes in Schedule

If an employer has made a permanent or long-term change in the employee’s schedule (for reasons other than FMLA and before the notice of need for FMLA leave), the hours worked under the new schedule are to be used for making this calculation. If an employee’s schedule varies from week to week, a weekly average of the hours worked over the 12 weeks before the beginning of the leave period would be used for calculating the employee’s normal workweek.

Variable Schedules

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 (but for the taking of 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.

SPECIAL RULES FOR SPOUSES EMPLOYED BY THE SAME EMPLOYER

When both husband and wife work for the same employer, the amount of leave is limited to an aggregate of 12 weeks for “bonding” (the birth, adoption, or foster care placement of a child), for a qualifying exigency, and for leave to care for the employee’s parent with a serious health condition. However, if the leave is for the care of a sick child, to care for the other spouse, or for the employee’s own serious health condition, each spouse is allowed 12 weeks’ leave, less any bonding leave taken by that spouse.

Example

John and Jane Doe both work at ABC, Inc. When their daughter is born, they can take 6 weeks of leave to care for the newborn. John and Jane have now exhausted their 12-week “bonding” leave allotment. However, they each have 6 or more weeks of available leave for other qualified purposes. Thus, if John suffers a back injury later in the year, he can take up to 6 weeks of leave (depending, of course, on medical necessity).

Servicemember caregiver leave. A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 26 workweeks of leave during the “single 12-month period” if the leave is taken for the birth of the employee’s son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care, or to care for the child after placement, to care for the employee’s parent with a serious health condition, or to care for a covered servicemember with a serious injury or illness.

This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as a husband and wife are employed by the “same employer.” It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 26 workweeks of FMLA leave.

LEAVE FOR CAREGIVERS (NONSERVICEMEMBERS)

The U.S. Equal Employment Opportunity Commission (EEOC) has issued *Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, which illustrates circumstances under which discrimination against a working parent or other caregiver constitutes unlawful disparate treatment under the federal equal employment opportunity (EEO) statutes. See the **Appendix** of this guide for full text of the EEOC’s *Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (2007).

The EEOC guidance is intended to assist employers in determining whether discrimination against persons with caregiving responsibilities constitutes unlawful disparate treatment under federal EEO law. Although the federal EEO statutes do not prohibit discrimination based solely on parental or other caregiver status, the FMLA does give caregivers rights to leave in order to care for a family member with a serious health condition. Some state or local laws may provide broader protections for caregivers. Under the federal EEO laws, discrimination must be based on a protected characteristic such as sex or race.

The EEOC's enforcement guidance on caregivers illustrates various circumstances under which discrimination against a caregiver might violate federal EEO law. Examples include:

- Treating male caregivers more favorably than female caregivers
- Denying women with young children an employment opportunity that is available to men with young children
- Sex-based stereotyping of working women, including:
 - Reassigning a woman to less desirable projects based on the assumption that, as a new mother, she will be less committed to her job
 - Reducing a female employee's workload after she assumes full-time care of her niece and nephew based on the assumption that, as a female caregiver, she will not want to work overtime
- Lowering subjective evaluations of a female employee's work performance after she becomes the primary caregiver of her grandchildren, despite the absence of an actual decline in work performance
- Assumptions about pregnant workers, such as limiting a pregnant worker's job duties based on pregnancy-related stereotypes
- Discrimination against working fathers, such as denying a male caregiver leave to care for an infant under circumstances where such leave would be granted to a female caregiver
- Stereotyping based on association with an individual with a disability (for example, refusing to hire a worker who is a single parent of a child with a disability based on the assumption that caregiving responsibilities will make the worker unreliable)
- Hostile work environment affecting caregivers, such as:
 - Subjecting a female worker to severe or pervasive harassment because she is a mother with young children
 - Subjecting a female worker to severe or pervasive harassment because she is pregnant or has taken maternity leave
 - Subjecting a worker to severe or pervasive harassment because his wife has a disability

DOMESTIC PARTNERSHIPS

A domestic partnership is a relationship between two individuals who are usually a same-sex couple, but may also be an unmarried opposite-sex couple. The relationship is usually one that cannot be legalized by marriage. Different localities may have different definitions of what constitutes a domestic partnership.

Some organizations use the term “spousal equivalents”—defined as those partners who are unable to legalize their relationship through marriage. When addressing the issue of domestic partners in your workplace, it is crucial to specify in corporate documents such as policies and handbooks which type (or types) of relationships will meet the definition of domestic partnership.

Where there is no state regulation of domestic partnerships, employers may want to require a statement of financial interdependence and intent that the relationship is permanent before recognizing a domestic partnership for leave (or other benefits-related) purposes. Employers who are adopting policies of granting domestic-partnership benefits accept an “Affidavit of Domestic Partnership” signed

under penalty of perjury before a Notary Public as verification of the relationship. Employers may also consider sending an annual renewal statement asking the covered employee to verify that the relationship still exists.

In its Administrator Interpretation #2010-3 (June 22, 2010), DOL notes that “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.”

DOL has stated that 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. According to DOL, an employee who will share equally in raising 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, as noted in this section under **Leave for Birth and Bonding**, an employee who will share equally in raising 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.

DOL has interpreted the FMLA to say 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. According to DOL, “neither the statute nor the regulations restrict the number of parents a child may have under the FMLA” (Administrator Interpretation #2010-3).

It is important to note the DOL’s interpretation of *in loco parentis* determinations is relevant only where the FMLA leave is sought *for a son or daughter*. Unmarried employees remain ineligible to take federal FMLA leave for their partners’ serious health conditions, including pregnancy and prenatal care even where the unmarried partner is the father.

DOL’s Administrator Interpretation does not have the binding force of a statute or court opinion. However, agency opinions like Administrator Interpretation #2010-3 typically receive deference from courts, and employers should give them careful consideration in structuring FMLA policies.

SPECIAL RULES FOR EDUCATIONAL AGENCIES

All the rules and regulations of the FMLA that apply to covered employers also apply to local educational agencies and private elementary and secondary schools, with the exception of special rules for educational agencies discussed below. These special provisions were crafted to address special circumstances presented by employees of educational employers and to assure minimum disruption in the classroom.

These special rules do not apply to colleges, trade schools, or preschools. Employers and employees of these institutions would follow the same coverage and eligibility requirements as those of noneducational private sector employers.

DEFINITIONS

Some definitions are required for understanding the scope of the special rules for local educational agencies.

Local Educational Agency

A “local educational agency” is defined in the **Elementary and Secondary Education Act** as “a public board of education or other public authority legally constituted within a state for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a state, or such combination of school districts or counties as are recognized in a state as an administrative agency for its public elementary or secondary schools. Such term includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.”

Instructional Employees

“Instructional employees” are those employees whose principal function is to teach and instruct students—for example, teachers, athletic coaches, and drivers’ education assistants. Teacher assistants, aides, cafeteria workers, building service workers, bus drivers, and other primarily noninstructional employees are not considered to be working in an instructional capacity and, therefore, are not considered instructional employees.

Academic Term

For purposes of these provisions, “academic term” means a designated school semester. Typically, the first academic term ends near the end of the calendar year, and the second academic term ends late in the spring. The FMLA allows for no more than two academic terms per school year.

EDUCATIONAL AGENCIES: EMPLOYER COVERAGE

Public and private elementary and secondary schools are “local educational agencies” and are covered by the FMLA, regardless of the number of employees.

This is different from the standard FMLA rules for employers, which require only those employers with at least 50 employees to comply with the law. As noted previously, educational institutions are covered no matter how many or how few employees they have. However, in order for employees to be eligible to take leave, they must first satisfy the “worksite size” requirement that they work at a site with at least 50 employees on-site or within a 75-mile radius. Therefore, for all practical purposes, an educational employer with fewer than 50 employees will not ever need to give FMLA leave, because none of its employees can meet the worksite size requirement. However, the employer is nonetheless covered and must comply with FMLA’s notice, posting, and antiretaliation requirements.

EDUCATIONAL AGENCIES: EMPLOYEE ELIGIBILITY

The eligibility requirements for employees of local educational agencies are the same as the eligibility requirements for employees of noneducational agencies. These are the standard rules for employee eligibility for FMLA-approved leave. To be eligible, an employee must meet three requirements. Two are service-related; the other is a worksite requirement. Under the law, an educational employee must:

1. Have worked for the employer for at least 12 months
2. Have worked for the employer for at least 1,250 hours in the 12 months preceding leave
3. Work at a site where at least 50 employees are employed within a 75-mile radius of the work site.

Note: For eligibility purposes, full-time teachers of an elementary or secondary school system, institution of higher education, or other educational establishment are deemed to meet the 1,250-hour test. If an employer wants to challenge that, he or she must be able to clearly demonstrate that such an employee did not work 1,250 hours during the previous 12 months.

Example

Employees of a rural school would not be eligible for FMLA leave if the school has fewer than 50 employees and there are no other schools under the jurisdiction of the same employer (usually, a school board) within 75 miles.

EDUCATIONAL AGENCIES: INTERMITTENT AND REDUCED LEAVE

Special rules govern “instructional” employees’ use of reduced and intermittent leave.

Duration of Leave for Medical Condition

The FMLA requires that employers grant eligible employees reduced or intermittent leave because of an employee’s own serious health condition or to care for a covered family member with a serious health condition. This requirement applies to all employers, including educational agencies, who are covered under the FMLA.

The special rule for educational agencies is related to the duration of leave. Under the standard rule, the duration of intermittent or reduced leave is governed by the medical necessity for such leave. Employers, for example, may not require employees who need to take 2 hours of leave a day to take one-half day of leave, instead. Likewise, employers may not require employees who intermittently need a day or two of leave to take a full week of leave.

This, however, is not always the case for instructional employees. Under the special exceptions, school boards may require “instructional” employees to take intermittent or reduced leaves for a particular length of time. The time period set by the school board may not exceed the duration of planned medical treatment (29 USC 2618 (c)(1)). The rationale behind this rule is that the intermittent presence of a teacher in the classroom is too disruptive of the educational process.

Under this special rule, local educational agencies may require instructors to take intermittent or reduced leave for “periods of a particular duration” of time when:

1. The leave is foreseeable based on planned medical treatment; *and*
2. The employee would be on leave for more than 20 percent of the total number of working days in the period during which the leave would extend.

Example

Stephen, a high school teacher, requires Mondays, Wednesdays, and Fridays off for the next 6 weeks for planned medical treatment. His employer, the local school district, rather than having him in the classroom 2 days a week and replaced by a substitute for the other 3 days, may require him to take the entire 6-week period as a leave.

“Periods of a particular duration” means a block of time beginning no earlier than the first day for which leave is needed and ending no later than the last day on which leave is needed.

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

Alternative Position Transfer

The standard for temporary transfers for employees on reduced or intermittent leave is the same for local educational agencies as it is for all other employers covered under the FMLA. Local educational agencies as well as other employers may transfer the employee, temporarily, to an available alternative position with equivalent pay and benefits, which better accommodates the recurring periods of leave.

Policy issue: The local board of education will need to determine if it is desirable to require instructional employees to take time off in blocks and if it is desirable to transfer, temporarily, employees on reduced and intermittent leave to other positions. If so, it should then determine what its rules will be in this regard and develop appropriate language for all applicable collective bargaining agreements.

School Vacations

The period of time during summer vacation or other school holidays of a week or more, where the employee would not otherwise be required to work, cannot be counted against an employee’s leave entitlement.

LEAVE FOR INSTRUCTIONAL EMPLOYEES NEAR END OF TERM

Special rules apply when an instructional employee begins leave near the end of an academic term. There are three sets of special rules; all allow the employer to require the employee on leave to continue taking leave until the end of the school term.

Leave Begins More than 5 Weeks Before Term End

If an instructional employee takes a leave for any reason, and begins the leave more than 5 weeks before the end of a term, the school may require the employee to remain out until the end of the term if:

- The leave will last at least 3 weeks; *and*
- The employee would have returned to work during the 3-week period before the end of the term.

Leave Begins Fewer than 5 Weeks Before Term End

If an instructional employee takes a leave for a reason other than his or her own serious health condition, and the leave begins fewer than 5 weeks from the end of the school term, the local educational agency may require the employee to remain on leave until the end of the term if:

- The leave is longer than 2 weeks; *and*
- The employee would have returned to work in the 2 weeks before the end of the term.

Leave Begins Fewer than 3 Weeks Before Term End

If an instructional employee takes a leave for a reason other than his or her own serious health condition, and the leave begins 3 weeks or fewer from the end of the school term, the local educational agency may require the employee to remain on leave until the end of the term, provided the length of the leave is more than 5 working days.

Leave Time Is Not Counted If the Instructional Employee Is Able to Return

Where the employer requires the instructional employee to remain out until the end of the term, but where the instructional employee is ready and able to work, such time off cannot be counted against the employee's leave entitlement.

The employer has the option not to require the employee to stay on leave until the end of the school term. Therefore, any additional leave required by the employer to the end of the school term is not counted as FMLA leave. However, the employer must maintain the employee's group health insurance and restore the employee to the same or equivalent job and benefits at the conclusion of the leave.

EDUCATIONAL AGENCIES: SPECIAL RULES ON REINSTATEMENT

Under the standard rules for reinstatement under the FMLA, an employee must be restored to his or her former position or to an equivalent position. An equivalent position is one with equivalent benefits, pay, and other terms and conditions of employment. For example, an employee may not be restored to a position requiring additional certification.

In the case of a local educational agency, a determination to place a returning employee into an equivalent position must be made on the basis of established school board policies, practices, and collective bargaining agreements. Under the special rules, such policies, practices, and collective bargaining agreements used as the basis for restoration must:

1. Be in writing; *and*
2. Be made known to the employee prior to taking leave; *and*
3. Clearly explain the employee's restoration rights on return from leave.

The Act, in this case, appears to give school boards more latitude in defining an equivalent position for reinstatement than the Act gives other employers. However, the regulations provide that "any established policy which is used as the basis for restoration of an employee to 'an equivalent position' must provide substantially the same protections as provided in the Act for reinstated employees." In other words, the policy or collective bargaining agreement must provide for restoration to an "equivalent position" with equivalent benefits, pay, and other terms and conditions of employment.

The regulations, thus, redefine "equivalent" for local educational agencies so that it is essentially indistinguishable from the standard rules governing restoration to an equivalent position for all other employers. Therefore, we recommend adherence to general rules applicable to all employers with respect to restoring an employee to his or her equivalent job.

REDUCED LIABILITY

Employers who illegally violate the rights of an employee under the FMLA or in any manner discriminate against an individual for opposing any practice made unlawful by the FMLA may be liable to that individual for, among other things, actual monetary damages plus interest.

Local educational agencies that violate the FMLA, but have reasonable grounds for believing their conduct is not a violation of the law, may, at the discretion of the court, have the overall amount of actual damages and interest reduced.

Employers, including local educational agencies, may be liable for double damages unless they prove that their unlawful acts or omissions were made in good faith and they had reasonable grounds for believing the actions did not violate the FMLA.

