Ready or Not, Here They Come: The FMLA Final Regulations

Webinar

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Founded in 1993 by five attorneys and two staff, today the firm’s staff includes Lyndel L. Erwin, who worked for the United States Department of Labor, Wage and Hour Division for thirty-six years, the last several of which as Area Director for Alabama and Mississippi; Jerome C. Rose, who joined the firm in 2001 upon retiring from the EEOC after working for twenty-two years as its Regional Attorney covering all EEOC litigation and enforcement matters in Alabama and Mississippi; and John E. Hall, who joined the firm in January 2002 after working for OSHA for twenty-seven years, the last several of which as Area Director for Alabama.

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ABOUT YOUR PRESENTERS

Donna Eich Brooks’ practice is concentrated in litigating Title VII and other employment disputes. She also devotes substantial time to guiding clients with proactive, preventative counseling. Donna assists employers and human resource professionals with all facets of affirmative action and OFCCP compliance and provides strategic planning to assist employers with short- and long-term affirmative action goal-setting.

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I. Introduction

The U.S. Department of Labor (“DOL”) has now issued its long-awaited final revisions to the regulations that implement the Family and Medical Leave Act. The final regulations have kept the original FMLA’s compromise approach intact – these final regulations offer clarification, but no major salvation for either employers or employees. These final regulations were the first significant revisions to the FMLA regulations since the law was enacted 15 years ago and they affect all employers subject to the FMLA.

II. Coverage

A. Application of FMLA to employers: FMLA covers private employers that have at least 50 employees for at least 20 weeks in the current or preceding calendar year.

B. Joint Employment:

1. These final regulations clarify that a Professional Employer Organization (PEO), which is a business that contracts with another employer to perform administrative functions (i.e., payroll, benefits, regulatory paperwork), is not considered a joint employer if it performs only these administrative functions.

2. If, however, a PEO (1) exercises control over the client company’s employee; (2) has authority to hire, fire or supervise employees, or (3) benefits from work performed by the client’s employees, it might be considered a joint employer with the organization for whom it performs services.

3. The regulations direct employers to examine the economic realities of their arrangement with PEOs, and also state that the client employer is likely the primary joint employer. The client employer should count any PEO employees that are jointly employed in reaching the 50-employee FMLA threshold.

   a) The worksite of a jointly-employed worker is the primary employer’s office – where the employee is assigned or
III. Eligibility

A. Employment Duration

1. For the purposes of assessing whether an employee has been employed by an employer for at least 12 months and has worked at least 1,250 service hours, the DOL gave us these clarifications:

   a) The 12 months of employment does not have to be consecutive, but employers do not have to count time worked prior to a break-in-service of seven years or more in determining whether an employee has been employed for at least 12 months. However, there are two exceptions in the case of:

      (1) an employee’s fulfillment of his/her military obligations;

      (2) a period of approved absences or unpaid leave, such as for education or child-rearing purposes, where a written agreement or collective bargaining agreement exists concerning the employer’s intent to rehire the employee.

      In these cases, the employee’s employment before the break-in-service would count towards the 12 months of employment regardless of how much time has lapsed between the two periods of employment.

   b) In keeping with USERRA, time spent fulfilling an employee’s military service obligations (National Guard or Reserve) is counted toward the employee’s 1,250-hour and 12-month requirements.

2. Even if an employee is not eligible for FMLA protection at the beginning of his/her leave, that employee can subsequently become eligible and can still begin FMLA leave once they have met the eligibility requirements.

3. An employee need not have completed the 1,250 hours before giving notice of the intent to take FMLA leave – in fact, we want advance notice as possible. If the employee would be FMLA-eligible at the time the leave is to start, the employer cannot take

reports – unless the employee has worked for at least one year at a facility of the secondary employer (in which case, the latter location will be deemed the worksite).
negative action (retaliate) against the employee for giving notice or for any inconvenience the leave may cause.

B. Worksite

1. To be eligible, employees must work at a site with 50 employees within a 75-mile radius.
   
a) DOL has clarified that an employee’s worksite ordinarily is the place to which he or she reports or, if there is no such site, the place to which the employee’s work is assigned.
   
b) The worksite for those with no fixed worksite can be either the place to which they are assigned, from which their work is assigned, or to which they report.

2. If an employee is jointly employed, his or her worksite is the primary employer’s office from which the employee is assigned or to which the employee reports, unless he or she has physically worked at a secondary employer’s facility for at least one year. In that case, the secondary employer’s site becomes the worksite. The secondary employer also would count that employee to determine the FMLA eligibility of the secondary employer’s employees.

IV. Serious Health Condition

A. Although employers desperately wanted changes in the definition of “serious health condition” – especially the “chronic health condition” prong – DOL did not answer the call. Instead, the DOL fine tuned the definition, providing slightly more clarity on some prongs of the definition.

B. The six categories of “serious health condition,” along with the slight adjustments in definition from the final regulations, are as follows:

1. **Inpatient care:** Conditions requiring an **overnight stay** in a health care facility (e.g., hospital or hospice) automatically are considered serious health conditions. FMLA leave covers the time in the facility and any subsequent period of incapacity or follow-up treatment in connection with that condition.

2. **Incapacity and Treatment:** A period of incapacity of more than three consecutive, **full** calendar days, and any subsequent treatment period of incapacity relating to the same condition, that also involves:
a) two or more treatments by a health care provider within the 30 days that start with the first day of incapacitation, with the first treatment occurring in the first seven days; or

b) one in-person treatment by a health care provider within the seven days that start with the first day of incapacitation, plus a regimen of continuing treatment under the provider’s supervision. The regimen of continuing treatment can include prescription medication, for example.

c) Extenuating circumstances – meaning factors beyond the employee’s control that prevent the second visit to a health care provider from occurring – can excuse the failure to undergo two treatments in 30 days. The health care provider, and not the employee/patient, determines whether a follow-up visit is necessary.

**NOTE:** This means you may not know if an employee has a serious health condition until 30 days after the first absence. This will likely result in a lot of retroactive designations, and you will likely need to develop a procedure where you “highlight” employees or provisionally treat them as protected until 30 days has elapsed.

3. **Pregnancy and prenatal care:** Incapacity due to pregnancy and prenatal care counts as a serious health condition.

4. **Chronic conditions:** The FMLA also applies to chronic serious health conditions that incapacitate a person. A chronic serious health condition is one that requires periodic visits for treatment by a health care provider, continues over an extended period of time, and may cause episodic rather than continuing periods of incapacity. An employee with a serious health condition must visit a health care practitioner for treatment at least twice a year. Examples of chronic conditions that might qualify for FMLA leave include diabetes, asthma, and epilepsy. As with pregnancy, an employee incapacitated because of a chronic condition can take FMLA leave for the condition even when the employee does not see a doctor and is not incapacitated for more than three full consecutive calendar days. An example would be an asthma attack.

**NOTE:** Once again, this will lead to uncertainty and provisional approvals of FMLA leave where some follow-up will be necessary to determine if the second visit to the health care provider takes place within twelve months.
5. **Permanent or long-term conditions:** The FMLA covers 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, stroke, terminal disease, etc.).

6. **Conditions requiring multiple treatments:** The FMLA protects an absence to receive multiple treatments by health care providers and also to recover from the treatment, as with chemotherapy. This category includes reconstructive surgery after an accident or injury or a condition that would be likely to result in incapacity of more than three consecutive full calendar days if left untreated, such as cancer, severe arthritis, or kidney disease. It does not include nonrestorative cosmetic procedures, although they could be covered by FMLA if they required inpatient treatment. The Final Regulations did not give us any more clarity or limitations on this definition.

C. Serious health condition leave can be taken for the employee’s own serious health condition or to care for a spouse, son, daughter or parent with a serious health condition.

1. The Final Regulations clarified the definitions of “parent” and “son and daughter:”
   a) A “parent” can be a biological, adoptive, step, or foster mother or father, as well as any individual who stood *in loco parentis* to the employee.
   b) For the purposes of determining whether a “son or daughter” who is 18 or older is “incapable of self-care because of a mental or physical disability,” the Regulations clarify that that determination is made at the time the leave commences.

2. The employee seeking leave to care for a family member with a serious health condition does not have to be the only individual available to care for the covered family member.

V. **Leave for Pregnancy/Birth, Adoption or Foster Care**

   A. While these situations may also qualify as serious health conditions, they also stand on their own as a qualifying basis for FMLA leave.

   B. The Final Regulations consolidated a lot of prior sections providing guidance on employee leave for pregnancy/birth/adoption/foster care.

   C. Beyond the consolidation, the Final Regulations provide:
1. An expectant mother may take FMLA leave before the birth of her child for prenatal care or if her condition makes her unable to work.

2. A husband may take FMLA leave to care for his expectant spouse if she is incapacitated; this includes providing psychological comfort and reassurance.

3. Only a spouse may receive FMLA leave to care for a pregnant woman; a boyfriend, fiancé, or life partner would not be eligible for this leave.

4. Both mother and father can take up to 12 weeks of leave to care for a newborn child with a serious health condition, even if both are employed by the same employer. The limitation (under which, if both mother and father are employed by the same employer they can only take a combined 12 weeks of leave) applies only to bonding time during the first 12 months.

D. The Final Regulations also include a new definition for “adoption”: “legally and permanently assuming the responsibility of raising a child as one’s own. The source of an adopted child (e.g., whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for FMLA leave.”

VI. Employer Notice Provisions

A. The final regulations require employers to give employees three kinds of notice, generally within five business days (previously two) in the absence of extenuating circumstances.

1. **Poster/General notice:** Covered employers must both post and distribute a general notice:

   a) Posting: The posting requirement can be met by an electronic posting.

   b) Distribution:

      (1) Employers with employee handbooks or other written materials must include a general FMLA notice.

      (2) Employers with no such materials must give employees FMLA notice upon hire, rather than once a year.
(3) The DOL has modified its model general notice to include more detail on the information employees must furnish to receive FMLA leave.

(4) Employers can duplicate the text of the DOL’s model notice or can use another form, as long as the information provided includes, at a minimum, all of the information contained in that notice.

(5) Notice must be given in languages besides English if a “significant percentage” of non-English speakers are in the workplace; the percentage remains undefined.

2. **Eligibility and Rights and Responsibilities notice:** An employer is required to provide an eligibility notice within five business days (absent extenuating circumstances) of being advised by the employee that he or she needs to take FMLA leave or has been made otherwise aware of the employee’s need for such leave.

   a) If an employee is ineligible, the employer must give at least one reason for ineligibility. The employer must also notify the employee in either the eligibility or designation notice of how much FMLA leave she has available. Only one eligibility notice is required per qualifying FMLA reason per leave year.

   b) Eligible employees must receive the Rights and Responsibilities notice when they receive the eligibility notice. This notice includes such information as the procedure for furnishing certification and the consequences of not doing so, the right to substitute paid leave, the requirement of paying health insurance premiums, etc., along with any required certification forms.

   **TIP:** If the employer has special procedures or limitations for the use of paid leave, here is the place to put the employee on notice of those requirements. Don’t just go with a boiler-plate form – take it and tailor it to help you.

   c) Our model form is attached as Appendix A.

3. **Designation notice:** This notice is given within five days of the employer obtaining enough information to determine whether leave is being taken for an FMLA-qualifying reason. In this notice, the employer must:
a) Notify the employee whether the leave (specifying the amount) will count as FMLA leave.

b) Tell the employee whether and what additional information is needed in order to assess whether the leave is FMLA-qualifying.

c) Notify the employee if the employer requires the substitution of paid leave.

d) Tell the employee if he or she will have to provide a fitness-for-duty certification to return to work and, if the certification needs to reflect the employee’s ability to perform the essential functions of the job, this notice must contain the essential functions.

e) Our model form is attached as Appendix B.

B. **Employer liability:** If an employee suffers individual harm because the employer did not follow the notification rules, the employer may be liable for any actual harm the employee suffered as a result.

C. **Retroactive designation:** The employer can retroactively designate leave as FMLA leave, provided the employer (1) follows the notification requirements and (2) has not caused harm to the employee by not having made a timely designation of leave. The employer and the employee may mutually agree to retroactively designate FMLA-qualifying leave.

The question for determining whether there has been harm may best be analyzed by asking: “Could the employee have made a different choice if they knew the leave was being counted?” For instance, could they have made arrangements for another family member to care for their parent or spouse.

VII. **Employee Notice Requirements** – An employee must now comply with an employer’s usual and customary notice/procedural requirements for requesting leave, in the absence of unusual circumstances; for instance, employers can (consistently) require written notice of the need to take leave, or specify that employees direct that notice to a specific person.

A. **Foreseeable leave:** Employees must give at least 30 days’ notice when the need for FMLA leave is foreseeable that far in advance. If 30 days is not practicable, the employee must give notice “as soon as practicable” but the employee must tell the employer, if asked, why 30 days was not practicable.

B. **Unforeseeable leave:** It generally should be practicable for employees to give notice of unforeseeable leave within the time required by the
employer’s usual and customary notice requirements. The final rule modified the previous provision, which had been interpreted to allow some employees to notify their employers of their need for FMLA leave up to two full business days after an absence, even if they could provide notice sooner. Absent unusual circumstances, employees must follow their employers’ usual notice and procedural requirements for taking leave unless they are more stringent than FMLA permits. An employer may delay or deny FMLA leave when an employee does not comply with these procedures and there are no unusual circumstances.

VIII. Leave Entitlements

A. Holidays – Whether an employee is charged FMLA leave for a holiday depends on whether the employee takes FMLA leave for a full or partial week:

1. An employee taking a full week of FMLA leave during a week containing a holiday will have the holiday counted against his or her FMLA allotment. Remember: take a whole week, count the whole week.

2. An employee taking less than a full week of FMLA leave during a week containing a holiday will not have the holiday counted against his or her FMLA allotment unless the employee was otherwise scheduled and expected to work the holiday. The only explanation provided for this seeming inconsistent approach to holidays was: “[t]he Department believes that where leave is taken in less than a full workweek, the employee’s FMLA leave entitlement should only be diminished by the amount of leave actually taken.”

B. Scheduling Intermittent or Reduced Schedule Leave – Employees must make a “reasonable effort” to schedule treatment so as not to disrupt unduly an employer’s operations. This “reasonable effort” language replaces the word “attempt.”

C. Transferring Employees On Intermittent or Reduced Schedule Leave – The DOL considered but ultimately decided against allowing an employer to transfer an employee to a different position when the need for intermittent or reduced leave is unforeseeable. As a result, the rule continues: the only time an employer can transfer an employee taking intermittent or reduced leave is when such leave is foreseeable based on planned medical treatment.

D. Increments of Intermittent of Reduced Leave

1. An employer may charge an employee with more FMLA leave than he/she needs where such employee is physically unable to
access the worksite after a shift begins (e.g., flight attendant, railroad conductor). This exception will be applied narrowly.

2. An employee who is unable to work mandatory overtime can be charged FMLA leave for that overtime.

3. When the employee works a variable schedule, the employer must calculate the average workweek looking at the scheduled hours over the prior 12 months (versus 12 weeks) from the date leave commences.

4. Employer must count leave using increments no greater than the shortest period of time the employer uses to account for other forms of leave, provided that period of time is not greater than one hour.

E. Substitution of Paid Leave

1. An employee who elects (or who is required by his or her employer) to take paid leave must follow the employer’s paid leave policies with respect to use of that leave. DOL provided this example:

   [W]here the employee takes two hours of FMLA leave and requests to substitute paid leave which must normally be used in full-day increments, the employer must grant two hours of unpaid FMLA leave, but may choose to deny the substitution of paid leave, or to waive its normal minimum increment and allow the employee to substitute paid leave for the two-hour FMLA absences. The employee has the right to take two hours of unpaid FMLA leave, but under the terms of the employer’s paid leave policy does not have a right to substitute paid leave unless he or she chooses to take the full day of leave (thus fulfilling the requirements of the employer’s paid leave policy).

2. An employer must make employees aware of any additional procedural requirements in conjunction with the use of paid leave. This information must be provided to employees in the rights and responsibilities notice.

3. Because an employee is not on unpaid leave status while receiving paid disability leave/workers’ compensation, the rules pertaining to substitution of paid leave do not apply in these circumstances. Where an employee’s short-term disability or workers’ compensation benefits only partially replace an employee’s
income, as is typically the case, the employer and employee may agree to have paid leave supplement those benefits.

4. For public employers, accrued compensatory time can be substituted for unpaid FMLA leave.

F. Benefits While on Leave

1. In situations where an employee’s health benefits have lapsed because of his or her failure to pay the employee portion of the premium while on FMLA leave, the employer still has the duty to reinstate the employee’s health benefits upon return from leave and may be liable for harm suffered by the employee as a result of any failure to reinstate.

G. Perfect Attendance/Production Bonuses

1. The Final Regulations address the payment of bonuses that are based on the achievement of a specific goal (perfect attendance, hours worked, products sold) by allowing an employer to disqualify an employee who has not achieved the goal due to his or her use of FMLA leave, so long as employees on equivalent types of leave for a non-FMLA reason are treated consistently.

2. Employers can choose to prorate these bonuses and awards.

H. Light Duty

1. Light duty programs are widely regarded as advantageous, both to the employer and to the employee who has been injured on the job. Employees generally return to full-duty work faster if their employers have light duty programs.

2. Under the old FMLA regulations, some employers argued that time spent performing light duty work could be counted against an employee’s FMLA entitlement. With the new regulations, that argument no longer holds water. **Time spent on light duty does not count as FMLA leave.**

3. Another major aspect of the FMLA light duty rule: an employee’s right to restoration is held in abeyance while he/she is on light duty, up to the end of the applicable twelve-month FMLA leave year.

4. To illustrate the practical effect of the FMLA light duty rules, consider a hypothetical: Suppose an employee: 1) is injured on the job; 2) is released to light duty work, which his employer will accommodate; and 3) has FMLA leave available.
a) The employee may refuse the light duty work, and take FMLA leave instead. Although he may lose workers’ compensation benefits, he will maintain the job restoration protection afforded by the FMLA, until his FMLA leave expires.

1) If the FMLA leave is exhausted prior to the employee’s release to full duty, then the employee has no further restoration protection under the FMLA.

2) If the employee is released to full duty prior to the exhaustion of FMLA leave, then the employee has the right to be restored to his or her usual job, or an equivalent position, in accordance with the FMLA.

b) In the alternative, the employee may voluntarily accept the light duty position offered by an employer.

1) The employee’s FMLA job restoration rights would then remain intact while the employee performs the light duty assignment, through the end of the applicable 12-month FMLA leave year (even though the employee has not actually taken any FMLA leave).

2) If the light duty assignment ends before the employee is released to full duty, then the employee may utilize FMLA leave, if available.

5. In contrast, if an employee has already exhausted his or her full 12 weeks of FMLA leave entitlement in a 12-month period, and then voluntarily accepts a light duty position, that employee no longer has a right under the FMLA to restoration.

6. The Department of Labor acknowledges that the light duty rules may create a disincentive for employers to offer light duty positions, because the new regulations provide a more open-ended right to reinstatement. However, the DOL notes that “nothing prevents employers from offering light duty positions for a finite period of time.”

7. On the subject of workers’ compensation and FMLA, remember: FMLA leave and workers’ compensation leave may run concurrently (provided the leave is properly designated by the employer). That rule remains unchanged. (Here, we are not referring to light duty, but instead time missed from work due to a workers’ compensation injury). If your current policy is not
counting workers’ compensation leave as FMLA leave, you may want to consider revising your policy.

IX. Medical Certification

A. DOL has split its model Certification form into two Certification forms – one for employees requesting leave due to their own serious health condition (Form WH-380E), and one to be used for employees seeking leave to care for a family member (Form WH-380F).

1. Our model form in Appendix C combines these.

B. The employer has five business days to request certification, and the employee has at least 15 calendar days to submit it, including when the employee has given 30 days’ advance notice of foreseeable leave.

1. If an employee submits an incomplete or otherwise insufficient (vague, ambiguous, or non-responsive) medical certification form, the employer must advise the employee in writing as to what additional information is needed.

2. Employees have at least seven days to cure incomplete or insufficient certifications. They must be given more time if they are unable to comply within that timeframe despite diligent, good faith efforts.

C. The employer can now request:

1. information about a health care provider’s specialization and fax number

2. an employee or family member’s diagnosis

3. certification from the health care provider that intermittent or reduced leave is medically necessary

4. a statement related to which essential job functions an employee cannot perform

5. more detailed information on the anticipated frequency and duration of intermittent and reduced schedule leave.

D. The employer can request that an employee provide annual medical certifications for medical conditions lasting in excess of a leave year.

E. An employer can consider information about an employee’s medical condition obtained while trying to determine disability status under the
ADA, a workers’ compensation program, or qualification for benefits under a disability plan.

F. **Clarification and Authentication:**

1. The employer’s representatives – specified as a health care provider, HR professional, leave administrator, or management official, but not the employee’s direct supervisor – may contact the employee’s health care provider directly for authentication or clarification of the certification, provided the employee has been given an opportunity to cure a faulty certification.

2. “Clarification” is defined as help in understanding handwriting or the meaning of a response.

3. The employer must obtain a valid HIPAA authorization for contacts with HIPAA-covered health care providers. If the employee does not sign the authorization and does not otherwise clarify the information, an employer may deny FMLA leave on the grounds that the certification form is unclear.

G. **Recertification**

1. In general, an employer may request recertifications no more often than every 30 days and only in connection with an absence, unless the minimum duration of the condition is more than 30 days.

2. Recertifications may be requested in less than 30 days in the following cases: the employee requests an extension of his or her leave, circumstances stated in previous certifications have changed significantly, or the employer receives information casting doubt on continuing validity of employee’s certification.

3. When employees request intermittent or reduced leave for periods in excess of six months, an employer can request recertification every six months in connection with an employee’s absence.

4. In connection with a recertification, an employer may provide an employee’s health care provider with a record of the employee’s absence pattern and ask the health care provider if the employee’s serious health condition and need for leave are consistent with the absence pattern.

X. **Fitness-For-Duty Certifications**

A. Remember: to utilize this tool, the employer must notify the employee of this requirement in the employer’s designation notice.
B. The employer can obtain return-to-work certifications, also known as fitness-for-duty certifications, from employees returning from leave.

C. Employees on intermittent leave may be asked for fitness-for-duty certification when there are reasonable safety concerns, defined as a reasonable belief of a significant risk of harm to the employee or others, considering the nature and severity of the potential harm and likelihood of occurrence. These certifications cannot be required more often than once every 30 days.

D. There is no form for fitness-for-duty certification, and employers cannot obtain a second or third opinion regarding fitness-for-duty.

E. The authentication and clarification principles recounted above apply to fitness-for-duty certifications.

F. Assuming prior notice was given in the designation notice, if the employee does not provide the fitness-for-duty certification (or request additional FMLA leave), then the employee is no longer entitled to reinstatement under the FMLA.

XI. Miscellaneous

A. In response to conflicting case law, DOL has now clarified that an employee can voluntarily settle or release FMLA claims based on past employer conduct without first obtaining DOL or court approval for that settlement or release.

XII. Military FMLA

A. **Injured Servicemember Leave or “Caregiver Leave”** – Effective January 28, 2008, an employee is entitled to take up to 26 weeks of leave in a single 12-month period to care for a covered servicemember with a serious injury or illness. Importantly, DOL did not circulate proposed regulations on this new leave prior to issuing the final regulations; therefore, expect legal challenges to these provisions.

1. Coverage

   a) Employees may take caregiver leave to care for an injured servicemember who is the employee’s spouse, parent, child, and relatives for whom the employee is the “next of kin.”

      (1) “Next of kin” is defined as the servicemember’s nearest blood relative, excluding his or her spouse, parent, or child, and prioritized as follows:
(a) Blood relatives with legal custody of the servicemember by court order or statute

(b) Siblings

(c) Grandparents

(d) Aunts and uncles

(e) First cousins

The servicemember, however, may designate in writing a specific blood relative as next of kin, and that will control.

(2) If the servicemember does designate a “next of kin,” the designated individual will be the servicemember’s only next of kin. In contrast, when no designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember’s next of kin and can take FMLA leave to provide care, either consecutively or simultaneously.

(3) Employers can ask employees for reasonable documentation of family relationships; a simple statement will suffice.

b) “Covered servicemember” is defined as: (1) a current member of the Armed Forces (including the National Guard or Reserves) or a member of the Armed Forces/National Guard/Reserves who is on the temporary disability retired list, who (2) has a serious injury or illness (3) incurred in the line of duty on active duty (4) for which he or she is undergoing medical treatment, recuperation or therapy, otherwise in outpatient status, or otherwise on the temporary disability retired list.

(1) This does not include a former member of the Armed Forces, National Guard or Reserves or one who is on the permanent disability retired list.

2. Leave and Timing

a) There is a separate “FMLA year” for caregiver leave purposes, beginning with the first date of caregiver leave
and ending 12 months later. This differs from the “regular FMLA year” that the employer has chosen for non-caregiver FMLA purposes, and if an employee takes military FMLA leave, the employer will have to track FMLA use under the two calendars. For example, the DOL’s regulations state that once an employee takes military caregiver leave and has begun to use that type of FMLA during the caregiver FMLA year, the employee can take a maximum of 26 weeks of FMLA leave for any purpose during that 12 months. If he takes nonmilitary FMLA leave, say to care for his own serious health condition, that counts against the maximum 26 weeks of FMLA leave to which he is entitled during that 12-month period.

b) The maximum of 26 weeks of leave may be taken in a single block or intermittently during the employee’s caregiver FMLA year.

c) Caregiver leave time cannot be carried over from year to year; it runs in a single 12-month period. It is possible for an eligible employee to take more than one caregiver leave because this type of leave, according to regulation, applies on a per servicemember, per injury basis in a single 12-month period. For example, an employee may take 26 weeks of caregiver leave for her military spouse’s qualifying leg injury in Year 1, and take additional caregiver leave in Year 2 for her daughter’s qualifying military injury or for her spouse’s second, unrelated military illness or injury.

d) If leave qualifies as both caregiver leave and leave to care for a family member with a serious health condition, the military provisions trump and the employer must designate the leave as caregiver leave.

3. Certification Requirements

a) Employers should have a separate certification form entitled “Certification for Serious Injury of Illness of Covered Servicemember for Military Family Leave.” DOL provided a model form (Form WH-385).

(1) Our model form is attached as Appendix D.

b) An employer must accept “invitational travel orders” or “invitational travel authorizations” issued by the DOD to
family members as sufficient certification of the need for military caregiver leave, at least until the expiration date of the order or authorization. Employers may seek authentication and clarification of such certifications, but may not seek second or third opinions or recertification.

c) Employers can request certification from the covered servicemember’s authorized health care provider.

d) During the certification process, employers can obtain details about the servicemember’s medical condition, such as whether the injury occurred in the line of duty, when it occurred, its probably duration, and the amount of time the servicemember will require care.

e) Employees can be required to provide confirmation of their relationship to injured servicemembers. That confirmation can come through a simple statement from the employee, or via court documents or birth certificates.

B. Qualifying Exigency Leave – Eligible employees now have FMLA leave (called qualifying exigency leave) available to deal with family emergencies resulting from a covered spouse, parent, or child being called to active military duty in the National Guard or Reserves.

1. Leave and Coverage

a) This newly-created type of leave allows eligible employees of covered employers to take up to 12 weeks of FMLA leave for a “qualifying exigency” (“QE”) arising from the fact that their spouse, child, or parent is on active duty or called to active duty in support of a “contingency operation,” as defined under specific military statutes.

b) Perhaps the most important fact to remember about this rule is that it does not apply to family members of military members who are in the regular armed forces. The reasoning is that families of regular armed servicemembers, unlike families of reservists, are accustomed to disruptions in their lives caused by military activities and are less in need of this type of leave. QE leave also applies only to a federal call to duty or a state call under order of the president.

c) QE leave does apply to retired military members of the Regular Armed Forces, Reserve, Ready Reserve, Select Reserve, Individual Ready Reserve, or the National Guard.
d) It does not apply to any retired member of a state Reserve of National Guard unit.

e) Unlike injured servicemember leave, the employer’s standard FMLA leave year applies to QE leave; therefore, QE leave is based on a 12-month period and can be designated by the employer as the calendar year, a fixed 12-month period, a 12-month period measured forward or backward (“rolling” 12-month period) from the date of the employee’s first absence.

2. Notice - Employees seeking QE leave must give reasonable and practicable notice if the exigency is foreseeable. The notice must inform the employer that a family member is on active duty or call to active duty status, cite a listed reason for leave, and give the anticipated length of absence.

3. Qualifying Exigencies - The regulation contains a “specific and exclusive” list of reasons for QE leave, as follows:

   a) Short-notice deployment, meaning a call/order given seven or fewer calendar days before deployment. The employee can take up to seven days beginning on the date of notification.

   b) Military events and related activities, such as official military-sponsored ceremonies and family support and assistance programs, sponsored by the military and related to the family member’s call to duty.

   c) Urgent (as opposed to recurring and routine) childcare and school activities such as arranging for childcare. “Child” is defined more broadly than under the childbirth and adoption leave portions of FMLA to include a biological, adopted, or foster child; a stepchild; a legal ward of a covered military member; or a child for whom a covered military member stands in lieu of a parent. The child must be either under age 18 or, if older than 18, incapable of self-care because of physical or mental disability.

   d) Financial and legal tasks, such as making or updating legal arrangements to deal with a family member’s active duty.

   e) Counseling related to the family member’s call to duty.

   f) To spend time with the covered servicemember on rest and recuperation breaks during deployment, for up to five days per break.
g) Post-deployment activities such as arrival ceremonies and reintegration briefings, or to address issues from the servicemember’s death on active duty; this is limited to up to 90 days following termination of active duty status.

h) Other purposes arising out of the call to duty, as agreed upon by the employee and employer.

4. Certification Requirements

a) DOL has provided a separate Certification from (Form WH-384) entitled “Certification for Qualifying Exigency for Military Family Leave.”

   (1) Our model form is attached as Appendix E.

b) During the certification process, employers can ask for copies of the military member’s duty orders or other military documentation, facts regarding the exigency, dates of the military member’s active duty service, and date of commencement of the exigency.

c) The employee only has to provide a copy of the covered member’s active duty orders once.

d) If the employee requests QE leave on an intermittent/reduced leave schedule, the employer can ask him or her to provide beginning and ending dates, as well as an estimate of the frequency/duration of the QE leave.

e) If the employee needs QE leave in order to meet with a third party (such as a daycare or financial advisor), the employee must provide detailed information about the third party and the nature of the meeting so that the employer can verify the need for leave.
Appendix A

Notice of Eligibility

This form is for guidance only; please personalize the form so that it will refer to the employer, specific workplace situations, and specific employer policies.
Notice of FMLA Eligibility And Rights & Responsibilities

This form is for guidance only; please personalize the form so that it will refer to the employer, specific workplace situations, and specific employer policies.

Part I—Notice of Eligibility

To: ____________________________________________
   First                                        Middle                                          Last                   Suffix

From: ____________________________________________  Date: __________________
   Employer FMLA Representative

On ________________, you notified us that you would seek FMLA leave beginning on ____________ for:

   □ The birth of a child or placement of a child for adoption or foster care;
   □ Your own serious health condition
   □ The serious health condition of a family member requiring care.
   □ A qualifying exigency arising from the call to duty or active duty of status of a Servicemember
   □ The serious injury or illness of a Servicemember requiring care.

This notice serves to inform you that you are:

   □ Eligible for FMLA Leave (see Part II)  Eligibility does not mean that your leave is designated as FMLA leave. Designation will be provided to you in a separate notice.
   □ Not eligible for FMLA Leave for reasons including (but not limited to) those indicated below:
      □ You do not meet the FMLA 12-month service requirement. As of the first date of requested leave, you will have worked approximately ____ months towards this requirement.
      □ You have not met the FMLA 1,250 hours of service requirement.
      □ You do not work or report to a site with a qualifying number of employees.
      □ Other:

      ____________________________________________________________

If you have questions, please contact _____________________________________ or view the
   FMLA poster in ________________________________________.

Part II—Rights & Responsibilities

While on FMLA leave, you have the responsibilities indicated below by checkmark.

   □ Your health benefits continue during FMLA leave under the same conditions as if you were continuing to work. Contact _______ at _______ to make arrangements to continue your share of the premium payments for your health insurance so that health benefits are maintained while you are on leave. You have a 30-day grace period in which to make the premium payment. If the payment is not timely made, your group health insurance may be cancelled. The Company may either give you 15 days warning before your health
coverage lapses, or, at its option, the Company may pay your share of the premiums and then recover the amount of
those payments after you return from work.

☐ You must use your available paid ☐ sick, ☐ vacation, and/or ☐ other leave during FMLA leave. The paid leave
indicated above will run concurrently with the FMLA leave and be counted against your FMLA leave entitlement.

☐ You must provide a completed certification form within 15 days. Failure to comply may result in a delay in the
leave being classified as FMLA-leave or denial of FMLA status for the leave.

☐ While on leave you will be required to report to us your status and intent to return to work every
_______________________________.

☐ When you return from leave, pursuant to Company policies, it will be necessary for you to bring a fitness-for-duty
certification from your health care provider. The fitness-for-duty certification must address your ability to perform the
essential functions of the job.

☐ Once every thirty days, if you are on leave for your or an immediate family member’s serious health condition, you
will furnish a recertification of that condition, unless the original certification states that the incapacity will last longer
than 30 days.

☐ (if employee is approved for reduced schedule or intermittent leave). Once every thirty days, while you are on
reduced schedule or intermittent leave, you must bring a fitness-for-duty certification from your health care provider.
The fitness for duty certification must address your ability to perform the essential functions of the job, unless the
original certification states that the incapacity will last longer than 30 days.

☐ You are considered a “key employee” as defined in the FMLA. See below:

☐ The Company has determined that you cannot be reinstated without substantial economic injury. The
Company cannot deny you FMLA leave because you are a key employee. However, you will be denied
restoration to employment after taking the FMLA leave. A separate notice, delivered either in person or sent
by certified mail, explains the basis of our findings.

☐ At this time, the Company has not determined whether or not you can be restored without substantial
economic injury. When the Company reaches such a determination, it will notify you in writing, delivered in
person or sent by certified mail. You will have a reasonable time to return to work after the notice is sent.

☐ The Company has determined that though you are a key employee, based on the type and/or duration of
leave and the business conditions the Company reasonably and in good faith anticipates it will be able to
restore you to your former position without substantial injury. If the circumstances of your leave or business
conditions change, the Company may change this determination, in which case, it will notify you in writing,
delivered in person or sent by certified mail. You will have a reasonable time to return to work after the
notice is sent.

*If you are able to return to work earlier than anticipated when you requested leave, you must give the Company at
least two workdays notice before your return.*

Under the FMLA and by Company policy, you are entitled to up to 12 weeks of unpaid leave in the 12-
month period described below:

☐ the calendar year (January 1 – December 31).

☐ some other fixed year beginning on _______________________ and ending _____________________

☐ the 12-month period beginning with the date of your first FMLA leave use.

☐ the rolling 12-month period measured backward from the date of any FMLA leave use.

Under the FMLA, you are entitled to up to 26 weeks of unpaid leave to care for a covered Servicemember
with a serious injury or illness in a 12-month period. The applicable 12-month period begins on the first
date on which Servicemember Caregiver leave is taken.
You will be restored to your previously-held job or the same or equivalent job that you would have held had you not taken leave with the same pay, benefits, and terms and conditions of employment when you return from FMLA leave.

If you do not return to work following FMLA leave, under some circumstances, the Company may recover any health insurance premiums paid on your behalf during your leave.

If you are not required to use certain forms of accrued paid leave while taking FMLA leave, you may have that paid leave run concurrently with the unpaid FMLA leave, as long as you meet any applicable requirements of the paid leave policy.
Appendix B

Notice of Designation

This form is for guidance only; please personalize the form so that it will refer to the employer, specific workplace situations, and specific employer policies.
Notice of Designation of Requested Leave

This form is for guidance only; please personalize the form so that it will refer to the employer, specific workplace situations, and specific employer policies.

To: ______________________________________________________________________________

First                                        Middle                                          Last                   Suffix

From: _____________________________________________ ____________  Date: _________________

Employer FMLA Representative

Upon review of your request for FMLA leave and the supporting documentation, we have decided:

☐ Your FMLA request is approved.

The FMLA requires you notify the Company as soon as practicable of changes in the anticipated leave.

☐ Based on the information you have provided, we anticipate the following number of hours, days, or weeks will be counted against your leave entitlement:

___________ hours, _____________ days, ______________ weeks

☐ Because the leave you have requested is unscheduled, an estimate cannot be provided at this time. You may request an actual count of the time counted against your FMLA entitlement once in a 30-day period, provided you took leave during that period.

Substitution of paid leave:

☐ You have been approved, as you requested, for paid leave to run concurrently during your FMLA leave. The following leave(s) has been approved to run concurrently:

_________________________________________________________________________

☐ You are required to use paid leave during FMLA leave. The following leave(s) will run concurrently with your FMLA leave:

_________________________________________________________________________

Fitness-for-duty certification:

☐ You will be required to present a fitness-for-duty certificate to be restored to your position. Your restoration may be delayed until the certificate is produced.

☐ A list of essential functions for your job is attached. The fitness-for-duty certificate must address your ability to perform these essential functions.

☐ You are provisionally approved for FMLA leave, pending receipt of the following information:

☐ Certification Information (form enclosed)

☐ Other certification information: ________________________________________________

☐ Documentation of family relationship

☐ Other: ________________________________________________________________________

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The information requested above, if any, must be returned within 7 calendar days (except where not practicable under the circumstances) from this notice. If the information is not provided in a timely manner, your leave may be denied or delayed.

☐ The Company exercises its rights to require you to have a second or third opinion medical certification at its expense. Details will be provided to you subsequently.

☐ Your FMLA request is not approved.
    ☐ The FMLA does not apply to your leave request.
    ☐ You have exhausted your FMLA leave entitlement.
Appendix C

Certification of Serious Health Condition

This form is for guidance only; please personalize the form so that it will refer to the employer, specific workplace situations, and specific employer policies.
FMLA – Certification of Serious Health Condition of Employee or Covered Family Member, or for Birth/Placement/Adoption of Child

This form is for guidance only; please personalize the form so that it will refer to the employer, specific workplace situations, and specific employer policies.

Part I: Employer Information

To be Completed by the Employer:

1. Employer Name: _______________________________________________________________

2. a. FMLA Contact (Name/Department): _____________________________________________
   b. FMLA Contact Phone No.: (______)________________________ ext. ______________________
   c. FMLA Contact Fax No.: (______)________________________
   d. FMLA Contact E-mail: __________________________________________________________

3. a. Employee’s Job Title: __________________________________________________________'
   b. Employee’s Regular Work Hours: _________________________________________________
   c. Employee’s Essential Job Functions: _____________________________________________
      _____________________________________________________________________________
      _____________________________________________________________________________
   or check here if job description attached ☐.

Part II: Employee Information

To be Completed by the Employee before providing to Health Care Provider

Employee Name: _________________________________________________________________________

First                                        Middle                                          Last                    Suffix

Are you requesting leave 30 days or more before you need to take leave?  ☐ Yes.  ☐ No.

If No, Please describe why it was not possible for you to give 30 days notice prior to submitting request:

_____________________________________________________________________________________
_____________________________________________________________________________________

If seeking leave for a family member’s serious health condition, please complete the following:

Family Member name: ____________________________________________________________________

Relationship of family member to you: _________________________________________________

If family member is son or daughter, his/her date of birth: _________________________________
Describe the care you will provide and estimated amount of leave to provide care:
________________________________________________________________________________________
________________________________________________________________________________________
________________________________________________________________________________________

Employee Signature ______________________________ Date ________________________

Part III-A—General Information about the Health Condition
To be Completed by Health Care Provider

FMLA leave is requested due to a serious health condition. You must answer fully, completely, and accurately, all applicable questions. Where the answer requires judgment, you should use your medical knowledge, experience, and information learned from the patient in providing your best estimate. Be as specific as you can. Vague answers may require additional follow up or result in denial or delay of FMLA coverage. Respond only with respect to the condition(s) for which the employee is seeking leave. You must verify your responses with your signature.

1. a. Provider Name: ________________________________________________________________
   b. Provider Address: ______________________________________________________________
   c. Practice Type/Specialty: _________________________________________________________
   d. Provider Contact (Name): _____________________________________________________
   e. Provider Contact Phone No.: (______)______________ ext. ____________________
   f. Provider Contact Fax No.: (______)______________
   g. Provider Contact E-mail: _______________________________________________________

2. a. Date condition commenced: _________________________
   b. Probable duration of condition: _________________________

3. Dates you treated patient for this condition:
________________________________________________________________

4. Indicate if, because of the condition, the patient was admitted for an overnight stay in a hospital, hospice, or residential medical care facility:
   ☐ Yes ☐ No. If Yes, list the dates of admission: ______________________________________

5. Indicate if, because of the condition, the patient will need to have treatment visits at least twice a year:
   ☐ Yes ☐ No.

6. Indicate if, because of the condition, medication (other than over-the-counter) was prescribed:
   ☐ Yes ☐ No.
7. Indicate if, because of the condition, the patient was referred to another health care provider for evaluation or treatment:

☐ Yes  ☐ No. If Yes, describe the nature of the treatments and anticipated duration of treatment:

__________________________________________________________________________________________
__________________________________________________________________________________________

8. If the condition is pregnancy, provide the expected delivery date: ___________________.

Part III-B: Information to be Completed if the Employee Seeks Leave for His/Her Own Health Condition

To be Completed by Health Care Provider

9. Based on the job description provided, or, if none is provided, based on the employee’s own description of his or her job duties:

Indicate if, because of the condition, the employee is unable to perform any of his or her job duties:

☐ Yes  ☐ No.

Which job duties is the employee unable to perform?

__________________________________________________________________________________________
__________________________________________________________________________________________
__________________________________________________________________________________________

10. Describe other relevant medical facts related to the condition for which the employee seeks leave (may include symptoms, diagnosis, description of continuing treatment, description of other equipment or medication that will be required).

__________________________________________________________________________________________
__________________________________________________________________________________________
__________________________________________________________________________________________

11. If the patient will be incapacitated for a single continuous period of time due to the medical condition above, please indicate the beginning and ending dates of the incapacity.

__________________________________________________________________________________________

12. Will leave be needed for medically necessary follow-up treatment related to the condition described above?

☐ Yes  ☐ No

If Yes, estimate the treatment schedule with respect to when leave will be required. Be as specific as possible, especially with respect to appointment dates and available office hours:

__________________________________________________________________________________________
__________________________________________________________________________________________
__________________________________________________________________________________________
13. Will the employee need to work on a reduced schedule or take intermittent leave because of his/her medical condition? Please estimate the reduced work schedule needed or the frequency of intermittent leave needed.

a. **Reduced Schedule:**
   - ________ hours/day; ________ days/week;
   - from ______________ through __________.

b. **Intermittent Leave:** Does the medical condition cause episodes during which the employee is unable to perform his/her job function?

   [ ] Yes  [ ] No

Is it medically necessary for the employee to be absent from work during these episodes?

   [ ] Yes  [ ] No. If Yes, please describe:

   __________________________________________________________________________________
   __________________________________________________________________________________
   __________________________________________________________________________________

Estimate the frequency and duration of these episodes of incapacity that the patient may experience over the next six months.

Frequency: ________ times per ________ week(s) or ________ month(s)

Duration: ________ hours or ________ day(s) per episode.

**Part III-C: Information to be Completed if the Employee Seeks Leave Because of the Health Condition of Family Member**

To be Completed by Health Care Provider

14. Will the patient be incapacitated for a single continuous period of time due to the medical condition above?

   [ ] Yes  [ ] No

a. Will the patient need care for any portion of this period?

   [ ] Yes  [ ] No

b. If Yes, indicate the period during which care will be necessary and describe the care to be provided and why it is medically necessary:

   __________________________________________________________________________________
   __________________________________________________________________________________
   __________________________________________________________________________________

   [ ] Yes  [ ] No

c. Will the patient require medically necessary care during follow up treatment related to the condition described above?

   [ ] Yes  [ ] No

d. If Yes, estimate the treatment schedule with respect to when leave will be required. Be as specific as possible, especially with respect to appointment dates. Also describe the care that is medically required and why it is medically required, as well as available office hours during which such care may be scheduled, if applicable:

   __________________________________________________________________________________
15. Will the patient require care such that the employee must work on a reduced schedule to provide the care?

☐ Yes  ☐ No

a. Please estimate the reduced work schedule needed.

Patient needs care for: _____ hours/day; _____ days/week; from ___________ through ______________.

b. Describe the care that is medically required and why it is medically required:

________________________________________________________________________________________
________________________________________________________________________________________
________________________________________________________________________________________

16. Will the patient experience episodes of incapacity from normal daily activities during which care will be required?

☐ Yes  ☐ No

a. If yes, estimate the frequency and duration of episodes of incapacity from normal daily activities that the patient may experience over the next six months.

  Frequency: _________ times per ______ week(s) or _______ month(s)

  Duration: ___________ hours or ________ day(s) per episode.

Describe the care that is medically required and why it is medically required:

________________________________________________________________________________________
________________________________________________________________________________________
________________________________________________________________________________________

17. **Attach any additional information to this form.**
Appendix D

Certification of Caregiver Leave

This form is for guidance only; please personalize the form so that it will refer to the employer, specific workplace situations, and specific employer policies.
FMLA – Certification for Serious Injury or Illness of Covered Servicemember

This form is for guidance only; please personalize the form so that it will refer to the employer, specific workplace situations, and specific employer policies.

Part I: Employer Information

To be Completed by the Employer:

1. Employer Name: ________________________________________________________________

2. a. FMLA Contact (Name/Department): ____________________________________________
   b. FMLA Contact Phone No.: (______)________________ ext. __________________
   c. FMLA Contact Fax No.: (______)________________
   d. FMLA Contact E-mail: ______________________________________________________

Part II: Employee Information

To be Completed by the Employee:

1. Employee Name: ________________________________________________________________

2. Servicemember Name: _________________________________________________________

3. a. Relationship of covered military member to you (Employee): _________________________
   b. Is the servicemember your son, daughter, parent, or spouse?
      ☐ Yes ☐ No.
   c. If no, please explain how you are the servicemember’s next of kin. Provide documentation as needed.
      __________________________________________________________________________
      __________________________________________________________________________

4. Is military member a current member of the Regular Armed Forces, Reserves, or National Guard?
   ☐ Yes ☐ No.

5. Is military member on the Temporary Disability Retired List (TDRL)?
   ☐ Yes ☐ No.

6. Indicate the branch and unit of the military in which the member serves, and his or her rank:
   __________________________________________________________________________
   __________________________________________________________________________

7. Are you requesting leave 30 days or more before you need to take leave?
☐ Yes.  ☐ No.

If No, Please describe why it was not possible for you to give 30 days notice prior to submitting request:

________________________________________________________________________________________
________________________________________________________________________________________

8.  a.  Is the servicemember assigned to a military medical treatment facility as an outpatient or to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients (such as medical hold or warrior transition unit)?

   ☐ Yes  ☐ No.

b.  If yes, please provide name of the medical treatment facility or unit:

________________________________________________________________________________________

The following section should be completed by the Servicemember:

9.  Describe the care to be provided and estimate the amount of leave needed to provide that care:

________________________________________________________________________________________
________________________________________________________________________________________

________________________________________________________________________________________

Part III—Information about the Illness or Injury

To be Completed by Health Care Provider:

To complete this section, you must be either a Department of Defense (“DOD”) health care provider, a U.S. Department of Veterans Affairs (“VA”) health care provider, a DOD TRICARE network authorized private health care provider, or a DOD non-network TRICARE authorized private health care provider.

I certify that I am a:

☐ DOD health care provider

☐ VA health care provider

☐ DOD TRICARE network authorized private health care provider

☐ DOD non-network TRICARE authorized private health care provider.

_____________________________________________    _____________________
Signature of Health Care Provider       Date

If you are unable to make certain military-related determinations contained below, you may rely on determinations from an authorized DOD representative (such as a DOD recovery care coordinator).

Please ensure the employee and servicemember have completed the previous sections on this form before you complete the following.

You must sign the portion above and at the end of this section, as indicated.

1.  a.  Provider Name: ___________________________________________
b. Provider Address: ________________________________________________________________

c. Practice Type/Specialty: __________________________________________________________

d. Provider Contact (Name): _______________________________________________________

e. Provider Contact Phone No.: (______)_________________ ext. ______________________

f. Provider Contact Fax No.: (______)__________________

g. Provider Contact E-mail: _________________________________________________________

2. a. Date condition commenced: _________________________________

b. Probable duration of condition: _________________________________

3. Dates you treated patient for this condition: _______________________________________

4. The servicemember’s medical condition is classified as:

☐ Very Seriously Ill/Injured (illness or injury is so severe that life is imminently endangered. Family members are requested at bedside immediately. This designation is an internal DOD casualty assistance designation used by DOD health care providers).

☐ Seriously Ill/Injured (Illness or injury is so severe that there is cause for immediate concern, but servicemembers life is not in imminent danger. Family members are requested at bedside. This designation is an internal DOD casualty assistance designation used by DOD health care providers).

☐ Other Ill/Injured (Serious injury or illness that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank or rating.)

☐ None of the above. (If this box is selected, employee may still be eligible to take serious health condition FMLA leave.)

5. Is the condition for which the servicemember is being treated one that was incurred in the line of duty while on active duty in the armed forces?

☐ Yes  ☐ No.

6. a. Date condition commenced: ________________________________________________

b. Probable duration of condition or need for care: ________________________________

7. a. Is the servicemember undergoing medical treatment, recuperation, or therapy?

☐ Yes  ☐ No.

b. If yes, please describe medical treatment, recuperation, or therapy:

_____________________________________________________________________________

_____________________________________________________________________________

_____________________________________________________________________________

8. a. Will the Servicemember need care for a single continuous period of time due to the medical condition above?

☐ Yes  ☐ No
9. a. Will the Servicemember require periodic follow-up treatment appointments?
   □ Yes   □ No

   b. If Yes, estimate the treatment schedule with respect to when leave will be required. Be as specific as possible, especially with respect to appointment dates, and available office hours during which appointments can be made.

   ______________________________________________________
   ______________________________________________________
   ______________________________________________________

   c. Is it medically necessary for the Servicemember to have periodic care for follow-up treatment appointments?
   □ Yes   □ No

   d. If Yes, estimate the duration and frequency of the care that is necessitated and provide available office hours during which time appointments can be scheduled.

   ______________________________________________________
   ______________________________________________________
   ______________________________________________________

10. a. Is there a medical necessity for the Servicemember to have periodic care other than for scheduled follow-up treatments or appointments as described above?
    □ Yes   □ No

   b. If yes, please estimate the frequency and duration of this periodic care:

   ______________________________________________________
   ______________________________________________________
   ______________________________________________________

   Signature of Health Care Provider ____________________________ Date ____________________________
Appendix E

Certification of Qualifying Exigency Leave

This form is for guidance only; please personalize the form so that it will refer to the employer, specific workplace situations, and specific employer policies.
This form is for guidance only; please personalize the form so that it will refer to the employer, specific workplace situations, and specific employer policies.

Part I: Employer Information

To be Completed by the Employer:

1. Employer Name: ____________________________________________________________

2. a. FMLA Contact (Name/Department): _______________________________________

   b. FMLA Contact Phone No.: (______)__________________________ ext. ______________

   c. FMLA Contact Fax No.: (______)__________________________

   d. FMLA Contact E-mail: ________________________________________________

Part II: Employee Information

To be Completed by the Employee:

1. Employee Name: ____________________________________________________________

   First                                  Middle                                   Last                    Suffix

2. Servicemember Name: ________________________________________________________

   First                                  Middle                                   Last                    Suffix

   a. Relationship of Servicemember to Employee: ________________________________

   b. Anticipated period of covered Servicemember’s active duty:

   ______________________________________________________________________

   c. Is Servicemember a member of the Reserves, National Guard, or a retired member of the Armed Forces?

      □ Yes  □ No.

   d. Indicate the branch of the military in which the Servicemember serves:

   ______________________________________________________________________

3. Is this your first request for Qualifying Exigency Leave?

   □ Yes  □ No.

   If this is the first request for Qualifying Exigency Leave, please attach the active duty orders or other documentation from the military certifying that the Servicemember is on active duty or has been notified of an impending call to active duty in support of a contingency operation.

   If you have previously provided sufficient written documentation, the Employer will locate it or contact you if additional documentation is required.

4. a. Indicate which reason(s) best describes why you are requesting leave:

   ________________________________________________________________
Short Notice Leave (Servicemember received notice of being called to active duty 7 days or less before being required to report)
Military Event or Related Event
Childcare/School (to arrange for childcare, transfer schools, etc. as a result of Servicemember call to active duty)
Financial and Legal (as a result of Servicemember call to active duty)
Counseling (to seek counseling for employee, the Servicemember, or child of Servicemember, by someone other than the regular healthcare provider as a result of Servicemember call to active duty)
Rest and Recuperation
Postdeployment Activity
Additional Activity as agreed to between Employee and Employer
Other

b. Describe the reason(s) you are requesting FMLA leave due to a qualifying exigency:
________________________________________________________________________________
________________________________________________________________________________
________________________________________________________________________________
________________________________________________________________________________
________________________________________________________________________________
________________________________________________________________________________

5. The Employer may seek written documentation from any third party or entity which supports your request for leave. Announcements from the military, confirmations of appointments, or copies of bills for legal services provided are examples. Please provide any written documentation which supports your request.

a. Is such documentation available at the time you submit this request? □ Yes □ No.

b. Is such documentation attached? □ Yes □ No.

6. Approximate date and time duration of exigency:
From: ____________________________ To: _________________________

7. Describe the duration of time for which you are requesting leave:

a. Is it for a single continuous period of time? □ Yes □ No.

   If so, approximate duration:
   From: ____________________________ To: _________________________

b. Is it for repeated periods? □ Yes □ No.
If so, estimate the dates and times you will need leave. Include schedule of meetings or appointments.

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

If applicable, estimate frequency and duration of leave:

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

Duration (include travel time): _______ hours per event.

8. a. Leave requested to meet with third parties (such as to arrange for childcare, attend counseling, make financial or legal arrangements, etc.) must include the following contact information. This information may be used by the Employer to verify that the information provided herein is accurate.

b. Organization Name: _____________________________ __________________________

Contact Name: _____________________________________ ______________________

Organization Address: _____________________________ ________________________

Phone No.: (______)_______________ ext.____ Fax No.: (______)

E-mail: ___________________________________________ ______________________

b. Describe nature of appointment or event:

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

I certify that the information I have provided herein is true and correct.

_____________________________________________    _______________________
Signature of Employee        Date
Appendix F

Prototype FMLA Policy – Long Form

This policy is for guidance only; please personalize the policy so that it will refer to the employer, specific workplace situations, and specific employer policies.

A copy of DOL’s Appendix C (the FMLA poster) must be attached to this policy.
Family Medical Leave Act (FMLA) Leave

This policy is for guidance only; please personalize the policy so that it will refer to the employer, specific workplace situations, and specific employer policies.

[A copy of DOL’s Appendix C (the FMLA poster) must be attached to this policy.]

Generally

FMLA Leave allows an Employee to take an extended absence, without pay, and then be restored to his or her original or equivalent position with equivalent pay, benefits and other employment terms as if he or she had remained in the workplace. It is possible for an employee on leave to be transferred, promoted, demoted, or terminated if changes in the work environment would have demanded that action even if the employee had not taken leave.

Types

There are three types of FMLA Leave: for a Serious Health Condition (also includes birth or adoption or placement of a child); for a Qualifying Exigency related to a Covered Servicemember’s call to duty or placement on duty; and to be a Caregiver for an injured Covered Servicemember. Each of these Leaves are detailed in the following pages.

Eligibility

Employees are eligible for FMLA Leave once they have worked for [Employer] for at least one year and performed at least 1,250 hours of work during the previous 12 months. Prior service to [Employer] will be credited, provided the break in service did not exceed seven years, unless the break was pursuant to an agreement between [Employer] and Employee or for Employee to serve in National Guard or Reserve.

Certain key employees, who are notified of their status when they first request FMLA Leave, are reinstated to their former or equivalent positions only if holding the position for them and their reinstatement does not cause [Employer] substantial economic injury.

Benefits

Employees on all types of FMLA Leave will continue to be covered by [Employer’s] group health benefits on the same terms that are applicable for active employees, provided the Employee on FMLA Leave plans to return and does actually return. FMLA Leave does not cause employees to lose any previously accrued employment benefits.

The information in these pages is meant to provide employees with a basic framework concerning when FMLA Leave can be taken, how much FMLA Leave may be taken, and
how the Leave may be requested. By no means is this Policy intended to be all-inclusive. Each case is unique. Employees should contact [Human Resources] with specific questions about FMLA Leave.

**Family Medical Leave Act (FMLA) Leave for a Serious Health Condition or Birth/Adoption/Placement of Child**

The purpose of this type of FMLA Leave is to grant leave without pay to eligible employees of [Employer] for up to 12 weeks in a [rolling/calendar] 12-month period in accordance with the Family and Medical Leave Act (FMLA). An employee requesting this type of leave must have taken less than 12 weeks of FMLA Leave of any sort in the current 12-month period.

**Reasons for Leave**

Eligible employees may request FMLA Leave to cover the time needed to be away from work for any of the following:

- To care for a newborn child or a newly adopted or newly placed foster care child, as long as the leave is taken in the year following the child’s birth or placement;
- To care for their child, spouse, or parent who has a serious health condition;
- To provide time to attend to their own serious health condition that leaves them unable to perform their job.

**Eligibility**

Employees are eligible for FMLA Leave once they have worked for [Employer] for at least one year and performed at least 1,250 hours of work during the previous 12 months. Prior service to [Employer] will be credited, provided the break in service did not exceed seven years, unless the break was pursuant to an agreement between [Employer] and Employee or for Employee to serve in National Guard or Reserve.

**Requesting Leave**

To request leave, employees must inform their supervisor/manager that they need FMLA Leave and give thirty (30) days’ advance notice of when they expect to be absent. However, if they cannot foresee the need thirty (30) days in advance, they must notify [Employer] within one day of becoming aware of the need for Leave. Excessive delay could lead to delay in designation of absences as FMLA-protected Leave. Employees need to complete a “Request for FMLA Leave” form and submit to [Human Resources].

Employees who request FMLA Leave because of a serious health condition, whether their own or a family member’s, must submit a completed “Certification of Health Care Provider” to [Human Resources] before Leave can be approved. The Employee has 15 days to have this form completed, though it is recommended that the Employee have the form completed as soon as possible. Failure to comply with the certification requirement
may result in the denial of the Leave request, or the treatment of any Leave taken as non-FMLA-covered Leave.

Once employees notify their supervisor/manager that they need FMLA Leave, the supervisor/manager may not ask or inquire about the reasons for the request. The supervisor/manager must immediately refer that request to [Human Resources] who will then make any necessary inquiries and evaluate whether there is a medical need for the leave. [Human Resources] is also responsible for ensuring that all medical information provided by employees is maintained in the strictest confidence.

**Intermittent Leave or Reduced Schedule Leave**

Employees taking leave because of their own or a relative’s serious health condition can take their allotment of leave intermittently or in accordance with a reduced work schedule, if medically necessary. Employees taking leave to care for a newly born or newly placed child do not have a legal right to take intermittent leave and can do so only with the [Employer’s] approval.

Employees must make a reasonable effort to schedule intermittent leave in a way that does not disrupt [Employer’s] operations.

**Light Duty**

Based on [Employer’s] needs and the Employee’s skills and availability, an Employee may be placed on a voluntary light duty assignment. Time worked on light duty cannot be counted as FMLA time. If the Employee exhausts his/her FMLA Leave, but is still unable to return to his/her former position, and he/she is placed in a light duty position after the expiration of leave, the Employee will not have a right to be restored to the previous position. If the Employee uses some, but not all, of his/her FMLA Leave, then works on a light duty basis, the right to restoration expires when the FMLA year ends, even if the Employee never takes the full 12 weeks.

There is no guarantee that any employee may receive a light duty assignment. Employees should consider how their FMLA rights might be affected by agreeing to perform light duty work rather than going on leave.
Family Medical Leave Act (FMLA) Leave for Servicemember Family Leave

The purpose of this type of leave is to provide up to 12 weeks of unpaid leave during a [rolling/calendar] 12 month period for “any qualifying exigency” for the spouse, child or parent of a family member who is a Covered Servicemember not in the regular armed forces on active duty or is notified of an impending call or order to active duty in the armed forces (including the Reserves and National Guard). An employee requesting this type of leave must have taken less than 12 weeks of FMLA of any sort in the current 12-month period.

Who is a Covered Servicemember?

Covered Servicemembers include only persons called or ordered to active duty, not full time active duty military members. This includes:

- Retired members of armed forces or the Reserves;
- Reserve units of the armed forces;
- Members of the Ready Reserve; and
- Person serving in the National Guard.

The Covered Servicemember must be called to duty by the federal government. Assignments by state government are generally not covered.

Eligibility

Employees are eligible for FMLA Leave once they have worked for [Employer] for at least one year and performed at least 1,250 hours of work during the previous 12 months. Prior service to [Employer] will be credited, provided the break in service did not exceed seven years, unless the break was pursuant to an agreement between [Employer] and Employee or for Employee to serve in National Guard or Reserve.

Employee must be the spouse, parent, son or daughter of called-up Covered Servicemember.

Reasons Leave May Be Taken (“Qualifying Exigencies’’)

- **Short Notice Deployment:** If Covered Servicemember is called to duty with seven days or less of warning, Employee may take seven days off, even if Covered Servicemember deploys less than seven days after notice of deployment. Any additional need following that period of time must be applied for under one of the other provisions. The Employee must provide notice to [Employer] that he or she is taking Leave under this provision as soon as he or she is aware of the impending deployment. Documentation will be required when the Employee returns to work.

- **Military Events & Related Events:** Allows Employee to attend military ceremonies, programs, events; and also to attend assistance programs, briefings,
family support sponsored by the military, military organizations, or the Red Cross.

- **Childcare and School:** Employee may have leave to arrange childcare or to enroll or transfer schools, or meet with school faculty/staff, *only as necessitated by the duty status of the Covered Servicemember*. Should an emergency situation arise concerning childcare (e.g., the primary childcare arrangement is unexpectedly cancelled and the Employee has no other alternatives), he or she may be granted leave to provide childcare on that immediate & urgent basis.

- **Financial and Legal:** Employee will be granted leave to make or update key legal documents and ensure that Employee will have access to all financial accounts and information needed. Additionally, under this type of leave, the Employee will receive leave to serve as representative before a government or military agency on the Servicemember’s behalf.

- **Counseling:** An Employee may take leave to obtain counseling for himself or herself, Covered Servicemember, or child of a Covered Servicemember, by someone other than the regular healthcare provider. (Counseling by the regular healthcare provider will likely fall under Serious Health Condition FMLA). The need for counseling *must be necessitated by the duty status of the Covered Servicemember*.

- **Rest and Recuperation:** When the Covered Servicemember returns home for temporary Rest and Recuperation leave, an Employee may have up to 5 days’ leave to spend with them.

- **Postdeployment:** Allows an Employee to take leave for arrival ceremonies, reintegration briefings, other official activities taking place in the 90 days (or under the Yellow Ribbon Reintegration Program) after return. This type of leave may also be used to plan funeral arrangements and related activities in the unfortunate situation where a Covered Servicemember dies in the line of duty.

- **Additional Activity:** [Employer] will make every effort to assist an Employee upon becoming aware of the Employee’s spouse, child, or parent being called to duty. If the Employee desires a period of leave for some other purpose than those listed above and the leave is related to the Covered Servicemember’s being called to duty, [Employer] may, within its discretion, grant that leave. For leave to be granted under this provision, the Employee and [Employer] must agree on the date, duration, and purpose of the leave. Leave granted under such an agreement “counts” towards the twelve-week allotment.

### Requesting Leave

Employee must fill out Servicemember Family Leave Form, and include documentation, if available, of the Covered Servicemember’s call to duty or current status in active duty. [Employer] will copy the documentation of the Covered Servicemember’s duty status, and it is generally not necessary for the Employee to provide this form at future dates when exigency leave is requested for the same call of duty.

In some cases, documentation or verification from third parties may also be required.
Notice of leave should be provided as soon as the Employee is aware of it. Excessive delay could lead to delay in designation of absences as FMLA-protected leave.

Family Medical Leave Act (FMLA) Leave for Servicemember Caregiver Leave

The purpose of this type of leave is to provide up to 26 weeks of unpaid leave during any rolling 12 month period from the first date Caregiver Leave is taken for the Employee to care for a next of kin Covered Servicemember who has received a serious illness or injury in the line of duty. An Employee has 12 months from the first date Caregiver Leave is taken to exhaust the 26 weeks. No amount of Caregiver Leave can roll over or renew after 12 months from the first date Caregiver Leave is taken. Caregiver Leave may not be renewed each year to provide care for the same Covered Servicemember suffering from the same illness or injury. In any event, no more than 26 weeks of any type of FMLA Leave may be taken in the twelve month period from the first date Caregiver Leave is taken, even if Employee is caring for more than one Covered Servicemember or also needs to take some other kind of FMLA Leave.

Who is a Covered Servicemember?

Covered Servicemembers are current members of the armed forces, including full time active duty military members, Reservists, Ready Reservists, members of the National Guard, retired members of the armed forces or Reserves who are recalled to duty, and individuals on the Temporary Disabled Retired List. A family member who is a former member of the armed forces or is on the Permanent Disabled Retired List is not a Covered Servicemember, and his or her family member Employee is not eligible to take this type of leave, though he or she may be able to take FMLA Serious Health Condition leave.

The Covered Servicemember must be seriously injured or ill such that he is medically unfit to perform the duties of his office, grade, rank, or rating. The Covered Servicemember must also be undergoing medical treatment, recuperation, therapy, or outpatient treatment or be on the Temporary Disabled Retired List.

Eligibility

Employees are eligible for FMLA Leave once they have worked for [Employer] for at least one year and performed at least 1,250 hours of work during the previous 12 months. Prior service to [Employer] will be credited, provided the break in service did not exceed seven years, unless the break was pursuant to an agreement between [Employer] and Employee or for Employee to serve in National Guard or Reserve.

An Employee is eligible to take leave where he or she is the “next of kin” of the Covered Servicemember. “Next of kin” is first the Covered Servicemember’s spouse, parent, or child, or other family member which the Covered Servicemember designates in writing. If the Covered Servicemember has not designated a family member as “next of kin” in
writing, the next of kin status passes to: blood relatives who have been granted legal custody of the Covered Servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins. Family members sharing the same degree of relationship (ex: siblings) share the “next of kin” status.

**Requesting Leave**

Certification must be completed by a Department of Defense health care provider, a Veteran’s Affairs health care provider, a Department of Defense TRICARE network authorized private health care provider, or a Department of Defense non-network TRICARE authorized private health care provider. Failure to comply with the certification requirement may result in the denial of the Leave request, or the treatment of any Leave taken as non-FMLA-covered Leave.

Invitational Travel Orders (ITOs) or Invitational Travel Authorizations (ITAs) may be substituted for the above certification for the time period specified within the ITO or ITA.

Notice of leave should be provided as soon as the Employee is aware of it. Excessive delay could lead to delay in designation of absences as FMLA-protected leave.

**What happens if Employee Uses Caregiver Leave and another kind of FMLA Leave?**

No employee may use more than 26 weeks of any kind of leave *from the first date Caregiver Leave is taken*; additionally, no employee may use more than the allotted 12 weeks for any FMLA serious health condition leave or qualifying exigency FMLA leave, or combinations thereof, in the [calendar/rolling] 12 month period.

For instance, if an Employee takes 4 weeks of FMLA leave for his or her own serious health condition, then later (in the same year) begins taking Caregiver Leave, he or she may take up to a full 26 weeks of Caregiver Leave if necessary within the twelve months *from the first date Caregiver Leave is taken*. However, that Employee is still limited to 26 weeks total FMLA leave for any purpose over the next twelve months, and may only take eight weeks of other FMLA for the [calendar/rolling] period.
Appendix G

Prototype FMLA Policy – Short Form

This policy is for guidance only; please personalize the policy so that it will refer to the employer, specific workplace situations, and specific employer policies.
FAMILY AND MEDICAL LEAVE ACT POLICY

Basic Leave Entitlement

[Employer] will provide up to 12 weeks of unpaid, job-protected leave during any rolling calendar year to eligible employees for the following reasons:

- For incapacity due to pregnancy, prenatal medical care or child birth;
- To care for the employee’s child after birth, or placement for adoption or foster care;
- To care for the employee’s spouse, son or daughter, or parent, who has a serious health condition; or
- For a serious health condition that makes the employee unable to perform the employee’s job.

Military Family Leave Entitlements

Servicemember Family Leave. Eligible employees with a spouse, son, daughter, or parent on active duty or call to active duty status in the National Guard or Reserves in support of a contingency operation may use their 12-week leave entitlement to address certain qualifying exigencies. Qualifying exigencies may include attending certain military events, arranging for alternative childcare, addressing certain financial and legal arrangements, attending certain counseling sessions, and attending post-deployment reintegration briefings. Eligible employees should contact _____________________ with questions regarding whether a qualifying exigency is present.

Servicemember Caregiver Leave. FMLA also includes a special leave entitlement that permits eligible employees to take up to 26 weeks of leave to care for a covered servicemember during a single 12-month period measured from the first date that Caregiver leave is taken. A covered servicemember is a current member of the Armed Forces, including a member of the National Guard or Reserves, who has a serious injury or illness incurred in the line of duty on active duty that may render the servicemember medically unfit to perform his or her duties for which the servicemember is undergoing medical treatment, recuperation, or therapy; or is in outpatient status; or is on the temporary disability retired list.

Benefits and Protections

During FMLA leave, [Employer] will maintain the employee’s health coverage under any “group health plan” on the same terms as if the employee had continued to work. The employee will be responsible for making arrangements to pay the employee portion of any applicable premiums. Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms. Certain key employees, who are notified of their status when they first request FMLA Leave, are reinstated to their former or equivalent positions only if
holding the position for them and their reinstatement does not cause [Employer] substantial economic injury. Additionally, note that an employee on FMLA leave may be transferred, promoted, demoted, disciplined or terminated if changes in the work environment would have demanded that action even if the employee had not taken leave.

Use of FMLA leave will not result in the loss of any employment benefit that accrued prior to the start of an employee’s leave.

Eligibility Requirements

Employees are eligible if they have worked for [Employer] for at least one year and for 1,250 hours over the previous 12 months.

Definition of Serious Health Condition

A serious health condition is an illness, injury, impairment, or physical or mental condition that involves either an overnight stay in a medical care facility, or continuing treatment by a health care provider for a condition that either prevents the employee from performing the functions of the employee’s job, or prevents the qualified family member from participating in school or other daily activities.

Subject to certain conditions, the continuing treatment requirement may be met by a period of incapacity of more than 3 consecutive calendar days combined with at least two visits to a health care provider or one visit and a regimen of continuing treatment, or incapacity due to pregnancy, or incapacity due to a chronic condition. Other conditions may meet the definition of continuing treatment.

Use of Leave

An employee does not need to use the leave entitlement for a serious health condition in one block. Leave can be taken intermittently or on a reduced leave schedule when medically necessary. Employees must make reasonable efforts to schedule leave for planned medical treatment so as not to unduly disrupt the employer’s operations. Leave due to qualifying exigencies may also be taken on an intermittent basis.

Substitution of Paid Leave for Unpaid Leave

Employees taking FMLA leave will be required to exhaust any accrued paid leave while taking FMLA leave prior to taking any unpaid FMLA leave. In order to use paid leave for FMLA leave, employees must comply with [Employer]’s normal paid leave policies.

Employee Responsibilities

Employees must provide 30 days advance notice of the need to take FMLA leave when the need is foreseeable. When 30 days notice is not possible, the employee must provide notice as soon as practicable and generally must comply with [Employer]’s normal call-in procedures.
Employees must provide sufficient information for [Employer] to determine if the leave may qualify for FMLA protection and the anticipated timing and duration of the leave. Sufficient information may include that the employee is unable to perform job functions, the family member is unable to perform daily activities, the need for hospitalization or continuing treatment by a health care provider, or circumstances supporting the need for military family leave. Employees also must inform [Employer] if the requested leave is for a reason for which FMLA leave was previously taken or certified. Employees also may be required to provide a certifications and periodic recertification supporting the need for leave.

[Employer] may require that the employee submit a fitness for duty certification prior to resuming employment.

**Employer Responsibilities**

[Employer] will inform employees requesting leave whether they are eligible under FMLA. If an employee is eligible, the notice will specify any additional information required as well as the employees’ rights and responsibilities. If the employee is not eligible, [Employer] will provide a reason for the ineligibility.

[Employer] will inform employees if leave will be designated as FMLA-protected and the amount of leave counted against the employee’s leave entitlement. If [Employer] determines that the leave is not FMLA-protected, [Employer] will notify the employee.

**Unlawful Acts by Employers**

FMLA makes it unlawful for any employer to:

- Interfere with, restrain, or deny the exercise of any right provided under FMLA;
- Discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.

**Enforcement**

An employee may file a complaint with the U.S. Department of Labor or may bring a private lawsuit against an employer.

FMLA does not affect any Federal or State law prohibiting discrimination, or supersede any State or local law or collective bargaining agreement which provides greater family or medical leave rights.

Nothing herein is intended to create any entitlement to leave greater than that mandated by the FMLA. In all respects, [Employer] will interpret and apply its leave policies in manner that is consistent with the FMLA. The effective date for this policy is January 16, 2009.