

FAMILY MEDICAL LEAVE ACT

1993 and thereafter amended

OACB Presentation
February 6, 2012

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ACTIVITIES FOR TODAY

- ✘ Pretest/Post Test of FMLA Knowledge
- ✘ Review Family and Medical Leave Act (FMLA) as of December 2011
- ✘ Identify processing/procedures of FMLA
- ✘ Review pertinent interactions with
 - + Collective Bargaining Agreements
 - + Alphabet Laws (ADA, PDA, etc)
 - + Local Policies/Procedures
- ✘ Q/A

PRETEST – TRUE OR FALSE?

- ✘ Serious Health Condition and Disability are defined the same.
- ✘ Employers are required to have job descriptions under FMLA.
- ✘ You can require an EE on FMLA to return to work in a “Light Duty” position.
- ✘ Complying with FMLA protects you from charges under ADA, WC, PDA.
- ✘ FMLA modifies state/federal law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age and/or disability.

PRETEST (CONT'.)

- ✘ A pregnant EE who has been employed only seven months is eligible for FMLA.
- ✘ An EE who has been employed 13 months is eligible for FMLA.
- ✘ Healthcare providers under FMLA include nurse practitioners, midwives, Christian Science practitioner, acupuncturist, therapeutic masseuse, and herbalists.
- ✘ Same sex partners do not qualify for FMLA leave.
- ✘ Military Personnel do not qualify for FMLA leave.

WHAT IS THE HISTORY OF THE LAW?

- ✘ Public Law 103-3 – Enacted February 5, 1993
- ✘ Amended –
 - + National Defense Authorization Act, sec 585 - FY 2008 (P.L. 110-181) Enacted January 1, 2008
 - + National Defense Authorization Act, sec 565 - FY 2010 (P.L. 111-84) Enacted October 28, 2009
 - + Airline Flight Crew Technical Corrections Act (P.L. 111-119) Enacted December 21, 2009
- ✘ An ACT – To grant family and temporary medical leave under certain circumstances.

WHY DID CONGRESS ENACT THE ACT?

- ✘ “Congress found that
 - + # single & 2 parent households in which the single parent or both parents work is increasing
 - + It is important for the development of children and the family unit that fathers/mothers be able to participate in early childrearing and care of family members who have serious health conditions
 - + Lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting

WHY DID CONGRESS ENACT THE ACT? CONT.'

- + There is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods
- + Due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more often than it affects the working lives of men
- + Employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender”

PURPOSES OF THE ACT

- × “It is the purpose of this Act
 - + To balance the demands of the workplace with the needs of families, to promote the stability and economic security of families and to promote national interests in preserving family integrity;
 - + To entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;

PURPOSES OF THE ACT CONT.'

- + To accomplish the purposes described above in a manner that accommodates the legitimate interests of the employers;
- + To accomplish purposes described above in a manner that, consistent with the Equal Protection Clause of the 14th Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender neutral basis;

PURPOSES OF THE ACT CONT.'

- + To promote the goal of equal employment opportunity for women and men, pursuant to such clause.”

APPLICABILITY TO YOUR ORGANIZATION ?

- ✘ Employ 50 or more EE's each working day within at least 20 calendar workweeks in the current or preceding calendar year.
- ✘ Private Employers
- ✘ Select Public Employers :
 - US Government, Agencies, US Post Office
 - States, Agencies (i.e. schools), Political Subdivisions
 - Interstate Governmental Agencies

WHO IS ELIGIBLE?

- ✘ EE has at least 12 months of service with the covered ER
- ✘ EE has worked at least 1250 hours for the covered ER during previous 12 month period
- ✘ Works at site with 50 or more EE within 75 mile radius
- ✘ Eligibility determined at time EE makes leave request
- ✘ Rolling Year vs. Anniversary Year vs. Annual Year

WHEN IS EE ELIGIBLE?

- ✘ Basic Employee Entitlement :
 - + For incapacity due to pregnancy, prenatal medical care or child birth
 - + To care for the EE's child after birth, or placement for adoption, or foster care;
 - + To care for EE's spouse, son, daughter, parent (in loco parentis), who has a serious health condition; or
 - + For a serious health condition that makes the EE unable to perform the EE's job.

MILITARY FAMILY LEAVE ENTITLEMENT

- ✘ Eligible EE's with a spouse, daughter, son, 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 to address certain qualifying exigencies.
 - + Attendance at certain military events;
 - + Arranging for alternative child care;
 - + Addressing certain legal/financial arrangements;
 - + Attending certain counseling sessions; and
 - + Attending post-deployment reintegration briefings.

MILITARY FAMILY LEAVE ENTITLEMENT CONT.'

- ✘ Special Leave Entitlement – 26 weeks within 12 month period to take care of a covered servicemember
 - + Current member of Armed Services, National Guard, 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/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.

WHAT'S A SERIOUS HEALTH CONDITION?

- ✘ An illness, injury, impairment or physical or mental condition that involves:
 - A) Either an overnight stay in a medical care facility (aka hospital, hospice, residential medical care facility) or continuing treatment by a health care provider for a condition that either prevents the employee from performing functions of the EE's job, or prevents the qualified family member from participating in school or other daily activities; or

SERIOUS HEALTH CONDITION (CONT'.)

B) Any period of incapacity more than three (3) calendar days combined with at least 2 visits to a health care provider or 1 visit and a regimen of continuing treatment;
or

C) Incapacity due to pregnancy; or

D) Incapacity due to a chronic condition.

NOTE: Other conditions may meet the definition of continuing treatment.

USE OF LEAVE

- ✘ EE does not need to use leave entitlement in one continuous block;
- ✘ Leave may be used on an intermittent basis, when medically necessary;
- ✘ Leave may be used on a reduced schedule, when medically necessary;
- ✘ EE must make reasonable efforts to schedule leave for planned medical treatment so as not to unduly disrupt the ER's operation;
- ✘ Leave due to qualifying exigencies may also be taken on an intermittent basis.

HEALTH CARE PROVIDERS

- × Doctor of Medicine or Osteopathy
- × Dentist
- × Optometrist
- × Nurse Practitioner
- × Clinical Social Worker
- × Nutritionist (Bd. Cert.)
- × Podiatrist
- × Chiropractor
- × Clinical Psychologist
- × Nurse Midwife
- × Christian Science Practitioner
- × Any other healthcare provider defined or accepted by ER, ER's group health plan, Secretary of Labor

ER - BEST PRACTICES:

- ✘ ER is entitled to know why an EE is requesting time off under FMLA
- ✘ ER will not violate ADA by asking for the information specified in the FMLA certification form (DOL Form WH-380 – FMLA)
- ✘ ER may not request medical records
- ✘ ER may not contact health care provider directly
- ✘ Keep medical information in a file “separate” from the EE’s regular personnel file
- ✘ Post all required notices: EEOC, DOL, Worker’s Compensation

HOW MUCH LEAVE?

- ✘ Maximum amount of leave available is 12 workweeks during any 12-month period
- ✘ IF Intermittent, may be taken for sick family member or EE's own illness *IF* medically necessary - BUT Intermittent may not be taken for birth or placement of new child, unless the ER agrees to the arrangement

ER – BEST PRACTICES

HARDSHIP TO ER?

The FMLA requires an ER to provide up to 12 weeks of leave regardless of the hardship to the ER

“Critical Employee” return exception – may deny return to previous position if denial is necessary to prevent substantial and grievous economic injury to the operation of the ER (upper 10% of compensated)

PAID VS. UNPAID

- ✘ FMLA GUARANTEES up to 12 weeks of unpaid leave; however, EE may choose or ER may require the use of accrued paid leave while taking FMLA leave.
- ✘ In order to use paid leave, EE must comply with ER's normal call-in procedures.

MAINTAIN BENEFITS?

- ✘ Health Plans – ER must maintain coverage under “group health plan” under same terms as if EE still working
- ✘ Pension/Retirement Plans
- ✘ Seniority -
- ✘ Provisions of CBA excepted

ATTENDANCE POLICY IMPACT?

- ✘ EE entitled to 12 weeks of leave regardless of ER's policy
- ✘ ER prohibited from using FMLA as a negative factor in considering an EE for discipline, promotion, other employment actions
- ✘ ER is not specifically prohibited from discharging EE upon return from FMLA leave

REQUIRED FORMS -

- ✘ No SPECIFIC forms required by statute, but US Wage & Hour Division has “acceptable forms” for use
- ✘ ER Must keep records of:
 - Name, address, occupation
 - Rate/terms of pay, daily/weekly hours worked per pay period
 - Total compensation, additions/ deducts from wages
 - Dates (or hours) FMLA taken

REQUIRED FORMS (CONT'.)

Copies of EE notices regarding FMLA

Description of benefits and premium payments

(Note: DOL may review these records every 12 months)

? Should you hire someone outside the organization for compliance of portions/all of these requirements ?

EE RESPONSIBILITIES

- ✘ EE must provide 30 days notice of need to take FMLA leave, if need is foreseeable
- ✘ If 30 day notice not possible, EE must provide as much notice as is practicable and generally must comply with ER's normal call-in procedure
- ✘ EE must provide sufficient information for ER to determine if leave qualifies for FMLA leave

EE RESPONSIBILITIES CONT.'

- ✘ Sufficient information may include:
 - + EE's inability to perform job functions
 - + Family member is unable to perform daily activities
 - + The need for hospitalization or continuing treatment by healthcare provider
 - + Circumstances supporting the need for military family leave
- ✘ EE must inform ER if requested leave is for a reason for which FMLA leave was previously taken or certified

EE RESPONSIBILITIES CONT.'

- ✘ EE's may be required to provide a certification and periodic recertification supporting need for the leave

ER RESPONSIBILITIES

- ✘ Covered ER's must inform EE's requesting leave whether they are eligible under FMLA
- ✘ If EE is eligible, form must specify any additional information required as well as employee's rights and responsibilities
- ✘ If EE is not eligible, ER must provide reason for the ineligibility

ER RESPONSIBILITIES CONT.'

- ✘ ER's must inform EE's if leave will be designated as FMLA-protected and the amount of leave counted against the EE's leave entitlement
- ✘ ER's must notify EE if leave will not be designated as FMLA

EE RINSTATEMENT RIGHTS

- ✘ FMLA requires most EE's return to same or "Equivalent" position
- ✘ Equivalent = same pay, benefits and working conditions (including privileges, prerequisites, status) as position held prior to taking FMLA leave
- ✘ Use of FMLA leave does not protect employee from layoff or other actions that are not discriminatory

REINSTATEMENT RIGHTS (CONT'.)

- ✘ An ER may not challenge an EE's return-to-work certification under FMLA
- ✘ ER may not require EE to return to work in a "light duty" capacity under FMLA

WHAT IF EE DOES NOT RETURN TO WORK?

- ✘ An ER can recover health coverage premiums only if the EE's failure to return to work is not caused by a serious health condition ...
 - + Takes another position in another organization
 - + Decides not to return to the workforce
 - + Moves out of state
 - + EE Retires

ER – BEST PRACTICES

- ✘ State enforcement is by US DOL, Wage and Hour Division
- ✘ DOL may sue in any court of competent jurisdiction
- ✘ Damages may include – Lost wages, lost benefits, actual monetary losses sustained, equitable relief, reasonable attorney's fees, interest, other costs
- ✘ FMLA does not preclude ER from being more generous [?]

ER – BEST PRACTICES (CONT'.)

- ✘ FMLA does not supersede any provision of state or local law that provides greater family or medical leave rights than those provided by FMLA
- ✘ FMLA does supersede any provision of state or local law that provide less generous family or medical leave rights than those provided by FMLA

PRETEST – TRUE OR FALSE?

- ✘ Serious Health Condition and Disability are defined the same. **FALSE**
- ✘ Employers are required to have job descriptions under FMLA. **FALSE**
- ✘ You can require an EE on FMLA to return to work in a “Light Duty” position. **FALSE**
- ✘ Complying with FMLA protects you from charges under ADA, WC, PDA. **FALSE**
- ✘ FMLA modifies state/federal law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age and/or disability. **FALSE**

PRETEST (CONT'.)

- ✘ A pregnant EE who has been employed only seven months is eligible for FMLA. **FALSE**
- ✘ An EE who has been employed 13 months is eligible for FMLA. **FALSE**
- ✘ Healthcare providers under FMLA include nurse practitioners, midwives, Christian Science practitioner, acupuncturist, therapeutic masseuse, and herbalists. **FALSE**
- ✘ Same sex partners do not qualify for FMLA leave. **FALSE**
- ✘ Military Personnel do not qualify for FMLA leave. **FALSE**

LOCAL IMPACT?

✘ Contractual / Policy References

- + Family and Medical Leave
- + Holidays
- + Sick Leave
- + Vacation
- + Disability Separation
- + EE interaction with ER (known/should have known)
- + USERRA

WHAT IF WE DISAGREE WITH INITIAL DETERMINATION OR ?

× Follow-ups

- + 2nd Opinion / 3rd Opinion (ER cost)
- + Reasonable interval recertification

And then ...

- + Return to Duty Certification
- + Expiration of FMLA/return to active status

WHAT'S THE NEWEST NEWS?

- × DOL interprets FMLA to Cover Same-Sex Parents - 6.22.10 – EE's “who have no biological or legal relationship with a child may nonetheless stand in loco parentis to the child and entitled to FMLA leave” & “neither the statute nor the regulations restrict the number of parents a child may have under the FMLA”
Nancy Leppink, deputy administrator of DOL's Wage and Hour Division

WHAT'S THE NEWEST NEWS? CONT.'

- ✘ ADAAA (Americans with Disabilities Act Amendments Act) – 7.22.10 – Previously, it could be argued that an adult child going through chemotherapy or having surgery for cancer did not have an ADA disability (incapable of self care), but ADAAA broadens the definition of disability and perhaps a “broad range of diseases, congenital conditions and physical deficits could fall under the definition”
Margaret Edwards, Esq.

WHAT'S THE NEWEST NEWS? CONT.'

- ✘ Call-in Policies Can Aid FMLA-Compliant Employers – 8.23.10 – An employee may be required to follow a company's call-in policy when s/he is going to be absent, as long as the procedures are not more stringent than the FMLA regulations timing for FMLA notice. Don't drag the call-in procedures to the 'nth" degree. Article by Allen Smith

WHAT'S THE NEWEST NEWS? CONT.'

- ✘ DOL Wage/Hour issues guidance regarding parents in the workplace – 9.20.10 –
 - + Guidance as to the definition of parent – “in loco parentis” clarification
 - + Specific examples ... Unmarried partners, same sex partners, step-parent without legal relationship, grandparent, uncle/aunt, more than 2 parents allowed (divorced & remarried => 4 parents)
 - + Documentation may be required [*KISS*]

WHAT'S THE NEWEST NEWS? CONT.'

- ✘ DOL Wage/Hour issues guidance regarding parents in the workplace – 9.20.10 –
 - + Effective 3.23.10 – ER must provide:
 - ✘ “Reasonable break time for an EE to express breast milk for her nursing child for 1 year after the child’s birth each time such employee has need to express the milk.”
 - ✘ “A place, other than a bathroom, that is shielded from view and free from intrusion from co-workers and the public, which may be used by an employee to express breast milk.”
PL 111-148
 - ✘ Applies to EE’s who are not exempt from overtime under FLSA
 - ✘ Financial hardship for ER with under 50 EE’s exemption

WHAT'S THE NEWEST NEWS? CONT.'

- ✦ Notice of Proposed Rule Making [213 pages]- 1.30.12 (comments to be received 60 days after publication in the Federal Register)

Major Provisions of the FMLA Statutory Amendments NPRM

- + the extension of military caregiver leave to eligible family members of recent veterans with a serious injury or illness incurred in the line of duty;
- + a flexible, three-part definition for serious injury or illness of a veteran;
- + the extension of military caregiver leave to cover serious injuries or illnesses for both current Servicemember and veterans that result from the aggravation during military service of a preexisting condition;
- + the extension of qualifying exigency leave to eligible employees with covered family members serving in the Regular Armed Forces;
- + inclusion of a foreign deployment requirement for qualifying exigency leave for the deployment of all Servicemember (National Guard, Reserves, Regular Armed Forces);
- + ~~the addition of a special hours of service eligibility requirement for airline flight crew employees; and~~
- + ~~the addition of specific provisions for calculating the amount of FMLA leave used by airline flight crew employees.~~

DEPARTMENT OF LABOR – CONTACT INFO

✦ Description of FMLA, references to sources of assistance

+ <http://www.dol.gov/dol/topic/benefits-leave/fmla.htm>

DEPARTMENT OF LABOR – FMLA FORMS

✘ <http://webapps.dol.gov/libraryforms/>

✘ [Contains the following forms currently set to expire 1.31.12](#)

✘ [WH-380-E](#)

Certification of Health Care Provider for Employee's Serious Health Condition

✘ [WH-380-F](#)

Certification of Health Care Provider for Family Member's Serious Health Condition

✘ [WH-381](#)

The Employer Response to Employee Request for Family and Medical Leave may be used by an employer covered by the Family and Medical Leave Act (FMLA) to satisfy its obligation (whether or not it chooses to use the form) to provide written notification detailing the employer's specific expectations and obligations of an employee taking FMLA protected leave.

✘ [WH-382](#)

Designation Notice of the Family and Medical Leave Act

✘ [WH-384](#)

Certification of Qualifying Exigency For Military Family Leave

✘ [WH-385](#)

Certification for Serious Injury or Illness of Covered Servicemember -- for Military Family Leave

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THANKS!