



**Tuesday, May 1**  
**2:00–3:30 pm**

**901 Issue Spotting: Employment Mistakes to Avoid**  
*New to In-house Track*

**Eileen A. Groves**  
*Associate General Counsel*  
United Space Alliance, LLC

**Lynn C. Outwater**  
*Regional Managing Partner*  
Jackson Lewis LLP



## **Issue Spotting: Employment Mistakes to Avoid**

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# **Always One Step Ahead**

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## Discrimination, Harassment & Retaliation in the Workplace

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## 2006 EEO Statistics

- The EEOC received 75,800 charges of discrimination in 2006, edging up from 75,400 in 2005.
  - **Pregnancy Discrimination – 4,901 charges**
  - **Race Discrimination – 27,238 charges**
  - **Sex Discrimination - 23,247 charges**
  - **Sexual Harassment - 12,025 charges**
  - **Retaliation - 22,740 charges**
  - **Disability Discrimination - 14,893 charges**
  - **Age Discrimination - 13,569 charges**
  - **National Origin Discrimination - 8,327 charges**
- Monetary benefits paid to victims of discrimination in 2006: \$274 million, compared with \$378 million in 2005.

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## New Guidance On Race And Color Discrimination

- In the face of a growing number of race and color discrimination charges, the Equal Employment Opportunity Commission issued a 51-page compliance manual.
- The manual provides guidance to employers on how to avoid race and color discrimination in employment under Title VII, including best practices for:
  - Recruiting
  - Hiring
  - Promotion
  - Other employment decisions

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## Legislative Priority List For 2007

- **Prohibiting discrimination based on genetic information.**
  - In the past two Congresses, the Senate has passed legislation that bars discrimination based on genetic information in health insurance and employment, and that regulates the use of such information.
  - While the House previously has blocked such legislation, enactment is a definite possibility during this session.

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## Legislative Priority List For 2007

### ● Prohibiting discrimination based on sexual orientation

- In 2002, the Employment Non-Discrimination Act, which would bar employment discrimination based on sexual orientation under federal law, passed the Senate HELP Committee.
- Neither the full Senate nor the House further considered such legislation at the time, but it is likely to return in the upcoming session.

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## Legislative Priority List For 2007

### ● Removal of Title VII Damages Cap

- The Civil Rights Act of 1991 established a cap on the amount of compensatory and punitive damages that are available for violations of Title VII of the Civil Rights Act of 1964.
- A top priority of Senator Kennedy is repealing this cap so plaintiffs in discrimination lawsuits would not be limited by a damages cap.

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## Discrimination & Harassment

- Retaliation
  - 30% of EEOC filings in 2006

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## Discrimination & Harassment

- **Burlington Northern and Santa Fe Ry. Co. v. White (2006)**
  - The Supreme Court issued a decision expanding the protection for employees who allege they have suffered retaliation after making a complaint of discrimination or harassment under Title VII.
  - No longer must employees prove they suffered an “ultimate employment decision” or “materially adverse change in the terms and conditions of employment” (such as discharge, demotion, etc.)

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## Discrimination & Harassment

- According to Jury Verdict Research, the median award for a retaliation claim in 2005 was \$150,452.
  - Employment Practice Liability: Jury Award Trends and Statistics, 2006 Edition, Jury Verdict Research.

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## Trends In Employment Practice Liability

### Trends in Employment Practice Liability

#### Award Trends

The compensatory award median, probability range, award range, and award mean for all plaintiff verdicts collected for the years 1999 through 2005 are analyzed in the table below.

Year	Award Median	Probability Range		Total Range		Award Mean
1999	\$150,000	\$50,000	-	\$463,919	\$1 - \$21,000,000	\$620,747
2000	169,813	50,000	-	500,000	177 - 10,000,000	556,590
2001	145,777	43,387	-	450,125	1 - 12,500,000	439,819
2002	200,000	56,884	-	500,000	1 - 36,555,000	755,510
2003	161,000	49,649	-	514,130	1 - 4,000,000	425,243
2004	199,000	57,000	-	505,224	1 - 5,355,780	526,464
2005	276,711	90,532	-	658,000	37 - 53,885,000	957,891
Overall	180,970	54,917	-	500,000	1 - 53,885,000	603,376

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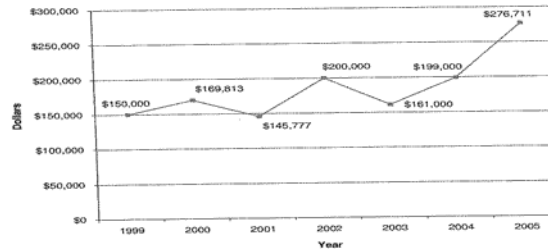
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## Trends In Employment Practice Liability

Compensatory Award Medians by Year



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## Discrimination & Harassment

- While the Supreme Court's decision directly applies only to retaliation claims under Title VII, other federal courts and administrative agencies are guided by the Court's analysis when considering retaliation claims under other statutes.

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## Discrimination & Harassment

### ● *Foraker v. Appollo Group Inc.*

- Applying the 'reasonable employee' standard, the Arizona court held the employer's actions would dissuade a reasonable employee from exercising his or her FMLA rights and was, therefore, 'materially adverse' under the Supreme Court's legal standard for retaliation.
- In reaching this conclusion, the court considered the fact that, although the plaintiff continued to receive full compensation and benefits during his leave, the employer had relieved him of all duties and had prohibited him from entering the workplace.

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## What Does All This Mean?

- Likely increase in harassment, discrimination & retaliation claims
- Employers less likely to achieve summary judgment
- Increased likelihood of liability

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## What Can You Do?

- Update harassment, discrimination & retaliation policies and practices
- Train management
- Today's employer must practice preventive strategies to avoid employment litigation

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## ADA/FMLA

- Anticipated Revisions to FMLA Regulations
- EEOC Disability-Specific Guideline
- Intermittent Leave

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## Legislative Priority List For 2007

### ● Expansion of Family and Medical Leave Act

- These bills seek to expand coverage by, for example, lowering the coverage threshold from 50 to 25 employees.

### ● Modifications to the Americans With Disabilities Act

- The leadership may choose to push legislation that would limit employer's ability to argue that employees are not disabled within the meaning of the ADA.
- Under this legislation, the focus would be whether an individual with an impairment was subject to discrimination.

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## ADA/FMLA

- Clary et al. v. Southwest Airlines (2007)
  - Southwest workers file FMLA class action challenging computation method used and available leave time

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## ADA/FMLA

- **Sommer v. Vanguard Group (3d Cir. 2006):**
  - An employer may prorate an hours worked-based “production bonus” for employees who are absent from work while on leave under the FMLA.

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## ADA/FMLA

- **Ward v. Merck & Co. (3d Cir. 2007):**
  - Merck & Co. was justified in requiring a former chemist who was barely performing his job to take a fitness-for-duty examination.
  - The court held that Merck & Co. was required to show a business necessity for the examination and having met this burden, did not violate the ADA by requiring the examination.

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## What Can You Do?

- Be able to spot ADA or FMLA issues
- Remember that ADA analyses must be fact-specific
- Consider ADA at the end of every FMLA leave or worker's compensation leave
- Consult with counsel regarding proper method for calculating FMLA leave banks and deductions

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## Fall In! Compliance with Military Leave Laws

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## What is USERRA?

- Uniformed Services Employment And Reemployment Rights Act of 1994
- Federal Statute Passed In 1994
- Most Recent In Series of Statutes
- Purpose

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## What Does USERRA Do?

- Prohibits discrimination and retaliation
- Provides reemployment rights
- Assures treatment same as other employees

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## Why Should You Care?

- Prominent role of Reservists and National Guard in military operations throughout the world
- Recent GAO report shows increase in USERRA claims each year since 2001 (895, 1195, 1315, 1465)
- GAO says survey data shows only 18-28% of service members with USERRA problems filed a formal or informal complaint

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## Who is Protected?

- Employees – any person employed by an employer
- Anyone associated with an employee
- “Service In Uniformed Service” – performance of duty on a voluntary or involuntary basis on:
  - Active duty
  - Active and inactive duty for training
  - National Guard duty under a federal statute
  - Examination for fitness for service
  - Funeral honors
- Independent contractors not covered

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## Prohibits Discrimination

- “ A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit or employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.” 38 U.S.C. §4311

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## Reemployment Rights

- Employee Notice To Employer – *Not Permission, No Accommodation By Employee Required*
- Five Years Or Less Of Cumulative Service With The Employer
  - There Are A Number Of Exceptions
- Employee Timely Returns To Work Or Applies For Reemployment
- Employee Not Separated From Service With Disqualifying Discharge

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### **Return to Work/Application for Reemployment**

- Less Than 31 Days – Beginning Of Next Work Day
- 31 To 180 Days – Within 14 Days
- More Than 180 Days – Within 90 Days
- If Employee Fails To Give Timely Notice – Must Be Disciplined Pursuant To Employer's Policies

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### **Upon Reemployment No Termination Except "For Cause"**

- If Period Of Service 31 – 180 Days, Only "For Cause" Discharge For 180 Days
- If Period Of Service 181 Days Or More, Only "For Cause" Discharge For 1 Year

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## **What Job Upon Reemployment?**

- “Prompt” Reemployment – Within 2 Weeks
- The Escalator Principle

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## **Employee Consideration on a Leave of Absence**

- While On Leave And After Return, Must Enjoy Non-seniority Based Rights Enjoyed By Other Employees On Leave Of Absence
- Upon Reemployment Must Enjoy Benefits Of Seniority As If Had Been Continuously Employed

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## What Can You Do?

- Work It Out With The Employee And The Unit
- Work With Lawyer With Military Experience
- Resources - DOL Website (VETS), ESGR
- Military Leave Policies Say If “Required”
- Wages For Hourly And Exempt Employees
- Enhanced Benefits? GAO Says:
  - 26% Pay Salaries Or Differential Pay
  - 32% Receive Medical Benefits Not Required By USERRA
  - 30% Receive Other Benefits Not Required By USERRA

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## Class Actions

- Pay & Promotion
- FLSA (or State Wage Law)
- Age Discrimination
- Severance Policy

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## Class Actions

- Dukes et al. v. Wal-Mart
  - Nationwide million-member classes are possible



## What Does All This Mean?

- Continuing increase in class action litigation
- EEOC pursuing systemic discrimination



## What Can You Do?

- Conduct internal wage & hour audit
- Analyze diversity of workforce at all levels and pay differentials
- Implement corrective measures, if necessary

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## Challenges in Severance Agreements

- Release of FMLA claims
- Specificity of ADEA group waivers
- Preservation of the right to file administrative claims

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## **Tips to Avoid Challenges in Severance Agreements**

- Review (and do not automatically use!) old forms
- Recognize the consequence of invalid waivers
- Keep up-to-date on evolving legal doctrines

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## **Wage & Hour**

- Minimum-wage increase
- Paid family leave
- Paid sick leave
- Employee mis-classification

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## Wage & Hour

- Off-the-clock (donning & doffing protective gear)
- Class certification

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## What Can You Do?

- Keep up-to-date on evolving legal developments
- Check [www.jacksonlewis.com](http://www.jacksonlewis.com) for legal updates
- Conduct internal wage & hour audit
- Implement corrective measures, if necessary

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## **Avoiding Gotcha! Are You Ready for the New Rules of Preserving Electronic Information?**

- Parties must preserve Electronically Stored Information (ESI);
- Parties to discuss electronic discovery issues during the initial case-planning conference;
- ESI will be produced as it is “ordinarily maintained or reasonably usable” absent agreement to the contrary;
- Limited exception to discovery , when ESI is “not accessible because of undue burden or cost”;
- Safe harbor provisions; and
- Added protection in case of inadvertently disclosed privileged information contained in ESI

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## **What Can You Do?**

- Implement practical electronic information-retention policy
- Update technology/electronic communications policies
- Establish-and-follow an electronic information retention and destruction policy
- Design and deploy effective litigation hold procedures immediately upon awareness of potential claims
- Conduct supervisory and staff training to ensure policy compliance

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## Clarification on “Supervisors”

- Employees who assign other employees to overall duties, and are held accountable for directing subordinates to undertake specific tasks, and have the discretion to do so without close direction from management will be recognized as “supervisors.”
- Kentucky River Trilogy:
  - Oakwood Healthcare, Inc., 348 NLRB 37 (2006)
  - Croft Metals, Inc., 348 NLRB 38 (2006)
  - Beverly Enterprises-Minn. Inc., d/b/a Golden Crest Healthcare Center, 348 NLRB 39 (2006)

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## Why Does It Matter?

- The NLRB decision that a RN at a nursing home was a supervisor under the NLRA and therefore was “legally” fired for circulating a petition protesting a proposed change in working conditions, was overturned by the District of Columbia Circuit Court.
- Supervisors have no rights to union representation while employees do.

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## What Can You Do?

- Review and modify job descriptions/actual duties
  
- Documentation of work performance

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## NLRA Issues In Employee Handbooks & Personnel Policies

- Guardsmark, LLC v. National Labor Relations Board (D.C. Cir. Feb. 2, 2007)
  - A policy prohibiting employees from “fraterniz[ing] on duty or off duty, dat[ing] or becom[ing] overly friendly with the client’s employees or with co-employees” violated the NLRA, because employees could reasonably interpret the rule as preventing them from talking about terms and conditions of employment within their union.

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## **NLRA Issues In Employee Handbooks & Personnel Policies**

- **Cintas Corp. v. NLRB**
  - The D.C. Circuit took a similarly broad reading of the NLRA and ruled that an employer's innocuous confidentiality policy infringed upon protected rights.



## **What Can You Do?**

- Carefully review all handbooks and personnel policies to ensure they cannot be read by employees as restricting protected rights.
  
- Ensure there is no restriction on NLRA covered employees' rights to discuss terms and conditions of employment



## Employee Blogging, Instant Messaging, And Other Communications And Privacy Issues

- Key differences between blogging, instant messaging, and email
- Employee blogs can expose employers to risk
- Employee monitoring and privacy issues
- Legal constraints on employee discipline
- Key elements of electronic communications policies

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- In early January of 2007, the National Labor Relations Board issued a rare public notice inviting amicus briefs from third parties on important questions to all employers
  - Does a business-use only electronic communications policy prohibiting employees from utilizing the company's e-mail system for non-business purposes, including to discuss terms and conditions of employment, unionization and other protected activities, constitute an unlawful interference with employee rights under section 7 of the National Labor Relations Act?

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## Alternative Dispute Resolution

- Peer Review
- Informal Mediation
- Formal Mediation
- Arbitration

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## Alternative Dispute Resolution

- Median time from filing to arbitration decision: 16 ½ months
- Median time from filing to court decision: 25 months
- Only 3.8% of court cases went to trial

Statistics from Orrick, Herrington & Sutcliffe Study of NY employment cases in federal court and cases arbitrated by NASD and NYSE

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## Alternative Dispute Resolution

- Arbitration median recovery = \$236,292
- Court median recovery = \$377,030

### **With attorneys fees included:**

- Arbitration median recovery = \$272,574
- Court median recovery = \$526,786



## Alternative Dispute Resolution

- Total costs of arbitration are less than court proceedings
- More costly settlements in court actions due to accelerated discovery process during early stages of litigation



## Alternative Dispute Resolution

# Class Action Waiver in Arbitration Agreement Has Been Upheld

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## What Does All This Mean?

- Arbitration tends to be quicker and more efficient
- May result in lower awards
- Saves money in attorneys' fees
- May stem the tide of class action litigation in the workplace

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## What Can You Do?

- Consider other forms of internal dispute resolution
- Review and update arbitration agreements to ensure enforcement
- Keep up-to-date on evolving legal doctrines



## 1. A SNAPSHOT OF THE FMLA MAZE

PROVISION	FEDERAL FAMILY & MEDICAL LEAVE ACT
Covered Employers	Having 50 or more associates.
Counting Associates	Employs 50 or more associates, whether full or part time, for each working day during each of 20 or more calendar weeks in current or preceding year.
Eligible Associates	Employed for at least 12 months and worked for <i>at least 1,250 hours</i> in 12 month period preceding leave request. <i>Small worksite exclusion:</i> employer with less than 50 associates within 75-mile radius.
Length of Leave	Up to 12 weeks in 12-month period.
Purpose of Leave	<i>Prenatal care</i> , birth of and care of a child, adoption of a child, <i>"serious health condition"</i> of a child, spouse, parent or the associate.
Time Limits For Taking Leave	For birth, adoption or foster placement, leave must be taken within 12 months.
Leave May Be Reduced By	Any accrued paid leave, including vacation. Generally, associate may choose, or employer may require use of accrued paid leave.
When Both Spouses Are Employed	Combined leave cannot exceed the individual maximum, except for <i>illness of the associate, spouse or child</i> ; each spouse is entitled to the full leave.
Requesting Leave	Associate must provide <i>30 days</i> notice if the need for the leave is foreseeable, as much notice "as practicable" if the need for the leave is not foreseeable. Associate "should" consult with Employer when planning medical treatment.
Medical Certification	Employer may require initial certification of serious health condition of associate, child, spouse or parent, and later certifications if employer has reason to question the appropriateness of the leave or its duration. Associate must have at least 15 calendar days to provide the certification. An employer who doubts associate provided certification may obtain a second opinion from a provider who is not employed or contracted regularly by the employer. <i>A third certification can break a tie.</i>
Intermittent Leave/Reduced Schedule	Leave may be taken intermittently (in blocks) or on a reduced schedule (less hours per day or days per week) when medically necessary; for birth or adoption, at the employer's discretion. <i>Federal "exempt status"</i>

PROVISION	FEDERAL FAMILY & MEDICAL LEAVE ACT
	<i>protected.</i>
Benefits During Leave	Employer must continue health benefits as if associate were still at work. Other benefits and seniority need not be accrued or provided during leave.
Return To Work	Associate may be required to provide a "fitness for duty" certification. Associate must be returned to the original job or one of like pay and status. A "key associate" (exempt associate within highest paid 10%) need not be restored if it would create substantial and grievous economic injury to the employer's operations.
Definitions	<b>Serious health condition:</b> When associate is unable to work and needs <i>continuing medical care</i> , whether inpatient or outpatient; or associate is needed to care for sick family member. <b>Parent:</b> Biological parent, <i>or an individual who stood "in the place of a parent" when the associate was a child.</i> <b>Child:</b> Biological, adopted or foster child, stepchild, legal ward, child or person standing in the place of the parent; includes a child over 18 years of age if the child is "incapable of self-care due to mental or physical disability." <b>Spouse:</b> Husband or wife.
Notice Requirements	Employers <i>must</i> post a notice in conspicuous places and must include FMLA "entitlement and associate obligations" in handbook. When an associate requests leave, employer must give the associate notice addressing eight specific FMLA issues. <i>FMLA leave does not begin until this notice is given!</i>
Associate Complaints	Associates may file a complaint with the USDOL or sue the employer directly. Generally, must be done within two years of the alleged unlawful conduct. (Three years for filing with DOL if the violation was willful.) "Make whole" relief, liquidated damages, attorney's fees, and interest are available remedies.

Questions	Length of Time	Calendar or Business Days
<p><b>Example</b></p> <p>An employee wants his foreseeable FMLA leave to start on May 1. How many days prior to May 1 may the employer require the employee to request the leave?</p>	30 days	Calendar
<p><b>Quiz Questions</b></p>		
<p>1. What is the maximum number of days an employee has to request FMLA leave after an unforeseeable leave has commenced? (Assume no mitigating circumstances exist.)</p>		
<p>2. The employee has properly requested FMLA leave. How many days does the employer have to provide the employee with written notice that designates the leave as FMLA?</p>		
<p>3. What is the maximum number of days an employee has to provide medical certification to justify the need for leave for his/her own serious health condition? (Assume no mitigating circumstances exist.)</p>		
<p>4. The employee has provided medical certification to justify an undetermined length of leave for a serious health condition. Circumstances have not changed. How long must the employer wait before requiring the employee to provide an updated medical certification?</p>		
<p>5. Company policy requires the employee to pay a portion of the medical premium to maintain health insurance coverage during FMLA leave. How long must an employee have to make up a delinquent payment?</p>		
<p>6. An employee on FMLA leave fails to make up a delinquent medical insurance payment. When must the employer provide the employee with written notice to cancel coverage?</p>		
<p>7. The employer requires an employee on FMLA leave for his/her own serious health condition to provide a fitness-for-duty medical certification before returning to work. How long must the employee have to provide the</p>		

certification? (Assume no mitigating circumstances exist.)		
8. An impairment qualifies as a “serious health condition” in several ways. For each type of impairment, how long must the period of incapacity be?		
a) How long must the person receive inpatient care?		
b) If the person receives treatment by a health care provider twice or receives a regimen of continuing treatment, how long must the initial period of incapacity be?		
c) How long must the absence be for treatment of pregnancy or prenatal care?		
d) How long must the absence be for treatment of a chronic condition, a permanent or long-term condition or a condition requiring multiple treatments?		
9. The employer’s policy is not to continue non-medical benefits during an FMLA leave. An employee returns from FMLA leave on May 26. How long does the employer have to reinstate the employee’s non-medical benefits that the employer did not continue during FMLA leave?		
10. In the FMLA regulations, what is the maximum number of days an employer may retroactively designate leave as FMLA leave? (Note: FMLA requires a specific time period, plus three very limited exceptions.)		

## Answers to the FMLA Quiz Questions

**Question #1:** What is the maximum number of days an employee has to request FMLA leave after an unforeseeable leave has commenced? (Assume no mitigating circumstances exist.)

**Answer #1:** The employee should give the employer notice within one or two working days from the date the employee learned the need for unforeseeable leave (29 CFR § 825.303).

**Question #2:** The employee has properly requested FMLA leave. How many days does the employer have to provide the employee with written notice that designates the leave as FMLA?

**Answer #2:** The employer must give the employee notice within one or two business days after the employee requests either foreseeable or unforeseeable leave (29 CFR § 825.301(c)). The employer may condition FMLA leave for the employee's own serious health condition or the serious health condition of a spouse, child or parent on the employee's providing the proper medical certification (see Question #3).

**Question #3:** What is the maximum number of days an employee has to provide medical certification to justify the need for leave for his/her own serious health condition? (Assume no mitigating circumstances exist.)

**Answer #3:** The employer must allow up to 15 calendar days after the employer requests the employee to provide medical certification (29 CFR §§ 825.305 and 311). If mitigating circumstances exist, the employer must grant a "reasonable" extension.

**Question #4:** The employee has provided medical certification to justify an undetermined length of leave for a serious health condition. Circumstances have not changed. How long must the employer wait before requiring the employee to provide an updated medical certification?

**Answer #4:** The employer may not require recertification more often than every 30 calendar days. If the original certification is for more than 30 days, the employer must wait until the initial certification period has passed. E.g., if the health care provider initially certifies the employee will be incapacitated for 60 days, the employer must wait until after 60 days. A change in circumstances, however, permits the employer to require recertification sooner (29 CFR § 825.308).

**Question #5:** Company policy requires the employee on unpaid leave to pay a portion of the medical premium to maintain health insurance coverage during FMLA leave. How long must an employee have to make up a delinquent payment?

**Answer #5:** Under 29 CFR § 825.210, the employer may institute a payment system for unpaid leave; the options are:

- The same time the payroll deduction would have been made;

- The same as the COBRA schedule;
- Payment (at the employee's option) under a cafeteria plan;
- The same as other unpaid leaves, provided the rules do not require prepayment; or
- Any other system voluntarily agreed to by the employer and employee.

The employee has up to 30 calendar days to make up a delinquent medical premium payment (29 CFR § 825.212). The employer's FMLA designation notice to the employee must set forth the payment systems and the consequences for failure to make a timely payment (29 CFR § 825.301).

**Question #6:** An employee on FMLA leave fails to make up a delinquent medical insurance payment. When must the employer provide the employee with written notice to cancel coverage?

**Answer #6:** The employer must provide the employee with written notice explaining that if the employee does not make the delinquent medical premium payment, the employer will cancel the employee's coverage. The employer must send this notice at least 15 calendar days before it intends to cancel coverage. If the notice is not sent, the employer cannot cancel coverage; however, it may collect the delinquent premiums when the employee returns to work. (Note: State laws may apply on collection of employee benefits (29 CFR § 825.212)). The employer can cancel coverage retroactively if it has a uniformly applied policy of retroactively canceling coverage if an employee fails to make the payment for all non-paid leaves and the employer has sent the 15-day notice.

**Question #7:** The employer requires an employee on FMLA leave for his/her own serious health condition to provide a fitness-for-duty medical certification before returning to work. How long must the employee have to provide the certification? (Assume no mitigating circumstances exist.)

**Answer #7:** The employer should notify the employee of the fitness-for-duty requirement when it specifically designates the leave as FMLA leave. The employee must then present the fitness-for-duty certificate on the day the employee returns to work (29 CFR §§ 825.310 and 825.311).

**Question #8:** An impairment qualifies as a "serious health condition" in several ways. For each type of impairment, how long must the period of incapacity be?

**Answer #8:** FMLA (29 CFR § 825.114) has several different categories of serious health condition:

- (a) An overnight stay in a medical facility qualifies as inpatient care;
- (b) More than three consecutive calendar days of incapacity, plus two treatments (or one treatment followed by a regimen of continuing treatment) by a health care provider;
- (c) Any period of incapacity due to pregnancy or prenatal care; or

- (d) A chronic condition, a permanent or long-term condition, or a condition requiring multiple treatments: An employee in this category qualifies for intermittent leave. FMLA has no limit on the size of the increment for intermittent leave. The employer, however, may limit leave increments to the shortest period of time that the employer's payroll system uses to account for a benefit or use of leave, provided it is one hour or less (29 CFR § 825.203(d)).

**Question #9:** The employer's policy is not to continue non-medical benefits during an FMLA leave. An employee returns from FMLA leave on May 26. How long does the employer have to reinstate the employer's non-medical benefits that the employer did not continue during FMLA leave?

**Answer #9:** The employer must reinstate the employee's non-medical benefits immediately upon the employee's return to work from FMLA leave (29 CFR §§ 825.214 and 215). If the employer canceled the employee's medical coverage due to failure to make the premium payment (see Question #6), it must also immediately reinstate the medical benefits.

**Question #10:** In the FMLA regulations, what is the maximum number of days an employer may retroactively designate leave as FMLA leave? (Note: FMLA requires a specific time period, plus three very limited exceptions.)

**Answer #10:** In general, the employer may not designate FMLA retroactively for more than two business days. Three exceptions, however, may apply:

1. If the employer doesn't learn of the need for FMLA leave until after the leave has begun, the employer may retroactively designate FMLA leave to the date of the qualifying event (29 CFR § 825.208(d)). For example, if an employee suffers an injury while on paid vacation, the employer may retroactively designate the time commencing with the date of injury as FMLA leave.
2. If the employer does not know the reason for an absence, and the employee notifies the employer of an FMLA-covered reason within two business days after returning to work, then the employer may retroactively designate the leave as FMLA (29 CFR § 825.208(e)(1)).
3. If the employer has made a preliminary designation of FMLA leave, conditioned upon providing timely medical certification, the employer's preliminary designation becomes final when the employee provides the timely certification (29 CFR § 825.208(e)(2)).

Were you surprised by any of these answers? The FMLA is very complicated, so be sure to obtain clarification or advice if you have questions about a specific situation.

## FAMILY AND MEDICAL LEAVE POLICY

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**The Leave Policy.** You are eligible to take up to 12 weeks of unpaid family/medical leave within any 12 month period and be restored to the same or an equivalent position upon your return from leave provided you: (1) have worked for \_\_\_\_\_ for at least 12 months, and for at least 1250 hours in the last 12 months; and (2) are employed at a worksite that has 50 or more employees within 75 miles. The 12 month period in which 12 weeks of leave may be taken will be measured forward from the first day of your family/medical leave. To the extent state law may require additional protection or benefits for pregnant employees or on any other basis, this policy shall be interpreted consistently with such requirements.

**Reasons For Leave.** You may take family/medical leave for any of the following reasons: (1) the birth of a son or daughter and in order to care for such son or daughter; (2) the placement of a son or daughter with you for adoption or foster care and in order to care for the newly placed son or daughter; (3) to care for a spouse, son, daughter, or parent ("covered relation") with a serious health condition; or (4) because of your own serious health condition which renders you unable to perform any of the essential functions of your position. Leave because of reasons "1" or "2" must be completed within the 12 month period beginning on the date of birth or placement. In addition, spouses employed by \_\_\_\_\_ who request leave because of reasons "1" or "2" or to care for an employee's parent with a serious health condition may only take a combined total of 12 weeks leave during any 12 month period.

**Notice Of Leave.** If your need for family/medical leave is foreseeable, you must give \_\_\_\_\_ at least 30 days prior written notice. If this is not possible, you must at least give notice to your \_\_\_\_\_ as soon as practicable (within 1 to 2 business days of learning of your need for leave). Failure to provide such notice may be grounds for delay of leave. Additionally, if you are planning a medical treatment you must consult with \_\_\_\_\_ to attempt to schedule the treatment to avoid disrupting \_\_\_\_\_'s operation. Where the need for leave is not foreseeable, you are expected to notify \_\_\_\_\_ within 1 to 2 business days of learning of your need for leave, except in extraordinary circumstances. \_\_\_\_\_ has Request for Family/Medical Leave forms available from the \_\_\_\_\_'s Office. You should use these forms when requesting leave.

**Medical Certification.** If you are requesting leave because of your own or a covered relation's serious health condition, you and the relevant health care provider must supply appropriate medical certification. You may obtain a Medical Certification Form from the \_\_\_\_\_'s Office. When you request leave, \_\_\_\_\_ will notify you of the requirement for medical certification and when it is due (at least 15 days after you request leave). If you provide at least 30 days notice of medical leave, you should also provide the medical certification before leave begins. Failure to provide requested medical certification in a timely manner may result in denial of leave until it is provided.

\_\_\_\_\_, at its expense, may require an examination by a second health care provider designated by \_\_\_\_\_, if it reasonably doubts the medical certification you initially provide. If the second health care provider's opinion conflicts with the original medical certification,



\_\_\_\_\_, at its expense, may require a third, mutually agreeable, health care provider to conduct an examination and provide a final and binding opinion. \_\_\_\_\_ may require subsequent medical recertification. Failure to provide requested certification within 15 days, if such is practicable, may result in delay of further leave until it is provided.

**Reporting While On Leave.** If you take leave because of your own serious health condition or to care for a covered relation, you must contact \_\_\_\_\_ on the first day of each month regarding the status of the condition and your intention to return to work. In addition, you must give notice as soon as practicable (within 2 business days if feasible) if the dates of leave change or are extended or initially were unknown.

**Leave Is Unpaid.** Family/medical leave is unpaid leave, although you may be eligible for short-term or long-term disability payments and/or workers' compensation benefits under those insurance plans. In such cases, paid time off such as paid vacation will not be substituted for unpaid time. If you request leave because of a birth, adoption or foster care placement of a child, any accrued paid vacation first will be substituted for unpaid family/medical leave. If you request leave because of your own serious health condition, or to care for a covered relation with a serious health condition, any accrued paid vacation or medical/sick leave first will be substituted for any unpaid family/medical leave. The substitution of paid leave time for unpaid leave time does not extend the 12 week leave period. Further, in no case can the substitution of paid leave time for unpaid leave time result in your receipt of more than 100% of your salary. Your family/medical leave runs concurrently with other types of leave, unless otherwise prohibited by law.

**Medical And Other Benefits.** During an approved family/medical leave, \_\_\_\_\_ will maintain your health benefits as if you continued to be actively employed. If paid leave is substituted for unpaid family/medical leave, \_\_\_\_\_ will deduct your portion of the health plan premium as a regular payroll deduction. If your leave is unpaid, you must pay your portion of the premium through the \_\_\_\_\_'s Office. Your health care coverage will cease if your premium payment is more than 30 days late. If your payment is more than 15 days late, we will send you a letter to this effect. If we do not receive your co-payment within 15 days after the date of this letter, your coverage may cease. If you do not return to work for at least 30 calendar days at the end of the leave period, you will be required to reimburse \_\_\_\_\_ for the cost of the health benefit premiums paid by \_\_\_\_\_ for maintaining coverage during your unpaid leave, unless you cannot return to work because of a serious health condition or other circumstances beyond your control.

**Exemption For Highly Compensated Employees.** Highly compensated employees (i.e., highest paid 10% of employees at a worksite or within 75 miles of that worksite) may not be returned to their former or equivalent position following a leave if restoration of employment will cause substantial economic injury to \_\_\_\_\_. (This fact-specific determination will be made by \_\_\_\_\_ on a case-by-case basis). \_\_\_\_\_ will notify you if you qualify as a "highly compensated" employee, if \_\_\_\_\_ intends to deny reinstatement, and of your rights in such instances.

**Intermittent And Reduced Leave Schedule.** Leave because of a serious health condition, may be taken intermittently (in separate blocks of time due to a single health condition) or on a reduced leave schedule (reducing the usual number of hours you work per workweek or workday) if medically necessary. If leave is unpaid, \_\_\_\_\_ will reduce your salary based on the amount of time actually worked. In addition, while you are on an intermittent or reduced leave schedule, \_\_\_\_\_ may temporarily transfer you to an available alternative position which better accommodates your recurring leave and which has equivalent pay and benefits.

**Returning From Leave.** If you take leave because of your own serious health condition, (except if you are taking intermittent leave) you are required to provide medical certification that you are fit to resume work. You may obtain Return to Work Medical Certification Forms from the \_\_\_\_\_'s Office. Employees failing to provide the Return to Work Medical Certification Form will not be permitted to resume work until it is provided.

Consistent with applicable law, if you fail to return to work upon expiration of your leave, you will be considered to have voluntarily resigned.

**No Work While On Leave.** The taking of another job while on Family/Medical Leave or any other authorized leave of absence may lead to disciplinary action, up to and including discharge.

**State And Local Family And Medical Leave Laws.** Where State or local family and medical leave laws offer more protections or benefits to employees, the protections or benefits provided by such laws will apply.

**Definitions.** For the purposes of this policy, the following definitions apply:

“Spouse” is defined in accordance with applicable State law of the state where the employee resides, including common law marriages where recognized by the state where the employee resides.

“Parent” includes biological parents and individuals who acted as your parents, but does not include parents in-law.

“Son” or “daughter” includes biological, adopted, foster children, stepchildren, legal wards, and other persons for whom you act in the capacity of a parent and who is under 18 years of age or over 18 years of age but incapable of caring for themselves because of a physical or mental disability.

“Serious Health Conditions” means an illness, injury, impairment, or physical or mental condition which involves: (1) “Inpatient care,” meaning an overnight stay in a hospital, hospice or residential care facility, including any period of “incapacity” or any subsequent

“treatment” in connection with such inpatient care; or (2) “Continuing treatment” by a “health care provider,” meaning an incapacity of more than three consecutive calendar days; and (a) two or more treatments by a health care provider, by a nurse or physician’s assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders or referral of a health care provider; or (b) one treatment by a health care provider which results in a “regimen of continuing treatment” under the supervision of the health care provider (e.g., prescription medication).

Any period of incapacity because of pregnancy or prenatal care (even without treatment by a health care provider during the absence and even if the absence is less than 3 days: e.g., morning sickness); or any period of incapacity because of a “chronic serious health condition” (even without treatment by a health care provider during the absence and even if the absence is less than 3 days: e.g., asthma attack, migraine headaches, etc.); or any period of absence to receive multiple treatments by health care providers or provider of health care services (under order or referral of a health care provider) for restorative surgery after an accident, injury, or for a condition that would likely result in a period of incapacity of more than 3 consecutive calendar days if untreated: e.g., cancer (chemotherapy); severe arthritis (physical therapy); kidney disease (dialysis).

“Continuing treatment” means: (1) two or more treatments by a health care provider; (2) two or more treatments by a provider of health care services (e.g., physical therapist) on referral by or under orders of a health care provider; (3) at least one treatment by a health care provider which results in a regimen of continuing treatment under the supervision of the health care provider (e.g., a program of medication or therapy); or (4) under the supervision of, although not actively treated by, a health care provider for a serious long-term or chronic condition or disability which cannot be cured (e.g., Alzheimer’s or severe stroke).

“Health care provider” means: (1) an MD or OD licensed by the State (or country in which he/she practices); (2) podiatrists, dentists, clinical psychologists, optometrists, chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist) authorized to practice under State law; (3) nurse practitioners and nurse-midwives authorized under State law; (4) Christian Science practitioners (may be required to submit to second or third certification through examination - not treatment of a health care provider); (5) certified social workers; (6) a health care provider also includes a health care provider who practices in a foreign country in accordance with the laws of that country, and; (7) any other health care provider from whom the employer or the employer’s group health plan benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits.

“Needed to care for” a family member encompasses: (1) physical and psychological care of a child, spouse or parent with a serious health condition; and (2) where the employee is needed to fill in for others providing care or to arrange for third party care of a child, spouse or parent who is receiving inpatient or home care.

The phrase “unable to perform the functions of his/her job” means an employee is: (1) unable to work at all; or (2) unable to perform any one of the essential functions of his/her position at

the time notice is given or leave commenced, whichever is earlier. The term “essential functions” is borrowed from the Americans with Disabilities Act (“ADA”) to mean “the fundamental job duties of the employment position,” but does not include the marginal functions of the position.

**For Additional Information.** If you have any questions about \_\_\_\_\_’s leave policy, please refer to the policy in the employment handbook, or contact your \_\_\_\_\_ or the \_\_\_\_\_’s Office.

## FAMILY AND MEDICAL LEAVE POLICY

**The Leave Policy.** You are eligible to take up to 12 weeks of unpaid family/medical leave within any 12 month period and be restored to the same or an equivalent position upon your return from leave provided you: (1) have worked for the Company for at least 12 months, and for at least 1250 hours in the last 12 months; and (2) are employed at a worksite that has 50 or more employees within 75 miles. [Companies must specify how to calculate the 12 month period. We recommend the "rolling" 12-month method.]

**Reasons For Leave.** You may take family/medical leave for any of the following reasons: (1) the birth of a son or daughter and in order to care for such son or daughter; (2) the placement of a son or daughter with you for adoption or foster care and in order to care for the newly placed son or daughter; (3) to care for a spouse, son, daughter, or parent ("covered relation") with a serious health condition; or (4) because of your own serious health condition which renders you unable to perform any of the essential functions of your position. Leave because of reasons "1" or "2" must be completed within the 12 month period beginning on the date of birth or placement. In addition, spouses employed by the Company who request leave because of reasons "1" or "2" or to care for an employee's parent with a serious health condition may only take a combined total of 12 weeks leave during any 12 month period.

**Notice Of Leave.** If your need for family/medical leave is foreseeable, you must give the Company at least 30 days prior written notice. If this is not possible, you must at least give notice as soon as practicable (within 1 to 2 business days of learning of your need for leave). Failure to provide such notice may be grounds for delay of leave. Additionally, if you are planning a medical treatment you must consult with the Company first regarding the dates of such treatment. Where the need for leave is not foreseeable, you are expected to notify the Company within 1 to 2 business days of learning of your need for leave, except in extraordinary circumstances. The Company has Request for Family/Medical Leave forms available from the Human Resources Department. You should use these forms when requesting leave.

**Medical Certification.** If you are requesting leave because of your own or a covered relation's serious health condition, you and the relevant health care provider must supply appropriate medical certification. You may obtain Medical Certification Forms from the Human Resources Department. When you request leave, the Company will notify you of the requirement for medical certification and when it is due (at least 15 days after you request leave). If you provide at least 30 days notice of medical leave, you should also provide the medical certification before leave begins. Failure to provide requested medical certification in a timely manner may result in denial of leave until it is provided.

The Company, at its expense, may require an examination by a second health care provider designated by the Company, if it reasonably doubts the medical certification you initially provide. If the second health care provider's opinion conflicts with the original medical certification, the Company, at its expense, may require a third, mutually agreeable, health care provider to conduct

an examination and provide a final and binding opinion. The Company may require subsequent medical recertification. Failure to provide requested certification within 15 days, if such is practicable, may result in delay of further leave until it is provided.

**Reporting While On Leave.** If you take leave because of your own serious health condition or to care for a covered relation, you must contact the Company on the first and third Tuesday of each month regarding the status of the condition and your intention to return to work. In addition, you must give notice as soon as practicable (within 2 business days if feasible) if the dates of leave change or are extended or initially were unknown.

**Leave Is Unpaid.** Family/medical leave is unpaid leave [although you may be eligible for short or long-term disability payments and/or workers' compensation benefits under those insurance plans. These plans are described elsewhere in the handbook.] [Employers should be advised that leave is not unpaid if an employee receives workers' compensation or STD benefits. In such cases, paid time off such as paid vacation may not be substituted for unpaid time]. If you request leave because of a birth, adoption or foster care placement of a child, any accrued paid vacation, [personal leave or family leave] first will be substituted for unpaid family/medical leave. If you request leave because of your own serious health condition, or to care for a covered relation with a serious health condition, any accrued paid vacation [personal leave, family or medical/sick leave] first will be substituted for any unpaid family/medical leave. The substitution of paid leave time for unpaid leave time does not extend the 12 week leave period. Further, in no case can the substitution of paid leave time for unpaid leave time result in your receipt of more than 100% of your salary. **Your family/medical leave runs concurrently with other types of leave, unless otherwise prohibited by law (i.e., paid vacation, state family leave laws, etc.).** [Employers may elect to make leave paid or unpaid. The bracketed material must be modified depending on whether the Company provides paid personal, family or medical/sick leave and under what circumstances these paid leaves may be used].

**Medical And Other Benefits.** During an approved family/medical leave, the Company will maintain your health benefits, as if you continued to be actively employed. If paid leave is substituted for unpaid family/medical leave, the Company will deduct your portion of the health plan premium as a regular payroll deduction. If your leave is unpaid, you must pay your portion of the premium through [employers should specify the method they wish to use.] Your health care coverage will cease if your premium payment is more than 30 days late. If your payment is more than 15 days late, we will send you a letter to this effect. If we do not receive your co-payment within 15 days after the date of this letter, your coverage may cease. If you elect not to return to work for at least 30 calendar days at the end of the leave period, you will be required to reimburse the Company for the cost of the health benefit premiums paid by the Company for maintaining coverage during your unpaid leave, unless you cannot return to work because of a serious health condition or other circumstances beyond your control.

**Exemption For Highly Compensated Employees.** Highly compensated employees (i.e., highest paid 10% of employees at a worksite or within 75 miles of that worksite) may not be

returned to their former or equivalent position following a leave if restoration of employment will cause substantial economic injury to the Company. (This fact-specific determination will be made by the Company on a case-by-case basis). The Company will notify you if you qualify as a “highly compensated” employee, if the Company intends to deny reinstatement, and of your rights in such instances. [This exception is so difficult to satisfy, employers may wish to delete reference to it.]

**Intermittent And Reduced Schedule Leave.** Leave because of a serious health condition, may be taken intermittently (in separate blocks of time due to a single health condition) or on a reduced leave schedule (reducing the usual number of hours you work per workweek or workday) if medically necessary. If leave is unpaid, the Company will reduce your salary based on the amount of time actually worked. In addition, while you are on an intermittent or reduced schedule leave, the Company may temporarily transfer you to an available alternative position which better accommodates your recurring leave and which has equivalent pay and benefits.

**Returning From Leave.** If you take leave because of your own serious health condition, (except if you are taking intermittent leave) you are required to provide medical certification that you are fit to resume work. You may obtain Return to Work Medical Certification Forms from the Human Resources Department. Employees failing to provide the Return to Work Medical Certification Form will not be permitted to resume work until it is provided.

Consistent with applicable law, if you fail to return to work upon expiration of your leave, you will be considered to have voluntarily resigned.

**Extended Leave For Serious Health Condition.** [Optional, based on a typical disability pay and extended leave policy.] Leave taken because of your own serious health condition may be extended on a month-to-month basis for a maximum of an additional [ ] weeks upon: (1) written request to the Company; (2) proof that the serious health condition has continued; and (3) approval by the Company (which is subject to its business needs). If you do not return to work on the originally scheduled return date nor request in advance an extension of the agreed upon leave with appropriate documentation, you will be deemed to have voluntarily terminated your employment with the Company. If you request an extension of your leave beyond the initial 12 week period, you must submit medical certification of your continued serious health condition in advance for each month that the leave is extended. Reinstatement is not guaranteed on an extended leave and will depend on Company needs.

**No Work While On Leave.** [Optional.] The taking of another job while on Family/Medical Leave or any other authorized leave of absence may lead to disciplinary action, up to and including discharge.

**State And Local Family And Medical Leave Laws.** Where State or local family and medical leave laws offer more protections or benefits to employees, the protections or benefits provided by such laws will apply.

**Definitions.** [Optional] For the purposes of this policy, the following definitions apply:

“Spouse” is defined in accordance with applicable State law of the state where the employee resides, including common law marriages where recognized by the state where the employee resides.

“Parent” includes biological parents and individuals who acted as your parents, but does not include parents in-law.

“Son” or “daughter” includes biological, adopted, foster children, stepchildren, legal wards, and other persons for whom you act in the capacity of a parent and who is under 18 years of age or over 18 year of age but incapable of caring for themselves because of a physical or mental disability.

“Serious Health Condition” means an illness, injury, impairment, or physical or mental condition which involves: (1) “Inpatient care,” meaning an overnight stay in a hospital, hospice or residential care facility, including any period of “incapacity” or any subsequent “treatment” in connection with such inpatient care; or (2) “Continuing treatment” by a “health care provider,” meaning an incapacity of more than three consecutive calendar days; and (a) two or more treatments by a health care provider, by a nurse or physician’s assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders or referral of a health care provider; or (b) one treatment by a health care provider which results in a “regimen of continuing treatment” under the supervision of the health care provider (e.g., prescription medication).

Any period of incapacity because of pregnancy or prenatal care (even without treatment by a health care provider during the absence and even if the absence is less than 3 days: e.g., morning sickness); or any period of incapacity because of a “chronic serious condition” (even without treatment by a health care provider during the absence and even if the absence is less than 3 days: e.g., asthma attack, migraine headaches, etc.); or any period of absence to receive multiple treatments by health care providers or provider of health care services (under order or referral of a health care provider) for restorative surgery after an accident, injury, or for a condition that would likely result in a period of incapacity of more than 3 consecutive calendar days if untreated: e.g., cancer (chemotherapy); severe arthritis (physical therapy); kidney disease (dialysis).

“Continuing treatment” means: (1) two or more treatments by a health care provider; (2) two or more treatments by a provider of health care services (e.g., physical therapist) on referral by or under orders of a health care provider; (3) at least one treatment by a health care provider which results in a regimen of continuing treatment under the supervision of the health care provider (e.g., a program of medication or therapy); or (4) under the supervision of, although not actively treated by, a health care provider for a serious long-term or chronic condition or disability which can not be cured (e.g., Alzheimer’s or severe stroke).



“Health care provider” means: (1) an MD or OD licensed by the State (or country in which he/she practices); (2) podiatrists, dentists, clinical psychologists, optometrists, chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist) authorized to practice under State law; (3) nurse practitioners and nurse-midwives authorized under State law; (4) Christian Science practitioners (may be required to submit to second or third certification through examination - not treatment of a health care provider); (5) certified social workers; (6) a health care provider also includes a health care provider who practices in a foreign country in accordance with the laws of that country, and; (7) any other health care provider from whom the employer or the employer’s group health plan benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits.

“Needed to care for” a family member encompasses: (1) physical and psychological care of a child, spouse or parent with a serious health condition; and (2) where the employee is needed to fill in for others providing care or to arrange for third party care of a child, spouse or parent who is receiving inpatient or home care.

The phrase “unable to perform the functions of his/her job” means an employee is: (1) unable to work at all; or (2) unable to perform any one of the essential functions of his/her position at the time notice is given or leave commenced, whichever is earlier. The term “essential functions” is borrowed from the Americans with Disabilities Act (“ADA”) to mean “the fundamental job duties of the employment position,” but does not include the marginal functions of the position.

**For Additional Information.** If you have any questions about the Company’s leave policy, please refer to the policy in the employment handbook, or contact \_\_\_\_\_.

<b>FEDERAL FAMILY/MEDICAL LEAVE REQUEST FOR LEAVE</b>	
<i>PART I: TO BE COMPLETED BY EMPLOYEE (Type or Print)</i>	
1. Name of employee (First Name, Middle Initial, Last Name)	2. Employee's position
3. Reason for requested leave: a. <input type="checkbox"/> Birth of a son or daughter of the employee and in order to care for such son or daughter. b. <input type="checkbox"/> Placement of a son or daughter with employee for adoption or foster care. c. <input type="checkbox"/> In order to care for a spouse, child or parent ("covered relation") with a serious health condition, or d. <input type="checkbox"/> Because of my own serious health condition which makes me unable to perform the functions of my position.	
4. If "c," please check one:  <input type="checkbox"/> Spouse <input type="checkbox"/> Child <input type="checkbox"/> Parent	5. If "c," state name and address of relation.
6. Date on which you wish to commence leave.	7. Date of anticipated return to work.
8. Are you requesting leave on an intermittent or reduced-schedule leave?  <input type="checkbox"/> Yes <input type="checkbox"/> No	9. If "yes," please give schedule of when you anticipate you will be unavailable for work.

<b>FEDERAL FAMILY/MEDICAL LEAVE RETURN TO WORK MEDICAL CERTIFICATION</b>	
<b><i>PART I: TO BE COMPLETED BY EMPLOYEE (Type or Print)</i></b>	
1. Name of employee (First Name, Middle Initial, Last Name)	2. Employees position
3. Date leave commenced	4. Date of planned return to work
5. Signature of employee	
_____ Signed	_____ Dated
<b><i>PART II: TO BE COMPLETED BY EMPLOYEES HEALTH CARE PROVIDER</i></b>	
6. I certify that on _____, _____ is able to resume (Date) (Name of Employee) performing the functions of his/her position with or without reasonable accommodation.	
Signed:	Dated:
7. Health Care providers name, address & telephone number.	

<b>FEDERAL FAMILY/MEDICAL LEAVE SCHEDULE OF EMPLOYEE PERIODIC REPORTS DURING LEAVE</b>			
<b><i>TO BE COMPLETED BY EMPLOYER</i></b>			
This form is to be used by _____ to keep track of the periodic reports by the employee.			
Employees on leave must contact _____ on the first day of each month regarding their status and intention to return to work.			
Date of Periodic Report	Status of Health Condition	Date of Anticipated Return to Work	Signature of Person Who Conducted Periodic Report

Certification of Health Care Provider  
(Family and Medical Leave Act of 1993)

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



(When completed, this form goes to the employee, **Not to the Department of Labor.**)

OMB No.: 1215-0181  
Expires: 08-31-2007

1. Employee's Name

2. Patient's Name (If different from employee)

3. Page 4 describes what is meant by a "**serious health condition**" under the Family and Medical Leave Act. Does the patient's condition<sup>1</sup> qualify under any of the categories described? If so, please check the applicable category.

(1) \_\_\_\_\_ (2) \_\_\_\_\_ (3) \_\_\_\_\_ (4) \_\_\_\_\_ (5) \_\_\_\_\_ (6) \_\_\_\_\_, or None of the above \_\_\_\_\_

4. Describe the **medical facts** which support your certification, including a brief statement as to how the medical facts meet the criteria of one of these categories:

5. a. State the approximate **date** the condition commenced, and the probable duration of the condition (and also the probable duration of the patient's present **incapacity**<sup>2</sup> if different):

b. Will it be necessary for the employee to take work only **intermittently or to work on a less than full schedule** as a result of the condition (including for treatment described in Item 6 below)?

If yes, give the probable duration:

c. If the condition is a **chronic condition** (condition #4) or **pregnancy**, state whether the patient is presently incapacitated<sup>2</sup> and the likely duration and frequency of **episodes of incapacity**<sup>2</sup>:

<sup>1</sup> Here and elsewhere on this form, the information sought relates **only** to the condition for which the employee is taking FMLA leave.

<sup>2</sup> "Incapacity," for purposes of FMLA, is defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom.

- 
6. a. If additional **treatments** will be required for the condition, provide an estimate of the probable number of such treatments.

If the patient will be absent from work or other daily activities because of **treatment** on an **intermittent** or **part-time** basis, also provide an estimate of the probable number of and interval between such treatments, actual or estimated dates of treatment if known, and period required for recovery if any:

- b. If any of these treatments will be provided by **another provider of health services** (e.g., physical therapist), please state the nature of the treatments:
- c. **If a regimen of continuing treatment** by the patient is required under your supervision, provide a general description of such regimen (e.g., prescription drugs, physical therapy requiring special equipment):

- 
7. a. If medical leave is required for the employee's **absence from work** because of the **employee's own condition** (including absences due to pregnancy or a chronic condition), is the employee **unable to perform work** of any kind?

- b. If able to perform some work, is the employee **unable to perform any one or more of the essential functions of the employee's job** (the employee or the employer should supply you with information about the essential job functions)?  
If yes, please list the essential functions the employee is unable to perform:

- c. If neither a. nor b. applies, is it necessary for the employee to be **absent from work for treatment**?

8. a. If leave is required to **care for a family member** of the employee with a serious health condition, **does the patient require assistance** for basic medical or personal needs or safety, or for transportation?

b. If no, would the employee's presence to provide **psychological comfort** be beneficial to the patient or assist in the patient's recovery?

c. If the patient will need care only **intermittently** or on a part-time basis, please indicate the probable **duration** of this need:

\_\_\_\_\_  
Signature of Health Care Provider

\_\_\_\_\_  
Type of Practice

\_\_\_\_\_  
Address

\_\_\_\_\_  
Telephone Number

\_\_\_\_\_  
Date

**To be completed by the employee needing family leave to care for a family member:**

State the care you will provide and an estimate of the period during which care will be provided, including a schedule if leave is to be taken intermittently or if it will be necessary for you to work less than a full schedule:

\_\_\_\_\_  
Employee Signature

\_\_\_\_\_  
Date

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A **"Serious Health Condition"** means an illness, injury impairment, or physical or mental condition that involves one of the following:

1. Hospital Care

**Inpatient care** (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity<sup>2</sup> or subsequent treatment in connection with or consequent to such inpatient care.

2. Absence Plus Treatment

(a) A period of incapacity<sup>2</sup> of **more than three consecutive calendar days** (including any subsequent treatment or period of incapacity<sup>2</sup> relating to the same condition), that also involves:

- (1) **Treatment<sup>3</sup> two or more times** by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or
- (2) **Treatment** by a health care provider on **at least one occasion** which results in a **regimen of continuing treatment<sup>4</sup>** under the supervision of the health care provider.

3. Pregnancy

Any period of incapacity due to **pregnancy**, or for **prenatal care**.

4. Chronic Conditions Requiring Treatments

A **chronic condition** which:

- (1) Requires **periodic visits** for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;
- (2) Continues over an **extended period of time** (including recurring episodes of a single underlying condition); and
- (3) May cause **episodic** rather than a continuing period of incapacity<sup>2</sup> (e.g., asthma, diabetes, epilepsy, etc.).

5. Permanent/Long-term Conditions Requiring Supervision

A period of **Incapacity<sup>2</sup>** which is **permanent or long-term** due to a condition for which treatment may not be effective. The employee or family member must be **under the continuing supervision of, but need not be receiving active treatment by, a health care provider**. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

6. Multiple Treatments (Non-Chronic Conditions)

Any period of absence to receive **multiple treatments** (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for **restorative surgery** after an accident or other injury, or for a condition that **would likely result in a period of incapacity<sup>2</sup> of more than three consecutive calendar days in the absence of medical intervention or treatment**, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), and kidney disease (dialysis).

This optional form may be used by employees to satisfy a mandatory requirement to furnish a medical certification (when requested) from a health care provider, including second or third opinions and recertification (29 CFR 825.306).

*Note:* Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number.

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<sup>3</sup> Treatment includes examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations.

<sup>4</sup> A regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition. A regimen of treatment does not include the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider.

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#### Public Burden Statement

We estimate that it will take an average of 20 minutes to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

**DO NOT SEND THE COMPLETED FORM TO THIS OFFICE; IT GOES TO THE EMPLOYEE.**

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Employer Response to Employee  
Request for Family or Medical Leave  
(Optional Use Form -- See 29 CFR § 825.301)

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



**(Family and Medical Leave Act of 1993)**

OMB No. : 1215-0181  
Expires : 08-31-07

Date:

To: \_\_\_\_\_  
(Employee's Name)

From: \_\_\_\_\_  
(Name of Appropriate Employer Representative)

**Subject: REQUEST FOR FAMILY/MEDICAL LEAVE**

On \_\_\_\_\_, you notified us of your need to take family/medical leave due to:  
(Date)

- The birth of a child, or the placement of a child with you for adoption or foster care; or
- A serious health condition that makes you unable to perform the essential functions for your job; or
- A serious health condition affecting your  spouse,  child,  parent, for which you are needed to provide care.

You notified us that you need this leave beginning on \_\_\_\_\_ and that you expect  
(Date)  
leave to continue until on or about \_\_\_\_\_.  
(Date)

Except as explained below, you have a right under the FMLA for up to 12 weeks of unpaid leave in a 12-month period for the reasons listed above. Also, your health benefits must be maintained during any period of unpaid leave under the same conditions as if you continued to work, and you must be reinstated to the same or an equivalent job with the same pay, benefits, and terms and conditions of employment on your return from leave. If you do not return to work following FMLA leave for a reason other than: (1) the continuation, recurrence, or onset of a serious health condition which would entitle you to FMLA leave; or (2) other circumstances beyond your control, you may be required to reimburse us for our share of health insurance premiums paid on your behalf during your FMLA leave.

This is to inform you that: (check appropriate boxes, explain where indicated)

1. You are  eligible  not eligible for leave under the FMLA.
2. The requested leave  will  will not be counted against your annual FMLA leave entitlement.
3. You  will  will not be required to furnish medical certification of a serious health condition. If required, you must furnish certification by \_\_\_\_\_ (insert date) (must be at least 15 days after you are notified of this requirement), or we may delay the commencement of your leave until the certification is submitted.
4. You may elect to substitute accrued paid leave for unpaid FMLA leave. We  will  will not require that you substitute accrued paid leave for unpaid FMLA leave. If paid leave will be used, the following conditions will apply: (Explain)

Form WH-381  
Rev. June 1997

5. (a) If you normally pay a portion of the premiums for your health insurance, these payments will continue during the period of FMLA leave. Arrangements for payment have been discussed with you, and it is agreed that you will make premium payments as follows: *(Set forth dates, e.g., the 10th of each month, or pay periods, etc. that specifically cover the agreement with the employee.)*
- (b) You have a minimum 30-day *(or, indicate longer period, if applicable)* grace period in which to make premium payments. If payment is not made timely, your group health insurance may be cancelled, *provided* we notify you in writing at least 15 days before the date that your health coverage will lapse, or, at our option, we may pay your share of the premiums during FMLA leave, and recover these payments from you upon your return to work. We  will  will not pay your share of health insurance premiums while you are on leave.
- (c) We  will  will not do the same with other benefits *(e.g., life insurance, disability insurance, etc.)* while you are on FMLA leave. If we do pay your premiums for other benefits, when you return from leave you  will  will not be expected to reimburse us for the payments made on your behalf.

6. You  will  will not be required to present a fitness-for-duty certificate prior to being restored to employment. If such certification is required but not received, your return to work may be delayed until certification is provided.

7. (a) You  are  are not a "key employee" as described in § 825.217 of the FMLA regulations. If you are a "key employee:" restoration to employment may be denied following FMLA leave on the grounds that such restoration will cause substantial and grievous economic injury to us as discussed in § 825.218.
- (b) We  have  have not determined that restoring you to employment at the conclusion of FMLA leave will cause substantial and grievous economic harm to us. *(Explain (a) and/or (b) below. See §825.219 of the FMLA regulations.)*

8. While on leave, you  will  will not be required to furnish us with periodic reports every \_\_\_\_\_ *(indicate interval of periodic reports, as appropriate for the particular leave situation)* of your status and intent to return to work *(see § 825.309 of the FMLA regulations)*. If the circumstances of your leave change and you are able to return to work earlier than the date indicated on the reverse side of this form, you  will  will not be required to notify us at least two work days prior to the date you intend to report to work.

9. You  will  will not be required to furnish recertification relating to a serious health condition. *(Explain below, if necessary, including the interval between certifications as prescribed in §825.308 of the FMLA regulations.)*

This optional use form may be used to satisfy mandatory employer requirements to provide employees taking FMLA leave with Written notice detailing specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. (29 CFR 825.301(b).)

Note: Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number.

#### Public Burden Statement

We estimate that it will take an average of 5 minutes to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, DC 20210.

**DO NOT SEND THE COMPLETED FORM TO THE OFFICE SHOWN ABOVE.**

## SAMPLE FMLA LETTER TO EMPLOYEE

Date

Dear \_\_\_\_\_:

Enclosed is a copy of \_\_\_\_\_'s Family and Medical Leave Act ("FMLA") Policy. Also enclosed are forms to request leave under the FMLA. **(Optional - Your FMLA leave is provisional and will begin on \_\_\_\_\_ pending receipt of the completed forms).** After receipt of the completed forms, your eligibility for FMLA will be determined.

The following forms are to be completed and promptly returned to \_\_\_\_\_:

1. Request for Leave Form (to be completed by you and returned immediately);
2. Certification of Health Care Provider (to be completed by the health care provider and returned within 15 days).

Should you have any questions, please contact me.

Very truly yours,

[Name]

**SAMPLE FMLA LETTER TO EMPLOYEE  
(VERSION 2)**

Date

Dear \_\_\_\_\_:

**[Optional - Enclosed is a copy of \_\_\_\_\_'s Family and Medical Leave Act ("FMLA") Policy.]** Enclosed are forms to request leave under the Family and Medical Leave Act ("FMLA"). After receipt of the completed forms, your eligibility for FMLA will be determined. Your FMLA leave is provisional and will begin on \_\_\_\_\_ pending receipt of the completed forms, and determination of FMLA eligibility.

The following forms are to be completed and promptly returned to \_\_\_\_\_:

1. Request for Leave Form (to be completed by you and returned immediately);
2. Certification of Health Care Provider (to be completed by the health care provider and returned within 15 days).

Should you have any questions, please contact me.

Very truly yours,

[Name]

## SAMPLE LETTER TO EMPLOYEE (STD AND FMLA)

Date

Dear \_\_\_\_\_:

Enclosed is a copy of \_\_\_\_\_'s Family and Medical Leave Act ("FMLA") Policy. Based on the medical information submitted to \_\_\_\_\_ and your eligibility for short term disability, your leave commencing from \_\_\_\_\_ to \_\_\_\_\_ qualifies as leave under the FMLA. Accordingly, while you are on short term disability from \_\_\_\_\_ to \_\_\_\_\_, you will also be concurrently on FMLA leave. See attached FMLA leave form. [Complete and attach Employer Response to Employee Request for FMLA Leave form]

Should you have any questions, please contact me.

Very truly yours,

[Name]

## SAMPLE LETTER TO EMPLOYEE (WC AND FMLA)

Date

Dear \_\_\_\_\_:

Enclosed is a copy of \_\_\_\_\_'s Family and Medical Leave Act ("FMLA") Policy. Based on the medical information we have received and your eligibility for workers' compensation, your time off work on workers' compensation from \_\_\_\_\_ to \_\_\_\_\_ qualifies as leave under the FMLA. Accordingly, while you are on workers' compensation from \_\_\_\_\_ to \_\_\_\_\_, you will also be concurrently on FMLA leave. See attached FMLA leave form. [Complete and attach Employer Response to Employee Request for FMLA Leave form]

Should you have any questions, please contact me.

Very truly yours,

[Name]

## THE BASICS - ADA

- A disability is:
  - A physical or mental impairment that substantially limits one or more major life activities
  - A record of such an impairment
  - Or being regarded as having such an impairment
- A qualified individual with a disability is one who has such an impairment, yet who can perform the essential functions of the job with or without reasonable accommodation

## WHAT IS A REASONABLE ACCOMMODATION?

- Any change in the work environment or in the way things are customarily done that would enable a qualified individual with a disability to enjoy equal employment opportunities

## WHAT IS NOT A REASONABLE ACCOMMODATION?

- Eliminating essential job functions or reassigning them
- Excusing or forgiving misconduct
- Changing a supervisor
- Monitoring medications
- Violating a seniority system
- Withholding discipline

## LEAVE ACCOMMODATIONS

- Must develop peripheral vision
- Must see the laws intersect
- Must train supervisors on when these laws come into play
- Must integrate legal and HR earlier and deeper into the process



## LEAVE ACCOMMODATIONS

- Leave Plan Analysis (LPA)
  - Step One: Provide all leave employees are “entitled” by law
  - Step Two: Provide all leave permitted under company policies
  - Step Three: Provide additional leave as reasonable accommodation if necessary

## LEAVE ACCOMMODATIONS STEP ONE

- Determining leave entitlement by law:
  - FMLA
  - State leave laws
  - State or local anti-discrimination laws
  - State workers’ comp laws

## LEAVE ACCOMMODATIONS STEP TWO

- Determining how much leave is permitted under policies
  - Consider paid and unpaid leave
  - Distinguish between right to compensation (i.e., STD, LTD, workers' compensation) vs. job restoration

## LEAVE ACCOMMODATIONS STEP THREE

- Additional leave as a reasonable accommodation
  - Leave need not be paid
  - EEOC says it carries with it a right to job restoration
  - Is there a definite date of return? If indefinite date, likely to be undue hardship