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Family Medical Leave Act (2010)

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FAMILY MEDICAL LEAVE ACT

Bonnie Curran Jones, Human Resource Consultant
April 2010

THE UNIVERSITY of TENNESSEE 
MUNICIPAL TECHNICAL ADVISORY SERVICE

In cooperation with the Tennessee Municipal League



FAMILY MEDICAL LEAVE ACT

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BACKGROUND

The Family and Medical Leave Act (FMLA), a federal law passed in 1993, requires employers to grant eligible employees job protected leave for their own serious health conditions, birth, legal placement or adoption of children or to care for an eligible seriously ill family member.

In early 2008, the President amended the law to provide two new family leave entitlements for military families. The new law was amended to provide:

- 1) Up to 12 weeks of leave for certain qualifying exigencies arising out of a covered military member's active duty status, or notification of an impending call or order to active duty status, in support of a contingency operation, and
- 2) Up to 26 weeks of leave in a single 12-month period to care for a covered service member recovering from a serious injury or illness incurred in the line of duty on active duty. Eligible employees are entitled to a combined total of up to 26 weeks of all types of FMLA leave during the single 12-month period.

In November 2008, the Department of Labor (DOL) issued the final regulations, which not only addressed these new military entitlements, but also aimed at clarifying existing FMLA rules. After much discussion, the final regulations sought to enhance communication between employees, health care providers, and employers. While these new regulations do provide clarity, there are regular circumstances in which judgment is required. This was the first significant change to the FMLA in more than a decade.

THE NATIONAL DEFENSE AUTHORIZATION ACT

On October 27, 2009, President Obama signed the National Defense Authorization Act (NDAA) of 2010. The general purpose of the law is to annually authorize funding for the defense of the United States and its interests abroad, for military construction, and for national security-related energy programs.

Among other things, NDAA expanded the scope of FMLA which includes:

- **Expanded Eligibility:** Qualifying exigency leave is expanded to include members of the regular Armed Forces who are deployed to a foreign country. (Previously, qualifying exigency leave was only available for covered military members in the *Reserves or Guard*.)
- **Veteran Leave:** Eligible employees will be able to elect military caregiver leave for those veterans who served in the regular Armed Forces or the Military Reserves within five years of the date the veterans undergo medical treatment, recuperation or therapy. Previously, military caregiver leave was only available to care for current members of the Armed Forces, Guard or Reserves.
- **Federal Expansion, Title II:** The legislation includes qualifying exigency leave for federal employees covered by Title II of the FMLA. Previously, federal employees covered by Title II did not have the right to take qualifying exigency leave.
- **Pre-existing Condition Expansion:** Military caregiver leave was expanded to cover aggravation of existing or pre-existing injuries incurred in the line of duty while on active duty.



Previously, DOL regulations did not consider aggravation of existing injuries incurred in the line of duty while on active duty as a basis for taking military caregiver leave under the FMLA. The illness or injury would need to rise to the level of a subsequent injury or illness to be considered as eligible for the FMLA.

FINAL FMLA REGULATIONS EFFECTIVE JANUARY 1, 2009

After a two-year period that involved nearly 20,000 comments, the Department of Labor released a significant update to the Family and Medical Leave Act that took effect January 16, 2009.

The final update includes clarifications to the military benefit enhancements that were released in early 2008 (NDAA) and specifies how to administer the changes that came about as a result of the amendment.

In addition, the rule re-organizes the traditional FMLA regulations and clarifies the statute’s rights and obligations. The DOL also used this occasion to amend and create new forms that should be used for certification requirements regarding the use of FMLA and military family leave. The DOL took the opportunity to review thousands of employer and public comments and questions on all areas of FMLA and addressed many of those administrative issues in the final 762 pages of regulations. The final regulations can be accessed at <http://www.dol.gov/federalregister/PdfDisplay.aspx?DocId=21763>.

In short, the Department of Labor aimed to use a common sense approach to help Americans better comprehend their benefits under the FMLA while taking into consideration the cumbersome administration burdens the FMLA requires. Employers, employees, and members of the public all had a chance to provide input in the formulation of these new regulations and the DOL offered much legislative background behind its final decision.

FMLA HISTORY

October 27, 2009	President Obama signs National Defense Authorization Act of 2010 that modifies FMLA to expand availability and clarify regulations from 2008.	Assume effective immediately, as the law does not specify an effective date.
January 16, 2009	New FMLA Regulations take effect.	These regulations helped employers in applying the new types of military leave provided under NDAA as well as clarifying traditional types of FML.
December 2008	DOL issues final Rule on FMLA.	Scheduled to become effective January 16, 2009.
November 17, 2008	DOL publishes regulations.	First significant regulations since law was enacted in 1993.
January 28, 2008	FMLA Expansion, which provides enhanced benefits for military families, signed into law.	President Bush
August 5, 1993	FMLA becomes effective.	President Clinton
February 5, 1993	FMLA is signed into law.	President Clinton



A LOOK AT FMLA

FMLA ELIGIBILITY

Generally, Family Medical Leave (FML) eligibility remains unchanged.

- Employees must be employed by or with a covered employer for a total of 12 months. These months do not have to be consecutive. Time the employee is employed by a temporary agency does count toward this 12-month period.
- Employees are required to work at least 1,250 hours over the previous 12 months before becoming eligible for FML, and;
- Employees must work for a covered employer where at least 50 employees are employed by the employer (within a 75-mile radius).

BREAK-IN-SERVICE

Under the new legislation if an employee has a break in employment that lasts seven years or less, the employee's service prior to the service must be counted when determining if the employee has been employed for at least 12 months.

Breaks in service of more than seven years need not be counted unless the break in service was caused by:

- The fulfillment of National Guard or Reserve military duties;
- A written agreement including collective bargaining agreement; or
- The employer's agreement to re-hire the employee after the break.

SERIOUS HEALTH CONDITION

Much to employers' relief, the final rules do not change the fundamental definition of what constitutes a serious health condition. However, it does provide additional timely information in relation to health care provider visits and administering FML.

An employee may have a serious health condition if he or she is incapacitated for more than three

consecutive days and undergoes continuing treatment from a health care provider. In order for continuing treatment to exist, the employee must have an in-house visit with a health care provider within seven days of the onset of the incapacity and have a second visit within 30 days of the incapacity.

Prior to these changes, FMLA regulations simply provided that a serious health condition involved more than three consecutive, full days of incapacity. Now, the final rule indicates that the employee must see his or her health care provider within seven days after the first day of incapacity and have a second visit within 30 days of the incapacity.

In addition, the final rule clarifies that in the case of an employee taking more than three consecutive calendar days of incapacity (days off) plus two visits to a health care provider, the two visits must occur within 30 days of the period of incapacity.

The final rule states that periodic visits to a health care provider for chronic serious health conditions require at least two visits to a health care provider per year. 29 CFR § 825.115(c)(1).

SERIOUS HEALTH CONDITION – ALWAYS A CHALLENGE FOR EMPLOYERS

Section 101(11) of FMLA defines a Serious Health Condition as an Illness, injury, impairment or physical or mental condition that involves:

- inpatient care in a hospital, hospice, or residential medical care facility; or
- continuing treatment by a healthcare provider.

The definition of Serious Health Condition continues to be heavily debated. It is intended to cover illnesses and injuries that require an employee be absent from work more than a few days or on a recurring basis. Serious Health Conditions under FMLA are not intended to cover short and minor



illnesses such as seasonal allergies, colds, stomach bugs and viruses. However, complications that result in serious health conditions (i.e., hospitalizations or advancement to pneumonia, etc.) would certainly qualify as a serious health condition. It is important to note that the medical certification is used to qualify each situation separately. It is certainly possible for one diagnosis to affect one person drastically different from another.

EXAMPLES OF SERIOUS HEALTH CONDITIONS

Some common examples could be: pregnancy (including severe morning sickness), emphysema, appendicitis, severe respiratory conditions (such as chronic asthma), heart attacks, heart conditions requiring bypass or valve operations, back conditions requiring surgery or extensive therapy, most cancers, strokes, spinal injuries, severe arthritis, pneumonia, severe nervous disorders, any serious injury caused by an accident on or off the job, emotional distress following a miscarriage and migraine headaches.

CONTINUING TREATMENT

Continuing treatment generally means treatment two or more times within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health provider. Continuing treatment could also mean treatment by a health care provider on at least one occasion, which results in a regiment of continuing treatment. The two treatments referred to must be in-person and the first treatment/visit must occur within seven days of the first day of incapacity.

Please refer to the regulations for the entirety of the rules related to defining a serious health condition.

SERIOUS HEALTH CONDITIONS: QUESTION AND ANSWER SECTION

DOL: Q AND A

<http://www.dol.gov/esa/whd/opinion/FMLA/prior2002/FMLA-87.htm>

Question 1A: *People on occasion will go to their doctor if their cold or flu lasts more than three days. The doctor may prescribe an antibiotic (which the patient may or may not fill) in case there is a bacterial infection. The regulations state that, ordinarily, unless complications arise, the common cold and flu are not serious health conditions for purposes of FMLA. Can a cold or the flu ever be a serious health condition for purposes of FMLA? (Note: This would also apply to the H1N1 virus.)*

Answer 1A: Yes, the cold or flu may be a serious health condition for FMLA purposes, if the individual is incapacitated for more than three consecutive calendar days and receives continuing treatment by a health care provider, as defined in the regulations.

Question 1B: *What if the employee telephones the doctor but does not actually see the doctor for an examination?*

Answer 1B: If an employee, who has the flu, only telephones the doctor but is not seen or examined by the doctor, those circumstances would not qualify as treatment under the regulations. Treatment means an examination to determine if a serious health condition exists, evaluations of the condition, and actual treatment by the health care provider to resolve or alleviate the condition. A telephone conversation is not an examination. An examination or treatment requires a visit to the health care provider to qualify under FMLA.



Question 1C: *What if the doctor only prescribes medication “in case your cold turns into something more serious?” What if the employee does not have the prescription filled or does not follow the doctor’s orders?*

Answer 1C: A prescription that is given “in case your cold develops into something serious” raises the question of whether the existing condition is a serious health condition for purposes of FMLA. In all likelihood, the employee has not yet suffered the complications that would qualify the illness as a serious health condition for FMLA leave purposes. An employee who does not follow the doctor’s instructions is probably not under a “regimen of continuing treatment by or under the supervision of the health care provider” within the meaning of the FMLA regulations.

Question 1D: *What if the doctor advises the employee to stay at home, drink plenty of fluids, and stay in bed for a few days?*

Answer 1D: Staying at home, drinking fluids, and staying in bed are activities that can be initiated without a visit to a health care provider and do not constitute continuing treatment under the FMLA regulations. See section 825.114(b).

Question 2A: *What if the absence is for strep throat or an ear infection, and the employee goes to the doctor and gets a prescription for an antibiotic, is that a serious health condition?*

Answer 2A: The circumstances surrounding each illness must be evaluated to see if it meets one of the regulatory definitions of a serious health condition. If either a strep throat or ear infection results in an incapacity of more than three consecutive calendar days and involves continuing treatment by a health care provider (which can

include a course of prescription medication like an antibiotic), the illness would be considered a serious health condition for purposes of FMLA.

Question 2B: *Is strep throat without complications a serious health condition just because an antibiotic was prescribed?*

Answer 2B: If an illness such as strep throat incapacitates someone for a period of more than three consecutive calendar days and involves continuing treatment by a health care provider (including a course of prescription medication like an antibiotic), the condition qualifies as a serious health condition for purposes of FMLA.

Question 3A: *What if the employee stays out because her child has bronchitis? She goes to the doctor and medication may or may not be prescribed. Does this meet the criteria for a “serious health condition”?*

Answer 3A: Bronchitis may itself be a serious health condition if it meets one of the regulatory definitions. Bronchitis ordinarily may not be a serious health condition because typically it does not involve incapacity of more than three consecutive calendar days and continuing treatment by a health care provider as defined by the regulations. In the case where the doctor does not prescribe any course of medication to resolve or alleviate the health condition, it would not qualify as a regimen of continuing treatment within the meaning of the regulations.

Question 3B: *If bronchitis may qualify as a serious health condition, does section 825.208(d) of the regulations contradict this when it says “e.g., bronchitis that turns into bronchial pneumonia?”*



Answer 3B: No. The complications of an illness that is not itself ordinarily a serious health condition, i.e., does not routinely meet FMLA's definition of a serious health condition, may convert a routine illness into a serious health condition for FMLA leave purposes (e.g., when bronchitis turns into bronchial pneumonia). In such a situation, it may be difficult to determine when the initial illness became a serious health condition for FMLA leave purposes as a result of complications. Any question regarding the onset of a serious health condition may be resolved by obtaining a medical certification from the employee's health care provider and, where there is reason to doubt the validity of the certification provided a second medical opinion.

Question 4A: *Employees occasionally stay home for a week or more with a child who has chicken pox. Assuming there are no complications, is the employee entitled to leave under FMLA?*

Answer 4A: Based on the limited information in the situation you describe, there appears to be no continuing treatment by a health care provider that would qualify the absence for FMLA leave.

Question 4B: *What if the employee gets chicken pox unrelated to a pregnancy?*

Answer 4B: In the absence of additional information, there appears to be no continuing treatment by a health care provider that would qualify the absence for FMLA leave.

Question 4C: *What if a doctor advises the employee to stay home for a week?*

Answer 4C: The regimen of care described in your question appears to be treatment or activities that can be initiated without a visit to a health care provider. Under those circumstances, without other

factors, the situations would not qualify as serious health conditions for FMLA leave purposes.

Do several illnesses add up to one?

It's difficult to determine whether an employee has a serious medical condition if several illnesses taken together may constitute a serious health condition, even though none of the illnesses alone would be considered serious under the FMLA.

EMPLOYEE NOTICE REQUIREMENTS

The final rule specifies that employees, absent unusual circumstances, are required to follow an employer's policy relating to proper call-in procedures for reporting FMLA leave absence(s). Employers may require employees seeking FMLA leave to call a "designated number or a specific individual to request leave." 29 CFR § 825.303(c). Under old regulations, an employer could not delay or deny FMLA leave if an employee failed to follow protocol.

In a new ruling, it is specified that once FMLA has been granted for an employee's health condition, the employee must thereafter "specifically reference either the qualifying reason or the need for FMLA leave." 29 CFR § 825.303(b).

In attempt to tighten up this section, the final regulations indicate that even for unforeseeable absences, it should be "practicable" for employees to request leave "either the same day or the next business day." 29 CFR § 825.302(b).

- **Foreseeable Leave:** Employees must provide employers with at least 30 days advance notice before FMLA is to begin if the need for leave is foreseeable. When the employee becomes aware of the need for leave and it is less than 30 days out, the employee needs to notify the employer as soon as "practicable", such as the same day the employee becomes aware or the next day.



- **Unforeseeable Leave:** Employees must provide notice as soon as practicable and within the time prescribed by the employer’s usual and customary notice requirements. This means following the procedure such as calling in or using a specified number, if requested, by the employer.

SUBSTITUTION OF PAID LEAVE

As the Department of Labor pointed out, there is much confusion surrounding FMLA and pay. It is unique to each employee and employer circumstance. FMLA leave is a protection, not a paycheck. Employers’ policies determine if employees will be paid or unpaid and they can require that employees use any and all paid time off concurrently with FMLA leave.

Under the new and revised regulations, all forms of paid leave offered by an employer will be treated the same, regardless of the type of leave substituted. An employee using paid leave concurrently with FMLA leave must follow the same rules of the employer’s policy that apply to other employees. Previously, the DOL may have had different procedural requirements for using FML vs. sick, personal or annual leave. The statute provides that employees may choose to take annual, personal, sick leave concurrently with FMLA. Employers can require their employees to take paid leave.

LIGHT DUTY

Time spent in light duty positions cannot be used against an employee’s FMLA leave entitlement. Under previous FMLA regulations, the employer could count the light duty assignment against the employee’s entitlement. The provision has been revised and now states that employees who accept light duty work need not exhaust their FML by agreeing to perform light duty. Whether light duty is presented as an option or as a mandatory provision, it may not be counted toward an employee’s FMLA benefit. 29 CFR § 825.207(e).

PERFECT ATTENDANCE AWARDS

Final verdict, not everyone gets a medal. Prior FMLA regulations specifically held that employee awards based solely on attendance should not be denied to employees based solely on their absences related to FMLA leave.

The final regulations now state that bonus awards can be administered based on “achievement of a specified goal such as hours worked, products sold or perfect attendance” which means they can be denied to employees who have taken FMLA leave. However, FMLA leave and similar non-FMLA leaves must be treated the same for purposes of such awards and bonuses. 29 CFR § 825.215(c)(2).

OVERTIME

Many employees are regularly required to work overtime in their positions. However, when they go out on FML they are unable to do so. The hours that the employee would have been required/mandated to work as overtime may be counted against the employee’s FMLA entitlement (i.e., counted as intermittent or reduced schedule leave, as applicable). However, if that overtime is voluntary, those hours may not be counted against an employee’s leave entitlement.

EMPLOYER NOTICE OBLIGATIONS

The new rules combine several of the old notices into one section of the regulations and remove some inconsistencies that existed in regard to time periods. Employers are required to provide employees with the General Notice about FMLA (this could be via a poster and a handbook, an eligibility notification, a rights and responsibilities notice, or a designation notice). Employers are given additional time to provide the notices, which is now five days.

- **General Notice:** Employer should generate the General Notice to all employees. This can be done via a handbook or other written means. Consider how new hires and employees on leave of absence will be notified. Employers may also



opt to post this information online via the intranet or Internet. The regulations specify the distribution of this notice to new hires via handbooks if such manuals exist.

- **Eligibility Notice:** When an employee requests FMLA, or when an employee is out of work due to an illness or injury that may qualify under the FMLA, the employer must notify the employee of the employee's eligibility to take FMLA within five business days, absent extenuating circumstances. If the employer determines the employee is ineligible, the notice must state at least one reason why he/she is ineligible for FMLA. If FMLA is approved, all FMLA absences for the same qualifying reason are considered a single leave and will not change during the designated FMLA 12-month period.
- **Rights and Responsibilities Notice:** Employers must provide written Rights and Responsibilities Notice: (a) each time an eligibility notice is required and (b) any time the information changes thereafter which includes the expectations, obligations and consequences (i.e., failure to pay premiums will result in termination of coverage). This notice can be mailed in tandem with other notices such as the medical certification form.

NOTE: There are now two separate medical certification forms: one for the employee's own serious health issues and one for the employee's family member. To find updated forms, visit <http://www.dol.gov/whd/fmla/index.htm>.

in writing what information is needed and provide the employee with seven calendar days to remedy this.

- The final rule allows the health care provider to give a diagnosis of the patient's health condition as part of the certification, but does not require this.
- The Department of Labor may have separate forms available and required for applicable/eligible family members. Refer to those forms as necessary.

MEDICAL CERTIFICATION AND TIMING

- Employers may request a new medical certification each leave year for health conditions that last more than one year.
- Employers may request a re-certification of an on-going condition every six months in conjunction with an absence. (Except when a minimum duration of incapacity has been specified in the certification, in which case re-certification generally may not be required until that duration has passed).
Previously, under the law, an employer could require re-certification no more than every 30 days.
- Employers now have five (versus two) days after the employee provides notice to request that an employee furnish a medical certification.

MEDICAL CERTIFICATION PROCESS (CONTENT AND CLARIFICATION)

- Employer representatives responsible for contacting the employee's health care providers must be a health care provider, HR professional, leave administrator, or management official. They cannot be the employee's direct supervisor.
- Employers should ask for information required by the certification form only.
- Employers who believe the medical certification form is incomplete or insufficient must specify

FITNESS FOR DUTY CERTIFICATION

- **Job Safety Exception:** Restrictions still apply for those employers requesting fitness for duty certificates for employees on intermittent FMLA. Under the new legislation, employers are now able to request a fitness for duty certificate once every 30 days "if reasonable safety concerns exist regarding the employee's ability to perform his or her duties, based on the



serious health condition for which the employee took such leave.”

WAIVER OF RIGHTS

Under updated rules, employees elect to voluntarily settle their FMLA claims without the interference of court or DOL. Prospective waivers of FMLA are prohibited. Employees cannot waive, nor may employers induce employees to waive, their rights under the FMLA

TWO NEW LEAVE PROVISIONS FOR MILITARY FAMILIES

In 2008, FMLA was first amended to provide new benefits for military personnel and their families resulting from the National Defense Authorization Act (NDAA) for Fiscal Year 2008 (Public Law 110-181). This was further clarified and expanded in October 2009.

NOTE: In 2008, FMLA was first amended to provide new benefits for military personnel and their families resulting from the National Defense Authorization Act (NDAA) for Fiscal Year 2008 (Public Law 110-181). This was further clarified and expanded in October 2009.

(1) Military Caregiver Leave

The NDAA provides a new leave entitlement of up to 26 weeks to care for a covered service member with a serious injury or illness. An eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered service member who is recovering from a serious illness or injury sustained in the line of duty is entitled to up to 26 weeks of leave in a single 12-month period to care for the service member.

A covered service member is a member of the Armed Forces (including a member of the National Guard or Reserves) who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness; or a veteran who is undergoing medical treatment, recuperation, or therapy, for a serious injury or illness and who was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during the period of five years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy.

(2) Qualified Exigency Leave (QE)

The NDAA provides a new reason for leave under FMLA to allow families of National Guard, regular Armed Forces, Reserve personnel, and eligible veterans to take FMLA job-protected leave to manage their responsibilities called qualifying exigencies.

- An eligible employee may be entitled to up to 12 weeks of leave due to a “qualifying exigency” arising from the fact that the spouse, son, daughter, or parent of the employee is in the line of duty on active duty, or has been notified of an impending call to active duty status, in support of a contingency operation.

NOTE: Qualifying Exigency Leave was recently clarified by NDAA of 2010 to apply to *veterans* who served in the *regular Armed Forces or the Reserves* within five years of the date the veterans undergo medical treatment, recuperation or therapy. Previously, military caregiver leave was only available to care for current members of the Armed Forces, Guard or Reserves.



Qualified Exigency: *The NDAA did not define a “qualifying exigency.” This has been left to the DOL to determine. Rather than provide a detailed definition of QE, they determined what activities qualify as FMLA leave under the new provision, the DOL’s rules define a “qualifying exigency” simply by listing a number of broad categories for which employees must be permitted to use FMLA leave.*

These include:

- (1) Short-notice deployment,
- (2) Military events and related activities,
- (3) Childcare and school activities,
- (4) Financial and legal arrangements,
- (5) Counseling,
- (6) Rest and recuperation,
- (7) Post-deployment activities, and;
- (8) Additional activities where the employer and employee agree to the leave.

DID YOU KNOW: All employers covered by FMLA are required to post an FMLA notice, even if no employees are eligible for FMLA.

<http://www.dol.gov/whd/fmla/finalrule/FMLAPoster.pdf>

EMPLOYER CHECKLIST

- ✓ Review your FMLA policies.
- ✓ Review applicable benefit forms.
- ✓ Consider changes to payroll system, databases, HRIS system, etc.
- ✓ Revise current policies to reflect changes.
- ✓ Plan a communication strategy – consider newsletter articles, bulletin boards, handbooks, departmental memos, payroll stuffers, etc.
- ✓ Consider employees on leave (military, family leave, maternity, workers compensation and other types of leave).
- ✓ Consider placing information on your company’s Web site (intranet or Internet).
- ✓ Allow employees to ask questions; often employees don’t understand change.



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