

FMLA Q&A (with Forms)

Michael J. Ossip and Robert M. Hale

The Family and Medical Leave Act left many questions to be answered by regulations. Although they are controversial and have been subject to court challenges in some areas, the Department of Labor's final regulations supply answers to most FMLA questions.

Michael J. Ossip is a member of the firm of Morgan, Lewis & Bockius, L.L.P., in Philadelphia. **Robert M. Hale** is a partner with Goodwin, Procter LLP, in Boston. This article is based on a paper the authors prepared for a seminar sponsored by the ABA's Section of Labor and Employment Law.

EVER SINCE ITS ENACTMENT, the Family ("FMLA") has inspired a lot of head scratching. Employers have wondered if they are subject to its provisions. Workers have wondered if they are entitled to leave in specific circumstances they are experiencing. Human resources managers have wondered how FMLA provisions dovetail with other workplace rules and benefits. Finally, attorneys who have been asked to offer opinions about what the law requires have often wondered what it really means.

Many of the answers to these questions can be found in the final regulations of the U.S. Department of Labor ("DOL"). (Those regulations appear at 29 C.F.R. Part 825. Except where otherwise noted, all citations are to the DOL regulations.) Congress gave the DOL the authority to resolve a number of issues. Although the DOL's solutions have often been controversial, all can agree that the DOL regulations are comprehensive. This article sets forth some of the most common questions that arise under the FMLA along with their answers from the regulations. Also included as appendices are the DOL prototypes for an individualized notice of rights to be given to employees and a medical certification form.

1. What Does the FMLA Require Employers To Do?

Basically, the FMLA requires covered employers to allow eligible employees a total of 12 weeks of leave during any 12-month period for one or more of the following reasons:

- The birth, adoption, or foster care placement of a child;
- The care of a child, spouse, or parent with a serious health condition;
- A serious health condition that makes the employee unable to perform his or her job.

2. Which Employers Does the FMLA Apply to?

The FMLA applies to employers that employ 50 or more employees for each working day during each of 20 or more weeks in a calendar year or the previous calendar year. §825.104(a). An employee is treated as employed for each working day in a week if he or she appears on the payroll for the full week, regardless of whether he or she is paid for

the week. §825.105(b). Part-time employees, employees on leave with a reasonable expectation of returning to work, and leased and contingent workers are included in the calculation. §§825.105(c), 825.106(d). However, those employed outside the United States are not counted. §825.105(b).

3. Does the FMLA Apply to Public Employers?

Yes. The FMLA also applies to public agencies, public school boards, and public and private elementary and secondary schools. These employers are not subject to the 50-employee test, although the criteria for employee eligibility described below apply to these employers (including the 50 employees within 75 miles test). §§825.104(a), 825.600(a) and (b).

4. Can Legally Separate Entities Be a Single “Employer” for FMLA Purposes?

Yes. In some circumstances, legally separate entities may be considered to be the same “integrated employer” for FMLA purposes, based on factors such as commonality of management, interrelationship of operations, centralization of control of labor relations, and degree of common ownership and/or financial control. §§825.104(c)(2). In addition, an employer may automatically assume FMLA obligations as a “successor.” §825.107. The DOL regulations also address the allocation of responsibilities between “joint employers,” such as a temporary help agency and the business to which it supplies workers. §825.106.

5. Are All Employees Eligible for FMLA Leave?

No. To be eligible for leave under the FMLA, an employee must:

- Have worked for his or her current employer or its predecessor in interest for a minimum of 12 months (which need not be consecutive);
- Have performed at least 1,250 hours of service during the 12 months prior to the leave request; and
- Work at a worksite of at least 50 employees or work within 75 miles of travel distance of at least 49 other employees of the employer (including those at the employee’s own worksite). §825.110(a). Employees with no fixed worksite are considered to be located at the site to which they are assigned as their home base, from which their work is assigned, or to which they report. §825.111(a)(2).

6. Can Eligible Employees Take FMLA Leave To Care for Family Members?

Yes. The FMLA provides an eligible employee with the right to take a leave to care for a parent, spouse, or child with a serious health condition. §825.112(a)(3). Care for a child over age 18 is not covered, however, unless the child is incapable of self-care due to a mental or physical disability. §825.113(c).

7. Can Eligible Employees Take FMLA Leave for the Birth, Adoption, or Foster Care Placement of a Child?

Yes. The FMLA provides an eligible employee with the right to take a leave due to the birth, adoption, or foster care placement of a child. §825.112(a)(1), (2). Leave due to a

birth, adoption, or foster care placement is available to be taken only during the first 12 months following the birth or placement. §825.201. In addition, in the event that spouses work for the same employer, the combined total of their leave taken because of birth, adoption or foster care placement may not exceed 12 weeks. §825.202(a). However, each spouse may be eligible for additional leave for other reasons. For example, if both spouses individually took six weeks off in connection with the birth of their child, they could each take an additional six weeks in the same 12-month period for a serious personal health problem or to care for a parent.

8. Can an Eligible Employee Take FMLA Leave for His or Her Own Serious Health Condition?

The FMLA provides an eligible employee with the right to take a leave because of a serious health condition that makes the employee unable to perform the essential functions of his or her job. §825.112(a)(4).

9. What Is a “Serious Health Condition” for Purposes of Taking FMLA Leave?

As indicated above, the existence of a “serious health condition” is an essential element of two of the three types of FMLA leaves. A serious health condition is a physical or mental condition involving either inpatient care (i.e. an overnight stay) in a medical facility or “continuing treatment” by a health care provider.

A serious health condition involving continuing treatment means any of the following:

- Incapacity for more than three calendar days and subsequent treatment or incapacity, provided that it also involves *either* (a) two or more treatments by, under the supervision, or on referral by a health care provider; or (b) one treatment by a health care provider resulting in a regimen of continuing treatment under the health care provider’s supervision;
- Any period of incapacity due to pregnancy or for prenatal care;
- Any period of incapacity due to a “chronic” serious health condition;
- A period of incapacity due to a long-term condition for which treatment may not be effective (e.g., Alzheimer’s Disease);
- Absence for treatments for restorative surgery; or
- Absence for treatments to prevent further incapacity (e.g., chemotherapy).

(The above are set forth at section 825.114(a)).

10. Who Qualifies as a Health Care Provider for Purposes of Rendering Treatment for a Serious Health Condition?

Health care providers for purposes of the FMLA include:

- Licensed doctors of medicine or osteopathy;
- Podiatrists;
- Dentists;
- Clinical psychologists;
- Optometrists;

- Chiropractors (for limited types of treatments);
- Nurse practitioners;
- Nurse-midwives;
- Official Christian Science practitioners;
- Clinical social workers;
- Medical professionals practicing in foreign countries and individuals recognized by the employer (or its group health benefit plan manager) as authorized to certify serious health conditions for benefit claims.

(The above are set forth at §825.118.)

11. How Is the Leave Period Measured?

There are alternative methods of measuring leaves. As noted above, an eligible employee is entitled to take up to 12 weeks of leave in any 12-month period. Employers may choose any of several methods for measuring this 12-month period, including:

- A calendar year, fiscal year, year between anniversary dates, or other fixed 12-month leave year;
- A 12-month period measured forward from the date an employee's first FMLA leave begins; or
- A "rolling" 12-month period measured backward from the date an employee uses any FMLA leave. Many employers have chosen the rolling 12-month period because that method avoids the risk that employees will have the legal right to take FMLA leaves of more than 12 successive weeks by combining FMLA leaves between the end of one 12-month period and the beginning of another. §825.200(b).

12. What Happens if the Employer Fails to Select a Method for Measuring the Leave?

If an employer did not select a method for measuring the 12-month period before the April 6, 1995 effective date of the FMLA regulations, the method that provides the most beneficial outcome to an employee on an FMLA leave must be used, even if that results in having different 12-month periods for different employees. §825.200(e). An employer could correct this problem by selecting a uniform method of measurement to apply prospectively, provided that it gives all employees 60 days notice of the selection. *Id.*

13. Does the Employee Have to Schedule the Leave In Advance?

Yes, if the leave will be used for planned medical treatment of an employee or family member. In this circumstance, the employee must make a reasonable effort to schedule the leave at a time least disruptive to the business. §825.302(e).

14. Does the Employee Have to Use the Leave in a Single Block?

This depends on the circumstances. In general, an employer may require an employee to take a complete leave from work on an unbroken basis. However, if "medically necessary," an employee has the right to take leave on an intermittent basis or on a reduced leave schedule. An intermittent leave schedule divides the leave entitlement into

separate blocks of time. A reduced leave schedule reduces the employee's usual number of hours per day or per week. §825.203(a) and (c).

15. Does the Use of Intermittent Leave Reduce the Total Amount of FMLA Leave the Employee Can Take?

No. The use of an intermittent leave or a reduced leave schedule will not reduce the 12 weeks of total leave to which the employee is entitled. For example, an employee whose regular work schedule is 40 hours per week and who qualifies for a reduced leave schedule of 20 hours per week is entitled to 24 weeks of such a leave. §825.205(a).

16. If the Employee Takes Intermittent Leave, Can the Employer Require the Employee To Transfer to an Alternative Position?

Yes. An employer may require those employees using an intermittent or reduced leave schedule to transfer temporarily to an alternative position which (1) has equivalent pay and benefits, and (2) better accommodates recurring periods of leave. §825.204(a) and (c).

17. Can the Employer Require the Employee To Substitute Paid Leave for Unpaid FMLA Leave?

Yes. An FMLA leave may be unpaid. However, under certain circumstances, an employee may elect, or the employer may require, that previously accrued paid leave be substituted for any part of the leave permitted by the FMLA. Leave taken because of a birth, an adoption, or to care for a family member may be substituted with accrued paid vacation, personal or family leave. Leave taken to care for a family member with a serious health condition, or because of the employee's serious health condition, may be replaced with accrued paid vacation, personal or family leave or, if eligible under the paid leave plan under the circumstances, with medical or sick leave. §825.207(a), (b) and (c).

18. Does the Use of Substituted Paid Leave Reduce the Amount of Available FMLA Unpaid Leave?

Yes. If paid leave is substituted for unpaid FMLA leave, the leave used will nevertheless be counted against the employee's FMLA leave entitlement. However, employers may not count the use of paid leave which does not qualify as FMLA leave (*e.g.*, isolated sick days taken for non-serious health conditions) to reduce FMLA entitlement. §825.207(g).

19. Does the Employer Have To Continue Benefits While the Employee Is Taking FMLA Leave?

Yes. Regardless of whether a leave is otherwise paid or unpaid, the employer must maintain coverage of the employee on FMLA leave under any group health plan (including medical and dental coverage) on the same basis as for active employees.

20. If the Employee Takes FMLA Leave and Does Not Return to Work, Can the Employer Require the Ex-Employee To Reimburse Premiums Paid for Health Insurance?

It depends on the circumstances. If the employee does not return to work after the permissible period of leave, the employer may recover any premiums paid to maintain the employee's coverage during any otherwise unpaid portion of the leave, unless the employee failed to return because of either:

- The continuation, recurrence or onset of a serious health condition of the employee or a family member, or
- Other circumstances beyond the employee's control. §§825.209(a), 825.213(a)(1) and (2).

21. Do Employers Have To Tell Employees that FMLA Leave Is Available?

Yes. Employers must post conspicuously a notice explaining the FMLA's provisions and how to file complaints of alleged violations with the DOL. Employers must also include a statement of FMLA rights in their employee handbooks. Employers without employee handbooks must make statements of FMLA rights available to employees. §§825.300, 825.301(a).

22. Does the Employee Have To Give the Employer Notice of Intent To Take Leave?

Yes. The employee must give the employer a minimum of 30 days' notice of his or her intent to take leave, to the extent foreseeable. If the employee would not have been able to foresee the need for leave 30 days in advance, the employee must give as much notice as practicable. §825.302(a).

23. Is there a Specific Way in Which the Employee Must Notify the Employer of Intention To Take FMLA Leave?

The employer may require employees who seek FMLA leave to comply with the employer's regular leave request procedures, such as the submission of a written leave request. However, such policy requirements may not be enforced to deny leave if the employee gives verbal notice. §825.302(d). The employee need only provide "at least verbal notice" sufficient to make the employer aware of:

- The employee's need for FMLA leave;
- The anticipated timing of the leave; and
- The anticipated duration of the leave.

§825.302(c). The employee need not expressly mention or refer to the FMLA. *Id.* Notice to a supervisor will be sufficient. §825.800.

24. What Happens if the Employee Fails To Give Timely Notice of Foreseeable Leave?

Provided that the employer has complied with its posting obligation or can otherwise show that the employee had actual knowledge of the notice obligation, an employee who fails to give at least 30 days' notice of a foreseeable leave without any reasonable excuse may be subjected to a delay of at least 30 days from the date of notice. §825.304(b).

25. Can the Employee Notify the Employer of the Reason for the Leave After it has Been Taken?

Provided that an employer has not already “designated” an absence as an FMLA leave (as described below), an employee must notify the employer that the leave was for an FMLA reason within two business days of returning from the absence. If an employee fails to do so, the employee may not later claim FMLA protection for the absence. §825.208(e)(1).

26. Does the Employer Have To Designate FMLA Leave for It To Count Against the 12-Week Allotment?

Yes. When an employer learns that an employee will be out of work for an FMLA-qualifying reason, the employer must “designate” the leave as an FMLA leave for the leave to count against the employee’s annual FMLA entitlement. To designate a leave as an FMLA leave, the employer must notify the employee that the leave will be counted as FMLA leave. The designation should be made within two business days of the date that the employer (including any supervisor to whom the employee reports) learns that the leave is being taken for an FMLA-qualifying reason. §825.208(a) and (b)(1).

27. Is There a Prescribed Form for the Designation?

The designation notice may be made orally or in writing. If made orally, it must be confirmed in writing by the following payday (or the next payday thereafter, if the following payday is less than one week away). §825.208(b)(2).

If an employer knows of an employee’s claim of FMLA leave but seeks to confirm that the leave is FMLA-qualifying (such as by seeking medical certification, as described below), the employer must nevertheless designate the leave in a timely manner. However, the designation may be “preliminary” and may be withdrawn (with written notice to the employee) if the FMLA reason for the leave is not confirmed. §825.208(e)(2).

28. What Happens if an Employer Fails To Designate in a Timely Manner?

If an absence has begun and the employer does not designate the leave as FMLA-qualifying within two business days of receiving notice from the employee of the need for FMLA leave, the DOL’s position is that the employee will be entitled to full FMLA protections for the FMLA-qualifying period of leave before the date of the designation, but none of the time before the designation will be counted against the employee’s 12-week leave entitlement. §825.208(c). There is a lively debate about the enforceability of this provision. *Compare, e.g., McGregor v. Autozone, Inc.*, 180 F.3d 1305 (11th Cir. 1999) (held not enforceable) with *Plant v. Morton International, Inc.*, 212 F. 3d 929 (6th Cir. 2000) (held enforceable).

29. Does the Response to Ineligible employer Have To Tell the Employee He or She Is Ineligible for FMLA Leave?

According to the regulations, yes. An employer must notify an ineligible employee of his or her ineligibility within two business days of the request for leave. If the employer fails to do so and the leave commences, the employer may not thereafter deny the leave based on the employee’s ineligibility. §825.110(d). However, nearly all courts that have reviewed this regulation have held that it is not enforceable. *See, e.g., Seaman v. Downtown Partnership of Baltimore, Inc.*, 991 F. Supp. 751 (D. Md. 1998).

30. Does the Employer Have To Provide an Individualized Notice of Rights To Each Employee Who Requests FMLA Leave?

Generally, yes. In addition to the notices that must be provided generally to employees, an employer must provide an employee who requests FMLA leave with an individualized notice of employee rights. §825.301(b). A notice consistent with the current prototype form prepared by the DOL is included with this article as Appendix 1. Variations can be made in that form, as long as the same information is provided. In addition, if an employer were not to rely on the “key employee” standards for limiting certain employees’ leave rights, that portion of the notice need not be included.

31. Does the Employer Have To Furnish an Individualized Notice of Rights Each Time an Eligible Employee Requests FMLA Leave?

Generally, yes. An employer is generally required to reissue an individualized notice of rights upon each commencement of FMLA leave. However, the notice of rights need not be reissued if it was given to the employee less than six months earlier, unless the information provided to the employee has changed since the earlier notice. §825.301(c).

32. What Happens if the Employer Fails To Provide Individualized Notice?

An employer who fails to provide a timely notice of FMLA rights is barred from taking action due to the employee’s failure to comply with any requirement set forth in the notice. §825.301(f).

33. May the Employer Require the Employee To Provide Status Updates?

Yes. An employer may require the employee to report periodically on his or her status and intent to return to work at the conclusion of the leave period. §825.309(a).

34. May the Employer Require the Employee To Provide Notice of Intent To Return to Work?

Yes. The employer may require an employee to give notice within two business days if circumstances affecting the length of the leave period change, provided that their effect on the length of the leave period is foreseeable. In any event, if an employee’s need for leave reduces due to changed circumstances, the employee may not be required to remain on FMLA leave longer than necessary to resolve the circumstances that precipitated the leave. §825.309(c).

35. When an Employee Wants To Take FMLA Leave for a Serious Health Condition or To Care for a Family Member, May the Employer Require Medical Certification?

Yes. An employer may require those employees requesting leave because of a serious health condition or to care for a family member to provide medical certification for the leave. A form consistent with the DOL’s current prototype medical certification form is included with this outline as Appendix 2. §825.305(a).

36. May the Employer Make Inquiries Concerning Medical Certification?

Yes, with some restrictions. If an employer has questions concerning the medical certification, a health care provider representing the employer may contact the employee's health care provider, with the employee's permission, for the purpose of clarifying and/or authenticating the medical certification. However, neither the employer for a health care provider retained by the employer may request *additional* information from the employee's health care provider. §825.307(a)(1).

37. May the Employer Require Additional Certifications for a Request for Leave?

Yes, but the process stops at the third certification. An employer that has reason to doubt the validity of a medical certification may require an employee to obtain a second medical certification at the employer's expense. However, the employer may not require examination by a health care provider that it regularly utilizes. If the conclusions of the first and second certifications differ, the employer may require a third certification by a jointly selected health care provider, again at the employer's expense. The third certification will be final and binding. §825.307(a)(2), (b) and (c).

38. When the Employee Seeks Leave for a Previously Certified Condition, May the Employer Require a new Certification?

Generally, yes, an employer may seek recertifications of previously certified medical conditions. §825.308. But the frequency of the recertifications varies with the type of leave. Except for situations involving changed circumstances, requests for leave extensions or new information giving rise to reasons to doubt the continuing validity of the original certification, recertification may be requested no more frequently than the longer of (a) 30 days; or (b) the minimum duration of incapacity specified in the original certification. For pregnancy, chronic or permanent long-term conditions, recertifications may be requested no more often than every 30 days and only in connection with an absence. §825.308(a), (b) and (c).

39. When Must the Employee Provide the Response?

Employees must provide recertifications within 15 days of requests for recertification. §825.308(d).

40. May the Employer Require the Returning Employee To Certify Fitness for Duty?

Yes, if the requirement is applied uniformly. An employer may maintain and enforce a uniform policy applicable to all similarly situated employees, requiring fitness for duty certifications before employees return to work from an FMLA leave involving the employee's own serious health condition. The certification must be limited to the condition that prompted the need for leave and may be a simple statement of the employee's ability to return to work. The employee may be required to bear the cost of the certification (unless, of course, state law were to prohibit such a requirement). §825.310. The employer may not require a second or third fitness-for-duty certification. §825.310(e).

41. When the Employee Returns, Must the Employer Restore All Benefits?

Yes. Upon return from leave allowed under the FMLA, an employee is entitled to be restored either to the same job he or she previously held or to a position with equivalent pay, benefits and terms and conditions of employment. §825.214(a). The employee will be entitled to unconditional pay increases, such as cost of living increases, that occurred during the leave. Other pay increases, such as increases based on annual performance reviews, should be calculated based on service and performance, exclusive of the period of FMLA leave. §825.215(c)(1). In addition, the period of FMLA leave may not be considered to be an absence for purposes of attendance bonuses. §825.215(c)(2).

42. Do Employment Benefits Accrue While the Employee Is on Leave?

No. The employee will retain any benefits accrued prior to taking leave, but does not have the right to accrue any employment benefits during the period of leave. §825.215(d).

The required restoration of benefits following a leave must be immediate. Employers therefore need to ensure that any suspension of benefits, such as life insurance coverage, will not lead to any waiting period or medical examination requirement before restoration. §825.215(d)(1).

43. Do “Key Employees” Have the Same Rights to Restoration of Benefits?

No. The FMLA does not guarantee the same rights to salaried employees in the highest paid 10 percent of the business’ employees within 75 miles of the worksite. Employers may deny restoration of employment to these employees, referred to as “key employees,” if:

- Necessary to prevent “substantial and grievous economic injury” to the employer;
- The employer notifies the employee of intent to deny restoration when it is determined that such injury will occur; and
- The employee elects not to return after receiving the notice.

§825.219. The “substantial and grievous economic injury” must be caused by the job restoration, not by the taking of leave itself. §825.218(c). In the DOL’s view, situations in which an employer will be able to demonstrate substantial and grievous economic injury will be rare. §825.218(c) and (d).

44. Do State Laws Affect the Use of FMLA Leave?

Yes. The FMLA establishes a minimum floor of 12 weeks of family leave during a 12-month period. State laws may establish more generous leave policies, but may not reduce the total amount of leave below 12 weeks. State mandated leave that is also FMLA leave will count against an employee’s FMLA entitlement. However, FMLA leave that is *not* covered by state law will not reduce an employee’s rights under state law. §825.701.

45. Can Workers’ Compensation Leaves Count Against the FMLA Allotment?

Yes. A workers’ compensation absence may also qualify as an FMLA leave, if the employee has a “serious health condition.” In some circumstances, an employee who rejects an offer for a “light duty” position will become disqualified from eligibility for workers’ compensation benefits. Such a determination does not expand or contract the

individual's FMLA leave and restoration rights to a position equivalent to the one that he or she left. §825.702(d)(2).

46. Do FMLA Rights Supplement ADA Rights?

Yes. Employees who take a personal medical leave under the FMLA have additional rights and options available to them under the Americans with Disabilities Act ("ADA"). Employers with employees on personal medical leaves can be subject to obligations under both statutes. For example, a disabled employee who seeks restoration may seek a reasonable accommodation in connection with restoration, such as additional leave, part-time work or job restructuring. §825.702(b) and (c).

47. Do Salary Adjustments for FMLA Leave Change an Exempt Employee's Status?

The FMLA permits employees to take a reduced leave schedule, which may include taking part of a day off as leave. Because FMLA leave is unpaid, an employer may dock the employee's pay for those hours not worked. Under the Fair Labor Standards Act, employers generally may not reduce an exempt employee's salary if the employee takes less than a full day off. However, the FMLA specifically permits an employer to reduce an exempt employee's salary for all FMLA leave taken, including partial days, without jeopardizing the employee's exempt status. §825.206(a).

48. Who Can Bring an FMLA Enforcement Action?

Employees and the DOL. An employee may bring an action to enforce the FMLA either individually or on behalf of other similarly situated employees. §825.400(a)(1). The DOL may also enforce the FMLA. An employee's right to bring an action terminates when the DOL files a complaint covering his or her situation, unless the complaint is dismissed without prejudice. 29 U.S.C. §2617(a)(4).

49. What Remedies Are Available to the Aggrieved Employee?

Both an employee and the DOL may seek either monetary damages or equitable relief, such as reinstatement or promotion. Monetary damages under the FMLA consist of the sum of:

- The amount of either lost wages and benefits due to the violation, or if no wages or benefits have been lost, other costs incurred by the employee, such as the costs of providing care, up to 12 weeks worth of wages; and
- The interest on the amount described above; and
- An amount equal to the sum of the above two amounts as a penalty. The court has the discretion to withhold this penal award, however, if the employer shows that it acted in good faith and/or on reasonable grounds.

A successful employee-plaintiff is also entitled to recover attorney's fees and costs (including expert witness fees). §825.400(c).

50. When Must the Action Be Brought?

An action under the FMLA must be brought within two years of the date of the last event constituting the violation, or three years in the event of a "willful" violation. §825.400(b).

Appendix 1

Employer Response to Employee Request for Family and Medical Leave

TO: _____

(Employee's Name)

FROM: _____

(Name of appropriate employer representative)

SUBJECT: Request for Family/Medical Leave

DATE: _____

On _____, you notified us of your need to take family/medical leave due to:
(date)

- the birth of your 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 of 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 Family and Medical Leave Act of 1993 ("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 the 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)*
- 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 on a timely basis, 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 the certification is provided.

7(a) You ___ are ___ are not a “key employee” as described in §825.218 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 a substantial and grievous economic injury to us.

(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 for 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.)

Appendix 2

Certification of Health Care Provider

(Family and Medical Leave)

1. Employee’s Name:

2. Patient’s Name (if different from employee):

3. The attached sheet describes what is meant by a “**serious health condition**” under the Family and Medical Leave Act. Does the patient’s condition qualify under any of the categories described? If so, please check (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** 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)? Yes ____ No ____

If yes, state the necessary schedule adjustments and the probable duration:

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

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 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 a 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 **able to perform work** of any kind? Yes ____ No ____

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)? Yes ____ No ____ 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**? Yes ____ No ____

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 personnel needs or safety, or for transportation?

Yes ____ No ____

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

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

(Signature of Health Care Provider)
(Telephone Number)

(Type of Practice)

(Print Name and Address) (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)

Description of “Serious Health Condition”

For use with the “Certification of Health Care Provider”

A “**Serious Health Condition**” means an illness, injury, impairment or physical or mental condition that involves 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 incapacity² or subsequent treatment in connection with or consequent to such inpatient care.

2. Absence Plus Treatment

(a) A period of incapacity² of **more than three consecutive calendar days** (including any subsequent treatment or period of incapacity² relating to the same condition), that also involves:

(1) **Treatment³ 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 treatment⁴** 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 incapacity² (*e.g.*, asthma, diabetes, epilepsy, etc.).

5. Permanent/Long-term Conditions Requiring Supervision

A period of **incapacity²** 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 incapacity² 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), kidney disease (dialysis)