FMLA Guidelines

Eligibility Requirements

- An individual must be employed at least 12 months and worked at least 1,250 hours within the previous 12-month period (count hours worked only – PTO/STD time does not qualify)
  - The 12-month employment time does not have to be consecutive, however, if there is a break in service of more than 7 years, the employment time does not have to be counted, with the following exceptions:
    - Break-in-service is due to military service obligation
    - Written agreement reflecting an employer's intention to rehire the employee after the break in service

- Continuing treatment for a period of incapacity or a chronic condition
  - Incapacity is defined as more than 3 consecutive full days with an in-person treatment at least once within 7 days of the first day of incapacity.
  - Treatment two or more times by a health care provider must take place within a 30-day period.
  - For chronic conditions requiring periodic visits for treatment, such visits must take place at least twice a year.

Granting Leave

- Regular leave – 12 week entitlement in a 12-month period
  - Birth, adoption or foster care (includes travel time for adoption).
  - Serious health condition of spouse, son, daughter, or parent, or adult child who is unable to provide self care due to a mental or physical disability.
    - The employee need not be the only individual available to care for the qualified family member
    - An employee's husband is entitled to FMLA leave to care for the pregnant spouse who as severe morning sickness or other prenatal complications and to accompany her to prenatal doctors' appointments
  - Employee's own serious health condition
  - Qualifying exigency for a spouse, son, daughter, or parent who has been notified of a pending call or order to covered active military duty to a foreign country. (Use DOL Form #WH-384 to Certify Qualifying Exigency). Examples of qualifying exigencies include:
    - Short-notice deployment – if a covered military member is notified of an impending call or order to active duty in support of a contingency operation seven or less calendar days prior to the date of deployment, an employee may take FMLA leave for up to 7 calendar days beginning on the date the military member receives the call or order to active duty even if the seven day leave period ends after the military member has been deployed.
    - Military events and related activities – to attend an official ceremony, program, or event sponsored by the military that is related to the active duty or call to active duty status; to attend family support or assistance programs and informational briefings by the military, military service organizations, or the American Red Cross related to the active duty call or call to active duty status.

- Childcare and school activities – to make alternative childcare arrangements for a military member's child; to provide childcare to a military member's child on an urgent, immediate need basis but not routine, regular or everyday basis; to enroll in or transfer a military member's child in a new school or day care facility; to attend meetings with staff at a school or daycare with school officials regarding discipline, parent-teacher conferences or meetings with school counselors.
- Financial and legal arrangements – to make or update financial or legal arrangements to address the military member's absence while on active duty or call to active duty status; to act as the military member's representative before a federal, state, or local agency for the purposes of obtaining, arranging, or appealing military service benefits while the military member is on active duty or call to active duty status.
- Counseling – the need for counseling arises from the military member's active duty or call to active duty, the counseling is provided by someone other than a health care provider, and the counseling is for the employee, the military member, and/or the military member's child. (Note: if medical counseling is needed, the employee may be able to take regular FMLA due to a serious health condition).
- Rest and recuperation – eligible employees may take up to 15 work days for each instance of rest and recuperation while a military member is granted short-term, temporary leave during a period of deployment.
- Post-deployment activities – to attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following the termination of the military member's active duty status; and to address issues that arise from the death of a military member while on active duty status.
- Parental care – to care for a family military member's parent who is incapable of self-care
- Additional activities – FMLA may be taken for other exigencies provided: it arises out of the members active duty or call to active duty; the employer and employee mutually agree that such leave shall be considered for a qualifying exigency; and the employer and employee mutually agree on both the timing and duration of the leave.
  - An employer may require the employee to provide a copy of the covered military member's active duty orders for the first time only when the employee requests an exigency leave, however, for each separate call to active duty the employer may request a copy of the orders as well

- Intermittent or Reduced Schedule Leave – 12-week entitlement in a 12-month period
  - Employer must account for intermittent leave using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave, provided that it is not greater than one hour (UCCH's leave allowance is 1/10 of an hour).
  - If employee misses the start of a shift and employer does not allow employees to come in the middle of a shift, the DOL allows employers to use a full FMLday.
  - Employees may request the amount of leave entitlement they have remaining but not more than every 30 days.
  - Employee may be temporarily transferred to an alternative job with equivalent pay and benefits

- An employee on an unforeseeable intermittent leave cannot be transferred to an alternative job

✪ Military Caregiver Leave – 26-week entitlement in one 12-month period
- Serious illness or injury of a current servicemember, or veteran, while on, or was on, covered active duty that may render the person unable to perform the duties of the member's, or former member's, office, grade, rank or rating.
  - Son or daughter of any age
  - Parent
  - Next of kin (servicemember may designate blood relative in writing; in the absence of designation, multiple family members at same level of relationship all are next of kin (blood relatives who have been granted legal custody, siblings, grandparents, aunts, uncles, and first cousins) and may take leave consecutively or simultaneously)
  - Includes service members who had a pre-existing condition prior to covered active duty and the condition was aggravated by service
  - Includes current military service members, or veterans, undergoing treatment, recuperation, or therapy for a serious health condition or injury occurring any time during the five years preceding the date of treatment, recuperation or therapy.
- The employee need not be the only individual available to care for the covered service member.
- If military caregiver leave would also qualify as a serious health condition, no dual designation allowed. The leave must be designated as servicemember leave first.
- The employer may retroactively designate leave as servicemember leave.

✪ If an employer grants non-FMLA leave to an employee before the employee is eligible for FML, and if the employee becomes eligible for FML while on the non-FMLA leave, the leave period after the date the employee becomes eligible is FMLA leave and the leave period before is non-FMLA leave.

Medical Certification (Use DOL Form #WH-380E for employee's serious health condition; DOL Form #WH-380F for family member's serious health condition; DOL Form #WH-385 for current service member's Serious Illness or Injury; DOL Form #WH-385V for veteran' serious health condition)

✪ Employers must give employees 15 days to furnish medical certification.

✪ If certification is deficient, the employer must state in writing to the employee what additional information is necessary to make the certification complete and sufficient. The employee must be given at least 7 calendar days to correct the deficiencies.
- An incomplete certification is something on the form has not been filled out.
- An insufficient certification is everything on the form has been completed but part(s) of it are vague or not relative to the question.

✪ It is best to request the employee to contact his/her physician in writing, however, employers may contact the employee's health care provider for clarification and authentication purposes only. The employee's direct supervisor may NOT contact the health care provider. The employer may NOT obtain medical information in addition to what is on the medical certification.

- The employee must provide a HIPAA release form to permit employer to make the contact. This is not needed if the employee contacts his/her physician himself/herself.
- For FMLA purposes, definition of Clarification is if the handwriting is unreadable or a faxed copy is not clear.
- For FMLA purposes, definition of Authentication is verifying that the doctor in fact completed the form (i.e. did this come from your office; is this your signature; is this your patient, inconsistent responses).
- An employer may require a medical certification form be completed by an authorized HCP of a covered service member for military caregiver leave.
    - An employer may seek clarification and/or authentication of the certification for military caregiver leave
    - If the Department of Defense (DOD) issues "invitational travel orders" (ITO) or "invitational travel authorizations" (ITA) to any family member to join injured or ill servicemember at his or her bedside, an employer must accept these documents as sufficient certification and may not request additional certification unless the ITO or ITA has expired

✪ Second and third opinions are permitted at the expense of the employer.
- The employer may choose the health care provider for a second opinion, however, the HCP must not work for the employer.
- The employer and employee must agree upon a third opinion health care provider.
- The third opinion is determinative.
    - If an employee refuses to release relevant medical records to the HCP designated to provide a second or third opinion, an employer may deny leave (if records are requested by the HCP in order to render a sufficient and complete opinion)
- Second and third opinions are not permitted for military caregiver leave.

✪ Recertification may be requested once every six months in all cases in connection with an absence.
- Recertification may not be required until the initial period of leave has elapsed unless the circumstances change or there is reason to doubt the validity of the leave.
- If an employee needs to extend the leave, recertification is permitted.
- An employer may provide the healthcare provider with a record of the employee's absence pattern and ask if the serious health condition and need for leave is consistent with the pattern.
- Recertification is not permitted for qualifying exigency or military caregiver leave.

✪ Fitness for Duty Certification
- The employer must notify the employee in the leave designation notice if a fitness for duty certification is required to return to work.
- The employer can specifically address the employee's ability to perform the essential functions of the job only if a list of the essential functions is provided. It must be provided at the time of leave designation by sending the job description and task list along with initial medical certification form at the beginning of the leave process.
- Fitness for Duty certifications may only be requested for intermittent leave if reasonable safety concerns exist (reasonable belief of significant harm to employee or others). It may be requested once every 30 days.
- No second or third opinions are permitted for fitness for duty certifications.

Notifications

- ✪ Notice by Employee
  - Thirty days advance notice for planned medical treatment including treatment for serious injury or illness of a covered servicemember unless not practicable.
    - ✶ If 30 days is not received, the employer may ask the employee to explain reasons why providing such notice was not practicable
    - ✶ When foreseeable leave is due to a qualifying exigency, notice must be provided as soon as practicable regardless of how far in advance the leave was foreseeable
  - An employee does not need to mention Family or Medical leave in order to put the employer on notice of need for leave regardless of whether it is for a serious medical condition, exigency or military caregiver leave.
  - An employee must respond to an employer's questions in order to determine if the absence is FMLA qualifying.
    - ✶ Failure to respond to such inquiries may result in the denial of leave if the employer is unable to determine that the leave is FMLA qualifying
  - If the employee fails to comply with the employer's usual notice and procedures for absences, with the exception of unusual circumstances, the employer is permitted to delay or deny FMLA leave.
    - ✶ Unusual circumstance example includes a situation where there is no one to answer the call-in number and the employee is unable to leave a voicemail because the box is full
  - Calling in "sick" is insufficient to trigger FMLA obligations, employees must explain reasons for leave.
    - ✶ If intermittent leave, the employee must state FMLA reason that was certified in order for the absence to be counted against FML entitlement

- ✪ Notice by Employer
  - Employers must notify employees of FMLA leave rights and obligations through posting the DOL notice, in policy handbooks and at the time of leave request
  - Employers have 5 business days to provide the employee notice of FMLA leave rights and obligations after notice is given by employee of need for leave.

Other Important Points

- ✪ Employees <u>may not</u> refuse FMLA entitlement.

- ✪ Leave calculation for employees with fluctuating work schedules based on previous 12 <u>months</u> of work rather than 12 weeks.

- ✪ Light duty (for Workers' Compensation cases) is considered work hours and does not count toward FMLA entitlement.

- ✪ Disqualification for bonuses (i.e. attendance awards) is permitted so long as the employer does so consistently.

- ✪ Increased damages for interfering with FMLA leave rights (could be as simple as untimely notification).

✪ If an employee is off work for a Workers' Compensation injury, FMLA leave must also be considered if the employee meets the eligibility requirements.

Your FMLA Leave Rights and Responsibilities

- You have a right under the FMLA for up to 12 weeks of unpaid leave in a 12-month period calculated as a "rolling" 12-month period measured backward from the date of any FMLA leave usage.

- Your health benefits must be maintained during any period of unpaid FMLA leave under the same conditions as if you continued to work.

- You are required to pay your portion of health benefits premium(s). If you do not pay your portion of the premium(s) in a timely manner, or other arrangements have not been made, your health benefits may be cancelled with a minimum of 15 days notice.

- 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 FMLA protected leave.

- If you are unable to return at the end of your FMLA entitlement, or your leave is extended beyond your FMLA entitlement through an Unpaid Non-FMLA Leave, you do not have return rights under the FMLA.

- 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; 2) the continuation, recurrence, or onset of a covered servicemember's or veteran's serious injury or illness which would entitle you to FMLA leave; or 3) 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.

- You are required to return all certifications, recertifications, HIPAA release forms, and to also release relevant medical records to the designated health care provider in cases of a second or third opinion, in a timely manner. Failure to do so may result in denial of your leave.

- If certification is returned incomplete or insufficient, you will be notified in writing of the specific deficiency(s). You are required to return the corrected certification in a timely manner. Failure to do so may result in denial of your leave.

- You will be required to use your available paid-time-off and short-term disability hours during your FMLA absence. This means that you will receive your paid leave and the leave will also be considered protected FMLA leave and be counted against your FMLA leave entitlement.