THE FAMILY AND MEDICAL LEAVE ACT

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TABLE OF CONTENTS

Page No.

I. Generally 1

II. Calculating The Year 3

III. Length Of Leave 3

IV. Eligible Employees 4

V. Qualifying Reasons For Taking Leave 6

VI. What Is A "Serious Health Condition?" 10

VII. What Is A "Qualifying Exigency" Under the Military Leave Provisions 12

VIII. Notice Provisions 13

IX. Paid/Unpaid Leave – Substitution Of Leaves 17

X. Intermittent/Reduced Schedule Leave 18

XI. Medical Certification/Fitness For Duty Certification 18

XII. Benefits While On Leave 21

XIII. Pay Increases/Bonuses 22

XIV. Job Restoration 22

XV. Dishonesty and Abuse of Leave 24

I. GENERALLY

A. Family Leave: The Family Medical Leave Act ("FMLA") requires a "covered employer" to provide an "eligible employee" with up to 12 weeks of leave per year for eligible family and medical situations, with restoration for the employee to the same or a similar position upon return to work.

1. "Covered Employer" means:

a. All public employers, regardless of the number of employees employed are covered by the FMLA. 29 U.S.C.S. §2611 (4)(A)(iii). *See also* Frederico v. Grand Haven Charter Township, Case No.1:96-CV-25, (W.D. Mich., Sept. 30, 1996), ruling that all public agencies, regardless of size or number of employees, fall within the meaning of the term "employer" under the FMLA.

b. Public agencies are covered by the FMLA regardless of the number of employees; they are not subject to the coverage threshold of 50 employees; however employees of public agencies must meet all of the requirements of eligibility, including the requirement that the employer employ 50 employees at the worksite or within 75 miles. 29 C.F.R. § 825.108(d).

b. Private employers with 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year are covered by FMLA. (Twenty (20) calendar weeks do not need to be consecutive.)

2. "Eligible Employee" means that an employee must have:

a. Worked for the employer for at least twelve (12) months. The 12 months need not be consecutive, but service prior to a break in service up to seven (7) years ago need not be counted.

b. Worked for the employer for at least 1,250 hours in the 12 month period prior to the date on which leave is to commence**.** Exclude paid vacation leave, sick leave, holiday pay, and any paid FMLA leave.

NOTE: If employer fails to maintain accurate records, presumption in favor of the employee having worked the required hours.

c. Been employed at a worksite where 50 or more employees are employed by the employer or the employer employs 50 or more employees within 75 miles of the worksite

> **NOTE:** A state is considered to be a single public employer for purposes of counting the number of employees, as is a county or city. The regulations provide, and case law affirms, that any question as to whether a public entity is a public agency, as distinguished from a part of another public agency, will be resolved by first examining state law and if state law fails to resolve the issue, then by referencing the U.S. Bureau of Census' "Census of Governments." Rollins v. Wilson County Gov't, 154 F.3d 626 (6th Cir. 1998); 29 C.F.R. §825.108(c).

B. Military Leave: The FMLA's standard 12 weeks of leave during a 12 month period must also be provided to eligible employees due to a "qualifying exigency" related to an immediate family member's call to active duty in the military. The FMLA also requires covered employers to provide employees with **up to 26 weeks** of FMLA leave during a 12 month period in order to care for a "covered service member" suffering from a "serious injury or illness" received in the line of duty if the employee is an immediate family member or a "next of kin" to the service member.

1. "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 in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness; or a covered 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 5 years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy. The eligible employee must commence leave to care for a covered veteran within five years of the veteran's active duty service, but the actual single 12-month period of up to 26 workweeks of leave may extend beyond the five-year period.

2. "Serious injury or illness" means an injury or illness that was incurred by the member in the line of duty on active duty in the armed forces (or existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the armed forces) and that may render the member medically unfit to perform their duties.

3. "Next of kin" means the nearest blood relative (other than the service member's spouse, parent, son or daughter) in the following order of priority: blood relatives who have been granted legal custody of the service member, siblings, grandparents, aunts and uncles, and first cousins, unless the service member has designated in writing a different blood relative for purposes of military caregiver leave.

II. CALCULATING THE YEAR

A. The employer chooses how the year will be calculated. The employer **must** notify employees of how the year is calculated, or the time period most favorable to the employee will be used as the default. If the employer chooses to change the way the year is determined, it must give at least 60 days notice to all employees. All employees must be treated in the same manner.

B. Possible Methods of Calculating the Year.

1. Calendar year.

2. Any fixed 12 month period (anniversary of employment, fiscal year, etc.).

3. 12 month period measured forward from date initial leave commences.

4. Rolling 12 month period measured backward from the date the leave commences.

C. Case Law - Twelve Month Period.

1. McKiernan v. Smith-Edwards-Dunlap Co., 1995 U.S. Dist. Lexis 6822 (E.D. Pa., May 17, 1995). If an employer does not designate how the 12 month period will be calculated, the 12 month period will be calculated in the way most favorable to the employee.

III. LENGTH OF LEAVE

A. Case Law - Length of Leave.

1. Farina v. Compuware Corp., 256 F.Supp.2d 1033 (D.Ariz., 2003). The employer mistakenly informed Farina that she had 12 additional weeks of FMLA leave after she had already used at least 12 weeks of leave. The court held that Farina did not have a right to surplus leave, only to a total of 12 weeks. Farina was notified when she took leave, after becoming pregnant with triplets that her FMLA leave would run concurrently with her disability leave. The court referred to the Supreme Court decision, Ragsdale v. Wolverine, 535 U.S. 81 (2002), ruling that 12 workweeks of leave during any 12-month period are all employees may receive under the FMLA. The court found that Farina had not relied on the employer's notice, and any reliance would not have been detrimental to her FMLA rights, because she failed to return to work after her leave expired and before she had received the erroneous memo.

2. Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81 (2002). The employer failed to notify its employee that the leave she was taking, which amounted to a total of 30 weeks under the employer's plan, would count against her 12 weeks of FMLA leave. The Court found that DOL regulation, 29 CFR section 825.700(a),

which requires employers to grant an employee additional leave after granting more than 12 weeks of leave if the employer failed to notify the employee that the original leave counted against the employee's FMLA entitlement, was in conflict with the FMLA. Justice Kennedy wrote that the regulation amended the FMLA's most fundamental substantive guarantee, the 12-week leave entitlement, and thus undermined Congress's balance of the needs of families and the interests of employers.

IV. ELIGIBLE EMPLOYEES

A. Case Law - Eligible Employees.

1. N.Y. Metro Area Postal Union v. Potter, 2003 WL 1701909 (S.D.N.Y. Mar. 31, 2003). A labor union filed suit on behalf of its employee members under the FMLA for failure to post notices, include information in employee handbooks, and explain to employees their rights. The court dismissed the case, holding that a labor union cannot sue on behalf of its members as the FMLA expressly provides a *private* right of action only to an "eligible employee." Because the union would require the participation of individual members to prove its claim, it did not have standing to sue in court.

2. Ricco v. Potter, 377 F.3d 599 (6th Cir. 2004). Ricco was unlawfully fired. After reinstatement, she sought FMLA leave, which was denied because she had not met the hours-of-service requirement due to her absence while terminated. The appellate court ruled that the time Ricco would have worked but for her unlawful firing was included in her hours of service for FMLA purposes.

3. Rollins v. Wilson County Gov't, 154 F.3d 626 (6th Cir. 1998). Rollins worked for the county school system for 8 months and the county finance department 4 months before she was terminated. She brought an action against the county for allegedly terminating her in violation of the FMLA. The appellate court held that county school system and county government were separate entities under Tennessee law, and therefore periods former employee worked for each entity could not be aggregated for purposes of establishing her status as "eligible employee" under Family and Medical Leave Act (FMLA). In reaching its decision, the appellate court indicated that the school system and county government had separate origins, functions and management.

4. Fain v. Wayne County Auditor's Office, 388 F.3d 257 (7th Cir. 2004). Fain worked at the Wayne County Auditor's Office for nine years before she was terminated. Fain brought an action against the county for violations of the ADA and FMLA. The appellate court held that the duties of the Auditor's Office relate directly to the functioning and governance of the County, and since state law did not definitively resolve the issue, they must follow the U.S. Bureau of the Census' "Census of Governments." Therefore, the former auditor's office employee was an "eligible employee" under the FMLA, even though the auditor's office employed only 12 employees, it was located in county building along with other

county departments that had more than 50 employees, employee's paycheck was issued by the county government, not the auditor's office, the county's personnel department had handled the administration of employee's leave, and the auditor's office provided services to the county.

B. Interference Claims.

1. 29 U.S.C. § 2615(a)(1): It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

2. 29 C.F.R. 825.220(b): "Interfering with" the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employer to avoid responsibilities under FMLA, for example.

   a. Transferring employees from one worksite to another for the purpose of reducing worksites, or to keep worksites, below the 50-employee threshold for employee eligibility under the Act.

   b. Changing the essential functions of the job in order to preclude the taking of leave.

   c. Reducing hours available to work in order to avoid employee eligibility.

3. Interference cannot be found simply because employer imposes reporting obligations for employees who are on leave. For example, an employer does not interfere with an employee's right to take leave by establishing a policy requiring all employees to call in to report their whereabouts while on leave. The FMLA does not prevent employers from ensuring that employees who are on leave do not abuse their leave.

   a. <u>Callison v. City of Philadelphia</u>, 430 F.3d 117, 121 (3d Cir. 2005). The employer imposed a requirement on all employees taking sick leave that they "notify the appropriate authority or designee when leaving home and upon return" during working hours. The plaintiff argued that the call-in requirement constituted interference with his FMLA leave, which he interpreted as a right to be "left alone." But the court disagreed, stating that the FMLA does not prevent employers "from ensuring that employees who are on leave from work do not abuse their leave."

4. Elements: Plaintiff's burden is to demonstrate that she was entitled to a benefit under the FMLA, but was denied that entitlement by Employer. Parker v. Hahnemann Univ. Hosp., 234 F. Supp. 2d 478, 485 (D. N.J. 2002).

   a. Ballato v. Comcast Corp., 676 F.3d. 768 (8th Cir. 2012). Ballato was a cable customer service representative for Comcast who was granted intermittent FMLA leave for chronic fatigue and depression. Ballato sent a series of emails expressing job dissatisfaction after returning from 11 days of FMLA leave. The company viewed some of the emails as "disturbing" and deactivated Ballato's access to the company computer system and the building. Comcast attempted to reach Ballato by telephone, but Ballato failed to return the calls because he thought he was being terminated. Ballato called Comcast's human resources department to request FMLA leave, and the department told him to contact his supervisor. Ballato did not contact his supervisor. Ballato went to work, but could not access the building because his access had been deactivated. Ballato believed he was fired and did not report to his next three scheduled shifts. Comcast terminated Ballato due to unexcused absences.

      The Eighth Circuit found that Comcast's actions did not show interference with Ballato's FMLA rights. The Court found that the employee had many opportunities to correct his misperceptions that he had been terminated before missing three consecutive shifts. Further, the Court explained that "an employee who requests FMLA leave has no greater protection against termination unrelated to FMLA than he did before taking the leave."

5. Defenses.

   a. Same decision anyway: If employer proves, by a preponderance of the evidence, that employee would have lost her job even if she had not taken leave, this is an affirmative defense. For example, if employer proves that employee's position was going to be eliminated even if she would not have been on FMLA leave, no unlawful interference occurred.

   b. Prejudice: In order to succeed in an FMLA suit, a plaintiff must demonstrate that he or she was prejudiced by the interference. That is, the plaintiff must show that he or she was harmed by the claimed interference, with the most common showing being a loss in compensation. When no prejudice occurred, the employee's claim may be dismissed.

V. QUALIFYING REASONS FOR TAKING LEAVE

A. Qualifying Reasons.

1. Upon the birth of an employee's child and in order to care for the child.

2. Upon the placement of a child with an employee for adoption or foster care.

3. When an employee is needed to care for an immediate family member who has a "serious health condition."

   a. "Immediate family member" means a spouse, child, or parent.

   b. "Spouse" does not include unmarried or domestic partners, but does include common law spouses if recognized by the state.

   c. A "child" must be under 18 years of age or incapable of self-care because of a mental or physical disability. Included in "child" are children related to the parent biologically, adopted, foster children, a stepchild, and a legal ward. Also included in the definition is a child of a person standing *in loco parentis*. 29 U.S.C. § 2611(12).

   d. "Parent" means a biological parent or an individual who stands, or stood, *in loco parentis* to an employee when the employee was a child; does not include in-laws.

   e. "Loco parentis" employees who have no biological or legal relationship with a child may nonetheless stand in loco parentis to the child and be entitled to FMLA leave. The DOL's 2010 Interpretation of "In Loco Parentis" states that "either day-to-day care or financial support may establish an *in loco parentis* relationship where the employee intends to assume the responsibilities of a parent with regard to a child. In all cases, whether an employee stands in loco parentis to a child will depend on the particular facts."

4. When an employee is unable to perform the functions of his position because of the employee's own "serious health condition."

5. In order to care for a "next of kin" who is a military service member suffering from a "serious illness" received in the line of duty.

6. For a "qualifying exigency" related to an immediate family member's call to active duty in the military.

B. Case Law - Qualifying Reasons for Leave.

1. Schmauch v. Honda of American Manufacturing Inc., 295 F.Supp.2d 823 (S.D. Ohio 2003). Schmauch was employed as a production associate for Honda. He was a member of the Ohio Air National Guard and requested many leaves of absence to perform military service. Honda approved all of these requests and restored Schmauch to his prior position upon his return. Although military and FMLA did not count as an attendance occurrence, they extended Schmauch's

Attendance Improvement Program (AIP) status, which was a program for employees whose attendance remained below 98%. As a result of the leaves, Schmauch's attendance remained below 98% and he was terminated. He alleged that Honda violated the FMLA by prolonging his AIP for FMLA leave. Both parties sought motions for summary judgment. The Court held that Schmauch presented a genuine issue of material fact as to (1) whether Honda's extension of his AIP discouraged him from taking FMLA leave; (2) whether Honda used FMLA leave as a negative factor, and (3) whether he was harmed merely by the extension of his AIP. Honda was not able to prove that Schmauch did not have a genuine issue of material fact. Thus, the court determined that neither party was entitled to summary judgment on the FMLA claim.

NOTE: The DOL's Rules permit employers to deny perfect attendance bonuses to employees who took FMLA if employees would be ineligible for the bonus if they used other employer leave.

2. Cianci v. Pettibone Corp., No. 97-2115, 1997 U.S. Dist. Lexis 4482 (7th Cir. 1998). After learning of her mother's ill health, Cianci requested four weeks of vacation to visit her mother in Italy. The employer denied the request citing the adverse effects of having an employee gone for such an extended period of time. Thereafter, Cianci prepared a memo stating she was instead taking fifteen (15) days of FMLA leave followed by two (2) weeks paid vacation. The employer again denied the request because of the length of time requested. Two (2) months later, several employees, including Cinaci, were investigated concerning use of company services for their own personal business. Other employees were given suspensions, and Cianci was terminated. Cianci filed suit claiming the Employer violated the FMLA by denying leave for her to go to Italy. Stating that the FMLA does not provide leave for "every family emergency" and, based on the fact that Cianci was not needed to provide care for her mother, the Court granted summary judgment in favor of the Employer. Leave to visit a sick relative is not a qualifying reason for leave under the Act. Upon appeal, the Seventh Circuit affirmed the District Court's ruling, stating that the employee was terminated for reasons other than her FMLA request.

3. Campbell v. Pritchard Police Department, No. 97-0496-AH-C, 1997 U.S. Dist. Lexis 20463 (S.D. Ala. 1997). An employee may not take FMLA leave to care for the employee's grandparent during illness.

4. Bryant v. Delbar Products, Inc., 18 F. Supp. 2d 799 (M.D. Tenn., 1998). In this case, the Employer violated the FMLA when it terminated an employee for absences related to the employee's son's serious health condition, even though the son was over 18 years of age. Because the son had a serious health condition, was incapable of self-care due to a physical disability, and the employee had provided adequate notice, the absences were covered by the FMLA and the employer violated the FMLA by terminating the employee.

5. Jones v. C & D Technologies, Inc., 684 F.3d 673 (7th Cir. 2012). Jones, the employee, suffered from periodic leg and back pain and anxiety. At the time of his termination, he had accumulated penalty points under the company's attendance policy for a string of absences. Under the policy, if Jones accumulated a half point more, he would be subject to termination. Jones received permission to attend an afternoon medical appointment, but he failed to report for work at all that day. Instead, Jones made an unscheduled visit to his doctor's office to pick up a prescription refill order. Jones was not seen by a doctor on that day.

   Jones absence resulted in an additional penalty point under the company policy and he was terminated. Jones sued alleging violations of the FMLA. The District Court ruled in favor of the company on summary judgment because Jones did not receive "medical treatment" for his condition. The Seventh Circuit agreed with the lower court, but explained that in addition to establishing a "serious health condition," the employee was required to establish that he was unable to perform his job duties. To do so, the court reasoned that the employee, "must be absent from work to receive medical treatment." Jones' chronic condition which required continuing treatment was not enough to raise the unscheduled visit to the doctor's office to the level of necessary medical treatment that **required** the him to be absent from work.

C. Retaliation for Exercising FMLA Rights.

1. 29 U.S.C. § 2615(b): It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual—

   a. Has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter.

   b. Has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter.

   c. Has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter.

2. 29 C.F.R. 825.220(e): Individuals, and not merely employees, are protected from retaliation for opposing (i.e., filing a complaint about) any practice which is unlawful under the Act. They are similarly protected if they oppose any practice which they reasonably believe to be a violation of the Act or regulation. Retaliation also occurs where the action that was taken was because the employee exercised, or complained about the denial of, FMLA-protected rights. See also Edgar v. JAC Products, Inc., 443 F.3d 501, 512 (6th Cir. 2006).

3. Elements: An employee must show.

   a. She engaged in a statutorily protected activity.

b. She suffered an adverse employment action.

c. A causal (but-for and proximate) connection exists between the adverse action and the exercise of her FMLA rights.

Edgar v. JAC Products, Inc., 443 F.3d 501, 508 (6th Cir. 2006).

4. Defenses.

a. Legitimate, non-discriminatory reason for adverse action.

b. Same decision anyway: Employer would have made the same decision with respect to the employee's employment even if there had been no motive to discriminate on the basis of having taken FMLA leave. Employer entitled to verdict if it proves by a preponderance of the evidence that it would have treated the employee the same even if employee's leave had played no role in the employment decision.

c. Lack of knowledge of FMLA leave by decision makers.

d. Prejudice: In order to succeed in an FMLA suit, a plaintiff must demonstrate that he or she was prejudiced by the retaliation. That is, the plaintiff must show that he or she was harmed, with the most common showing being a loss in compensation. When no prejudice occurred, the employee's claim may be dismissed.

VI. WHAT IS A "SERIOUS HEALTH CONDITION?"

A. Any illness, injury, impairment, or physical or mental condition that also involves:

1. Inpatient care.

2. Any period of incapacity of more than three calendar days that **also involves**: (a) two or more treatments by a health care provider; **or**, (b) treatment by a health care provider on one occasion that results in a regimen of continuing treatment under the supervision of a health care provider.

a. The DOL Regulations clarify that the two treatments by a health care provider must occur within 30 days of the period of initial incapacity (absent extenuating circumstances) under the first part of this definition.

b. The DOL regulations also state that the "continuing regimen" section of the definition requires a first visit to a health care provider within seven days of the initial incapacity.

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

4. A chronic serious health condition which involves **all** of the following: (1) periodic visits for treatment to a health care provider; (2) continue over an extended period of time; and, (3) may be periodic rather than a continuing incapacity.

   a. The DOL Regulations clarify that "periodic visits" means at least two visits per year.

5. Any period of incapacity which is permanent or long term and for which treatment may not be effective (i.e. terminal stages of a disease, Alzheimer's disease, etc.).

6. Absence for restorative surgery after an accident/injury or for a condition that would likely result in an absence of more than three days at a later date without medical intervention at the present time (i.e. chemotherapy for cancer, dialysis for kidney disease, therapy, etc.).

B. Voluntary and cosmetic treatments that are not medically necessary are **not** "serious health conditions" unless inpatient care is required or complications arise. Surgeries performed for mixed purposes (cosmetic and a serious health condition) may qualify under the FMLA.

C. Colds and Flu: The DOL has advised that a cold or the flu may be considered a serious health condition for purposes of the FMLA if the situation meets the criteria outlined for a serious health condition. However, the C.F.R. states that under normal conditions, the flu and colds normally do not constitute a serious health condition. *See* Miller v. AT&T, 250 F. 3d 820 (4th Cir. 2001).

D. Case Law - Serious Health Condition.

1. Lackey v. Jackson Cty, Tenn., 104 Fed. Appx. 483 (6th Cir. 2004). Lackey was fired for excessive absenteeism. Lackey claimed that the three doctor notices he gave his employer as justification for his absences was sufficient notice of his need for FMLA leave. However, the court ruled that the notices did not provide sufficient information for the employer to determine whether the employee had an FMLA qualifying illness. The notices established, at most, a period of incapacity due to Lackey's back problems, diabetes, and high blood for a period of more than three consecutive days. This was not sufficient to establish a serious medical condition necessitating application of the FMLA.

2. Hendry v. GTE North, Inc., 896 F.Supp. 816 (N.D. Ind. 1995). Migraine headaches may constitute a serious health condition if the employee receives continuing treatment and the migraines prevent the employee from performing his or her job.

3. Oswalt v. Sara Lee Corp., 889 F. Supp. 253 (June 20, 1995), affirmed, 74 F.3d 91 (5th Cir., 1996). Food poisoning was not a serious health condition because it did not require inpatient or continuing care.

4. George v. Association Stationers, 932 F. Supp. 1012 (N.D. Ohio 1996). George had been previously warned about attendance problems. Subsequently, after calling in to report absences due to contracting chicken pox, George was terminated. However, the Court ruled that the termination was in violation of FMLA because in this case, the chicken pox was a serious health condition because the employee had received treatment for the condition from a doctor on two (2) occasions, the doctor told the employee he could not work for more than three (3) days, and the employee was contagious during the leave period. Therefore, the absences due to the chicken pox could not be counted in the company's no-fault attendance policy under FMLA.

5. Seidle v. Provident Mutual Life Insurance Co., 871 F. Supp. 238 (E.D. Pa. 1994). Ms. Seidle missed (4) days of work in order to care for her son who had been diagnosed with an ear infection. Due to these absences, she was terminated and subsequently sued arguing that her absences were protected by the FMLA. The Court disagreed and held that her son's ear infection did not rise to the level of a "serious health condition" because his condition was not recurring nor was he under the continuing care of a physician. In addition, Seidle failed to establish that her son was unable to attend day care for three (3) or more days. Therefore, Seidle's absences from work were not FMLA protected.

VII. WHAT IS A "QUALIFYING EXIGENCY" UNDER THE MILITARY LEAVE PROVISIONS

A. The DOL regulations state that the following will constitute a "qualifying exigency" under the FMLA:

1. A short notice deployment of seven days or less.

2. Attendance of military events sponsored by the military and/or Red Cross.

3. Arranging for child care and/or to attend non-routine school functions of the child of a covered military family member.

4. Taking care of financial and/or legal affairs and matters for a covered military family member.

5. Up to 15 days to spend time with a covered military service member on rest and recoupment leave.

6. Attending non-health care provider counseling arising from active duty in the military.

7. Attending ceremonies incident to the return of a covered military family member for a period of 90 days following military family member's termination from active duty.

8. Parental care for a military member's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the military member, when the parent requires active assistance or supervision to provide daily self-care in three or more of the activities of daily living, as described in 29 C.F.R. § 825.126. Qualifying parental care may be taken to arrange for parent care, provide urgent or immediate care, to admit or transfer a parent to a care facility, or attend meetings with staff at a care facility, all when the covered active duty or call to covered active duty status of the military member necessitates such action.

9. Any other activity arising out of a covered military service member's call or service to active duty.

VIII. NOTICE PROVISIONS

A. Notice by Employee (Standards for Employees).

1. Foreseeable need for leave: employee must give 30 days' notice to the employer; if 30 days not possible, then as soon as practical

2. Unforeseeable need for leave: employee must notify the employer as soon as practical

3. Employee **does not** need to mention FMLA; he/she need only state a qualifying reason for leave

   a. It is the obligation of the employer to determine if the reason for leave qualifies the employee for FMLA leave and to designate the leave as FMLA leave if it qualifies as such

4. Notice to a supervisor is sufficient to establish that the employee notified the employer.

   a. Reinwald v. Huntington Nat'l Bank, 684 F.Supp. 2d 975 (S.D. Ohio 2010). Employee record of three cell phone calls to the proper number at the Employer, coupled with employee's assertion that at least one of the calls went through was sufficient to avoid summary judgment on the issue of proper notice.

B. Notice by Employer (Requirements for Notice **to** Employee).

1. Posting.

   a. All covered employers must post an approved DOL FMLA notice in a conspicuous place; if no notice is posted and the employee fails to give the required advance notice for leave, the employer may take no adverse action against the employee.

2. Handbook/written policies.

   a. If the employer has any written guidance to employees regarding other benefit or leave rights, information concerning the FMLA and employee rights and obligations hereunder must be included.

3. Notice to specific employee requesting leave.

   a. Employer must designate leave as FMLA leave (if qualifying); designation may be oral or written; if oral, the employer must follow up in writing.

4. Written notice must include:

   a. Statements that leave will be counted against FMLA entitlement.

   b. Any requirements regarding required medical certification and consequences of not providing such certification.

   c. Notice of employer's requirements regarding substitution of paid leave or notice of employee's choice to substitute paid leave.

   d. Notice regarding procedure for maintenance of health benefits.

   e. Any requirement of certification of fitness for duty.

   f. Notice regarding employee's status as a "key employee" and the consequences of such status.

   g. Notice regarding the right to restoration upon return from leave.

   h. Notice regarding potential liability for health insurance premiums paid by employer if employee fails to return to work.

   i. Precise number of hours, days, or weeks that will be designated FMLA.

C. Timing of Written Notice by Employer.

1. Written notice must be given within five days of having sufficient information to make the determination; if leave has begun, mail to the address of record.

2. The DOL also requires employers to inform intermittent employees every 30 days that their leave is designated and protected under FMLA and to advise employees as to the amount of FMLA taken during the preceding 30-day period.

D. Case Law – Notice.

1. Employer's internal call-in system does not conflict with FMLA.

a. Allen v. Butler Cty Comm'rs, 331 Fed. Appx. 389 (6th Cir. 2009). Within two years, Allen, the employee received four disciplines which resulted in varying lengths of unpaid suspension. As a consequence of the final two infractions, the employee and the employer entered into a last chance agreement. The parties agreed that the employee's failure to comply with the employer's requirements for the use of leave, or for any other disciplinary offenses, would result in the employee's instant termination.

After signing the last chance agreement, the employee began to use flex time after being informed by his supervisor that flex time was prohibited. Before the employer even had a chance to send him a pre-disciplinary notice for his flex time violations, the employee called into work claiming he was ill and would be seeing a doctor. The employer's sick leave policy required individuals on paid sick leave to perform certain requirements not necessary under the FMLA, including: 1) procure a doctor's note letting his employer know when his employer could expect the employee's return; 2) call the employer daily with updates on his condition. Over a week after the employee began missing work due to his personal illness, the employee still had not provided a doctor's note. On the employee's ninth day of leave, the employee also failed to call in his absence in violation of the leave policy. The employer fired the employee for both the improper use of flex time and for violating the requirement for daily call-in while on sick leave.

The employee filed suit, claiming that the employer's sick leave policy interfered with his right to FMLA leave. The Sixth Circuit stated, "an employee can be required to comply with the reasonable requirements of an employer's sick leave policy while on FMLA leave." The Court determined that the sick leave procedure merely set forth the obligations of employees who are on leave, regardless of whether the leave is pursuant to FMLA. However, the Court was clear that an employer cannot evade their responsibilities under the FMLA by simply arbitrarily choosing to designate leave that qualifies as both FMLA leave and paid sick leave as

paid sick leave just to discharge an employee. Because the employee violated the last chance agreement by failing to follow call-in procedure and improperly using flex time, the Court upheld his termination.

b. Cavin v. Honda of America Mfg., Inc., 346 F.3d 713 (6th Cir. 2003). Cavin was injured in a motorcycle accident and notified Honda's security department of the fact that he would be absent for several days. Honda asserted that the Cavin violated company policy by failing to notify the company's Leave Coordination Department of his need for leave within the required time period and also by failing to timely submit a medical certification form four months later. Honda terminated Cavin for violating its leave policy. The court reversed the summary judgment in favor of Honda on the FMLA claim, finding that the employer's policy was inconsistent with the notice requirements set forth in the FMLA claim. The court concluded that employers could not deny FMLA relief for failure to comply with their internal notice requirements. The court found that Cavin complied with the FMLA's notice requirements as a matter of law. The court affirmed the dismissal of the wrongful discharge claim, finding that Ohio did not recognize a cause of action for wrongful discharge in violation of the public policy embodied in the FMLA.

c. The DOL's rules clarify that employees **must** comply with an employer's usual paid leave call-in procedures before taking unscheduled, intermittent leave under the FMLA except in cases of emergency. This rule makes it clear that an employee covered under FMLA is not entitled to any other paid benefits that they would not normally be entitled under the employer's paid leave policy.

d. Nicholson v. Pulte Homes Corp., 690 F.3d 819 (7th Cir. 2012). Nicolson, a sales associate for Pulte Homes Corp. casually mentioned her father's leukemia to her supervisor in December 2008, stating that she "might" need time off in the event he needs chemotherapy treatment. In February 2009, Nicolson had a "casual conversation" with other employees, including a supervisor, regarding the "challenges of dealing with aging parents." In April 2009, Nicholson mentioned that she drove her mother to doctor's appointments on her days off. Later that month, she indicated to her supervisor that her father had stage III cancer, but did not request or indicate a need for time off.

In the spring of 2009, Nicholson was placed on a performance improvement plan because she had failed to meet her sales goals for several months and had received customer complaints. Nicholson failed to improve and did not make a single sale in May or June. Consequently, she was terminated on June 24, 2009. Nicholson sued Pulte Home for FMLA interference and retaliation.

The issue in her FMLA case was whether Nicholson put the company on notice that she wanted to take FMLA leave. The Seventh Circuit was not convinced that Nicholson put the company on notice of her need for FMLA leave. The Court determined that her one "casual conversation" about aging parents was "clearly insufficient as a matter of law to notify [her supervisor] that FMLA-qualifying leave was needed." And although Nicholson alerted a supervisor of the seriousness of her father's illness, she did not put her supervisor on notice that she needed leave to care for him.

IX. PAID/UNPAID LEAVE - SUBSTITUTION OF LEAVES

A. FMLA provides for either 12 or 26 weeks of unpaid leave depending upon the reason for the leave; however, pursuant to employer's policy, leave may be paid, unpaid or combination of both. However:

1. Employees must be made aware of policy **prior** to implementation.

2. In certain FMLA qualifying situations, spouses working for the same employer may only be entitled to a combined total of 12 weeks of leave rather than 12 weeks each for birth, adoption or to care for a parent with a serious health condition.

B. Employers may require that employees substitute accrued but unused vacation, personal, family, or sick leave for unpaid FMLA leave.

1. Sick Leave - employer may only require that sick leave be substituted for FMLA leave involving serious health conditions (i.e. not for births or placements unless for employee's own recovery after giving birth or for ill child UNLESS the sick leave policy states otherwise.).

2. Compensatory time: Under the DOL's Rules, public employers may run compensatory time concurrently with an employee's FMLA leave.

3. Employers are allowed to apply their normal policies, terms and conditions for taking paid leave when an employee substitutes paid leave for FMLA regardless of the type of paid leave being substituted. (29 CFR 827.207)

C. Light Duty: Employers are prohibited from counting an employee's time worked during a temporary light-duty assignment (typically pursuant to a worker's compensation injury) against the employee's twelve-week FMLA allotment. The DOL rules specify that time worked in a light-duty assignment does not count toward an employee's FMLA leave.

X. INTERMITTENT/REDUCED SCHEDULE LEAVE

A. In medically necessary situations, the Act allows employees who take FMLA leave because of their own serious health condition or because of the serious health condition of a family member to take leave on an intermittent or reduced schedule basis (i.e., work fewer hours per day or per week).

1. FMLA leave for the birth or placement of a child may only be taken on an intermittent or reduced schedule basis with the permission of the employer.

B. Intermittent or reduced schedule leave may be taken by the employee in any size increments, and employers may only charge intermittent or reduced schedule FMLA leave against an employee's 12 week total by the smallest increment of time that the employer's payroll system will accommodate.

C. Employees taking intermittent or reduced schedule leave must attempt to schedule leave so that it does not interfere or disrupt the employer's operations.

D. Employer has the right to temporarily transfer an employee taking intermittent or reduced schedule leave to a position with equivalent pay and benefits, but is not required to do so.

XI. MEDICAL CERTIFICATION/FITNESS FOR DUTY CERTIFICATION

A. Initial Certification.

1. Employer is entitled to certification of initial need for leave.

2. Employee must return certification to employer within 15 days after receiving request from employer.

3. DOL "Certification of Health Care Provider Form" available; employer can use own form but cannot request more information than is on DOL form. DOL also has forms available for download and use relating to the military leave provisions as well.

B. Employer's Ability to Question Certification.

1. If an employee submits a completed certification, employer may only ask for clarification.

2. If certification is incomplete, an employer must inform the employee and give employee opportunity to provide missing information.

3. Employers are permitted to directly contact an employee's medical provider in order to obtain clarification or authentication of FMLA documentation. However, when doing so, the employer must comply with HIPAA's privacy rules.

Therefore, employers will need to have employees complete a HIPAA Release prior to contacting the employee's medical provider. Further, the employee's direct manager/supervisor **cannot** be the employer representative who contacts the medical provider. As a practical matter, the HR representative should be the representative clarifying FMLA documentation.

4. Employer may not ask for subsequent medical certification no more than every 30 days.

   a. Certification expenses are paid for by the employee.

C. Second and/or Third Medical Opinions.

1. Employer may obtain a second medical opinion at the expense of the employer.

   a. May not use a physician regularly employed by the employer.

2. If employee's medical certification and the second opinion/certification disagree, the employer can require a third evaluation of the employee, also done at the expense of the employer.

   a. Third examiner must be selected mutually by employer and employee.

   b. Third opinion is final and binding.

3. Employer must provide employee with copies of the second and/or third opinion, if requested, within two business days.

D. Failure of Employee to Provide Timely Medical Certification.

1. Foreseeable leave: leave may be denied until certification received.

2. Unforeseeable leave: if employee fails to provide certification in timely manner after leave commences, continuation of leave may be denied.

3. Certification never submitted: time off receives no FMLA benefits or protections.

E. Case Law – Certification.

1. Branham v. Gannett Satellite Information Network, Inc., 2010 WL 3431617 (6th Cir. Sept. 2, 2010). The Sixth Circuit found that employer was not permitted to deny employee's leave based on the "failure to provide certification" requirement since the employer never properly requested certification or informed the employee of the consequences of failing to provide certification, as required by DOL regulations. The employer never properly triggered Branham's duty to provide medical certification since no information was communicated to Branham

concerning the FMLA certification requirement, the fact that such certification was due within fifteen days, or the consequences of failing to return adequate certification. Moreover, even if one of Branham's supervisors had conveyed all of the appropriate FMLA information to her orally, an oral request for certification would have been insufficient to activate Branham's certification duty, since no evidence was introduced that Branham received written notification of the requirement during the six months prior to her request for leave, or that the certification requirement appeared in the employer's employee handbook.

2. Coffman v. Ford Motor Co., 719 F. Supp. 2d 856 (S.D. Ohio 2010). Certification form that is incomplete or inadequate requires employer to give the employee a chance to correct the problems before denying FMLA.

F. Return to Work/Fitness for Duty Certification.

1. Prior to an employee's return to work, an employer may require a fitness for duty certification.

   a. Only applies to employees who take leave due to their own serious health condition.

   b. Employee must be notified of obligation to provide fitness for duty certification.

   c. Purpose of certification is to show employee can perform the essential functions of his or her position.

   d. The DOL Rules permit employers to ask health care providers to address the functions set forth in a list of essential job functions (Job descriptions are very important!) (29 CFR 825.3112(b)).

   e. Where reasonable job safety concerns exist, employee may also be required to provide fitness-for-duty certification before returning from intermittent leaves up to once every 30 days. (29 CFR 825.312(f)).

2. Case Law – fitness for duty certifications.

   a. Wisbey v. City of Lincoln, 2009 WL 974945 (D. Neb. April 10, 2009). Emergency dispatcher for city applied for indefinite intermittent leave for depression via a medical certification that indicated her concentration and motivation could be affected. As a result, the Employer required a fitness for duty exam which found that the dispatcher was unable to safely perform her job. Dispatcher was terminated and filed suit. The court held that the Employer may obtain a fitness for duty examination as allowed by the Americans with Disabilities Act without violating the FMLA.

G. Failure of Employee to Provide Fitness for Duty Certification.

1. If employee is notified of obligation to provide fitness for duty certification, and employee fails to obey, reinstatement may be delayed until certification is received.

2. If no fitness for duty certification is ever received, employee may be terminated after expiration of leave.

XII. BENEFITS WHILE ON LEAVE

A. Group Health Plan.

1. Employer must continue to provide coverage at the same level and on the same terms and conditions as employees not on leave.

2. Employee may still be required to pay that portion of premiums, if any, that the employee was responsible for while working.

3. If leave is paid, employer may continue to deduct employee contribution from employee's pay; if leave is unpaid, employer may determine method of payment but must notify the employee of the terms for payment.

4. If an employee's portion of premium is more than thirty (30) days late, the employer may terminate group health coverage. However; before termination of coverage, employer must give employee written notice of termination at least fifteen (15) days before coverage will cease without payment. Remainder of FMLA rights and obligations continue.

5. If an employee chooses not to continue coverage while on leave, upon proper return to work, the employee is entitled reinstatement into the plan on the same terms as prior to the commencement of leave, including family or dependent coverage.

6. If an employee does not return to work for reasons other than the continuation of a serious health condition or other circumstances beyond the employee's control, the employer may seek reimbursement for any amounts paid to a group health program on behalf of that employee.

B. Other Benefits.

1. If employees can accrue hours of service (service credit) during periods of paid leave; FMLA leave, regardless of whether paid or unpaid, does not constitute a "break in service" for purposes of vesting and eligibility to participate in pension or retirement plan.

2. Employees on FMLA leave are not entitled to accrual of additional benefits or seniority that would have occurred during the period of leave (e.g., if employee has 10 years, 2 months and 7 days of seniority when FMLA leave begins, upon return from leave, employee has 10 years, 2 months, and 7 days of seniority).

3. Benefits accrued by an employee prior to taking FMLA leave and not used during FMLA leave are retained by the employee.

4. Upon return from leave, the employer is required to reinstate employee to equivalent level of benefits as employee enjoyed prior to leave.

5. Other benefits are determined per the employer's established policy and/or practices for employees on other types of leave.

XIII. PAY INCREASES/BONUSES

A. Increases such as annual cost of living increases or those based on the employee's anniversary date cannot be denied or delayed because an employee is on FMLA leave.

B. Increases based on seniority, length of service, or work performed may be delayed while employee is on FMLA leave, unless employer gives such increases to employees on other forms of unpaid leave.

C. If an employee is on FMLA, they may be denied a perfect attendance bonus, unless the employer gives such bonuses to employees on other forms of unpaid leave.

D. FMLA leave may also affect an employee's bonus based on performance, such as a production bonus; in this type of situation, treat the FMLA employee as other employees on paid or unpaid leave.

XIV. JOB RESTORATION

A. If employee took leave for his or her own serious health condition, employer may require the employee to produce certification of fitness for duty prior to restoration.

B. Requirement of fitness for duty certification must be uniformly applied to all employees.

C. Employer must notify employee, in advance, that such a certificate will be required.

D. Certification of fitness for duty must relate to condition for which employee took FMLA.

E. Certification must be provided by employee's health care provider. Employer may not require a second or third fitness for duty certification.

F. Employer may require employee to report periodically during leave regarding the status and intention of the employee to return to work. However, these reports may not be more frequent than every 30 days.

G. Upon proper return to work from FMLA leave, employee must be reinstated to the same or a similar position.

1. Similar position - equivalent status, responsibility, duties, shift, benefits, pay, etc. Employer makes the determination as to whether the positions are similar in nature.

H. There is no Obligation to Reinstate the Employee if:

1. Employee would not otherwise have been employed at the time of restoration (i.e., lay off, shift elimination, poor performance [established prior to leave]).

2. Assignment that employee was hired for concludes prior to the expiration of leave.

3. Employee cannot perform the functions of his or her position.

I. Highly Compensated/Key Employee.

1. Definition: salaried FMLA eligible employee among the highest paid ten percent (10%) of all employees employed by employer within 75 miles of the employee's worksite.

2. Employer must determine and inform employee, in writing, of status as key employee and the possible consequences thereof, at time leave is requested.

a. If employer fails to provide notice to employee, employer will not be able to deny restoration even if substantial and grievous economic injury will occur to employer as a result of reinstatement.

3. Employer may **not** deny a key employee the opportunity to take leave. However, the Employer may deny restoration to a key employee if:

a. In the opinion of the employer, the denial of restoration is necessary to prevent substantial and grievous economic injury to the operations of the employer.

b. The employer notifies employee of its intent to deny restoration prior to the commencement of leave.

c. If leave has commenced, as soon as employer determines that denial of restoration is necessary to avoid substantial and grievous economic injury

to the employer, the employer notifies the employee and the employee does not elect to immediately return to work.

XVI. DISHONESTY AND ABUSE OF FMLA

A. Case law - FMLA Damages if Employer Decision Overturned.

Pagan-Colon v. Walgreens of San Patricio, 697 F.3d 1 (1st Cir. 2012). The employee was hospitalized due to a heart condition, underwent surgery and was discharged from his employer two weeks later. The employee claimed that he and his wife frequently updated the employer on his condition; however, the employer claimed it requested an explanation for his absence, but never received a response. The employee was discharged for job abandonment. After the employee repeatedly requested an explanation and presented medical documentation, the employer reconsidered its discharge. The employer conducted an investigation into the incident; however other employees and management claimed to have no recollection of the employee or his wife contacting them or submitting medical documentation. Consequently, the employer terminated the employee for making dishonest statements during the investigation. The jury found in favor of the employee, finding that the employer's change in reason for termination to be a pretext for retaliation.

In upholding the jury's damage award of $47,145 in back pay, the court held that the provision in the FMLA that allows a prevailing employee to recover wages and "other compensation denied or lost" can encompass lost over-time earnings. This employee typically worked a lot of overtime. $20, 637 of the $47, 145 award was for overtime. This amount was calculated using the year-to-date average of weekly hours in the months preceding termination, which was upheld by the court. Additionally, the Court affirmed the lower court's denial of liquidated damages, which are allowed unless the employer can prove it acted in good faith and had reasonable grounds for believing the discharge was lawful. The court found that there was a breakdown in communication at the work location-level that prevented the management from learning the facts in a timely manner.

B. Case law - Abuse of FMLA.

Scruggs v. Carrier Corp., 688 F.3d 821 (7th Cir. 2012). The employee had been approved for intermittent FMLA leave to take his mother to and from medical appointments. The employer had set out to curtail employees' abuse of the company leave policies and had hired a private investigator to follow certain employees the employee suspected to be abusing FMLA leave. This employee was one of those suspected employees. The investigator conducted surveillance on the employee on three occasions. The first two instances were unremarkable; however, during the third occasion, the video surveillance revealed that neither the employee nor the employee's car left the property between 8:00 a.m. and 4:30 p.m.

When the employer interviewed the employee and gave him the opportunity to explain his absence, the employee stated that he did not recall the specifics, but was certain that

he was assisting his mother and did not abuse his leave. During the following investigation, the employee provided the employer with documentation from his mother's nursing home and notes from his mother's doctor. The documentation was not conclusive, but stated that the employee may have brought his mother to the doctor. There were also inconsistencies in the documentation as to whether or not he mother was actually seen by the doctor on that day. In light of this evidence, as well as inconsistencies in the documentation for prior alleged FMLA absences, the employer terminated the employee for abuse of FMLA leave.

The trial court ruled that while there was a question of fact as to whether the employee used his FMLA leave on the day in question, it was undisputed that the employer had an "honest suspicion" that the employee misused his leave, and the honest suspicion was enough to defeat the employee's claim of FMLA interference and retaliation. On appeal, the Seventh Circuit upheld the trial court's decision on the basis that the video surveillance, the employee's inability to recall the specifics regarding the day in question, and the inconsistent documentation was enough to create an honest suspicion that would defeat any FMLA claim.

Seeger v. Cincinnati Bell Telephone Co., LLC., 681 F.3d 274 (6th Cir. 2012). Seeger, a Cincinnati Bell employee, suffered a herniated disc in his back. Cincinnati Bell granted him leave under the FMLA. At the same time, he also applied for and was granted paid leave under the company's disability plan. Cincinnati Bell offered Seeger part-time light duty work, but Seeger refused because he was too disabled to do that work. Several days later, Seeger was seen by coworkers at Oktoberfest in downtown Cincinnati. Seeger admitted that he walked a total of ten blocks to and from the festival and was drinking beer. Cincinnati Bell took sworn statements from all employee-witnesses who saw Seeger at Oktoberfest and began an investigation into his conduct. After reviewing doctors' statements, witness statements and Seeger's own statements, Cincinnati Bell terminated Seeger for disability fraud, a violation of company policy.

Seeger filed suit for age discrimination and violation of his rights under the FMLA. The district court held that the close temporal proximity between Seeger's FMLA leave and his termination provided a sufficient casual connection to establish a prima facie case of retaliatory discharge. However, the court held that Cincinnati Bell established a legitimate, nondiscriminatory reason for terminating Seeger – disability fraud, and Seeger failed to show that this reason was pretextual. The Sixth Circuit Court of Appeals affirmed.

Linberry v. Detroit Medical Center (E.D. Michigan, February 5, 2013), Linberry, an RN with the Detroit Medical Center, was approved for FMLA leave after injuring her lower back and leg. While on FMLA leave, she took a vacation to Mexico. Though she had substantial lifting and mobility restrictions, her doctor "approved" the vacation because it was not as physically demanding as her job and did not conflict with her recovery.

During her FMLA leave, the employee posted numerous pictures on Facebook, showing her activities on vacation including riding in a motorboat, lying on her side holding up

two bottles of beer in one hand, and holding her grandchildren (one in each arm). She also posted comments regarding activities such as trips to Home Depot. Some co-workers, who were Facebook friends with the employee and knew of her claimed limitations, saw the pictures and complained to management about what they considered abuse of FMLA leave

While the employee was still on leave, the employee sent her supervisor an email complaint that she had not received a get well card from staff. The supervisor responded that "the staff were waiting until you came back from your vacation in Mexico...Since you were well enough to travel on a 4+ hour flight, wait in customs lines, bus transport, etc., we were assuming you would be well enough to come back to work." In her response, the employee repeatedly claimed that she traveled using a wheelchair so that she did not have to stand for any lengthy period of time. However, after the employee was advised that airports have cameras and was shown her own Facebook postings, she admitted to lying about using a wheelchair and admitted that she was able to stand for more than 30 minutes while going through customs.

The hospital terminated her employment for misuse of FMLA leave and for dishonesty. Linberry filed a lawsuit claiming violation of her FMLA rights because she was not reinstated. The Court dismissed her claims, finding that the hospital had the right to terminate her because of her admitted dishonesty and misuse of FMLA. The Court emphasized that the FMLA does not afford an employee any greater rights than she would otherwise have if she was not on FMLA leave. The Court reiterated that an employee's FMLA rights are not violated if the employer has a legitimate reason, unrelated to the exercise of FMLA rights, for terminating employment.

Presentation\TOPIC\FMLA\Standard Outline\Basic FMLA Outline