AMERICAN BAR ASSOCIATION
SECTION OF LABOR AND EMPLOYMENT LAW
BASIC FMLA PRACTICE

THE FAMILY AND MEDICAL LEAVE ACT

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JUNE, 2005
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This outline summarizes the primary provisions of the Family and Medical Leave Act of 1993 ("FMLA") as interpreted by the U.S. Department of Labor ("DOL") in its final regulations. Those regulations appear at 29 CFR Part 825. Except where otherwise noted, all citations are to the DOL regulations. This outline includes as appendices the DOL prototypes for an individualized notice of rights to be given to employees and a medical certification form.

I. OVERVIEW

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.

II. COVERAGE OF THE FMLA

A. COVERED EMPLOYERS

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(e), 825.106(d). However, those employed outside the United States are not counted. §825.105(b).

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).

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.

B. ELIGIBLE EMPLOYEES

To be eligible for leave under the FMLA, an employee must (1) have worked for his or her current employer or its predecessor in interest for a minimum of 12 months (which need not be consecutive); (2) have performed at least 1,250 hours of service during the 12 months prior to the leave request; and (3) 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).

III. TRIGGERING EVENTS

A. TYPES OF LEAVES

1. Care for Family Members: 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).

2. Birth, Adoption or Foster Care Placement of a Child: 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 twelve 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 twelve 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 twelve month period for a serious personal health problem or to care for a parent.

3. Employee’s 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).
B. SERIOUS HEALTH CONDITION

1. General Rules: 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.

2. Serious Health Condition Involving Continuing Treatment: 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).

§825.114(a).

3. Health Care Provider: 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. §825.118.

IV. NATURE OF THE LEAVE
A. **MEASURING THE LEAVE PERIOD**

1. **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 (1) a calendar year, fiscal year, year between anniversary dates or other fixed 12-month leave year; (2) a 12-month period measured forward from the date an employee’s first FMLA leave begins; or (3) 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).

2. **Consequences of Failure to Select a Method:** 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 utilized, 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.

B. **SCHEDULING OF THE LEAVE**

1. **Leaves for Planned Medical Treatment:** If the leave will be used for planned medical treatment of an employee or family member, the employee must make a reasonable effort to schedule the leave at a time least disruptive to the business. §825.302(e).

2. **Intermittent and Reduced Schedule Leaves in General:** 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).

3. **Calculation of Intermittent and Reduced Schedule Leaves:** 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).
4. **Employer Right to Transfer**: 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).
C. COMPENSATION DURING LEAVE

1. **Substitution**: 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).

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).

2. **Benefit Coverage During Leave**: 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. 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: (1) the continuation, recurrence or onset of a serious health condition of the employee or a family member, or (2) other circumstances beyond the employee’s control. §§825.209(a), 825.213(a)(1) and (2).

V. NOTIFICATION AND DESIGNATION

A. **EMPLOYER’S OBLIGATIONS TO NOTIFY EMPLOYEES GENERALLY OF RIGHTS UNDER THE FMLA**

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).

B. **EMPLOYEE’S DUTY TO NOTIFY EMPLOYER OF NEED FOR LEAVE**

1. **Timing of Notice**: 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).

2. **Type of Notice:** 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 (1) the employee’s need for FMLA leave; (2) the anticipated timing of the leave; and (3) 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.

3. **Employee’s Failure to Give Timely Notice**
   a. **Foreseeable Leaves:** 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).

   b. **Other Leaves:** 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).

C. **EMPLOYER’S DUTY TO DESIGNATE**

1. **General Requirement:** 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).

2. **Method of 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).
3. **Preliminary Designation:** 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).

4. **Consequences of Failure to Designate in a Timely Manner:** The DOL regulations state that 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 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); 825.700(a). However, the U.S. Supreme Court has held that the DOL exceeded its regulatory authority when it promulgated these standards. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002). Some courts have subsequently held that an employer that fails to designate leave in a timely manner may be precluded from denying restoration rights to an employee if timely designation may have led the employee to alter his or her use of leave. See, e.g., *Conoshenti v. Public Serv. Elec. & Gas. Co.*, 364 F.3d 135 (3d Cir. 2004).

5. **Response to Ineligible Employee:** An employer must generally 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). Some courts have held that this regulation is not enforceable. See, e.g., *Seaman v. Downtown Partnership of Baltimore, Inc.*, 991 F. Supp. 751 (D. Md. 1998).

**D. EMPLOYER’S OBLIGATIONS TO PROVIDE INDIVIDUALIZED NOTICE OF RIGHTS**

1. **General Requirement:** In addition to the notices that must be provided generally to employees (see Section V(A)), 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 outline at Appendix A. 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.

2. **Frequency of Individualized Notice:** 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).

3. Consequences of Failure 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).

E. EMPLOYEE’S DUTY TO RESPOND TO REQUESTS FOR PERIODIC REPORTS

The 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).

F. EMPLOYEE NOTICE OF INTENT TO RETURN TO WORK

An 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).

VI. MEDICAL CERTIFICATION

A. EMPLOYER’S RIGHT TO REQUEST MEDICAL CERTIFICATION

1. General: 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 at Appendix B. §825.305(a).

2. Inquiries Concerning Medical Certification: 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 nor a health care provider retained by the employer may request additional information from the employee’s health care provider. §825.307(a)(1).
3. **Additional Certifications**: 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).
B. RECERTIFICATIONS

1. **General:** An employer may seek recertifications of previously certified medical conditions. §825.308.

2. **Frequency:** 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).

3. **Employee Response:** Employees must provide recertifications within 15 days of requests for recertification. §825.308(d).

C. FITNESS FOR DUTY

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).

VII. EMPLOYMENT AND BENEFITS PROTECTION

A. GENERAL RULE ON RESTORATION

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).

B. BENEFITS ACCRUAL AND RESTORATION
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).

C. EXEMPTION FOR HIGHLY PAID EMPLOYEES

The FMLA does not guarantee the same rights to salaried employees in the highest paid ten 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).

VIII. INTERACTION WITH OTHER LAWS

A. STATE LEAVE LAWS

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.

B. WORKERS’ COMPENSATION

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).

C. **AMERICANS WITH DISABILITIES ACT**

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).

D. **FAIR LABOR STANDARDS ACT**

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).

IX. **ENFORCEMENT**

A. **WHO MAY BRING AN ACTION**

An employee may bring an action under 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).

B. **REMEDIES**

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:

1. the amount of either:
   a. lost wages and benefits due to the violation; or
   b. if no wages or benefits have been lost, other costs incurred by the employee, such as the costs of providing care, up to twelve weeks worth of wages; and
2. the interest on the amount described above; and
3. 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). In addition, the DOL may pursue an action for civil money penalties for posting violations. 29 U.S.C. §2619(b).

C. STATUTE OF LIMITATIONS

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 A

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:

□ 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
leave to continue until on or about ________________.

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 □ 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.

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.)

5(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.

5(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 B

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\(^1\) 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\(^2\) 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:\(^2\)

\(^1\) Here and elsewhere on this form, the information sought relates only to the condition for which the employee is taking FMLA leave.

\(^2\) “Incapacity,” for purposes of FMLA, is defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom.
6.a. If additional treatments will be required for the condition, provide an estimate of the probable number of such treatments:

If the patient will be absent from work or other daily activities because of treatment on an intermittent or part-time basis, also provide an estimate of the probable number 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:

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(Signature of Health Care Provider)  (Type of Practice)

(Telephone Number)

(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:

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(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 incapacity or subsequent treatment in connection with or consequent to such inpatient care.

2. Absence Plus Treatment

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

   (1) **Treatment two or more times** by a health care provider, by a nurse or physician’s assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

   (2) **Treatment** by a health care provider on **at least one occasion** which results in a **regimen of continuing treatment** 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:

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

4 A regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition. A regimen of treatment does not include the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider.
(1) Requires **periodic visits** for treatment by a health care provider, or by a nurse or physician’s assistant under direct supervision of a health care provider;

(2) Continues over an **extended period of time** (including recurring episodes of a single underlying condition); and

(3) May cause **episodic** rather than a continuing period of incapacity\(^2\) (e.g., asthma, diabetes, epilepsy, etc.).

5. **Permanent/Long-term Conditions Requiring Supervision**

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

6. **Multiple Treatments (Non-Chronic Conditions)**

Any period of **absence** to receive **multiple treatments** (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for **restorative surgery** after an accident or other injury, or for a condition that would likely result in a **period of incapacity\(^2\)** 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).
Eligible employees may take up to 12 weeks of leave during 12 months due to:

- Birth, adoption or foster care placement of a child
- Care of a child, spouse or parent with a serious health condition
- Employee’s own serious health condition

Coverage of Employers

- 50 or more employees
- Coverage issues for private sector employers
  - Integrated employer
  - Joint employers (e.g., temporary help agency and contracting employer)
  - Successors
- Other employers
  - Public sector
  - Local educational agencies
Eligible Employees

- 12 months of employment; and
- 1,250 hours of service in previous 12 months; and
- 50 employees are employed either:
  - at the employee’s worksite; or
  - within 75 miles of travel distance of the employee

Types of Leaves

- Care of child, spouse or parent with a serious health condition
  - Child over 18 does not qualify unless incapable of self-care
- Birth, adoption or foster care placement
  - Available only during first 12 months
  - Limitation on spouses employed by the same employer
- Employee’s own serious health condition
  - Unable to perform essential job functions
Serious Health Condition

- Incapacity for more than three calendar days plus either:
  - two or more treatments by or under supervision of health care provider; or
  - one treatment and regimen of continuing treatment
- Other qualifying circumstances
  - Inpatient care
  - Incapacity due to pregnancy or prenatal care
  - Incapacity due to a chronic condition
  - Incapacity due to a long-term condition
  - Absence for restorative surgery
  - Absence to prevent incapacity

Measuring the 12 Month Period Within Which to Use 12 Weeks

- Various alternatives available (e.g., calendar year, fiscal year, employee anniversary dates, 12 months from first FMLA leave, “rolling” 12 months measured backward)
- Consequences for employer of failure to select a method
Intermittent and Reduced Schedule Leaves

- Available only if permitted by employer or medically necessary
- Pro rata adjustment to measure leave used
- Employer right to transfer employee to a position that:
  - has equivalent pay and benefits; and
  - better accommodates recurring leaves

Compensation

- Substitution of paid leave
- Continuation of group health plan coverage
- Limited employer right to recover premium payments
Notification and Designation

- Employer’s general notice obligations (i.e., posting and handbook provisions)
- Employee’s notice of need for leave
  - Timing
  - Nature of notice
- Employer’s duty to designate
- Employer’s obligation to provide individualized notices of rights
- Employee’s obligation to report on status and intent to return to work

Medical Certifications

- Limited right to information
- Employer’s right to seek clarification or authentication through health care provider
- Employer’s limited right to require a second opinion
  - Employer must have reason to doubt the validity of the first medical opinion
  - Employer’s health care provider may not be “employed on a regular basis” by the employer
- Third opinion by jointly selected health care provider is final and binding
- Limited employer right to obtain recertifications
- Fitness for duty certification
Restoration Rights

- Restoration to the same job or a job with equivalent pay, benefits and terms and conditions
- Receipt of pay increases
- Right to immediate restoration of benefits
- Limitations
  - No greater rights than if no leave had been taken
  - Key employees

Interaction With Other Laws

- State Leave Laws
- Workers’ Compensation
- Americans with Disabilities Act
- Fair Labor Standards Act
Enforcement and Remedies

- Remedies
  - Lost wages and benefits
  - Interest
  - Liquidated damages
  - Attorney’s fees
- Statute of Limitations
  - 2 years; 3 years if willful
- Private right of action
- DOL enforcement