UNDERSTANDING AND EFFECTIVELY DEALING WITH THE FAMILY AND MEDICAL LEAVE ACT OF 1993

by

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I. PURPOSE

The Family and Medical Leave Act, or the "FMLA," of 1993 (29 U.S.C. § 2601, et seq.) was passed into law, becoming effective on August 5, 1993, for the purpose of allowing covered employees the time off from work they need in order to attend to the illness of a loved one or of themselves.

II. WHICH EMPLOYERS ARE COVERED?

The FMLA applies to any employer who employs 50 or more employees for at least 20 weeks in either the current or previous calendar year.

Public sector employers are covered by the FMLA regardless of the number of employees they employ.

III. WHICH EMPLOYEES ARE COVERED?

Employees are protected by the FMLA if they work for a covered employer and they:

a) Work within 75 miles of 50 or more other employees of the employer, which is determined at the time the employee requests the leave,

b) They have worked for their employer for at least 12 months within the last seven (7) years, which need not be consecutive, and

c) They have ***actually*** worked at least 1,250 hours in the preceding 12-month period prior to beginning their leave. (Sick time, vacation time or personal time off do not count towards this calculation.)

Consequently, the FMLA covers part-time as well as full-time employees.

Also, even though all public sector employers are automatically covered by the FMLA, all public employees are not automatically entitled to receive the benefits of the Act

unless each of these requirements are met as well.

The final regulations retain the proposed change clarifying that employees who become eligible for FMLA protection while in the middle of non-FMLA leave may automatically acquire FMLA protection. Leave that begins before FMLA eligibility may start out as "non-FMLA" qualifying leave, but if an employee becomes eligible for FMLA leave in the midst of the absence, FMLA protections are triggered from that point forward. 29 CFR § 825.110(d).

IV. JOINT EMPLOYERS

The final regulations contain new language clarifying that a joint employer relationship generally does not arise from "Professional Employer Organizations" in instances where the PEO "merely performs … administrative functions." However, in circumstances where a PEO or vendor actually has the right to hire, fire, and assign work, a joint employer relationship is still likely to exist, "based on all the facts and circumstances." 29 CFR § 825.106(b)(2).

V. MILITARY SERVICE COUNTS TOWARDS FMLA ELIGIBILITY

The final regulation state that the **months** in which an employee is deployed on a qualifying USERRA military leave ***will also count towards*** the employee's FMLA eligibility. 29 CFR § 825.110(b)(i).

An employee returning from USERRA-covered service must be credited with the hours of service that the employee ***would have worked*** if it had not been for the employee's military service. Accordingly, an employee who is reemployed following USERRA-covered service has the hours that he would have worked for the employer ***added to any hours actually worked*** during the previous 12-month period to meet the FMLA's hours of service requirement. In order to determine the hours that would have been worked during the time spent on military leave, the employee's pre-service work schedule can generally be used for calculations. 29 CFR § 825.110(c)(2).

VI. WHEN CAN A COVERED EMPLOYEE GET TIME OFF FROM WORK?

Covered employees may receive up to 12 weeks of unpaid leave per any 12-month period due to:

a) The birth, adoption or receipt of a child into foster care,

b) A serious health condition that makes the employee unable to perform the essential functions of his/her position, or

c) A serious health condition wherein the employee is needed to care for a spouse, child or parent.

FMLA leave is also available for the placement of adopted children. The final regulations retain the proposed clarification that FMLA leave may include time to

"travel to another country to complete an adoption." FMLA eligibility is not affected by the **"source of the adopted child."** 29 CFR § 825.121(a)(1).

Employees who become eligible for FMLA protection while in the middle of non-FMLA leave may automatically acquire FMLA protection. As a result, leave that begins before FMLA eligibility may start out as "non-FMLA" qualifying leave, but if an employee becomes eligible for FMLA leave in the midst of the absence, FMLA protections are triggered from that point forward. 29 CFR § 825.110(d).

VII. FMLA LEAVE FOR EMPLOYEES IN THE MILITARY & THEIR FAMILIES

The final regulations extend FMLA protection to employees who are needed to care for family members in the military with a serious injury or illness incurred in the line of duty. Likewise, the amendment allows families of National Guard and Reserve personnel on active duty to take FMLA job-protected leave in order to manage activities associated with their service, known as "**qualifying exigencies**."

The final regulation defines "qualifying exigencies" as: (1) short-notice deployment, (2) military events and related activities, (3) childcare and school activities, (4) financial and legal arrangements, (5) counseling, (6) rest and recuperation, (7) post-deployment activities, and (8) additional activities to which the employer consents. 29 CFR § 825.126(a).

On January 28, 2008, President Bush signed into law an amendment to the Family and Medical Leave Act (FMLA) that expands its coverage to the families of U.S. service men and women.

Under this amendment, covered businesses are now required to offer up to **26 weeks** of unpaid leave to employees who need to provide care to wounded U.S. military personnel. The FMLA defines a covered veteran as a veteran who has been discharged or released under conditions other than dishonorable within the **five-year period preceding the date the employee first takes military caregiver leave to care for the veteran.**

VIII. CALCULATING FMLA LEAVE HOURS

A. How Many Hours of FMLA Leave Is An Employee Eligible To Receive?

The FMLA does not state how many hours or days of leave an employee is allowed to use under the FMLA. Instead, the FMLA, employees are entitled to receive 12 weeks of leave for covered conditions.

Therefore, in order to calculate number of hours an employee would be entitled to take under the FMLA, employers need to look at the number of hours that employee would normally work in a given week.

If an employee normally works 40 hours in a given week, that employee would be entitled to receive 480 hours of FMLA time in a given year.

Likewise, if an employee normally works only 30 hours in a given week, that employee would be entitled to receive 360 hours of FMLA time in a given year.

If an employee's schedule varies from week to week to such an extent that an employer is unable to determine with any certainty how many hours the employee would otherwise have worked if he was not on leave, a weekly average of the hours scheduled over the 12 months prior to the beginning of the leave period (including any hours for which the employee took leave of any type) would be used for calculating the employee's leave entitlement.

B. Mandatory Overtime Hours And FMLA Hours of Eligible Leave

If an employee would normally be required to work overtime, but is unable to do so because of an FMLA-qualifying reason that limits the employee's ability to work overtime, the hours which the employee would have been required to work may be counted against the employee's FMLA entitlement. Such issues arise when an employee is using FMLA intermittent or reduced schedule leave.

For example, suppose and employee would normally be required to work 48 hours in a particular week. However, due to an FMLA serious health condition the employee is unable to work more than 40 hours. That employee would be able to use eight hours of FMLA-protected leave out of the **48-hour workweek**, or one-sixth (1/6) of a week of FMLA leave.

Therefore, the employee's allotted time off would not be calculated on a 40-hour work week but instead on a 48-hour work week.

However, voluntary overtime hours do not count towards this calculation. Only mandatory overtime counts.

Of course, these mandatory overtime hours do not matter when an employee misses an entire week. One week is equal to one week, regardless of the number of hours worked.

IX. CALCULATING THE FMLA LEAVE YEAR

A. Establishing The 12-Month Period Of Time Used For Calculating FMLA Leave

The FMLA allows employers to choose from four different methods of calculating the 12-month period in which employees may use their 12 weeks of FMLA leave. Once an employer has chosen the method it intends to use, the employer must then communicate its choice to its employees, which is most often done in the employer's FMLA policy. The employer must then administer its method of calculation in a uniform and consistent manner.

If the employer later decides to use another method in tracking such accrued time off, the employer can only do so by providing its employees with 60 days of advanced notice.

The four methods employers may adopt are as follows:

1. **Calendar year.**

   Under this method, an employee could conceivably take 24 straight weeks of FMLA leave: 12 weeks at the end of the year and 12 weeks at the beginning of the year. Such back-to-back leave entitlement is referred to as "stacking."

2. **Any fixed 12-month "leave year," such as a fiscal year.**

   It is common for leave years to begin with the employee's hire date. Others begin when the employer's benefit plan year begins.

   Consider the example of an employer's leave year that begins for all of its employees on June 1 and ends on May 31 of the next year. If an employee contracts a serious health condition under the FMLA and qualifies for leave under the Act in March, the employee could take 12 weeks of leave through May 31, and then take another 12 weeks starting June1. Therefore, stacking is possible under this method.

3. **The 12-month period starting when an employee first begins taking FMLA leave. The employee would then be eligible to take 12 weeks of FMLA leave within the next 12-month period.**

   Consider the example of an employee who takes 12 weeks of FMLA leave beginning March 1. The employee would not be eligible to take another twelve weeks of FMLA leave until February 28 of the next year. Once that year passes, the employee then qualifies for and requires six more weeks of FMLA leave starting April 15 of that next year, that employee would have until April 15 of that following year to use the remaining six weeks of FMLA leave. Therefore, exactly when the 12-month period for using the 12 weeks of leave allotted under the FMLA begins and ends depends on when the employee first starts using his FMLA leave.

   Stacking is also possible under this method. Consider the example of an employee who takes one week of FMLA leave starting March 1. That employee's 12-month period for taking 12 weeks of FMLA leave would not end until February 28 of that next year.

   However, later that same year in December, the employee then takes 11 more weeks of FMLA leave, which finally runs out on February 28. Starting March 1 again, the employee would be entitled to another 12 weeks of FMLA leave.

4. **A "rolling" 12-month period that includes any FMLA leave taken by an employee within any previous 12-month period regardless of when the employee first took such leave.**

   Under this method of calculation, every time an employee uses FMLA leave, how much time the employee is entitled to receive is determined by counting how much FMLA leave time was used in the preceding 12-month period. By far, the "rolling" 12-month period method of calculating FMLA leave is the most popular with employers since it does not allow for stacking of time off by employees.

X. LEAVE NEED NOT BE PAID; EMPLOYEES MAY BE REQUIRED TO USE ACCRUED TIME OFF

Although the Act does not require that FMLA leave be paid by the employer, employers may require in their policies that employees off on leave, including FMLA leave, use their accrued time off accounts while they are off from work. (i.e., sick time, vacation time, etc.).

XI. EMPLOYERS MAY REQUIRE FMLA LEAVE AND OTHER LEAVES TO RUN CONCURRENTLY

Employers may also state in their policies that an employee's paid time off and the employee's FMLA leave run concurrently with each other and not in succession. As a result, an employee would not be eligible to take 12 weeks of FMLA leave, return to work, and then use his vacation account to take even more time off from work.

Employers may also require employees' FMLA leave to run concurrently with short-term or long-term disability and Workers' Compensation leave. However, employers should first clearly reserve all such rights in their policies before imposing such requirements against employees.

If an employer does not state that FMLA leave runs concurrently with other leaves, the presumption under the law is that they will run consecutively.

XII. DOL OPINION LETTER ALLOWS EMPLOYER TO UNILATERALLY DESIGNATE FMLA LEAVE

There has always been a question as to whether an employer could unilaterally designate a leave of absence as being covered by the FMLA. Before 2014, the answer seemed to be a clear "yes." The DOL had issued a few opinion letters that stated it was the employer's right to designate absences as FMLA leave, regardless of whether the employee wanted it.

However, starting in 2014, a few courts held employees could decline FMLA protection for specific absences and "save" the leave for future use. That was contrary to the

existing FMLA regulations and opinion letters and caused confusion for employers nationwide.

In 2019, the DOL came out with a new opinion letter that unequivocally reaffirms that an employer may designate an employee's absences as FMLA leave even if she doesn't want it to.

The DOL's rationale is complicated, but in short, it concludes:

1. Once an employer confirms that an absence qualifies as FMLA leave, it is absolutely obligated to designate the absence as such; and

2. Failure to do so will constitute unlawful interference with the employee's FMLA rights.

The issues addressed in the opinion letter commonly arise when an employee has more than one reason for FMLA leave. Employees may resist using their FMLA entitlement for an earlier absence because they want to save leave for later ones. The best and most common example is a pregnant employee who takes time off for a different FMLA-qualifying reason, such as to care for another child or a sick parent. Similarly, the employer may prefer not to force the employee to take FMLA leave for every little absence that might qualify.
In that situation, not only can the employer require the employee to use their FMLA leave until it is exhausted for all these absences, but the employer is required to do so. For employees who have paid leave available, you may allow them to choose between using it concurrently with FMLA leave or save it for after their protected leave is exhausted, but you may not allow them to use it first and save their FMLA leave for later.

WHAT DOES THIS MEAN FOR HR?

Opinion letters can be very helpful in clearing such confusing issues as this with the FMLA. Just because the DOL interprets a law a certain way does not mean the courts have to agree with it. However, these opinion letters are not law, but they are very persuasive to a court.

XIII. HOLIDAYS

Under the regulations, where an employee takes a full week of FMLA leave, the fact that a holiday may occur within the week does not affect how much of an employee's 12-week FMLA allowance has been used – the week is still counted as a full week of FMLA leave.

However, if an employee is using FMLA leave in increments of less than one week, the intervening holiday **will not count against the employee's 12-week entitlement** unless the employee was otherwise scheduled and expected to work during the holiday. 29 CFR § 825.200(h).

XIV. WHO IS A CHILD?

Section 2611 of the FMLA defines a "child" as being any biological, adopted, foster child, stepchild, a legal ward or a child of a person standing in loco parentis ("in place of

the parent") who is either **under the age of 18 or is 18 years of age or older and is "incapable of self-care because of a mental or physical disability**."

XV. DOL ISSUES NEW ADMINISTRATOR'S INTERPRETATION OF FMLA LEAVE TO CARE FOR A DISABLED ADULT CHILD

On January 14, 2013, the U.S. Department of Labor issued an **Administrator's Interpretation** clarifying several aspects of the FMLA's application to FMLA leave taken by an employee to take care of an adult child.

Who is an adult son or daughter under the FMLA?

An employee requesting FMLA leave to care for a son or daughter ***under*** 18 years of age must show only a need to care for the child due to a serious health condition.

To take leave to care for a "son or daughter" who is ***18 years of age or older***, the employee must show that the child has a mental or physical disability and is incapable of self-care because of that disability. The new Administrator's Interpretation clarifies that the child's disability **need not** have occurred or been diagnosed **before** age 18, but may have commenced at any time in the child's life.

The DOL's interpretation states that an adult son or daughter must meet **four requirements** before the employee/parent may take FMLA leave to provide care. (The employee must also meet all the other requirements of the FMLA, such as employer coverage and employee eligibility.)

The son or daughter must:

1. Have a mental or physical disability as defined under the Americans with Disabilities Act (ADA) as amended by the ADAAA;

2. Be incapable of caring for himself or herself because of the disability;

3. Have a serious health condition; and

4. Be in need of care because of the serious health condition.

An Employee is Entitled to FMLA Leave Only if the Adult Child is "Incapable of Self-Care"

Even though more adult children will qualify as disabled, an employee is not entitled to FMLA leave unless the adult child is "**incapable of self-care**." The Administrator's Interpretation explains this requirement.

The term "**incapable of self-care**" basically means that the individual needs active assistance or supervision in order to care for himself and engage in **at least three** of the "activities of daily living." Examples of the "activities of daily living" means that the adult child requires active assistance or supervision in activities such as **caring appropriately for one's grooming and hygiene, bathing, dressing, eating, cooking, cleaning, shopping, taking public transportation, paying bills and maintaining a**

residence. Therefore, a parent may be "needed to care" for an adult child whose serious health condition renders him or her unable to care for his or her own basic medical, hygienic, or nutritional needs, or travel alone to the doctor.

Existing rules govern whether a person is needed to care for a son or daughter; "needed to care" includes providing psychological comfort to a son or daughter receiving inpatient or home care.

XVI. WHO IS A "PARENT" AND "IN LOCO PARENTIS"?

"Parent" means a biological, adoptive, step or foster father or mother, ***or any other individual who stood in loco parentis to the employee when the employee was a son or daughter***. This term does not include parents "in law."

On June 22, 2010, the U.S. Department of Labor ("DOL") issued Administrator's Interpretation No. 2010-3 clarifying the circumstances under which a person stands "in loco parentis" to a child for purposes of taking leave under the Family and Medical Leave Act ("FMLA") (29 U.S.C. § 2601 et. seq.).

The FMLA entitles employees with up to 12 weeks of job-protected leave for the birth or placement of a son or daughter, to bond with a newborn or newly placed son or daughter, and to care for a son or daughter with a serious health condition. "Son or daughter" is defined to include biological, adopted, or foster child, stepchild, legal ward, and a child of a person standing "in loco parentis."

Persons who are in loco parentis to a child include those with day-to-day responsibilities to care for and/or financially support a child.

Thus, 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 Interpretation is a step forward for gay and lesbian caregivers, and opens the door for caregivers in other nontraditional family structures. In light of the DOL's interpretation, employers may need to adjust their FMLA policies to reflect the broader definition of "in loco parentis."

The DOL added that the fact that a child has both a mother and father would not prevent a finding that a child is the "son or daughter" of an employee who lacks a biological or legal relationship with the child.

"Neither the statute nor the regulations restrict the number of parents a child may have under the FMLA," the DOL wrote. "For example, where a child's biological parents divorce, and each parent remarries, the child will be the 'son or daughter' of both the biological parents and the stepparents, and all four adults would have equal rights to take FMLA leave to care for the child."

The DOL added that when an employer has questions about whether an employee's relationship to a child is covered by the FMLA, the employer may require an employee to provide reasonable documentation or statement of the family relationship. "A simple

statement asserting that the requisite family relationship exists is all that is needed in situations such as in loco parentis where there is no legal or biological relationship."

As the interpretation makes clear, an uncle who is caring for his young niece and nephew when their single parent has been called to active military duty may exercise his right to family leave. Likewise, a grandmother who assumes responsibility for her sick grandchild when her own child is debilitated will be able to seek family and medical leave from her employer. And an employee who intends to share in the parenting of a child with his or her same-sex partner will be able to exercise the right to FMLA leave to bond with that child.

Further …

In June 2012, the DOL clarified its position on the "in loco parentis" language as it relates to not just who constitutes a "child" under the FMLA, but also who constitutes a "parent." Specifically, the DOL said:

> "Parent" means a biological, adoptive, step or foster father or mother, ***or any other individual who stood in loco parentis to the employee when the employee was a son or daughter***. This term does not include parents "in law."

Therefore, a parent also includes anyone who at any time stood in the place of a child's parent. As a result, after that child grows up and starts working for you, that child, or employee, can get time off from work under the FMLA to care for that "parent."

XVII. NEW FMLA REGULATIONS AND CALLING OFF FROM WORK

In 2009, the Department of Labor's new FMLA regulations changed what employers can require from their employees who call in sick from work.

Under the original FMLA regulations, employees were expected to report their need for FMLA leave "as soon as practicable" if they couldn't provide notice 30 days before they needed to miss work. The old regulations included interpretive examples and suggested that employees had ***up to two days*** to call in if they were out for FMLA protected reasons.

However, the new final regulations first say that "[w]hen an employee seeks leave for the ***first time*** for an FMLA qualifying reason," the employee need not mention the FMLA by name. However, once FMLA leave has been granted for an employee's health condition, the employee must thereafter **"specifically reference either the qualifying reason or the need for FMLA leave."** 29 CFR § 825.303(b).

The final regulations expressly state that an employee cannot merely call in "sick" and thereby trigger an affirmative duty for the employer to inquire further about whether the absence might be FMLA-qualifying. 29 CFR § 825.303(b).

Additionally, the final regulations specify that even when a leave is unforeseeable, it should be "practicable" for employees to request leave "either the same day or the next business day." 29 CFR § 825.302(b).

Also under the final regulations, when the need for leave is not foreseeable, an employee must comply with the employer's ***usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances.*** Specifically, the new regulations generally permit employers to require employees to follow established call-in procedures (except ones that impose more stringent timing requirements than the regulations provide), and they provide that failure to properly notify employers of absences may cause a delay or denial of FMLA protections. 29 CFR § 825.302(d). Employers may require employees seeking FMLA leave to call a "**designated number or a specific individual to request leave."** 29 CFR § 825.303(c). Under the previous 1995 regulations, an employer could not delay or deny FMLA leave if an employee failed to follow such procedures.

After these new regulations were adopted, many employers rejoiced, assuming they could safely discharge employees who didn't show up and didn't call in.

However, in Randolph v. Grange Mutual Casualty Company, No. 09-AP-519, 10th District Court of Appeals of Ohio (Franklin County 12/22/09), James Randolph worked for Grange Mutual Casualty and had an absenteeism problem. He was placed on probation and warned that if he had one more unauthorized absence, he would face termination.

The company had a call-in rule that required employees who needed to miss a scheduled workday to call off within 30 minutes of their scheduled work time.

Randolph suffered from a form of depression and was allowed to take intermittent FMLA leave for such things as medication checks and treatment.

Randolph claimed that one evening before a scheduled workday, he went into a dark depression and "blacked out" until he awoke the next day at 3:00 p.m., having missed his workday. He then headed for his doctor's office and decided to check his voice mail before calling his supervisor.

The supervisor had already fired Randolph after not hearing from him by the 30-minute deadline. That termination was by voice mail, which Randolph retrieved on his way to the doctor. Randolph said the news worsened his condition so much that he drove straight to his mother's house, crying. He never made it to the doctor.

His mother then called in for him about 11:00 p.m., explaining that her son was having a "nervous breakdown."

Randolph phoned the supervisor at 7:15 a.m. the next morning. However, Grange would not reconsider Randolph's termination.

Randolph sued, alleging that he had called in as "soon as practical."

The company argued that the new regulations allowed it to insist that Randolph follow the company's call-off rules.

But the court said that Randolph's suit deserved a trial. It concluded Randolph had no way of knowing that he would black out, was shocked when he learned he had been terminated and then tried to notify his employer via his mother. That, said the court, could be seen as prompt notice under both the old and the new regulations.

XVIII. WHAT IS A "SERIOUS HEALTH CONDITION"?

The FMLA defines a "serious health condition" as being whenever a covered individual:

1. Undergoes treatment or experiences a period of incapacity that requires inpatient care in a hospital, hospice or residential medical care facility, or any subsequent treatments stemming from this inpatient care, or

2. Requires continuing treatment under the care of a health care provider which results in the person being incapacitated for more than three consecutive calendar days, as well as any subsequent treatments or periods of incapacity that relate to the same condition which also involves:

    a. At least **two treatments** under the direct supervision of a health care provider, nurse or physician's assistant, or by a provider of health care services (i.e., physical therapist) under the direction of a health care provider within a **30-day period** and within **seven days of the onset of the leave**, or

    b. A single treatment by a health care provider that results in a continuing regimen of treatment under the supervision of a health care provider, or

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

4. Any period of treatment or incapacity due to a chronic serious health condition which:

    a. Requires periodic visits of at least **two times each year** for treatment by a health care provider, or by a nurse or physician's assistant under the direct supervision of a health care provider (29 CFR § 825.115(c)(1)),

    b. Continues over an extended period of time, and

    c. May cause episodic rather than a continuing period of incapacity (i.e., asthma, diabetes, epilepsy, etc.).

5. A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective, as in the case of a stroke, Alzheimer's, or the terminal stages of a disease. The person must still be under the continuing supervision by a health care provider, but she need not be receiving active treatment, or

6. Any period of absence to receive multiple treatments under the care or referral by a health care provider for restorative surgery after an accident or other injury, or for a condition that would likely result in an absence of more than three consecutive calendar days if such treatment was not provided, as in the case of chemotherapy for cancer, physical therapy for severe arthritis and dialysis for kidney disease.

XIX. WHAT IS ***NOT*** A SERIOUS HEALTH CONDITION?

Although it may not seem like it, not everything qualifies as a "serious health condition" under the FMLA.

First, treatments that are cosmetic or are not medically necessary are not covered by the FMLA, unless an inpatient hospital stay is required.

Unless an individual's health condition has serious complications, a "serious health condition" does not include:

1. Common cold or the flu,
2. Earaches,
3. Upset stomach or minor ulcers,
4. Headaches (other than migraines), or
5. Routine dental or orthodontia problems.

"Treatment" by a health care provider does not include routine appointments, such as for:

1. Physical examinations,
2. Hearing examinations,
3. Eye examinations, or
4. Dental examinations.

"Regimen of continuing treatment" does not include activities that can be initiated without a visit to a health care professional, which include:

1. Over-the-counter medications (i.e., aspirin or salves),
2. Bed rest,
3. Drinking fluids, or
4. Exercise and the like.

Also, treatments that can be initiated by individuals without the assistance of a health care professional, such as with over-the-counter medications, exercise, rest or by drinking fluids, do not qualify as a "regimen of continuing treatment" under the Act.

Although an individual may qualify for FMLA leave when referred by a health care provider to receive **treatment** for substance abuse, FMLA leave is not available when the individual is simply unable to come to work due to such abuse. Therefore, individuals may qualify for FMLA coverage when they receive treatment for a chemical dependency condition, not for the abuse of a substance.

XX. WHEN IS AN EMPLOYEE NEEDED TO CARE FOR A COVERED FAMILY MEMBER?

In Willard v. Ingram Construction Co., Inc., 194 F.3d 1315 (6th Cir. 1999), the plaintiff, an employee covered by the FMLA, was terminated from his job after taking a leave of absence to care for his premature baby and girlfriend. The plaintiff contended that he was needed to care for his girlfriend, so he was protected by the FMLA. The plaintiff also claimed that his baby was in the hospital and he had other children to care for as well since his girlfriend was incapacitated.

The employer claimed that the FMLA did not cover girlfriends, even if an employee has a child with her.

The employer also contended that the employee was not needed to care for his premature infant child since the baby was in the hospital. The hospital could do that.

And finally, the employer argued that the FMLA does not allow time off to care for the other children in the family who may need attention when a new child is born.

The court agreed with the employer regarding the status of the employee's girlfriend, holding that the plaintiff was not entitled to any leave to care for her since she was not legally his wife.

However, the court disagreed with the employer on its other arguments.

The court held that even when a child is hospitalized, a parent might be needed to care for that infant. The court also held that it is quite likely that when a child is born, the new parent will need time off from work to care for the other children in the family as well.

The court therefore held for the plaintiff on these last two issues.

NOTE: It is important to understand that various courts have held that emotional and psychological support may qualify as "necessary care" when covered family members are hospitalized.

XXI. FMLA COVERS TIME OFF FOR "PSYCHOLOGICAL COMFORT"

In Scamihorn v. General Truck Drivers, Office, Food and Warehouse Union, 282 F.3d 1078 (9th Cir. 2002), Scamihorn was an employee of General Truck Drivers when he took a leave of absence to care for his father. Scamihorn took a leave under the FMLA, but his employer later terminated Scamihorn, claiming that he was not really needed "to care for" his father. Scamihorn claimed that his termination was illegal under the FMLA.

Scamihorn's father suffered from and took medication for depression, which was brought about by the murder of his daughter. As a result, Scamihorn's father functioned at about 65% of his normal capacity. He generally continued working, stating that "work was part of my salvation," but took some time off and was assisted at other times by his wife. Scamihorn spent several hours each day talking with his father about his sister's death, and sometimes drove his father to therapy when his father was too emotionally distraught to drive. He also performed various chores on an intermittent basis as needed.

The FMLA does not define what it means to "care for" a family member. The regulations, however, state that "[i]t includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor, etc. The term also includes providing psychological comfort and reassurance which would be beneficial to a seriously ill child or parent receiving inpatient care." 29 CFR Section 825.116(a) (1993).

The final regulations clarify that "care" includes the provision of psychological comfort to those "receiving impatient or home care." 29 CFR Section 825.116(a) (1995). Noting that "[t]he legislative history of the FMLA underscores the significance of this type of care [S. Rep. No. 103-3 at 24 (1993)]," the court concluded that "the regulations specifically contemplate situations that encompass both physical and psychological care for a family member." The court therefore concluded that Scamihorn was in fact needed to "care for" his father within the meaning of the FMLA.

XXII. TRIP TO LAS VEGAS COVERED BY FMLA

In Ballard v. Chicago Park District, No. 13-1445 (7th Cir. 2014), Beverly Ballard cared on a daily basis for her mother, Sarah, who suffered with end-stage congestive heart failure. Through a social worker at her hospice, Sarah received a grant take a family vacation to Las Vegas. Ballard requested leave from her employer, Park District, to travel with her mother, which was denied, although the record was unclear when the denial occurred. Several months later, the Park District terminated Ballard for her allegedly unauthorized absences accumulated during her trip.

On appeal, the Seventh Circuit affirms the district court's decision denying a motion for summary judgment. The central promise of the family-care provisions of the FMLA is that employees are entitled to leave "[i]n order to care for" a family member with a "serious health condition." 29 U.S.C. § 2612(a)(1)(C). The Park District argued that only

ongoing medical treatment, not routine support, was covered by this section. But the Seventh Circuit held that the FMLA speaks in terms of "care," not "treatment." Moreover, nowhere does the FMLA limit where such care could be provided.

Citing the Department of Labor's regulation, 29 C.F.R. § 825.116 (2008), it favors the employee's argument that even basic care was covered:

> "Sarah's basic medical, hygienic, and nutritional needs did not change while she was in Las Vegas, and Beverly continued to assist her with those needs during the trip. In fact, as the district court observed, Beverly's presence proved quite important indeed when a fire at the hotel made it impossible to reach their room, requiring Beverly to find another source of insulin and pain medicine. Thus, at the very least, Ballard requested leave in order to provide physical care. That, in turn, is enough to satisfy 29 U.S.C. § 2612(a)(1)(C)."

The Seventh Circuit declares its split with cases in the First and Ninth Circuits, holding that travel unrelated to medical treatment was not supported by the FMLA. "[N]one of the cases explain why certain services provided to a family member at home should be considered 'care,' but those same services provided away from home should not be." And the panel rejects the argument that a liberal construction of care will foster abuse of FMLA leave:

> "[The Park District] also raises the specter that employees will help themselves to (unpaid) FMLA leave in order to take personal vacations, simply by bringing seriously ill family members along. So perhaps what the Park District means to argue is that the real reason Beverly requested leave was in order to take a free pleasure trip, and not in order to care for her mother . . . However, we note that an employer concerned about the risk that employees will abuse the FMLA's leave provisions may of course require that requests be certified by the family member's health care provider. See 29 U.S.C. § 2613."

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

Employers must realize that the term "to care for" is interpreted very broadly by the DOL and the courts. Therefore, it would be difficult to find a situation where an employee was ***not*** caring for an FMLA covered person.

XXIII. SELF-INFLICTED WOUNDS ARE COVERED BY THE FMLA

In Chandler v. Specialty Tires of America, 283 F.3d 818 (6th Cir. 2002), Heather Chandler was employed as an administrative assistant by Specialty Tires of America in Tennessee. On May 17, 1998, she attempted suicide by taking an overdose of pills. That evening, Chandler's parents found her and rushed her to the hospital. On May 18, she was transferred to another hospital so that she could be treated by psychiatrists.

During the week she was hospitalized, Chandler kept in close contact with the plant manager, Joe McNeer. She told him about her suicide attempt and that she needed time off for medical treatment. He agreed to place her on paid leave. By the end of the week, she felt better and was planning to return to work the following week.

Robert Beck, Specialty Tire's personnel manager and Chandler's immediate supervisor, learned of her suicide attempt on May 19. Believing that her behavior demonstrated a lack of responsibility, he concluded that he could no longer trust her to handle her duties as his administrative assistant. Following an eight-minute conversation with McNeer, Beck decided to fire Chandler without making any inquiries into her request for leave. He admitted that he had no experience with the FMLA when he fired her. He claimed, however, that he based his decision entirely on what he characterized as her irresponsible act of taking an overdose of pills.

Chandler sued Specialty Tires claiming that she was wrongfully fired in violation of the FMLA. The court found for Chandler and awarded her $36,652.00 in damages and $47,320.00 in attorneys' fees and costs. Specialty Tires appealed to the Sixth U.S. Circuit Court of Appeals, which covers Kentucky, Ohio, Michigan and Tennessee.

The Sixth Circuit FMLA held that hospitalization after a suicide attempt qualifies as a serious medical condition. The court also held that Chandler's notification of her condition was adequate to preserve her FMLA rights.

The court reasoned that an employee need not mention the FMLA when taking leave. All he must do is notify his employer that leave is needed. It is the employer's responsibility to identify the leave as qualifying for FMLA protection. The employer is then required to restore the employee to his previous position or an equivalent position when he returns from FMLA leave. The Act also prohibits employers from interfering with, restraining, or denying the exercise or attempted exercise of any FMLA right. That prohibition includes retaliatory discharge for taking FMLA leave.

Specialty Tire argued that Chandler wasn't fired for exercising her FMLA rights. It argued that Beck never considered the cause of her suicide attempt or the fact that it might result in her absence from work. The company claimed that the supervisor considered "only the *act* of overdosing, itself," which isn't protected activity under the FMLA.

The Sixth Circuit acknowledged that the FMLA protects an employee from termination as a result of taking leave for a serious medical condition **but doesn't protect an employee from a termination motivated by the underlying medical condition.** (Beware of the Americans with Disabilities Act!!!) The court concluded, however, that there was evidence that supported the jury's verdict that Beck fired Chandler for taking FMLA leave rather than for taking an overdose of drugs or being diagnosed with severe depression.

The court relied on the following undisputed facts:

- Beck knew that **Chandler** was on medical leave;
- He knew that she had been hospitalized for a suicide attempt;
- He decided to fire her shortly after an eight-minute conversation during which he learned that she was hospitalized;
- The timing of her termination coincided with the end of her period of leave; and
- Beck didn't realize that she was qualified for leave under the FMLA.

XXIV. WHEN IS AN EMPLOYER ON NOTICE OF AN FMLA CONDITION?

A. Employer Is On Notice Of Serious Health Condition Once Employer Is "Reasonably Aware" Of An FMLA Qualifying Event

If an employer should have been **reasonably aware** that an employee's absence from work may be covered by the FMLA, then the employer must send a notice to the employee informing the employee that he qualifies for FMLA coverage. Recent interpretations by the courts and Wage and Hour have weighed this "reasonably aware" standard **very much** into the favor of employees.

In Vargo-Adams v. U.S. Postal Service, WL 59349, N.D. OH 1998, an employee who suffered from migraines was terminated because she was unable to maintain a regular work schedule. The employee claimed her termination violated the FMLA since she should have been granted an intermittent work schedule for the days she missed.

The employer argued that migraines were not covered by the FMLA because she had not seen a physician regarding this condition. The employer also argued that it was never informed that the employee was missing work due to this condition.

However, the employee was able to prove that she had seen her physician six times to receive treatment for these migraines. The employee further claimed that she called off each time she had a migraine telling her supervisor that she had a headache and would not be in to work.

The court agreed with the employee. The court held that the employee had a serious medical condition, that she received treatment from a healthcare provider and that she gave her employer notice of this illness by telling her supervisor that she suffered from "headaches." With such a pattern of illnesses, the employer should have inquired further regarding the employee's condition.

B. Prolonged Absence May Constitute Notice To Employer

In those cases where an employee misses several days from work, the courts have tended to find that this constitutes reasonable notice to the employer that a serious health condition may be the reason for the absence. Therefore, in reality, if it is remotely reasonable to believe that the employee has incurred a qualifying event, the employer has a duty to investigate to the best of its ability and determine whether an FMLA qualifying event has occurred.

C. What If An Employer Could *Not* Have Reasonably Been Aware Of The Employee's Serious Health Condition?

If the employer could not have reasonably known that the leave an employee has been taking would qualify as FMLA leave, the employer may retroactively designate the employee's leave period as qualifying under the FMLA if the employer does so within five (5) business days of realizing that the employee's leave does in fact qualify for coverage under the FMLA.

D. Waiting For Medical Certification

An employer may also wait to classify an employee's leave as being covered by the FMLA by sending the employee a "Designation Notice" if the employer is waiting for medical certification. Upon receiving this medical certification, the employer has **five (5) business** days in which to retroactively designate the leave as covered by the FMLA.

However, as soon as an employer is given "reasonable" notice that an event or condition "may" be covered by the FMLA, the employer has **five (5) business** to provide the employee with an "Eligibility Notice" and a "Rights and Responsibilities" notice.

All of these employer notices will be discussed in these materials.

XXV. EMPLOYEE WHO CONCEALS SERIOUS HEALTH CONDITION

In Carter v. Ford Motor Co., No. 96-3668, CA 8, 1997, an employee had his wife call him off from work by telling his employer that he had family problems. Two days later, he was diagnosed with anxiety and depression. The employee called his employer back six days later and reported that he was still sick. A few days later, he called off again saying he was still sick.

The company then sent the employee a letter telling him to either report to work or provide a reason for his absence. The employee's wife called the company about a week later and said she was coming in with her husband's medical papers. However, the company said to not bother since her husband had been terminated.

The employee claimed he was terminated in violation of the FMLA. The court disagreed.

The court reasoned that the FMLA specifically requires employees to give their employers notice of their leave "as soon as practicable," which the court reasoned should be within two days. Since the employee never gave the employer adequate notice of his leave, the termination was legal.

XXVI. MEDICAL EXAMINATIONS

A. Medical Certifications

If employees are properly notified, they may be required to provide their employers with a medical certification from a qualified health care provider in order to substantiate the serious health condition of either themselves or of the covered family member. Employers may only request information relating to the serious medical condition in question.

The FMLA also allows employers to require their covered employees to obtain a second medical opinion regarding any serious health condition. If these two opinions differ, then the employer may require a third opinion. This third opinion is to be given by a health care provider that is jointly agreed upon by all parties and will be binding.

However, the FMLA places some significant restrictions on employers who wish to obtain second or third medical opinions, which include:

1. The second medical opinion cannot be from a health care provider whom the employer regularly contracts or uses in any way,

2. The employee or family member must be reimbursed for all of their reasonable out-of-pocket expenses incurred in order to obtain the second or third opinions, and

3. The employee or family member may not be required to travel more than a reasonable commuting distance in order to obtain these second or third opinions.

The final regulations also include new approved medical certification forms, including separate forms for the serious health conditions of employees and those of family members.

To streamline the processing of certifications, the final regulations allow health care providers to include medical facts about diagnoses, symptoms, hospitalization, doctors' visits, prescription medication, referrals for evaluation or treatment (physical therapy, for example), or any other regimen of continuing treatment.

B. Recertifying A Medical Condition

The regulations state that employers may request their employees to recertify their FMLA serious medical conditions on a reasonable basis, but under no circumstances may an employer require its employees to recertify their medical conditions more than once every 31 days unless:

1. The circumstances which surrounded the original medical certification have changed significantly,

2. There are reasonable doubts concerning the continuing validity of the certification, such as when the employee has been seen out shopping at the local malls or working at another job,

3. The employee requests an extension of his FMLA leave, or

4. The employee does not return from leave because of the continuation, recurrence, or onset of a serious health condition, and as a result, the employer is unable to recover the health premiums it paid on behalf of the employee. The employer may at that time request another medical certification of the employee's medical condition. Of course, this exception only applies if the employee fails to reimburse the employer for the premium payments made on his behalf.

However, if the medical certification indicates that the underlying condition will last more than **30 days, the employer may not request recertification until that minimum duration has passed**.

In all cases, however, even where a medical certification indicates that the underlying condition is a **"lifetime condition,"** employers may always require recertification **every 6 months** in connection with an absence. 29 CFR § 825.308.

C. Contact With Medical Professional

The 1995 regulations prohibited direct contact between employers and health care providers in most instances.

However, the new final regulations carve out an exception, allowing employers to contact physicians directly **"[i]f an employee's serious health condition may also be a disability within the meaning of the Americans with Disabilities Act,"** so long as the more liberal restrictions of the ADA are observed. 29 CFR § 825.306(d). (Under the old and new regulations, employers may also contact employees in accordance with state workers' compensation laws.)

The final regulations also permit an employer to make direct contact with the employee's physician to seek **"clarification and authentication"** of medical

certifications. Previously, only another physician hired by the employer could make such inquiries.

However, in a change from the proposed amendments, the final regulations require that employers **initiate** such contacts only through **"a health care provider, a human resource professional, a leave administrator, or a management official."** Importantly, **"[u]nder no circumstances … may the employee's direct supervisor contact the employee's health care provider."** 29 CFR § 825.307(a).

While the employee is not required to permit his or her doctor to communicate with the employer, the employer may deny the designation of FMLA leave for failure to consent. 29 CFR § 825.307(a).

On the other hand, if the employee's accident was work-related so that the employee is also on Workers' Compensation leave, many states' Workers' Compensation statute would take precedent and the employer would be permitted to contact the employee's health care provider.

XXVII. EMPLOYERS MUST INFORM EMPLOYEES OF THE CONSEQUENCES OF NOT RETURNING MEDICAL CERTIFICATION

In Wallace v. FedEx Corp., Nos. 11–5500, 11–5577 (6th Cir. 2014), Ms. Wallace worked at Fedex for approximately twenty-one years, ultimately reaching the position of senior paralegal in the summer of 2007. In addition to being, by all accounts, a dedicated employee, Ms. Wallace also suffered from a history and variety of health problems.

Throughout the summer of 2007, and despite numerous explicit warnings from her supervisor, Ms. Wallace found it increasingly difficult to arrive by her appointed 9:00 am start time due to her health problems. By August 2007, Ms. Wallace found herself needing extended time off from work. After visiting her doctor and obtaining letters from that doctor explaining the need for Ms. Wallace to take several weeks off of work, Ms. Wallace met with her supervisor and attorneys from FedEx's Labor and Employment Group.

During this meeting, Ms. Wallace's supervisor presented Ms. Wallace with FMLA forms, including a request for medical certification. The jury ultimately found that at no time during this meeting did Ms. Wallace's supervisor or the FedEx attorney inform Ms. Wallace of the importance of this certification form:

If she did not get it filled out by her doctor and return it to FedEx within 15 days, FedEx could deny her FMLA request.

Ms. Wallace, as the jury concluded, not knowing of the extreme importance of this documentation failed to submit it to FedEx even though she had her doctor complete the forms. After days of Ms. Wallace being out of work and not contacting her supervisor, FedEx made the decision to terminate her for failure to comply with FedEx's attendance and leave policies.

The turning point for this case rested on whether FedEx made it clear to Ms. Wallace that if she failed to return these forms she would lose her rights under the FMLA.

Both the FMLA and its regulations clearly state that while an employee need not use "magic words," such as "I need to take FMLA leave," it is the *employee's* duty to provide the employer with sufficient information from which the employer can determine that FMLA leave is needed. An employer's liability for FMLA violations only attaches if and when the employer knows that the employee is seeking FMLA qualified leave.

FedEx argued that it did not interfere with Ms. Wallace's FMLA rights because Ms. Wallace never returned the health certification form as required, and so FedEx did not know the duration of the leave that she required. It argued that because Ms. Wallace failed to return the forms, it did not know that she intended to take FMLA leave.

However, the Sixth Circuit reasoned,

> "[s]pecifically, FedEx focuses upon Wallace's failure to return the medical-certification form or to indicate that she desired leave beyond August 29 [2007]."

The court rejected FedEx's argument. Instead, the court explained that:

> "[b]y focusing on whether Wallace provided enough documentation for continued leave, FedEx largely misses the point of this notice element. The relevant question is whether Wallace provided FedEx with notice that she ***needed*** FMLA leave, ***not*** whether she provided notice that she needed a ***certain amount*** of FMLA leave."

To support its claim, FedEx cited the FMLA regulation that gives employers the option to request its employees provide a medical certification. The health certifications of the type FedEx relied upon provide employers with vital information regarding the reason for the leave, the type of leave (intermittent or for a block of time), and when (if known) the leave is supposed to end.

If the employee fails to return the completed certification to the employer within 15 days, the employer ***may*** delay or completely deny the employee's FMLA request. An employer ***must*** give notice of a requirement for certification each time that it desires one, and such notice must be in writing.

Because of the incredibly detrimental effect of failing to complete and return the FMLA form within the required time period, the regulations require that "[a]t the time the employer requests certification, ***the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification***."

The court noted, "[t]here was no mention of the need for medical certification or the consequences of failing to produce it. Given this evidence, a reasonably jury could find that FedEx failed to comply with the FMLA regulations and, thus, that terminating Wallace's employment interfered with her ongoing FMLA leave."

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

The Sixth Circuit was very clear in this case:

Employers MUST put employees on clear notice of the consequences if they do not return required FMLA documents.

Therefore, you need to check your FMLA paperwork to make sure it includes such vital notices.

XXVIII. FAILURE TO PROVIDE MEDICAL CERTIFICATION IN A TIMELY MANNER

In Brumbalough v. Camelot Care Centers, Inc., No. 04-5543 (6th Cir. 11/02/2005), Linda K. Brumbalough was employed as the State Clinical Director by Camelot Care Centers, Inc. ("Camelot") when she was terminated from her employment after taking a leave under the Family and Medical Leave Act ("**FMLA"**).

On June 11, 2001, Brumbalough sent an email to Julie Tesore, her supervisor and the Program Director of the Brentwood Office, informing her that she was having some health problems and she needed to cut back on her hours down to 40-45 per week. Following her appointment with her doctor, Ted Stallings, Brumbalough told Camelot that her doctor ordered her to take the rest of the week off. On June 17, 2001, Brumbalough informed Camelot of her intent to have her doctor sign the **FMLA** certification forms, since she was having more health problems and would need to take more time off.

Gretchen Jolly, Director of Human Resources, sent an **FMLA** Medical Certification form to Brumbalough. The Certification from Dr. Stallings provided that Brumbalough was presently incapacitated and that she would need **about** two to three months to recover. Brumbalough's **FMLA** leave was approved as of June 11, 2001. The twelve-week period of **FMLA** leave, if taken in full, was to expire on September 11, 2001.

Camelot then sent to Brumbalough an "Employer Response Form for **FMLA** Leave" which informed Brumbalough that she was to inform Camelot of her status every thirty days, that Brumbalough was required to present a fitness-for duty certification prior to being restored to employment and that she would need recertification from her physician after two months in order to get approval for further **FMLA** leave.

On July 27, 2001, Brumbalough sent an email to Camelot informing them that she felt ready to come back to work in "the next week or so." Ms. Jolly sent Brumbalough a letter on July 31, 2001, acknowledging Brumbalough's request to return to work and requesting that she provide a fitness-for-duty certification no later than August 7, 2001. The letter said,

"We required that you provide us with a date certain for your return. We also require a certification letter from your physician that you are indeed fit for duty to

return to your old job. I have enclosed a letter for your doctor to review and sign so that we can adequately assess your planned return to full-time employment."

The letter also included a copy of Brumbalough's job description and procedures. Dr. Stallings was asked to read the statement contained in the letter, put a date that Brumbalough could return to work, sign it and send it back to Camelot. Brumbalough received the letter on August 4, 2001.

On August 3, 2001, Brumbalough had an appointment with Dr. Stallings and he provided her with a handwritten note on a prescription pad stating, "She may return to work on 8/13/01. She should only work a 40-45 hour week and limit her out-of-town travel to 1 day per week."

Brumbalough claims that she faxed this note to Camelot; Camelot denies receiving it.

On August 8, 2001, Ms. Jolly mailed another letter stating that Camelot had not received a response to its request for a fitness-for-duty release for Brumbalough to return to work. The letter set a new deadline of August 10, 2001, and stated that if Camelot did not get the certification by August 10, 2001, it would consider Brumbalough's employment with Camelot terminated and would proceed to fill her position. This letter was delivered on August 9, 2001.

Brumbalough sought an extension of time for submitting the paperwork from Dr. Stallings. Ms. Jolly extended the deadline for Brumbalough to August 15, 2001. On August 10, 2001, Brumbalough received another overnight letter from Ms. Jolly, which confirmed the extended deadline of August 15, 2001 and stated if Brumbalough was unable to report for duty on or before Wednesday, August 15, 2001 with the fitness-for-duty certification, Camelot would consider her employment terminated. Brumbalough failed to submit the certification by this new deadline and was terminated by way of letter on August 17, 2001.

On August 18, 2001, Dr. Stallings prepared a letter which stated that Brumbalough may now return to work with certain modifications such as limiting her out-of-town travel to once a week and not working more than 45 hours a week. The letter indicated that the restrictions were expected to last for the next two months, at which time she would be reevaluated. Brumbalough was provided with this letter on August 22, 2001 to Camelot. Ms. Jolly testified that Camelot never received it and Brumbalough testified that she could not say for sure if anyone sent the letter to Camelot.

On April 11, 2003, Brumbalough filed suit against Camelot, alleging that Camelot violated her rights under the **FMLA** by terminating her while she was on **FMLA** leave and refusing to reinstate her.

In reviewing the case, the court first looked to the wording of the FMLA, which requires covered employers to provide their employees with up to twelve weeks of unpaid leave in the event that the employee has a serious medical condition. However, this entitlement is not without restrictions. The employer may require the employee to submit a **medical certification** of the employee's condition prior to the leave, or as soon as possible, if the leave was taken suddenly. 29 U.S.C. § 2613; 29 C.F.R. § 825.305(b).

As long as the employee is on **FMLA** leave, the employer may require the employee to submit a "recertification" of the medical condition as often as every thirty days. 29 C.F.R. § 825.308.

Furthermore, upon proper notification, the employer may require the employee to submit a "fitness-for-duty" certification by her health care provider as a condition of returning to work. 29 C.F.R. § 825.310. If the employee has not submitted a required "fitness-for-duty" certification by the time the employee's **FMLA** leave has ended, then the employee may be terminated. 29 C.F.R. § 825.311(c).

The **FMLA** also does not require the employer to reinstate an employee after her leave has ceased if the employee is unable to fulfill the essential functions of her job. 29 C.F.R. § 825.214(b).

Ms. Brumbalough argued that it was illegal to terminate her while she was still on FMLA leave. According to Brumbalough, Camelot improperly required her to submit a fitness-for-duty certification under the threat of termination because the **FMLA** only permits such an ultimatum to be made when the employee's **FMLA** leave has concluded. 29 C.F.R. § 825.311(c)

However, Brumbalough ended her rights under the FMLA to continue her leave when she notified Camelot of her intent to return to work on July 27, 2001. While the **FMLA** grants up to twelve weeks of leave, the **FMLA** also permits the employer to require certain documentation before the leave may be covered under the Act.

As previously mentioned, employers may require an employee to submit a recertification every thirty days in order to continue taking **FMLA** leave. 29 C.F.R. § 825.308(c). The employer must give the employee at least fifteen days to submit such recertification. See 29 C.F.R. § 825.308(d). If the employee fails to provide the recertification and continues to take leave, her leave is no longer covered under the **FMLA**. 29 C.F.R. § 825.311(b).

In this case, when Brumbalough started her leave, Camelot requested that she return to them a completed Medical Recertification Form within the next two months. Brumbalough's leave began on June 11, 2001, and Camelot indicated to her that her leave would continue until "on or about 8/11 - 9/11/01." Camelot therefore, providing proper notification, required that Brumbalough submit a recertification by August 11, 2001 … two months into her leave. Brumbalough failed to do so.

Accordingly, by August 11, 2001, Brumbalough was no longer covered under the **FMLA**.

XXIX. MISTAKENLY ASSIGNING FMLA ELIGIBILITY CAN CREATE FMLA COVERAGE

In Dobrowski v. Jay Dee Contractors, No. 08-1806 (6th Cir. July 8, 2009) Daniel Dobrowski, a mechanical engineer, was terminated by Jay Dee upon returning to work from an approved leave of absence for an elective surgical procedure he underwent to treat his epilepsy.

Dobrowski had been diagnosed with epilepsy since he was a child. Even though he took regular medication and underwent various treatments to control his condition, Dobrowski continued to have seizures as an adult. About six months prior to his October 2004 surgery, Dobrowski, in consultation with his physician, decided to explore additional treatment options, ultimately settling on a surgical option. In mid-July, his doctor cleared him for the surgery and scheduled it for October 15.

In September 2004, Dobrowski discussed his upcoming surgery with his supervisor and requested time off from work. Dobrowski was given a form entitled, "Application for Leave of Absence under the FMLA," which he completed and returned to Jay Dee. In October, the employer informed Dobrowski that his request for leave was approved for 12 weeks, from October 18, and that his position would be held open during the leave period.

Dobrowski underwent surgery and informed his employer that he wanted to return to work in early December, weeks before his leave period was to have concluded. When Dobrowski returned to work on December 13, 2004, he was informed that his position was being eliminated and no other position was available.

Dobrowski sued the employer, among other things, for FMLA violations. The employer moved for summary judgment, arguing that Dobrowski was not eligible for FMLA leave because the employer employed fewer than 50 employees within a 75-mile radius of Dobrowski's worksite.

Dobrowski argued that, having provided him with FMLA leave, the doctrine of equitable estoppel precluded the employer from denying his eligibility. Rejecting the plaintiff's argument, the district court granted the employer's motion. Dobrowski appealed.

The appellate court noted that it previously recognized the doctrine of equitable estoppel in FMLA cases to prevent employers from raising non-eligibility as a defense, but it had not adopted a standard for applying the doctrine. After a review of case law, the court held that a plaintiff must show that:

(1) A definite misrepresentation as to a material fact was made to the employee,

(2) The employee had a reasonable reliance on the misrepresentation, and

(3) The employee was harmed by relying on this misrepresentation."

The court previously had required that the party asserting the estoppel also be unaware of the "true facts," and that the adverse party intended the complaining party to rely on the statement or conduct.

However, the court found that Dobrowski failed to show that he detrimentally relied on the misrepresentation of eligibility. He presented no evidence establishing that he "change[d] his position" in reliance on the belief that his leave would be FMLA-protected. The court said that, if Dobrowski had relied on the erroneous representation, he should have pointed to "some action or statement that indicated that his decision to have the surgery was contingent on his understanding of his FMLA status."

On the contrary, the evidence demonstrated that Dobrowski already had decided to undergo surgery before he was informed of his eligibility. Accordingly, the court found the plaintiff failed to establish his estoppel claim, and the employer was entitled to judgment as a matter of law.

This case reminds employers of the importance of determining FMLA coverage before offering employees FMLA leave.

XXX. FIT FOR DUTY CERTIFICATES

The FMLA allows employers to require their employees to supply them with a fit for duty certificate before being allowed to return to work as long as the employer has such a policy in place requiring such certificates from every employee returning from leave.

This requirement must also be stated in the employee's original FMLA notice.

Just as with the medical certifications, employers are only allowed to obtain information regarding the particular health condition relating to the FMLA leave.

Unlike the medical certification, no second or third opinion may be obtained.

The employer may provide employees with a list of their essential job function together with the Designation Notice, as will be discussed later in these materials, where the employer told the employee that it would require a fitness-for-duty certification. If the employer provides such a list of essential functions, it may require the employee's health care provider to certify that the employee can perform them. When completing a fitness-for-duty certification, the health care provider therefore must assess the employee's ability to return to work against the identified essential functions. 29 CFR § 825.312(b).

Although employers are still not permitted to require a fit for duty certificate when the employee is on an intermittent leave, the final regulations carve out an exception:

> An employer is entitled to a certification of fitness to return to duty for **intermittent absences** up to once every 30 days if "reasonable safety concerns" exist regarding the employee's ability to perform his or her duties. 29 CFR § 825.312(f).

XXXI. UNAUTHORIZED WORK WHILE ON LEAVE

In Pharakhone v. Nissan North America, Inc., 324 F.3d 405 (6th Cir. 2003) Nissan had a policy that prohibited employees from engaging in unauthorized work while on leave. Viengsamon Pharakhone, an employee at Nissan, requested time off from work due to the birth of a child. Pharakhone also informed Nissan that he intended to work at the restaurant he and his wife had just purchased while he was on this FMLA leave. Pharakhone was told that under Nissan's policy prohibiting unauthorized work while on leave that he would not be permitted to work at the restaurant while on FMLA leave.

Pharakhone was terminated for violating company policy when he worked at the restaurant while on FMLA leave, in spite of the company's policy. Pharakhone then sued the company for violating his rights under the FMLA. However, the Sixth Circuit Court of Appeals held for the employer.

First, the court found that it was undisputed that Nissan had a uniform policy prohibiting "unauthorized work for personal gain while on leave" – and that Pharakhone did in fact violate this policy.

The court looked to the wording of the FMLA. The court reasoned that the right to reinstatement under the FMLA is not absolute. An employer need not reinstate an employee who would have lost his job even if he had not taken FMLA leave. (29 U.S.C. § 2614(a)(3)(B); 29 C.F.R. § 825.216) Therefore, an employer need not reinstate an employee if application of "a uniformly-applied policy governing outside or supplemental employment" – which would include a rule against working while on leave - results in the employee's discharge.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

Employers should examine their Leave Policies AND their FMLA Leave Policy. What is required? When is it required? The courts have allowed a little lee-way here for Human Resources to manage its workforce leave issues IF the company is consistent.

What do your policies say?

XXXII. HONEST BELIEF RULE

A. "HONEST SUSPICION OF FMLA MISUSE" As A Reason For Termination

In Seeger v. Cincinnati Bell Telephone Co., 681 F.3d 274 (6th Cir. 2012), Tom Seeger was employed as a network technician by Cincinnati Bell Telephone Company (CBT). In August 2007, Seeger began experiencing pain and numbness in his left leg. On September 5, 2007, a physician confirmed that Seeger had a herniated lumbar disc, and Seeger started an approved FMLA leave of absence the same day.

On September 19, Seeger was examined by Dr. Michael Grainger, his primary care physician. Dr. Grainger observed that it was difficult for Seeger to change positions, get in and out of a chair, and walk. The following day, Dr. Grainger's

office left a message for CBT that Seeger was unable to perform any restricted work.

However, on September 23, Seeger attended an Oktoberfest festival in Cincinnati for approximately 90 minutes, during which time he admittedly walked a total of 10 blocks. While at the festival, Seeger encountered several co-workers. One co-worker observed that Seeger was able to walk, seemingly unimpaired, for approximately 50 to 75 feet through the crowd, and the co-worker reported his observations to CBT's HR Manager.

On October 15, 2007, Seeger reported to Dr. Grainger that he had been asymptomatic for two days, and Dr. Grainger authorized his return to work. Seeger resumed his full-time position on October 16, 2007.

Meanwhile, CBT investigated the matter by obtaining sworn statements from Seeger's co-workers and by reviewing his medical records, disability file and employment history. Based on the inconsistency between Seeger's reported medical condition and his behavior at Oktoberfest, CBT decided to suspend Seeger's employment and scheduled a suspension meeting with him.

At the meeting, Seeger defended his actions and denied committing disability fraud. CBT invited Seeger to submit any relevant information, and Seeger provided a letter from Dr. Grainger. The letter stated, in part, that "[w]alking for one and a half hours at one's own pace doesn't equal working for an eight-hour day nor is it reasonable to assume that he could perform even limited duties for an eight-hour day."

Ultimately, CBT concluded that Seeger had "over reported" his symptoms and terminated his employment. Seeger filed a lawsuit alleging that he was fired in retaliation for taking protected leave. The trial judge dismissed the suit and Seeger appealed.

While the Sixth Circuit determined that Seeger established a *prima facie* case of retaliatory discharge due to the short amount of time between his return from FMLA leave and his termination, it also concluded that CBT articulated a legitimate, nondiscriminatory reason for discharging Seeger. In the court's words, "Fraud and dishonesty constitute lawful, non-retaliatory bases for termination."

The court then considered whether Seeger produced adequate evidence demonstrating that CBT's professed reason was a pretext for discrimination. Essentially, Seeger attempted to show that there was no factual basis for CBT's proffered reason for discharging him because CBT had ignored medical evidence in its possession that Seeger was responding to treatment, and his pain had improved before Oktoberfest.

Under the "honest belief rule," the inference of pretext is not warranted where the employer can show an honest belief in the proffered reason. The court explained that an employer's professed reason is believed to be honestly held where the

employer can show that it made a reasonably informed and considered decision before taking the adverse action. The court cautioned that an employer's invocation of the honest belief rule does not automatically shield it from liability because the employee must be given a chance to produce evidence to the contrary.

The Sixth Circuit held that CBT demonstrated that it reasonably relied on specific facts in determining that Seeger had committed disability fraud, and Seeger failed to refute CBT's honest belief. The court emphasized that Seeger's argument and presentation of competing medical evidence were misdirected. "The determinative question [was] not whether Seeger actually committed fraud, but whether CBT reasonably and honestly believed that he did." Accordingly, the Sixth Circuit upheld the judgment in favor of CBT.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

The significance of this decision is that employers can protect themselves from employees who are exaggerating or misrepresenting a medical condition to get off work. To substantiate a 'reasonably informed and considered' belief of FMLA fraud, employers should conduct a thorough investigation, including whether the off-work activity is actually inconsistent with the medical restrictions, and give the employee an opportunity to defend his or her actions. An employer cannot 'jump the gun' and act precipitously on a suspicion no matter how well founded. Here the quality of the employer's investigation, and affording the employee an opportunity to explain his actions, were instrumental in upholding the discharge decision."

ALSO …

In Scruggs v. Carrier Corp., No. 11-3420 (7th Cir. 2012), Daryl Scruggs was approved for intermittent FMLA leave to take his mother, who was living in a nursing home, to and from medical appointments. The employer, Carrier, believed the intermittent leave was being abused and therefore hired an investigator to conduct surveillance on the employee on three different occasions. The first two occasions were unremarkable. However, on the third occasion the investigator never observed the employee's car leave his property. The investigator presented this evidence to Carrier.

Carrier later interviewed the employee and allowed the employee an opportunity to explain. The employee indicated he did not remember specifics of the day in question, but he was certain that he was assisting his mother with a doctor's appointment. The employer documented the interview and also followed up its investigation with the nursing home where the employee's mother resided. The documentation reflected that the employee's mother was not actually seen by the doctor on the date in question. Carrier, in reviewing the doctor's notes, came across other inconsistencies regarding the employee's prior FMLA absences – the times of the absences did not match up with the times of the doctor's appointments.

After considering all the evidence, Carrier terminated the employee for FMLA leave abuse. The employee filed suit and the court granted summary judgment to defendant Carrier, holding it was undisputed the employer had an "honest suspicion" the employee misused his FMLA leave, and that this "honest suspicion" was enough to defeat any claims of FMLA interference and retaliation.

Scruggs appealed to the Seventh Circuit. The Seventh Circuit affirmed the trial court decision.

The court claimed that when Carrier questioned Scruggs, he could not recall what he did on that day, but stated that he did not misuse his FMLA leave. Although Scruggs later provided documentation from his mother's nursing home and doctor's office, this paperwork only raised further questions for Carrier. The documents Scruggs produced were facially inconsistent and conflicted with Carrier's internal paperwork. Taken together, this was enough for Carrier to have an "honest suspicion" that Scruggs misused his FMLA leave on July 24, 2007. Although Carrier could have conducted a more thorough investigation, as Scruggs fervently argued, it was not required to do so. Accordingly, Carrier did not violate Scruggs's FMLA rights because it honestly believed Scruggs was not using his leave for its intended purpose.

It is important to note what Carrier did before it terminated the employee. It investigated, documented, interviewed, and carefully checked the appointment records. The employer's "honest belief" must be based on a "reasonably informed and considered decision."

ALSO …

In Jaszczyszyn v. Advantage Health Physician Network, No. 11-1697 (6th Cir. 2012) Sara Jaszczyszn began working for Advantage Health Physician Network in January 2008 as a part-time clerical employee. She was later promoted to a full-time position in the Human Resources Department, and then was transferred to work as a customer service representative.

After seeing her on September 22, Sara's physician completed a Medical Certification form claiming that Sara "completely incapacitated" from October 5 to October 26.

However, on October 3, Sara spent eight hours at a local festival with friends. She later posted pictures on her Facebook page showing her at the festival. Her supervisor and several of Sara's co-workers were her "friends" on Facebook. One co-worker pointed out the pictures to Sara's supervisor. Sara's supervisor then notified her own supervisor, sharing some of the photos. After consulting with the employer's counsel, a thorough investigation was conducted that included an interview with Sara. She was unable to give a reasonable explanation for the

discrepancy between her request for leave and her conduct at the festival. The decision was made to terminate plaintiff's employment for fraud.

Sara sued the employer, asserting two claims: FMLA interference and FMLA retaliation.

The trial court granted the employer's request for summary judgment, agreeing that there was no evidence that anyone at the company had a retaliatory motive and that the employer had an "honest suspicion" Sara was abusing her leave.

Sara appealed to the Sixth Circuit Court of Appeals.

The law provides employees with two theories of recovery under the FMLA: **interference and retaliation.**

The Sixth Circuit found that in order for Sara to prevail, she must prove:

- For the interference claim, her employer **denied** her FMLA benefits or **interfered** with her FMLA rights and

- For the retaliation claim, there was a **causal connection** between her use of FMLA leave and the **adverse employment action** that was taken against her.

Sara must also prove that Advantage **intended** to discriminate against her in order to win under the **retaliation** theory, but she was not required to prove intent under the **interference** theory.

Next, the appeals court determined that FMLA interference claims must be analyzed under the McDonnell Douglas burden-shifting test, which means the employer is able to offer a "legitimate reason unrelated to the exercise of FMLA rights for terminating the employee" for the adverse action it took against the employee.

It is then the employee's burden to show that this reason is pretextual.

The Sixth Circuit Court of Appeals next considered whether an Advantage's "honest belief" that Sara committed fraud was the real reason it terminated her in order for the employer to defeat her FMLA interference claim. The court stated,

> "[S]o long as the employer honestly believed in the proffered [lawful] reason given for its employment action, the employee cannot establish pretext even if the employer's reason is ultimately found to be mistaken, foolish, trivial, or baseless."

The court said that it was unclear under Sixth Circuit precedent whether the "honest belief" rule applied to **interference** claims. However, the Court found it unnecessary to resolve the issue, since it concluded Sara had actually received all of the leave she was entitled to receive by the time the investigation into her

conduct began, and therefore, could not state a claim for interference with FMLA rights.

The court then applied the "honest belief" rule and rejected Sara's **retaliation** claim as well. It found the employer's reason for terminating her, FMLA fraud, was not pretextual. Advantage had an "honest belief" that Sara had committed FMLA fraud, a non-retaliatory reason for discharge. The court noted the investigation was adequate. It also noted that Sara was not cooperative during her investigative interview.

The Sixth Circuit affirmed the district court's grant of summary judgment in favor of Advantage. The court explained that "the interference theory does not convert the FMLA into a strict-liability statute because interference with an employee's FMLA rights does not constitute a violation if the employer has a legitimate reason unrelated to the exercise of FMLA rights for engaging in the challenged conduct."

Accordingly, the court held that, because Sara was granted her approved leave and paid for all of the time she had taken off prior to her termination, the district court correctly concluded that she could not sustain the interference claim.

With respect to the retaliation claim, the court determined that Sara had introduced "little to no evidence" to establish a causal connection between the protected FMLA activity and the adverse employment action. Instead, the court held that Advantage rightfully considered workplace FMLA fraud to be a serious issue, and Sara's termination on this basis was non-retaliatory. Sara presented no evidence to refute Advantage's honest belief that her claimed incapacitation was at odds with the pictures she posted on her own Facebook page. Accordingly, Sara's claims were dismissed.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

Although this case worked out in the employer's favor, such is not always the case when terminating an employee while on leave for alleged misuse of leave. This defense is not always upheld depending on the **investigation conducted and evidence provided** in support of the belief. Therefore, while an employee on leave is not absolved from abiding by company policies and expectations, employers always need to be cautious when considering terminating an employee on leave for alleged misconduct.

XXXIII. EMPLOYEE JOB PROTECTION

A. Same Or Equivalent Position

Aside from those key employees who have received proper notification, employees returning from FMLA leave must be restored to their same or an equivalent position, absent special circumstances. This includes equivalent wages, benefits and terms and conditions of employment.

Even if an employee accepts a light duty assignment instead of taking FMLA leave, the employee is still entitled to be restored to his former position, or to an equivalent one at the end of his FMLA.

However, if the employer can show that the employee did not receive her job back due to some reason that is independent of her FMLA leave, such as a layoff or shut down, then no violation will exist. Employees on FMLA leave have no greater rights than those not on FMLA leave.

Of course, if an employee on FMLA leave is laid off or terminated while on leave, then such an occurrence would alleviate the effected employee's restoration rights.

B. Job Restoration Must Be IMMEDIATE

In Hoge v. Honda of Am. Mfg., Inc., 384 F.3d 238 (6th Cir. 2004), Lori Hoge was a production associate at Honda of America. In November 1995, she broke her back in a nonwork- related car accident. Hoge then took an extended leave of absence until March 1996. When she returned to work, Honda accommodated her physical restrictions by reassigning her to another position. Hoge remained in this position until April 2000.

In April 2000, Hoge requested and received another FMLA leave from May 11 until June 12, 2000, for abdominal surgery, which was unrelated to her previous back injury. Around June 12, she telephoned Honda to request an extension of her FMLA leave because she needed additional time to recover from surgery. She claims that she requested an extension until June 26 and didn't request an extension beyond that. Honda claims that she requested an extension until July 12 and then December 31.

On June 27, 2000, Hoge came to work with a medical release from her doctor, expecting to return to her door-line position. Honda told her that no positions were available for her. On July 31, 2000, one month after her request to return to work, Honda placed Hoge in a job on the engine line. Honda said the delay in returning her to work was reasonable and was caused by several factors, including her unexpected return and the time required to find an equivalent position to accommodate her physical restrictions in light of the substantial changes made to its production processes during her leave.

Hoge sued Honda in the U.S. District Court for the Southern District of Ohio, claiming that its delay in returning her to work violated the FMLA. Honda did not dispute that Hoge was entitled to be restored to her former position or an equivalent position. It argued that it didn't violate the FMLA because it restored her to an equivalent position within a **reasonable period of time**.

The district court rejected Honda's argument that employers have a **reasonable period of time** to restore employees to their jobs following FMLA leave. The court found that Honda violated the FMLA by failing to reinstate Hoge to her door-line position or an equivalent position by June 28, 2000.

Honda appealed to the Sixth Circuit. The Sixth Circuit held for Ms. Hoge.

The court cited the FMLA, which says that "on return from [FMLA] leave," an employee has the right "to be restored by the employer to the position of employment held by the employee when the leave commenced" or "to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." The Sixth Circuit held that the FMLA requires job restoration when the employee is capable of performing the essential functions of that job. The court reasoned that the FMLA's requirement of job restoration upon return from leave is "unambiguous" and that "[i]f Congress had intended to permit employers to restore employees within a reasonable time after their need for FMLA leave had ended, it would have so stated."

The Court also noted that an employer violates the FMLA by requiring employees to take more medical leave than is necessary. If an employee needs to use less FMLA leave than originally anticipated, "the employer may require that the employee provide the employer reasonable notice (*i.e.,* within two business days) of the changed circumstance where foreseeable." Once the employee provides two business days' notice, the employer is required to restore the employee to his/her previous position or an equivalent one.

The court concluded that Honda was required to restore Hoge to her previous position or an equivalent one starting at least on **June 29, 2000** (two business days after receiving unambiguous notice of her return). The court sent the case back to the district court to determine whether Honda knew that Hoge would be returning to work on June 27, 2000, as she claims and which Honda denies. If Honda had notice that her FMLA leave was to end on June 27, she was entitled to restoration on that date.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

When an employee takes FMLA leave, human resources should immediately begin thinking about job restoration. Employers must make sure the employee's former job or an equivalent job will be available at any time upon a **two business day notice**.

C. Essential Job Functions: Number Of Hours Required

In Tardie v. Rehabilitation Hospital of Rhode Island, *et al*., 168 F.3d 538 (1st Cir. 1999), the director of human resources took an FMLA approved leave. When she returned, her work restrictions stated that she could not work more than 40 hours a week. The employer then demoted her to another position, claiming that an

essential function of this position was to work at least 50 to 70 hours a week. The employer demonstrated that such hours were necessary by showing that the plaintiff had regularly worked such hours before she took her leave.

The employee argued that a normal workweek was 40 hours a week and that requiring more than that could not be classified as an essential function of the job.

The court agreed with the employer. The court reasoned that employers have the right to establish the essential functions of any job as long as they are accurate and actually used in practice.

(Of course, the employer had American With Disabilities Act issues to deal with in this case in addition to the FMLA.)

XXXIV. EMPLOYEE BENEFITS

A. Health Insurance Coverage

1. Health coverage and premium payments must continue as if the employee was still at work.

Section 2614 of the Act requires employers to continue the employee's same health insurance coverage at the same level of protection and premium payment amounts for the duration of the leave just as if the employee never left his position. This requirement remains true even if the employee takes his FMLA leave on an intermittent or reduced schedule basis.

Therefore, whatever premium amounts the employee ordinarily pays for health insurance coverage, the employee can be required to continue to pay this sum throughout his FMLA leave, but no more than this amount. Accordingly, if the employer ordinarily subsidizes the employee's monthly health insurance premium, the employer must continue this subsidy throughout the employee's leave.

2. Notification responsibilities of the employer.

Employers are also required to notify the employee on FMLA leave regarding:

a. Where the employee is to send his premium payments,

b. When these payments must be received by the employer and

c. What will happen if the premium payments are not received by this date?

3. Employee has 30-day grace period.

Under the FMLA, employees are afforded a 30 grace period after the due date of their premiums in which to submit such payments. If an employee's premium payment is late, the employer must notify the employee in writing that the premium payment has not been received. This notice must be mailed at least 15 days before the employee's coverage is to end, and the employee must be informed as to exactly when the coverage will be terminated.

If such a 15-day notice is not given, then the employee's health benefits must continue until such notice is given.

4. Failure to return to work and recouping medical subsidy.

If the employee fails to return to work after the approved leave expires for any reason other than a legitimate medical concern, or any legitimate circumstances beyond the employee's control, then the FMLA permits the employer to recoup the health premium amounts paid on behalf of the employee.

However, the employer may only recoup those health insurance premiums that were made on the employee's behalf while the employee was on unpaid FMLA leave. Such payments made while the employee was on paid FMLA leave may not be recovered.

5. When is an employee deemed to have returned to work after FMLA leave?

Under the FMLA, an employee does not qualify as having actually returned to work until the employee has been back to work for at least 30 days.

6. Upon employee's return, health insurance must be reinstated if requested.

Upon the employee's return, even if the employee failed to keep his health insurance in force while out on FMLA leave, the employer is required to provide the employee with the same level of health care coverage that was in effect before taking FMLA leave without imposing any waiting periods or preexisting condition exclusions.

Therefore, as a practical matter, many employers opt to keep the employee's health insurance coverage in force irrespective of whether the employee chooses to continue this coverage during his time off.

Otherwise, when the employee returns, the employer may not be able to furnish such coverage without self-insuring the employee.

However, the employer is permitted to recover this expenditure from the employee as long as a "reasonable" repayment schedule is devised at the end of the employee's FMLA leave.

If an employee on FMLA leave is laid off or terminated while on leave, then such an occurrence would alleviate not only the effected employee's restoration rights, but also his group health care benefit rights under the FMLA.

A. Retention of Accrued Benefits

Employees are not entitled to accrue any seniority or employment benefits while on FMLA leave. However, employees are entitled to retain all of the benefits they accrued while they were actively working for the employer.

B. Attendance Bonus

The final regulations state that bonus awards can be properly based on the **"achievement of a specified goal such as hours worked, products sold or perfect attendance"** and therefore can be denied employees who have taken FMLA leave.

However, FMLA leave and similar non-FMLA leaves must be treated the same for purposes of such bonuses. 29 CFR § 825.215(c)(2).

XXXV. EMPLOYER NOTICE REQUIREMENTS

A. Time Frames

Generally … covered employers are required to notify qualified employees within **FIVE** business days of when it is reasonably suspected that their absences qualify as FMLA leave and of their rights and obligations under the Act. Otherwise, the employee cannot count the leave taken by the employee towards fulfilling the employee's twelve weeks of FMLA leave per year.

B. FMLA Notices

The final regulations now provide for three separate FMLA notices that must be provided by employers to employees: (1) "**General Notice**" of employee FMLA rights, (2) **"Eligibility and Rights & Responsibilities Notice"** to employees requesting FMLA leave and (3) **"Designation Notice"** indicating whether a given absence qualifies for FMLA leave.

- **"General Notice"** includes the conspicuous placement of the familiar poster listing employees' FMLA rights, but the final regulations also include a requirement that new employees be separately apprised of their FMLA rights in writing, in an employee handbook or otherwise **"upon hiring."** 29 CFR § 825.300(a).

- **"Eligibility and Rights & Responsibilities Notice"** is largely a new concept in the final regulations. When an employee requests (or the employer identifies) a potential FMLA-qualifying leave **for the first time** during the applicable 12-month period, the employer must notify the employee of their FMLA eligibility status within **5 business days,** absent any extenuating circumstances.

  If the employee is not eligible for FMLA leave, the notice must state **"at least one reason"** why the employee is ineligible.

  All FMLA absences for the same qualifying reason are considered a single leave during the applicable 12-month period. If the employee's eligibility does not change by the next time FMLA leave is requested, no new eligibility notice needs to be provided. 29 CFR § 825.300(b).

  While eligibility notice may be provided by the employer orally or in writing, an approved form for this eligibility notice is provided by the DOL in an appendix to the final regulations.

  "Eligibility and Rights & Responsibilities Notice" must be provided to employees in writing, detailing the employer's expectations and any consequences of the employee's failure to meet these expectations under the FMLA. This notice must be provided to the employee **every time** the "Eligibility Notice" is given to the employee, as described above.

  This "**Eligibility and Rights & Responsibilities Notice**" ***must*** include:

  1. An explanation that if FMLA leave is granted it will be deducted from the employee's 12-week allowance,

  2. Requirements for employees to submit medical certifications and the **consequences for failing to do so**,

  3. Any employer requirements regarding the use of paid leave, such as sick time or vacation,

  4. This notice must also inform employees of their right to continue their health care coverage while on FMLA leave just as if they were still at work.

  5. This notice must inform the employee of any requirements the employee must meet in order to maintain health benefits during FMLA leave, including the cost, where to send the payments,

when these payments are due each month, and the possible consequences of failing to make such payments on a timely basis (*i.e.*, the circumstances under which coverage may lapse).

6. If the employee defaults, then the employer must notify the employee in writing **15 days** before cancelling her coverage.

7. The employee's potential liability for unpaid health insurance premiums if the employee fails to return to work following leave.

8. The employee's status as a key employee, if applicable, and the potential consequence that the employee may not be restored to his/her previous position following FMLA leave, explaining the conditions required for such denial.

9. The employee's right to maintain benefits and to job restoration following leave. 29 CFR § 825.300(c).

The **"Eligibility and Rights & Responsibilities Notice"** may also include other information, such as:

- Whether the employee is required to periodically check in with the employer while the employee is on leave,

  Employers may require their employees on FMLA leave to report back into them periodically in order to keep the employer apprised as to their progress and the employee's continued desire to return to work at the end of the leave. This may be accomplished by simply requiring the employee to telephone the employer every so often.

  Such reporting back to the employer must be on a "reasonable" basis. Of course, what is found to be "reasonable" will vary from situation to situation depending upon the circumstances of each case.

  For instance, requiring an employee who misses work intermittently due to migraine headaches to telephone the employer every day to report on his status may be a reasonable requirement. On the other hand, requiring an employee who is off from work for six weeks of maternity leave to telephone the employer every day is most likely not a reasonable requirement and will probably be viewed as a type of harassment or retaliation for using FMLA leave.

- Whether the employer will require periodic reports from the employee regarding his/her medical status or his/her intent to return to work while he/she is off,

- That the employee must identify this leave as being FMLA whenever he/she calls off from work,

- How, when and to whom the employee is expected to call off from work and

- Whether the employee will be required to provide the employer with a "Fit to Return To Work" certification before being allowed to return to work.

If the specific information contained in the **"Eligibility and Rights & Responsibilities Notice"** changes, the employer has **5 business days** to provide the employee with a written notice referencing the prior notice and setting forth any of the information in the notice of rights and responsibilities that has changed. For example, if the initial leave period was paid leave and the subsequent leave period would be unpaid leave, the employer may need to give notice of the arrangements for making premium payments.

Employers are also expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA.

A prototype notice of rights and responsibilities may be obtained from local offices of the Wage and Hour Division or from the Internet at www.dol.gov/whd. Employers are permitted to change the prototype notice as appropriate to meet these notice requirements. The notice of rights and responsibilities may be distributed electronically so long as it otherwise meets these requirements.

➢ **"Designation Notice"** must be provided by employers in writing within **5 business days** (the analogous requirement in the 1995 regulations had required such notice within two days) after obtaining sufficient information, such as a medical certification, to know whether a given absence is FMLA-qualifying or not.

The employer must notify the employee whether the leave will be designated and will be counted as FMLA leave within **five business days**, absent extenuating circumstances. Only one notice of designation is required for each FMLA-qualifying reason per applicable 12-month period, regardless of whether the FMLA leave that is taken will be used in a continuous block of time or on an intermittent or on a reduced schedule leave.

If the employer determines that the leave **will not** be designated as qualifying for FMLA coverage (*e.g.,* if the leave is not for a reason covered by FMLA **or the FMLA leave entitlement has been exhausted**), the employer must notify the employee of that determination.

NOTE: Again, employees are **NOT** required to specifically request FMLA leave or to even mention that they would like to take FMLA leave. Employees need only place the employer on **REASONABLE NOTICE** that such leave may be needed. The law assumes that **EMPLOYERS**, which includes supervisors, know and understand the employees' rights under the FMLA. The law assumes employees **DO NOT KNOW OR UNDERSTAND** their rights, which places the burden of recognizing FMLA qualifying events on the shoulders of the employer.

The employer must also determine whether the employee's leave will be paid or unpaid, and then inform the employee. If an employer requires the employee to use her earned paid time off while on FMLA leave, this decision must be made within **5 business days** of receiving the employee's notice or when the employer determines that the employee's leave qualifies as FMLA leave.

The employee must also be informed if his/her paid time off leave will run concurrently with her FMLA leave.

If leave is granted, the designation notice must include any "fitness-for-duty" certification that may be required by the employer before allowing the employee to return to work.

If the employer requires that the fit-for-duty certification address the employee's ability to perform the essential functions of the employee's position, the employer must indicate this in the Designation Notice. The employer must also include a list of the essential functions of the employee's position. *See* 29 CFR §825.312.

If the employer handbook or other written documents (if any) describing the employer's leave policies clearly provide that a fitness-for-duty certification will be required in specific circumstances (*e.g.*, by stating that fitness-for-duty certification will be required in all cases of back injuries for employees in a certain occupation), the employer is not required to provide written notice of the requirement with the designation notice, but must provide oral notice no later than with the designation notice.

The Designation Notice must also specifically inform the employee of the amount of leave, "hours, days or weeks," that will be deducted from the 12-week FMLA allowance. If this breakdown is unknown at the time the leave is granted (e.g., where the amount of leave is unforeseeable or sporadic), the employer must provide such information upon an employee's request, but the employer need not provide such breakdowns more often than every 30 days. 29 CFR § 825.300(d).

The notice of the amount of leave counted against the employee's FMLA entitlement may be oral or in writing. If such notice is oral, it shall be confirmed in writing, no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday). Such written notice may be in any form, including a notation on the employee's pay stub.

If the specific information contained in the "Designation Notice" changes, (*e.g.,* the employee exhausts the FMLA leave entitlement), the employer shall within **5 business days** provide the employee with a written notice referencing the prior notice and setting forth any of the information in the notice of rights and responsibilities that has changed.

If the employer determines that a qualifying FMLA event has occurred and fails to send this notice to the employee, then the employee's 12 weeks of time off allowed under the Act may not begin to run until such notice is given. It is important to note that an employer **may not be permitted to retroactively designate** an employee's leave as having been covered by the FMLA if the employer **should have reasonably known** that this leave qualified for coverage under the Act and simply failed to send this notice.

Consequently, the employee may be entitled to take his twelve weeks of FMLA leave in addition to the leave the employee has already taken.

Therefore, again, when employees take leave of absences or miss a great deal of work, the employer has an affirmative duty to determine if such leaves could be covered by the FMLA.

Failure to follow the notice requirements set forth in this section may also constitute an interference with, restraint, or denial of the exercise of an employee's FMLA rights. An employer may then be held liable for any compensation and benefits lost by the employee, as well as for any other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered *See* §825.400(c).

The Designation Notice must be in writing. A prototype designation notice may be obtained from local offices of the Wage and Hour Division or from the Internet at www.dol.gov/whd.

XXXVI. REQUESTING FMLA DOCUMENTATION LATE FOUND PERMISSIBLE

In Kinds v. Ohio Bell Telephone Company, 724 F.3d 648 (6th Cir. 2013), Debra Kinds, a decade-long employee of Ohio Bell, was involved in a mentally and physically abusive relationship with her live-in boyfriend that culminated in death threats and an assault. She took a nine-week period of leave and applied for short-term disability benefits with Ohio Bell's insurance administrator, Sedgwick Claims Management Services.

The FMLA Operations Department sent a letter to Kinds on **October 21, 2009** that acknowledged her FMLA leave request and stated that her period of absence "will result in a claim for Short Term Disability Benefits." In addition, the letter explained that if Kinds' claim for disability benefits is approved, then FMLA leave would run concurrently. And even if the claim were denied, the letter stated that Kinds would still "have the right to request FMLA consideration," but would in such event need to have her healthcare provider submit an "FMLA4" form to document "the medical facts to support the denied absence period."

The letter further stressed that "[t]he FMLA4 is only required if your request for disability benefits has been denied."

Kinds first sought mental health treatment from Paula Reshotko, a licensed independent social worker, on November 3, 2009. This counseling session was the first medical treatment that Kinds received during her October to December 2009 absence from work. Reshotko diagnosed Kinds as having a "severe depression episode" and recommended further counseling. Kinds saw Reshotko for counseling again on November 10th and 19th and saw her family physician, Dr. Suzana Sarac–Leonard, also on November 10th.

On November 24, 2009, Sedgwick sent Kinds a letter explaining that her claim for short-term disability benefits was approved "for the period of **November 10, 2009 through December 14, 2009.**" However, her claim for disability benefits had been **denied** for **"the period of October 20, 2009 through November 9, 2009**."

Sedgwick therefore determined that Kinds did not have disability status until November 10th.

Sedgwick's approval of disability benefits for a portion of Kinds' absence prompted two actions by Ohio Bell:

(1) it approved the first week of Kinds's absence (October 13th to October 20th) and the period for which she was determined to be disabled (November 10th to December 14th) for FMLA leave, and

(2) it asked Kinds to submit an FMLA medical certification for the period that was ***not approved*** for disability benefits (**October 20th to November 9th**).

When Kinds failed to provide this FMLA paperwork, she was terminated.

Kinds filed suit against Ohio Bell claiming it interfered with her right to take FMLA leave. Kinds claimed that Ohio Bell failed to make a request for this medical certification in a timely manner, or within five days, as required by FMLA.

The 6th Circuit denied her claim, because Ohio Bell "was not required [by the FMLA] to promptly exercise its right to request a medical certification when Kinds first gave notice of her need for leave."

The court further reasoned that Ohio Bell had "reason to question the appropriateness of her leave after Sedgwick denied short-term disability benefits for the full period requested by Kinds."

Moreover, the court determined that "there is nothing [in FMLA] indicating that the discovery of employee fraud is the only acceptable reason for an employer to request a medical certification after the five-business-day period following an employee's notification of leave."

The court went as far to compliment Ohio Bell by saying that "the company's policy of deferring such requests is actually beneficial to employees because only those employees taking extended leaves for medical issues who have been denied short-term disability benefits are required to provide medical certifications."

Interestingly, even though Kinds' medical doctor sent a letter to Sedgwick certifying that she was providing Kinds "medical assistance" from the dates in question, the court said it was not persuaded, presumably because the letter **did not indicate what condition constituted Kinds' alleged disability.**

However, Sedgwick did not forward a copy of the letter to Ohio Bell, due to the restrictions on the sharing of private health information imposed by the Health Insurance Portability and Accountability Act of 1996.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

FMLA permits an employer to request medical certification even after the requisite five-business day period following an employee's notification of leave because of a serious health condition ***if*** it suspects that the reason for an employee's leave or its duration may not be appropriate.

The circuit court's decision can be viewed as a victory for employers in FMLA compliance matters because it affirms that an employer may defer making a request for medical certification pending claims for short-term disability benefits during the same period.

However, if you make a request for Medical Certification more than five days after becoming reasonably aware of the need for FMLA leave, then you must be prepared to provide a justifiable reason, as the employer did in this case.

XXXVII. INTERMITTENT AND REDUCED SCHEDULE LEAVES

A. Intermittent Leave

An **"intermittent leave"** occurs when an employee takes FMLA leave in certain blocks or intervals of time, such as when the employee takes a week off from work every so often, or a day, or a few hours, or so on. However, such leaves occur on an "irregular" or intermittent basis as the employee needs this time off from work.

The final regulations clarify that an employee **"must make a reasonable effort"** to schedule treatments so as not to **"disrupt unduly"** the employer's operations. 29 CFR § 825.203.

B. Reduced Schedule Leave

A **"reduced schedule leave"** occurs when an employee basically works a shortened daily or weekly work schedule, such as by only working five hours a day, three days a week, etc. A reduced schedule leave may also require an employee to take a few hours off from work each week or each day on a regular basis.

C. Intermittent Leave Schedule and Reduced Schedule Leave Must Be Medically Required

Employees may opt to take either an intermittent leave or they may opt to work on a reduced schedule whenever such a leave is medically required. Therefore, covered employees do not need their employer's permission regarding which type of leave they will be taking when such a leave is necessitated for medical reasons.

However, if an employee does not have a medical condition that requires him to take an intermittent or reduced schedule leave, then the employer will not be required to allow the employee to take such time off. Still, the employee may obtain either an intermittent or reduced schedule leave if the employer consents, such as in the case of the birth, adoption or the taking of a child into foster care.

D. FMLA Time Off Must Be Tracked In The Smallest Increments The Employer's Policies Allow

Employers must provide covered employees with such leaves and then track this time off in the smallest increments their policies allow.

For instance, if an employer tracks sick time in one hour increments, then the employer must track both intermittent and reduced schedule leaves in one hour increments in order to determine when the employee has exhausted his twelve weeks of FMLA leave.

E. Temporary Transfer Is Allowed

If the employee needs to take this time off from work on an intermittent or reduced schedule basis, then the FMLA allows the employer to temporarily transfer the employee to another position of equal pay and benefits for as long as the employee's intermittent or reduced schedule continues.

F. Employee's Treatments Must Be After Hours, If Possible

Also, in order to accommodate the scheduling of the employee's work, the Act permits employers to require the employee to schedule his medical appointments

or treatments before or after work hours in order to avoid a conflict with the company's work demands, if the health care provider agrees.

Employees are required to cooperate with their employer and make a reasonable effort to schedule their medical treatments so as not to unduly disrupt the employer's operations, subject to the approval of the health care provider.

For instance, if an employee requests every Tuesday afternoon off from work to go to an appointment with a health care provider, but these appointments may just as easily be scheduled after the employee's workday ends, then the appointment which does not conflict with the employee's work schedule must be taken.

XXXVIII. LIGHT DUTY ASSIGNMENTS

If an employee qualifies for FMLA leave, but is also able to work a light duty assignment for the employer, the employer may offer to the employee the opportunity to return to work and be assigned to such a position. However, if the employee declines the offer of working a light duty job, the employer cannot force the employee to return and accept the assignment. The employee loses none of his FMLA protections by declining a light duty assignment. 29 CFR § 825.207(e).

Employers also are not obligated to make such an offer.

On the other hand, employers may adopt a policy which states that any employees who decline a light duty assignment when they are physically able to do so will relinquish their rights to receive any sick time or disability benefits while on such a leave.

XXXIX. FMLA REGULATIONS: NO GREATER RIGHTS AFFORDED

Even though employees on FMLA leave have a right to reinstatement to their positions, or an equivalent one, upon their return, employees may be laid off or terminated while on FMLA leave if such decisions are made independent of the employee's protected class status under the FMLA. Such an occurrence would then alleviate the affected employee's job restoration rights under the FMLA.

29 C.F.R. §825.216 of the FMLA's regulations state that employees who are off on FMLA leave have no greater rights to reinstatement than if they had not taken an FMLA leave (i.e., remained continuously employed). However, it is the employer's burden to show that the employee would not have been employed at the time the employee would have otherwise been reinstated from FMLA leave.

As an example, the regulations state that if an employee's shift has been eliminated while he was on FMLA leave, that employee would not be entitled to return to work on that shift.

If an employee on FMLA leave is laid off or terminated while on leave, then such an occurrence would alleviate the effected employee's restoration rights.

In a Wage and Hour Advisory Opinion Letter dated August 23, 1994, where an employee who was on FMLA leave had his job eliminated due to corporate restructuring, the employer was permitted to transfer the employee to another position at a different location. Citing 29 C.F.R. §825.216, the Wage and Hour Administrator stated that employees on FMLA leave have no greater rights to reinstatement than if they had been employed continuously through the leave period.

XL. OTHER EMPLOYEE RIGHTS

A. Discipline For Absenteeism and FMLA Leave

1. Employees on FMLA leave may not be penalized.

Under the FMLA, employees may not be penalized for missing work due to a qualifying event. As a result, employers are not permitted to discipline their employees for missing work under the FMLA.

Even if the employer has an attendance policy that allows employees to only miss a certain number of days from work throughout the year, FMLA absences may not be included in these totals. **Absences that are due to an FMLA qualifying event may not be counted against employees as far as any attendance disciplinary systems are concerned**.

Of course, employees may still be required to follow an employer's procedures when reporting off from work.

However, if an employee does not indicate that she is taking FMLA leave, and the employer **could not have reasonably known** that such leave was covered by the FMLA, the employee may then be subject to the employer's disciplinary policy for excessive absenteeism if too much work is missed. Therefore, it is in the employee's best interest to clarify with the employer the reason for the time that was missed so that the employer might accurately classify this time as being covered by the FMLA in order to be protected from disciplinary action for excessive absenteeism.

Of course, again, the employer has a duty to investigate such situations in order to determine if an FMLA protected situation exists. Employees are not expected to request FMLA leave or to even recognize such an event when it occurs. Instead, they are expected to be truthful with their employers and explain the circumstances of their absences.

2. FMLA absences and performance reviews.

Similarly, an employee's FMLA absences cannot be used against an employee as part of the performance review process.

XLI. NO DUTY TO "REASONABLY ACCOMMODATE" UNDER THE FMLA

In Stewart v. Bear Mgmt., Inc., 5:15CV33 (N.D. Ohio, Mar. 24, 2016), Anne Stewart was employed as a supervisor at a Pizza Oven restaurant. She also worked part-time at a Dunkin' Donuts.

On February 16, 2013, Stewart fell while she was working at Dunkin' Donuts, tearing her rotator cuff and fracturing her left hand. Because she was unable to work, she was granted a leave of absence under the FMLA from her job at Pizza Oven.

Stewart claimed that approximately a week later, her physician released her to return to work with a **five-pound lifting restriction** and she informed her Pizza Oven store manager of her ability to work. Pizza Oven denied that FMLA claim. Stewart's medical records reflected that she wasn't released to return to work by her physician until September 1, 2013, more than six months later.

One of the restaurant's owners testified that due to Stewart's five-pound lifting restriction, but there was no way to accommodate such a restriction because all Pizza Oven employees were required to perform every task at the restaurant, some of which required them to lift more than five pounds. Stewart was told by management that she couldn't return to work unless she could provide a full release from her physician that stated she was able to return without restrictions.

On June 19, 2014, after Stewart informed Pizza Oven that her physician had extended her medical leave, one of the owners told her that her supervisor position had been filled. However, the owner told her that she could return to work, with a full release from her physician, in a nonsupervisory job that paid $1 an hour less than she had been making and included no paid time off.

On or about July 2, 2014, Pizza Oven terminated Stewart's employment because she was unable to provide a full release to return to work.

Stewart filed a lawsuit against the owners of Pizza Oven, claiming they required her to agree to a demotion, accept lower pay, and relinquish her paid time off and eventually terminated her employment in retaliation for her use of FMLA leave. She also claimed **disability discrimination** and wrongful termination based on a disability, both in violation of the Ohio Civil Rights Act.

The court granted Pizza Oven's motion for summary judgment, dismissing all of Stewart's claims without a trial.

Stewart appealed to the United States District Court Northern District of Ohio. The Northern District found for Pizza Oven.

In her appeal, Stewart argued that that Pizza Oven prevented her from returning to work sooner than she was actually able because it refused to accommodate her five-pound lifting restriction.

The court noted that her medical records didn't support that claim because she wasn't released to return to work, even with work restrictions, before September 1, 2013.

However, the court ruled that even if she had been released with work restrictions, the **FMLA doesn't require employers to provide accommodations for employees' health conditions**.

The court noted that the FMLA's regulations specifically state that an employee loses the right to reinstatement:

"if [she] is unable to perform an essential function of the position because of a physical or mental condition."

Because there was undisputed evidence that Stewart knew she could return to work with a full medical release from her doctor during or immediately after the first 12 weeks of her leave, Pizza Oven fully complied with the requirements of the FMLA. Terminating the employment of an employee who is unable to return to full duty when her leave expires doesn't violate the FMLA.

Because Stewart's FMLA claim was dismissed, there were no other federal law claims left to decide. The court declined to exercise jurisdiction over her disability-related claims under the Ohio Civil Rights Act and dismissed them as well. However, the state-law disability discrimination claims were dismissed "without prejudice," meaning they could be refiled in state court.

Although the employer prevailed in this case, its victory may be short-lived because Stewart can refile her disability discrimination claims in state court. Her FMLA claim lacked merit for all of the reasons cited by the court, but her disability discrimination claims will not be so easily resolved. If she refiles those claims, the state court will, at a minimum, evaluate whether Pizza Oven had a duty to continue her leave of absence through September 1, 2013, and whether it could have accommodated the final lifting restrictions imposed by her physician (first 20 pounds, then 30 pounds, and eventually a 50-pound permanent restriction).

Pizza Oven's requirement that Stewart be released by her physician with **no restrictions** before it would allow her to return to work arguably was improper because it failed to recognize an employer's responsibility to reasonably accommodate a disabled employee.

Further, just because that Pizza Oven refused to engage in the Interactive Process, which is a firm requirement under the Ohio Civil Rights Act, should be enough to establish a violation of the law.

WHAT DOES THIS MEAN TO HR?

It is vital that employers recognize the difference between the ADA and the FMLA.

Also, employers must understand that many more people are covered by the ADA after the 2011 regulations were adopted. As a result, whenever an employee incurs an injury

or illness, employers must consider the possibility that the employee is also covered by the ADA.

XLII. RETALIATION

A. Burlington Northern's Definition Of "Materially Adverse Employment Action" Applies To FMLA Retaliation Cases

In Millea v. Metro-North RR Co., No. 10-409 (2nd Cir. 08/08/2011), Christopher Millea suffered from severe post-traumatic stress disorder as a result of combat as a Marine during the First Gulf War. In 2001, Millea began working for Metro–North, a tri-state area commuter railroad. In 2005, he applied for special leave under the FMLA. Metro–North approved his application and granted him 60 days of intermittent FMLA leave for 2006.

In the summer of 2006, Millea was working in a Stamford storeroom under supervisor Earl Vaughn, with whom Millea had developed a contentious relationship. A phone conversation with Vaughn on September 18, 2006 developed into a heated disagreement that triggered one of Millea's panic attacks. Millea immediately left work to see his doctor. Because the encounter with Vaughn led to the attack, Millea did not inform Vaughn about his unforeseen FMLA leave. Instead, he advised Garrett Sullivan, the Lead Clerk, and asked Sullivan to advise Vaughn, which Sullivan did. The next day, Millea called Sullivan at 5:45 am to report that he was taking another FMLA day. Sullivan again relayed the information to Vaughn. In both instances, Vaughn received timely, although indirect, notice of Millea's use of FMLA leave.

Metro–North's internal leave policy states:

> **"[i]f the need for FMLA leave is not foreseeable, employees must give notice to their supervisor as soon as possible."**

Because Millea did not notify Vaughn of his two absences directly, Vaughn told Metro–North's payroll department to log Millea's absences as non-FMLA leave. Metro-North then opened an official investigation of Millea, which resulted in a formal "Notice of Discipline" being placed in his employment file for one year. The Notice was expunged after a year, Millea having had no further disciplinary incidents. After the investigation, Millea voluntarily transferred to a custodian janitorial job, which paid slightly less but was not supervised by Vaughn.

Millea then filed suit against Metro-North. Millea claimed that he never violated Metro-North's internal leave policy because he notified Vaughn indirectly of his absences, or, in the alternative, that the aspect of Metro-North's policy he violated was void because it conflicted with the regulations implementing the FMLA.

Millea alleged the following claims:

- Interference with Millea's ability to take FMLA leave. See 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.").

- Retaliation against Millea for taking FMLA leave by: (i) placing a notice of discipline in his employment file for a year; (ii) requiring him to update his FMLA certification; (iii) creating a work environment that motivated him to transfer to a lower paying job; (iv) delaying approval of his bid for the lead custodian position in 2009; and (v) subjecting him to heightened managerial surveillance. See 29 U.S.C. § 2615(a)(2) ("It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.").

On the interference claim, the Second Circuit Court of Appeals found for Millea. The court reasoned that there is no dispute that a company may discipline an employee for violating its internal leave policy as long as that policy is consistent with the law; however, we conclude that, on these facts, Metro-North's internal leave policy is inconsistent with the FMLA.

The FMLA generally requires employees to "comply with the employer's usual and customary notice and procedural requirements for requesting leave." 29 C.F.R. § 825.303(c). **However, this requirement is relaxed in "unusual circumstances" or where the company policy conflicts with the law**. Id.

The regulations implementing the FMLA provide that when an employee's need for FMLA leave is unforeseeable (as Millea's was), "[n]otice may be given by the employee's spokesperson (e.g., spouse, adult family member, or other responsible party) if the employee is unable to do so personally." Id. § 825.303(a). Because this regulation expressly condones indirect notification when the employee is unable to notify directly, Metro-North's policy conflicts with the FMLA and is therefore invalid to the extent it requires direct notification even when the FMLA leave is unforeseen and direct notification is not an option.

Whether Millea's situation on September 2006 constituted an "unusual circumstance" in which he was "unable" to personally notify Vaughn is a question of fact, not of law. The jury found that Millea gave proper notice, meaning his notice complied with the FMLA and all legally valid aspects of Metro-North's internal leave policy.

As for Millea's retaliation charge, Millea sought to define "retaliation" under the FMLA using the definition of "materially adverse employment action" articulated by the Supreme Court in the Title VII lawsuit, Burlington Northern & Santa Fe

Railroad Co. v. White, 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). In particular, Millea proposed that an adverse employment action occurs when "a reasonable employee in the plaintiff's position would have found the alleged retaliatory action materially adverse," and that a retaliatory action is "materially adverse" **when the action "would have been likely to dissuade or deter a reasonable worker in the plaintiff's position from exercising his legal rights."**

Burlington Northern expanded the definition of "materially adverse employment action" for purposes of Title VII retaliation claims. Today, a Title VII plaintiff "must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." The Court rejected the proposition that an act of retaliation must relate to the specific terms and conditions of the employee's employment.

The Second Circuit reasoned that this same rationale applies to the anti-retaliation provision of the FMLA. The FMLA's anti-retaliation provision has the same underlying purpose as Title VII-and is almost identical wording.

Therefore, the court held that under the FMLA's anti-retaliation provision, a materially adverse action is any action by the employer that is likely to dissuade a reasonable worker in the plaintiff's position from exercising his legal rights.

Consequently, a "material adverse action" is restricted solely to changes in the employee's terms and conditions of employment, the district court committed legal error.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

In short, the standard for employees to meet into order to prove FMLA retaliation just got a lot lower. Rather than having to prove that the employer took some action against some tangible aspect of their job, all employees have to prove today is that the employer has created a working environment that is:

"… likely to dissuade or deter a reasonable worker in the plaintiff's position from exercising his legal rights."

Unfortunately for employers, this is a question of fact to be determined by a jury.

Therefore, again, HR professionals must make sure that their managers and supervisors are able to document why they are taking the actions they are against employees as well as being aware of what type of environment they are creating in the workplace. This area of "retaliation law" is just another example of where good old HR practices will do much to prevent lawsuits.

XLIII. WAIVER OF RIGHTS

The 1995 regulations indicated that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA." Some courts had construed this language as prohibiting settlement agreements and other retroactive waivers without DOL or court approval.

The final regulations insert the word "**prospective**" before the word "**rights**," and include an express provision permitting **"the settlement or release of FMLA claims by employees based on past employer conduct without the approval of the Department of Labor or a court."** 29 CFR § 825.220(d).

XLIV. LIABILITIES AND DAMAGES

A. Managers Can Be Held Personally Liable

In Carpenter v. Refrigeration Sales Corp., *et al.*, 49 F. Supp.2d. 1028 (N.D. Ohio 1999), since 1990, the plaintiff reported to William Wagner and had received excellent reviews on her work. She was later offered a promotion to the account receivable position.

However, on April 7, 1997, she was diagnosed with hepatitis and needed to have the rest of the week off. When she told Wagner, he told the plaintiff that she was no longer eligible for the account receivable promotion.

On April 11, 1997, Wagner terminated the plaintiff's employment. The plaintiff sued both her employer and Wagner personally. The court allowed both claims to stand and granted summary judgment for the plaintiff.

Specifically, the court held that:

1. The plaintiff was eligible for FMLA leave,

2. The defendant was a covered employer,

3. The plaintiff suffered from a serious health condition,

4. The plaintiff provided her employer with adequate notice of her condition and

5. The employer never requested a medical certification.

The court also held that it was following the majority of federal courts that have allowed plaintiffs to hold their supervisors and managers personally liable under the FMLA.

B. Enforcement and Remedies

Enforcement provisions of the FMLA are adopted from the enforcement procedures under the Fair Labor Standards Act and are initiated by an administrative charge filed by the employee. Like the FLSA, the FMLA is enforced by the Wage and Hour Division of the U.S. Department of Labor.

Also like the FLSA, the statute of limitations for filing a FMLA charge is two years, unless the violation was willful, in which case the statute of limitations is three years.

Like Title VII, employees are protected for exercising their rights under the FMLA from any retaliatory acts that may be committed by their employer.

Additionally, § 2617 of the FMLA allows employees to pursue a private civil suit against employers who violate the Act. The Secretary of Labor is also empowered to file civil suits against an offending employer. Further, again like the FLSA, individuals may be held personally liable under the FMLA.

Employers and individuals who violate employees' rights under the FMLA may be ordered to pay monetary damages and equitable relief, which may include the employee's lost wages, "double" or liquidated damages, and the costs and attorneys' fees associated with enforcing these rights. Employers may also be ordered to reinstate and or promote such employees, depending on the circumstances of the cases.

XLV. NEW TAX CREDIT FOR FMLA LEAVE

Employers that offer paid family and medical leave may get an unexpected tax benefit next year at tax time. The tax reform law that passed earlier this year contains a little-noticed tax credit for employers that provide qualifying types of paid leave to their full and part-time employees. The credit is available to any employer, regardless of size, if:

- It provides at least two weeks of qualifying leave annually for employees who have been with the company for at least 12 months; and

- The paid leave is at least 50% of the wages normally paid to the employee.

The IRS recently issued a series of FAQs on the credit that are designed as a temporary measure to help employers understand (and hopefully take advantage of) the credit while waiting for official guidance in the form of regulations.

What types of leave qualify for the credit?

The credit is available when an employer pays for leave that would fall into the same categories for which leave is available under the federal Family and Medical Leave Act (FMLA). That includes both the FMLA's original reasons for leave (pregnancy,

childbirth, and serious health conditions) and leave that relates to the military service of an employee's family member (military caregiver and qualifying exigency leave).

In addition, however, employers can claim the credit when they offer paid leave for **any** of the listed (FMLA-like) reasons. For example, an employer that offers paid parental leave would be able to claim the tax credit even if it doesn't offer paid leave for the other types of qualifying leave. Employers that offer self-funded disability benefits should discuss whether they can claim the credit for those benefits with their attorney.

The credit isn't available for paid sick leave, paid vacation, or paid time off unless it's specifically offered for one or more of the qualifying reasons listed. Nor is it available for paid leave that is otherwise required by law.

How much is the credit?

For employers that offer paid leave in the amount of 50% of an employee's wages, the credit is 12.5% of the amount paid. The credit is increased by 0.25% for each percentage point by which the paid leave exceeds 50% of the employee's normal wage, but it is capped at a maximum credit of 25%.

Ordinarily, employers would claim paid leave as a general business deduction for wages or salaries paid or incurred. To claim the credit, that deduction would have to be reduced by the amount of the credit claimed. So it's possible that you would claim the credit for some employees (those who make less than $72,000 per year) and the deduction for others (those who make $72,000 or more).

The maximum period of paid leave for which the credit may be claimed is 12 weeks.

WHAT DOES THIS MEAN FOR HR?

The law specifically requires employers to have a written policy describing the paid leave offered. In addition, employers are required to provide part-time qualifying employees a proportionate amount of paid leave (based on their expected work hours).

At this time, the credit is available only for wages paid in 2018 and 2019, which may make it unlikely that employers will adopt new paid leave policies just to claim the credit. If you've been considering paid leave, however, the availability of the credit (and a conversation with your attorney and/or accountant) may help you in your decision.

XLVI. COMPLYING WITH THE FMLA

A. FMLA Employer Checklist

In general, in order to properly manage the FMLA, employers should consider adopting the following practices:

1. Display the FMLA Notice Poster in a conspicuous location, which may be obtained from the Department of Labor, Wage and Hour Division.

2. The employer's handbook should describe the rights afforded to employees under the FMLA, their responsibilities and what benefits they are entitled to receive under the Act. Alternatively, employers may distribute an FMLA fact sheet to employees that contains the same type of information. These materials should provide employees with such information as:

   a) They are entitled to receive up to 12 weeks of FMLA leave each year and on what basis this leave may be used (i.e., in one lump period of time, intermittently or on a reduced schedule basis, etc.),

   b) How their 12-month period of calculating FMLA leave will be made (i.e., rolling twelve-month period, calendar year, etc.),

   c) Whether employees will be required to provide a medical certification of their condition, or of a covered family member, if applicable, and the consequences of not providing such documentation to the employer (i.e., non-certification of the employee's condition),

   d) Whether the employer will require its employees to use their paid time off while on FMLA leave, as well as whether any conditions may be placed upon the employees for using their paid time off while on FMLA leave, and if the FMLA leave will run concurrently with any other paid leave taken,

   e) Whether employees will be required to make premium payments for their benefits, including their health care coverage, while on unpaid FMLA leave, where the employee is expected to send these payments, when such payments are due and the consequences for missing any premium payments. (The amount of these payments should also be included in the FMLA Designation and/or Eligibility Notice.)

   f) Whether a return-to-work, or a fit-for-duty, certificate will be required from the employee before being permitted to return to work, and the consequences of not providing one,

   g) Who qualifies as a key employee and what the potential consequences are of being classified as a key employee, and

Note: If the employee qualifies as a "key" employee and will be denied restoration rights by the employer, the employee must also be informed of this in writing and given a reasonable amount of time to return to work after receiving such notice.

   h) What restoration rights employees have regarding their jobs.

3. Employees should be required to contact their employer on a reasonable and periodic basis in order to keep the employer informed of their return-to-work status.

4. Employers should also reserve the right to have their employees' recertify their serious medical conditions on a reasonable basis, but no more frequently than once every 31 days, or sooner if any information regarding the covered individual's serious medical condition changes in any way.

5. If medical certification or return-to-duty certificate is required, the employee must receive written notice of this fact with every correspondence from the employer, unless the initial notice to the employee ***and*** the employer's handbook, or other written document, has already informed the employee of such requirements.

6. If the employer desires to have its health care provider contact the employee's health care provider, the employee should be asked to sign a consent form and a HIPAA Release form.

7. If the employer intends to cancel the employee's health insurance coverage due to the employee's failure to make timely payments, the employee must be informed of this fact in writing at least 15 days before such coverage is terminated.

8. Employers must also adopt and follow confidentiality measures in order to ensure that the medical conditions of their employees remain private.

9. Managers should be trained in what types of conditions may qualify for FMLA coverage, they should be trained to send employees they suspect of being covered by the FMLA to the Human Resource Department for authorization and certification. They should also be instructed to keep such information as an employee's serious health conditions private. Only those who are on a need-to-know basis should be privy to such information.

10. Employers may require that a second and even a third medical opinion be rendered when such opinions conflict. One of the best ways to manage the FMLA is to ensure that any employee's potentially serious health condition is certified as such by a health care provider.

11. Notices should be sent to employees by way of "proof of mailing" or by some method of tracking as proof that proper notices have been provided. If the employer fails to provide any of these notices, the lack of notice will fall to the employee's favor and protection under the FMLA.

12. Human Resource Departments should maintain a standardized collection of the FMLA forms needed to remain in compliance. These forms may then be customized to fit each employee's situation, then sent to the

employee in an efficient manner. A list of some of the forms employers should have ready to implement, as previously discussed, are:

a. General notice

b. Eligibility and Rights and responsibilities notice

c. Designation notice

d. Additional Notice of Eligibility & Rights Information

e. Medical Certification Form for Family Members

f. Certification for Serious Injury or Illness of Covered Service Member (FMLA)

g. Permission from Employee to Contact Health Care Provider

h. Notice of Termination of Health Insurance Coverage

i. Key Employee Denial of Job Restoration Letter.

Notice: Legal Advice Disclaimer

The purpose of these materials is not to act as legal advice but is intended to provide human resource professionals and their managers with a general overview of some of the more important employment and labor laws affecting their departments. The facts of each instance vary to the point that such a brief overview could not possibly be used in place of the advice of legal counsel. Also, every situation tends to be factually different depending on the circumstances involved, which requires a specific application of the law. Additionally, employment and labor laws are in a constant state of change by way of either court decisions or the legislature.
Therefore, whenever such issues arise, the advice of an attorney should be sought.

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Scott combines the areas of law and human resources to help organizations in "Solving Employee Problems ***BEFORE*** They Happen." Scott's goal is ***NOT*** to win lawsuits. Instead, Scott's goal is to ***PREVENT THEM*** while improving ***EMPLOYEE MORALE***.

Scott's book, **"Solve Employee Problems Before They Start: *Resolving Conflict in the Real World"*** is #1 for New Releases on Amazon for Conflict Resolution books!

Scott's "**Employment Law Videos**" on the ADA, FMLA, FLSA and Harassment, **"The Human Resource Professional's Complete Guide To Federal Employment And Labor Law" &** Scott's **"Do It Yourself HR Department"** are favorites for anyone wanting to learn Employment Law and run an HR Department.

Scott has been named one of Business First's 20 People To Know In HR, CEO Magazine's 2008 Human Resources "Superstar," a Nationally Certified Emotional Intelligence Instructor and a SHRM National Diversity Conference Presenter in 2003, 2006, 2007, 2008 and 2012.

Scott has also received the Human Resource Association of Central Ohio's Linda Kerns Award for Outstanding Creativity in the Field of HR Management and the Ohio State Human Resource Council's David Prize for Creativity in HR Management.

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