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The Family and Medical Leave Act: An Overview of Title I

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Summary

The Family and Medical Leave Act of 1993 (FMLA; P.L. 103-3, as amended) entitles eligible employees to unpaid, job-protected leave for certain family and medical reasons, with continued group health plan coverage.

FMLA requires that covered employers grant up to 12 workweeks in a 12-month period to eligible employees for one or more of the following reasons:

- the birth and care of the employee's newborn child, provided that leave is taken within 12 months of the child's birth;
- the placement of an adopted or fostered child with the employee, provided that leave is taken within 12 months of the child's placement;
- to care for a spouse, child, or parent with a serious health condition;
- the employee's own serious health condition that renders the employee unable to perform the essential functions of his or her job; and
- qualified military exigencies arising from the covered activity duty status of a covered military member who is the employee's spouse, child, or parent.

In addition, the act provides up to 26 workweeks of leave in a single 12-month period to eligible employees to care for a covered military servicemember (including certain veterans) with a serious injury or illness that was sustained or aggravated in the line of duty while on active duty, if the eligible employee is the covered servicemember's spouse, child, parent, or next of kin.

FMLA leave has four fundamental characteristics:

1. It is an *entitlement*, which means that, unlike other forms of leave (like vacation days), it must be granted to an eligible employee with an FMLA-qualifying need for leave who meet the act's notification and documentation requirements.
2. FMLA guarantees *unpaid leave*, but provides that employees may elect to substitute or employers may require the substitution of certain types of accrued paid leave for unpaid FMLA leave, within the constraints of employer policy.
3. FMLA leave is *job-protected*, which means that—with few exceptions—an employer must return the employee to the same job or to one that is equivalent in terms of pay, benefits, working conditions, and responsibilities to the one held prior to taking leave.
4. Pre-existing *group health benefits must be maintained* during the employee's absence under the same conditions that were in place prior to taking leave.

FMLA applies to covered employers and eligible employees in both the private and public sectors. Some provisions for federal civil service employees differ from those that apply to private-sector and state and local government employees.

Employer coverage and employee eligibility for FMLA leave are not universal. In general, employers engaged in commerce with 50 or more employees are covered. Employee eligibility is defined in terms of an employee's work history with a specific employer, and the size of the employer's workforce in or around the employee's worksite.

This report describes the major provisions of Title I of the act—which apply to the private sector, state and local governments, and certain federal agencies—as administered by the Secretary of Labor.

Contents

Tables

Appendixes

Contacts

Introduction

The Family and Medical Leave Act of 1993 (FMLA; P.L. 103-3, as amended) entitles eligible employees to unpaid, job-protected leave for certain family and medical needs, with continuation of group health plan benefits. Through the act, Congress sought to strike a balance between workplace responsibilities and workers' growing need to take leave for significant family and medical events.

The act as passed in 1993 focused on providing an entitlement to leave for the arrival of a newborn or newly-placed child, serious health conditions in the family, and the employee's own serious health condition that interferes with his or her ability to perform essential job functions. In passing the act, Congress cited an increase in dual-earner and single-parent households that reduced the share of families with a caregiver at home. This, alongside an aging population, increased workers' needs for workplace flexibility to attend to significant family and medical events.[1] In 2008 and 2009, Congress responded to a heightened need for leave among military families (connected to large-scale deployments) by adding new categories of leave that allow eligible employees to address certain military exigencies stemming from the deployment of a close family member to a foreign country, and to care for a servicemember with a serious injury or illness who is a close family member.

Congress recognized the potential for the FMLA leave entitlement to complicate scheduling for employers and otherwise disrupt business activity. It addressed business interests by placing clear parameters around the types of leave covered by the act, linking employer coverage and employee eligibility to the size of the employer's workforce, conditioning employee eligibility on job tenure and hours-worked requirements, and giving employers the right to advance notice of need for leave and to request medical documentation in certain circumstances.

FMLA applies to covered employers and eligible employees in the private and public sectors.[2] Title I of the act applies to eligible employees working in the private sector, state and local governments, and a small set of federal employees, and is administered by the Department of Labor (DOL). Congressional Offices, the Government Accountability Office, and the Library of Congress are also covered by Title I, but its provisions are administered by the U.S. Congress Office of Compliance, the Comptroller General of the United States, and the Librarian of Congress, respectively. Most federal civil service employees are covered by Title II of the act, which is administered by the Office of Personnel Management. Title II's statutory language is—with a few exceptions—closely similar in substance to Title I's, but there are some differences.

This report describes the major provision of Title I of the FMLA as administered by the Secretary of Labor. It covers the FMLA leave entitlement and its characteristics, employer coverage, employee eligibility criteria, employer and employee responsibilities, and enforcement. An appendix provides the legislative history of the act.

[1] Congress observed that voluntary provision of such leave by private and government employers had "failed to adequately respond to recent economic and social changes." U.S. Congress, House Committee on Education and Labor, *Family and Medical Leave Act*, committee print, 103rd Cong., 1st sess., February 2, 1993, H.Rept. 103-8, pt.1 (Washington: GPO, 1993) (hereafter "House Committee on Education and Labor Report").

[2] Members of the Armed Forces are not eligible for FMLA leave.

Leave Entitlement

FMLA entitles eligible employees to 12 workweeks of leave in a 12-month period for certain family and medical needs and up to 26 workweeks in a single 12-month period for the care of a covered servicemember with a serious injury of illness.[3]

FMLA-Qualifying Uses of Leave

The act requires that covered employers grant up to 12 workweeks (total) in a 12-month period[4] to eligible employees for one or more of the following reasons:[5]

- the birth and care of the employee's newborn child, provided that leave is taken within 12 months of the child's birth;
- the placement of an adopted or fostered child with the employee, provided that leave is taken within 12 months of the child's placement;
- to care for a spouse, child, or parent with a serious health condition;
- the employee's own serious health condition that renders the employee unable to perform at least one essential functions of his or her job;[6] and
- qualified military exigencies related to the covered active duty status of the employee's spouse, son, daughter, or parent who is a covered military member.

In addition, the act provides up to 26 workweeks of leave in a single 12-month period to eligible employees for the care of a covered military servicemember (including certain veterans) with a serious injury or illness that was sustained or aggravated in the line of duty while on active duty, if the eligible employee is the covered servicemember's spouse, child, parent, or next of kin.[7] The 26 workweek entitlement applies on a per-servicemember, per-serious-injury or -illness basis.[8] This type of FMLA leave is often referred to as *military caregiver leave*.

The combination of military caregiver leave and other FMLA-qualified leave cannot exceed 26 weeks in a 12-month period that starts on the first day that military caregiver leave is used. FMLA

[3] The act is intended as a minimum standard and does not preclude more generous provision of family or medical leave by employers. See 29 U.S.C. §2653. Where states provide for family and medical leave, the entitlement (state or federal) that is most generous to the employee prevails. See 29 U.S.C. §2651.

[4] Employers have several options for defining the recurring 12-month leave period. They may use the calendar year, any fixed 12-month period (e.g., fiscal year), the 12-month period starting the first day FMLA leave is used, or a "rolling" or "look-back" 12-month period calculated as the 12-months that precede an instance of FMLA leave. The method for calculating the 12-month period must be applied consistently and uniformly across all employees. Where an employer has not established a policy regarding the method used to define the leave period, the default period is the one that is most advantageous to the employee (29 C.F.R. §825.200(b)-(d)).

[5] 29 U.S.C. §2612 - Leave Requirement.

[6] Congress indicated in the House Committee on Education and Labor Report accompanying the act that a worker who must be absent from work to receive treatment for serious health condition "it follows as a matter of common sense that the employee is, during the time of the treatments, temporarily 'unable to perform the functions' of his or her position ... and therefore eligible for leave ...to receive the treatments" (pp. 36-37).

[7] The single 12-month period in which FMLA military caregiver leave may be taken always starts on the first day that FMLA military caregiver leave is used. See 29 C.F.R. §825.127(e)(1).

[8] This means, for example, that an employee may use a subsequent period of military caregiver leave—in a separate 12-month period—to provide care to the same servicemember for a separate serious illness or injury, or to provide care to a different covered servicemember.

leave used for the arrival and care of a new child, serious health conditions, and qualified military exigencies is always capped in total at 12 workweeks in the 12-month period.

Special rules regarding the calculation of the FMLA leave entitlement (and other provisions) apply to airline flight crew employees. These employees are entitled to 72 days of leave during a 12-month period for the arrival and care of a new child, serious health conditions, and qualified military exigencies, and 156 days of leave in a single 12-month period for military-caregiver leave. See **Appendix A** for more information.

Special Rules for Spouses Employed by the Same Employer

Spouses employed by the same employer may be limited to a combined 12 weeks of FMLA leave in a 12-month period for the arrival and care of a new child,[9] or the care of a parent with a serious health condition.[10] Spouses working for the same employer may also be limited to a combined 26 weeks of FMLA leave in a single 12-month period to care for a seriously injured or ill covered servicemember (i.e., military caregiver leave).[11]

Qualifying Reasons for FMLA Leave: Key Terms

The terms *serious health condition*, *qualifying military exigency*, *serious illness or injury*, and *care* have specific meaning under the FMLA and its accompanying regulations.

Serious Health Condition

Under the FMLA, a serious health condition is one that requires inpatient care or continuing treatment by a health care provider.[12] Inpatient care and continuing treatment are further defined by DOL regulations, resulting in six scenarios that qualify as a serious health condition for the purpose of taking FMLA leave.[13]

1. **Inpatient care.** FMLA leave may be taken for inpatient care that includes an overnight stay in a medical facility (e.g., hospital, hospice, or residential medical care facility). FMLA protects the time spent in inpatient care, and any associated period of incapacitation and treatment.
2. **Incapacity and treatment.** FMLA leave may be used for a period of incapacity that lasts more than three consecutive calendar days and requires either two or more in-person visits with a health care provider, or a single in-person visit that results in a course of continuing treatment under a health care provider's supervision.[14] In the context of the FMLA, *incapacity* refers to "an inability to

[9] The limits on leave taken by spouses with the same employer do not apply to leave taken to care for a child with a serious health condition.

[10] See 29 C.F.R. §825.120 (newborn child), 29 C.F.R. §825.121 (adoption or foster care), and 29 C.F.R. §825.201 (care of a sick parent).

[11] See 29 C.F.R. §825.127

[12] 29 U.S.C. §2611(11). Healthcare provider is defined in Department of Labor (DOL) regulations at 29 C.F.R. §825.125.

[13] 29 C.F.R. §825.113-115.

[14] Absent extenuating circumstances, the first (or only) in-person treatment visit must take place within seven days of the first day of incapacity, and at least two treatment visits must occur within 30 days of the first day of incapacity. 29 C.F.R. §825.115.

work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom."[15]

3. **Pregnancy or prenatal care.** FMLA leave may be used for any period of incapacity due to pregnancy or for prenatal care. There is no requirement tying use of FMLA leave for pregnancy or prenatal care to a specific duration of incapacity or treatment by a health care provider. It may be used as needed, for example, by expectant mothers (or to care for an expectant mother) experiencing severe morning sickness.
4. **Chronic conditions**. FMLA leave may be taken for treatment of or incapacity due to a chronic serious health condition. A chronic serious health condition is one that requires periodic visits—at least twice a year—for medical treatment, continues over an extended period of time, and may cause episodic or continuing periods of incapacity (e.g., asthma, diabetes, epilepsy).
5. **Long-term or permanent conditions.** FMLA may be used for a long-term or permanent period of incapacity due to a condition for which treatment may not be effective, as long as the employee or family member is under the continuing supervision of (although not necessarily receiving treatment from) a health care provider.
6. **Certain conditions requiring multiple treatments**. FMLA leave may be used for any absence to receive and recover from multiple medical treatments for restorative surgery after an injury or accident, or for a condition that would likely result in a period of incapacity lasting three or more consecutive calendar days if not treated. Examples of such conditions include cancer (e.g., chemotherapy), severe arthritis (e.g., physical therapy), or kidney disease (e.g., dialysis).

As demonstrated by the above list, FMLA leave cannot be used ordinarily for a minor ailment or for routine doctor's appointments. To give an example, the common cold generally does not meet the criteria of a serious health condition. In most cases it does not require an overnight stay in a medical facility and is unlikely to meet the regulatory definition of continuing treatment (e.g., three or more days of incapacitation and intervention by a health care provider). However, leave necessitated by a common cold is not excluded per se from protection under the act. If, for example, a common cold did lead to overnight hospitalization (e.g., due to complications or other factors), then it would be considered a serious health condition under FMLA and the absence—including periods of incapacitation, hospitalization, and subsequent treatment and recovery periods—would be protected.

Qualified Military Exigency

The act allows eligible employees to use FMLA leave to attend to qualified military exigencies stemming from the covered active duty status (or call to active duty) of a spouse, child, or parent who is a member of the Armed Forces (regular or reserve component).

Covered Active Duty

Under the act, *covered active duty* for a regular Armed Forces member means duty "during the deployment of the member with the Armed Forces to a foreign country."[16] For Reserve

[15] 29 C.F.R. §825.113(b).

[16] 29 C.F.R. §825.126(a). "*Foreign country*" includes international waters.

components, it refers to duty during the "deployment of the member with the Armed Forces to a foreign country under a Federal call or order to active duty in support of a contingency operation."[17]

Qualifying Military Exigencies

DOL regulations define the set of military exigencies that qualify for leave under the FMLA as follows.[18]

- **Short-notice deployment activities.** Up to seven days of leave may be taken to address issues stemming from short-notice (i.e., seven days or less notice) of a call or order to active duty in support of a contingency operation.
- **Military events and related activities**. If related to the military member's active duty status, leave may be used to attend official military ceremonies, programs, or events; certain family support or assistance programs; and informational briefings.
- **Childcare and school activities.** If necessitated by the military member's active duty status, leave may be taken to arrange childcare or, in limited circumstances, provide childcare for the child of a military member; and to attend school or daycare meetings for, or to enroll in school or childcare the child of a military member.
- **Financial and legal arrangements.** Leave may be taken to make financial or legal arrangements related to the military member's absence while on active duty (e.g., preparing powers of attorney, transferring bank account signature authority), and to act as the military member's representative before a government agency for certain matters related to military service benefits while the military member is on active duty and for 90 days following the termination of his or her active duty status.
- **Counseling**. FMLA leave may be used to attend counseling—provided by someone other than a health care provider—for the employee, for the military member, or the military member's child, when the need for counseling arises from the active duty or call to active duty status of a covered military member.[19]
- **Rest and recuperation.** Leave may be taken for up to five days (for each instance of rest and recuperation) to spend time with a deployed military member on short-term, temporary, rest and recuperation leave.

[17] 29 C.F.R. §825.126(a). A contingency operation is defined in 29 §C.F.R.825.102 as "a military operation that: (1) Is designated by the Secretary of Defense as an operation in which members of the Armed Forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or (2) Results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of Title 10 of the United States Code, chapter 15 of Title 10 of the United States Code, or any other provision of law during a war or during a national emergency declared by the President or Congress."

[18] 29 C.F.R. §825.126.

[19] DOL qualified that counseling be provided by an individual "other than a healthcare provider" based on the expectation that counseling provided by a healthcare provider is covered by the entitlement to use leave for a serious health condition. See U.S. Department of Labor, Wage and Hour Division, "The Family and Medical Leave Act of 1993; Final Rule," *Federal Register*, vol. 73, November 17, 2008, p. 67960.

- **Post-deployment activities**. Leave may be used to attend certain ceremonies, events, and programs sponsored by the military for a period of 90 days following the termination of the covered military member's active duty status, and to address issues that arise from the death of a covered military member while on active duty status.
- **Parental care**. Leave may be used to care for a parent of a military member, under certain circumstances, if that parent is incapable of self-care.
- **Additional activities**. An employer and an eligible employee may agree that FMLA leave may be used to address other needs arising from a covered military member's active duty or call to active duty status.

Serious Injury or Illness of a Covered Servicemember

FMLA leave is available to an eligible employee who is the spouse, child, parent, or next of kin of a *covered servicemember* with a *serious injury or illness*.

Covered Servicemember

A covered servicemember can be a current member of the Armed Forces, including the National Guard or Reserves, or a recent veteran. A current servicemember is *covered* if he or she has a serious injury or illness for which he or she is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list.[20] A veteran is a covered servicemember if he or she is undergoing medical treatment, recuperation, or therapy, for a serious injury or illness and was released from the Armed Forces under conditions other than dishonorable no more than five years prior to the first instance an eligible employee uses FMLA leave to provide care to the veteran.[21]

Serious Injury or Illness

When applied to a current member of the Armed Forces, *serious injury or illness* refers to an injury or illness that was incurred in the line of duty while on active duty in the Armed Forces—or a pre-existing injury or illness that was aggravated in the line of duty while on active duty in the Armed Forces—that renders the military member unfit to perform the duties of his or her office, grade, rank or rating.[22]

For a covered veteran of the Armed Forces, a serious illness or injury is one that was incurred in the line of duty while on active duty in the Armed Forces—or a pre-existing injury or illness that was aggravated in the line of duty while on active duty in the Armed Forces—and:

- is a continuation of an injury or illness that rendered the military member unfit to perform the duties of his or her office, grade, rank or rating when he or she was a current member of the Armed Forces;

[20] 29 U.S.C. §2611(15) and 29 C.F.R. §825.127(b).

[21] National Defense Authorization Act for Fiscal Year 2010 (NDAA FY2010, P.L. 111-84) delegated the task of defining a serious injury or illness for a covered servicemember who is a veteran to DOL. Per DOL regulations, the period between October 28, 2009, when the NDAA FY2010 became law, and March 8, 2013, when the DOL Final Rule became effective, is not counted toward the five-year period for covered veteran status. See 29 C.F.R. §825.127 (b)(2)(i).

[22] 29 U.S.C. §2611(18) and 29 C.F.R. §825.127(c).

- the veteran has received U.S. Department of Veterans Affairs Service-Related Disability Rating of 50% or greater;
- impairs a covered veteran's ability to attain "substantially gainful" employment, or would do so absent treatment; or
- is a physical or psychological injury for which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

Using FMLA Leave to Provide Care

The concept of care under FMLA includes both physical care and psychological care.[23] FMLA leave may be taken to assist an eligible family member or covered servicemember with medical, nutritional, and health and safety needs; provide transportation to medical appointments; make arrangements for changes in care; or offer comfort and reassurance to a family member receiving inpatient or home care.

Key Characteristics of FMLA Leave

FMLA leave has four fundamental characteristics. It is an entitlement, guarantees only unpaid leave, is job-protected, and requires continuation of group health benefits.

An Entitlement to Leave

FMLA leave is an *entitlement*, which means it must be granted to eligible employees with a FMLA-qualifying need for leave.

Employers' Rights to Delay Approval of FMLA Leave Requests

In some cases, an employer may delay approval of FMLA leave when advance notice requirements are not met or an employee does not follow the employer's standard policy for leave notification (see "Employees' Notice and Scheduling Responsibilities" section of this report). An employer may also delay leave for an employee who does not provide medical certification for leave related to a serious health condition or a serious injury or illness within 15 days of receiving written notice that such certification is required by the employer (see "Employer Rights to Require Certification" section of this report).

Employers' Rights to Deny FMLA Leave Requests

Leave may be denied if medical certification is incomplete or insufficient, and is not corrected by the employee. It may also be denied if the employer does not have enough information to determine that the employee's request falls under FMLA. However, if it is later determined (e.g., through additional information provided by the employee) that the reason for leave qualifies under the act, then leave must be approved; FMLA leave designation may be applied retroactively if doing so does not result in harm or injury to an employee.[24]

[23] 29 C.F.R. §825.124.

[24] 29 C.F.R. §825.301(d).

Unpaid Leave with the Option to Substitute Accrued Paid Leave

FMLA guarantees *unpaid leave*.[25] However, an employee may elect to use—or an employer may require that employees use—earned or accrued paid leave concurrently with unpaid FMLA leave, as long as use of such leave is consistent with the employer's leave policy.[26] Employers are obligated to notify employees that they may use paid leave alongside FMLA leave and convey the conditions related to such use of leave. Employers must notify employees when paid leave is designated as FMLA leave.[27]

Job-Protected Leave

FMLA leave is *job-protected*, which means—with some exceptions—an employer must return the employee to the same job or to one that is equivalent in terms of pay, benefits, working conditions, and responsibilities to the one held prior to taking leave.[28] An exception is made for *key employees* and in other limited circumstances.

Key Employees

An employer may deny job reinstatement to certain highly-paid, salaried employees—called *key employees*—if doing so is "necessary to prevent substantial and grievous economic injury to the operations of the employer."[29] FMLA and DOL regulations define a key employee as a salaried FMLA-eligible employee who is among the highest paid 10% of all the employees (both salaried and non-salaried) within 75 miles of the employee's worksite at the time leave is requested.

The employer must satisfy several notification requirements when designating a key employee and when it is determined that reinstatement of a key employee would result in substantial and grievous economic consequences to business operations.[30] A key employee retains all rights under FMLA "unless and until the employee either gives notice that he or she no longer wishes to return to work, or the employer actually denies reinstatement at the conclusion of the leave period."

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[25] 29 U.S.C. §2612(c).

[26] 29 U.S.C. §2612(d).

[27] Employers may not deduct paid leave taken for needs that do not qualify for FMLA leave (e.g., sick leave for a routine medical appointment unrelated to a serious health condition) from the employee's FMLA leave entitlement. See 29 C.F.R. 825.207(c).

[28] 29 U.S.C. §2614. DOL regulations define an equivalent position to be "one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority." See 29 C.F.R. §825.215. Special rules regarding job reinstatement (and the interpretation of an equivalent position) apply to certain employees of local education agencies. See **Appendix B** for more information.

[29] 29 U.S.C. §2614(b) and 29 C.F.R. §825.217. *Substantial and grievous economic injury* is discussed in 29 C.F.R. §825.218. It is worth noting that it is the effect of a key employee's *reinstatement* on business operations, not the economic consequences of his or her absence, that determines whether an employer may deny reinstatement.

[30] DOL regulations define the rights of a key employee. See 29 C.F.R. §825.219. Per DOL regulations, an employer must notify an employee in writing of his or her designations as a key employee at the time leave is requested (or taken, if sooner) and explain the potential consequences for the employee of such designation. If such notice is not provided in a timely fashion, the employer loses rights to deny restoration, even if substantial and grievous economic injury would result from the key employee's reinstatement. Should an employer determine that reinstatement of a key employee would result in substantial and grievous economic injury to its operation, the employer is obligated to notify the employee if its intent to deny restoration to employment on completion of the FMLA leave, and provide the employee reasonable time to return to work (i.e., to avoid denial of reinstatement).

Other Limits on Reinstatement

An employer may deny reinstatement and is not required to offer an alternate position to an employee who has been laid off (for reasons unrelated to FMLA leave use) while on FMLA leave.[31] Reinstatement may be delayed if an employee is required to supply fitness-for-duty certification and does not provide it; an employer may deny reinstatement of an employee who is no longer able to perform the essential functions of the position.[32] An employee who obtains FMLA leave fraudulently or who violates a uniformly-applied policy governing outside or supplemental employment while on leave has no right to reinstatement.

Continuation of Health Benefits

Employers are required to maintain coverage under pre-existing group health benefit plans during the employee's absence under the same conditions that were in place prior to taking leave.[33] The employee and employer are responsible for paying their respective shares of the health plan premium during the period of FMLA leave. Employers may recover their share of premiums paid during a period of FMLA leave if the employee does not return to work following the expiration of the employee's leave entitlement, unless the failure to return is due to a serious health condition (the employee's or a covered family member), the serious illness or injury of a covered servicemember, or circumstances outside the employee's control.

Intermittent Leave or Reduced Leave Schedule

Employers must allow employees to use FMLA leave intermittently when leave is taken for a serious health condition or a serious injury or illness and intermittent leave is medically necessary, or when leave is used to tend to a qualifying military exigency.[34] For example, an employee with a serious health condition that requires multiple treatments (e.g., dialysis for kidney disease) must be permitted to use FMLA leave intermittently; an employee may use leave intermittently to attend periodic school meetings for the child of a covered military member on active duty.

Similarly an employee must be permitted to use FMLA leave to reduce the usual number of hours worked per week or per day (i.e., a reduced leave schedule) to care for themselves or certain family members when medically necessary, or to tend to a qualifying military exigency.[35] For example, an employee may use FMLA leave to work a reduced schedule while recovering from surgery if medically necessary or to attend weekly counseling sessions related to the active duty status of a covered military member.

The act requires employees seeking to use FMLA leave intermittently or to work a reduced schedule to give 30 days of notice to employers, where possible; to provide the dates for which a reduced schedule is needed; and to provide certification, if required by the employer. When the need for intermittent or reduced schedule leave is foreseeable (e.g., based on planned medical treatments), the employer may transfer temporarily the employee to a position better suited to the

[31] Likewise, an employee is not entitled to return to his or her pre-leave shift or overtime hours if the shift or over time hours have been eliminated.

[32] Other laws including the Americans with Disabilities Act of 1990 (P.L. 101-336), as amended, state laws, and worker's compensation laws may affect employers' obligations for job reinstatement and workplace accommodations.

[33] 29 U.S.C. §2614(c) and 29 C.F.R. §§825.209-213.

[34] 29 U.S.C. §2612(b) and 29 C.F.R. §825.202.

[35] 29 U.S.C. §2612(b) and 29 C.F.R. §825.202.

anticipated schedule, as long as the employee is qualified for the alternative position and the alternative position has equivalent pay and benefits.

The act does not require employers to permit intermittent or reduced schedule leave for employees using FMLA leave for the birth or placement of a new child. However, an employer and employee may agree to such an arrangement.[36]

Special rules concerning the use of intermittent and reduced schedule leave apply to certain local educational agency employees and to airline flight crew employees. See **Appendix A** and **Appendix B**.

FMLA Leave to Care for or Address the Needs of Family Members

The act permits employees to use leave to care for or address the needs of certain family members (see "Leave Entitlement" for FMLA-qualifying reasons for leave). The set of family members for whom FMLA leave may be taken varies by the reason for leave, but the group of family members for whom at least one category of FMLA leave may be taken includes an employee's spouse, son or daughter, parent, or an individual for whom the employee is next of kin. With few exceptions, an employee may not use FMLA leave to care for other close family members, including parents-in-law, grandparents, cousins, siblings, or grandchildren.

Son or Daughter

Under FMLA, a *son or daughter* is a biological, adopted, or fostered child, a stepchild, legal ward, or an individual for whom an employee is standing in loco parentis.[37] In general, FMLA leave may be used for a son or daughter if the child is under the age of 18, or 18 years or older and incapable for self-care due to a mental or physical disability.[38] However, military exigency leave or military caregiver leave may be used for a son or daughter who is any age.

Spouse

Spouse refers to a husband or a wife.[39] FMLA recognizes any marriage performed legally in the United States, including common law marriage. The FMLA definition includes spouses of a marriage performed outside the United States that would be legal had it been performed in at least one U.S. state. Domestic partnerships are not recognized by the act.

Parent

A parent is a biological, adoptive, step- or foster parent, or an individual who stood *in loco parentis* to the employee when he or she was a child.[40] FMLA does not require a legal relationship to exist between a parent and child; it is sufficient for an individual to take on the role of a parent. This holds even when the child's biological or legal parent is also serving in a parental role, and means that FMLA does not limit a child to two parents.

[36] 29 U.S.C. §2612(b) and 29 C.F.R. §825.202.

[37] Per 29 C.F.R. §825.122(d)(3) persons "who are 'in loco parentis' include those with day-to-day responsibilities to care for and financially support a child ... [a] biological or legal relationship is not necessary."

[38] 29 U.S.C. §2611 (12) and 29 C.F.R. §825.122(d).

[39] 29 U.S.C. §2611(13) and 29 C.F.R. §825.122(b).

[40] 29 U.S.C. §2611(7) and 29 C.F.R. §825.122(c).

Next of Kin

FMLA leave may be taken by an employee who is next of kin for a covered servicemember with a serious illness or injury. The next of kin of a covered servicemember is either (1) the one person designated in writing by the servicemember as next of kin or (2) the nearest blood relative(s) other than the covered servicemember's spouse, parent, son, or daughter.[41]

Confirmation of Relationship

Employers may require confirmation of the relationship between an employee and the individual for whom he or she seeks to use FMLA leave. Such confirmation can take the form of a statement from the employee or an official document (e.g., birth certificate, court document).[42]

Employer Coverage

In general, FMLA applies to private-sector employers that

- are engaged in commerce or in an industry affecting commerce, and
- have at least 50 employees who are employed for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.[43]

All public agencies (i.e., federal, state, and local governments) covered by the act are covered employers regardless of employment levels.[44]

Title I provisions and accompanying DOL regulations apply to covered employers in the private sector, state and local governments, and some federal government agencies. The Congressional Accountability Act of 1995 extended FMLA Title I provisions to many congressional employees, and it is enforced by the U.S. Congress Office of Compliance. The Government Accountability Office and the Library of Congress are also covered by Title I, but its provisions are administered by the U.S. Comptroller General of the United States and the Librarian of Congress, respectively.

Most federal civil service employees are covered by Title II of the act, which is administered by OPM.[45] However, Title I as administered by DOL applies to the following federal agencies and employees:[46]

- U.S. Postal Service and the U.S. Postal Regulatory Commission;
- part-time federal executive branch employees who do not have an established regular tour of duty during the administrative workweek;
- federal executive branch employees serving under intermittent appointments or temporary appointments with a time limitation of one year or less;

[41] 29 U.S.C. §2611(17) and 29 C.F.R. §825.122(3). The order of priority for blood relatives is those with legal custody of the covered servicemember, siblings, grandparents, aunts and uncles, and first cousins.

[42] 29 C.F.R. §825.122(k).

[43] 29 U.S.C. §2611 and 29 C.F.R. §825.104.

[44] Public agency employees, like all employees, must meet all employee eligibility criteria.

[45] Title II statutory language and OPM regulations are—with a few exceptions—closely similar in substance to Title I and DOL regulations, as required by the act.

[46] See 29 C.F.R. §825.109.

- federal executive branch employees who are not covered by Title II of FMLA; and;
- federal judicial branch employees who are employed in a unit that has employees in the competitive service (e.g., U.S. Tax Court employees).

Employee Eligibility

FMLA eligibility is defined in terms of an employee's work history with a specific employer, and the size of the employer's workforce employed in or around the employee's worksite. In general, to be eligible to take FMLA leave, an employee must[47]

- work for a covered employer (see "Employer Coverage");
- have 1,250 hours of service in the 12 months prior to the start of leave;
- have worked for the employer for 12 months (months need not be consecutive, but months that precede a break in service of 7 years or more are generally not counted);[48] and
- work at a location where the employer has 50 or more employees within 75 miles.

In practice, these requirements mean that FMLA eligibility is not transferable across employers. They also mean that eligibility is not permanent: an employee may lose eligibility while working for a given employer if his or her hours dip below the 1,250 hours required in the 12 months before leave commences requirement, if the employers' workforce within 75-miles of the worksite falls below 50 employees, or if the employer is no longer covered by the law.

Special rules concerning the hours-of-service requirement apply to airline flight crew employees. See **Appendix A** for more information.

Employer and Employee Responsibilities

The act provides rules concerning employer and employee notification requirements, employee's responsibilities for scheduling of leave, employer rights to certification, and employer recordkeeping requirements.

Employer Notification Requirements

Employers have several notification requirements under FMLA:[49]

- **General Notice.** All covered employers must post a written notice that describes the act's provisions and how to file a complaint with DOL for FMLA violations.

[47] 29 U.S.C. §2611(2) and 29 C.F.R. §825.110.

[48] DOL regulations include some exceptions to the seven-year break-in-service rule for considering non-consecutive months of employment. The period of absence for a Uniformed Services Employment and Reemployment Rights Act (USERRA), (38 U.S.C. 4301) covered service obligation, and employment periods preceding the USERRA break in service, must be counted toward months of employment with the employer. Months of service preceding a break of more than seven years must be counted if "a written agreement, including a collective bargaining agreement, exists concerning the employer's intention to rehire the employee after the break in service (e.g., for purposes of the employee furthering his or her education or for childrearing purposes)." See 29 C.F.R. §825.110(b).

[49] 29 U.S.C. §2619 and 29 C.F.R. §825.300

The general notice must be displayed in a prominent place that can be viewed readily by all employees and applicants. In addition, covered employers *with at least one eligible employee* must include this information with other written materials describing employee benefits or leave (e.g., in an employee handbook), or provide it to each employee at the time of hiring. Electronic posting and provision is permitted.

- **Eligibility Notice.** Employers must provide a notice that indicates an individual employee's FMLA eligibility status each time that employee makes a new FMLA leave request. If an employee is deemed ineligible for FMLA leave, the employer must provide at least one reason for ineligibility. Absent extenuating circumstances, this notice must be provided within five business days of a request. Notice may be given orally or in writing.
- **Rights and Responsibilities Notice.** Employers must provide a written notice that outlines the employee's rights, expectations, and obligations under the act and explains the consequences of a failure to meet obligations to each employee who receives the eligibility notice.[50]
- **Designation of Leave Notice.** Employers must determine whether a request for leave will be designated as FMLA-qualifying and notify the employee accordingly. If leave is determined to be FMLA-qualifying, the employer must also indicate how much leave will be counted against the employee's FMLA entitlement; whether the employee is required to substitute accrued paid leave for unpaid leave, or if paid leave requested under separate leave plan (e.g., employee requested sick leave for prenatal care) will be designated as FMLA-qualifying and counted against the employee's FMLA entitlement; and identify any requirements for a fitness-for-duty certificate upon return to work (unless the need for such certification is established clearly in written materials describing the employer's leave policy). Once the employer has acquired sufficient information to determine whether the requested leave is FMLA-qualifying, the employer has five business days to provide the designation notice, absent extenuating circumstances. The designation notice must be given in writing.

Employees' Notice and Scheduling Responsibilities

Employee's Notice Requirements

An employee seeking to use FMLA leave must provide enough information to permit the employer to determine whether the leave request is (or is likely to be) FMLA-qualifying, and the expected timing and duration of leave.[51]

[50] Specifically, the notice should indicate: (a) that the leave may be designated as FMLA leave and counted against the employee's entitlement, (b) requirements for providing certification (see the "Employer Rights to Require Certification" section of this report), (c) the employee's right to substitute paid leave and whether such substitution is required by the employer, (d) the employee's responsibilities to make health benefit plan premium payments and the consequences for not making these payments, (e) the employee's status as a key employee and the potential consequences of key employee status to the employee (see "Key Employees" section in this report), (f) the employee's rights to reinstatement in the same or equivalent position, and (g) the employee's potential liability for the employer's share of health benefit plan premiums should the employee not return to work. Other information may be provided as well. See 29 C.F.R. §825.300(c).

[51] 29 C.F.R. §825.302(c). An employer may—and is expected to—inquire further if he or she has insufficient (continued...)

Employees must provide a 30-day advance notice to employers when the need for leave is foreseeable based on an expected birth or a scheduled medical treatment.[52] When the need for leave is not foreseeable (e.g., hospitalization resulting from an automobile accident) or when leave is needed to address a qualifying military exigency, notice must be given "as soon as practicable."[53] In some cases, an employer may delay approval of FMLA leave when advance notice requirements are not met.

Compliance with Employers' Policy for Requesting Leave

In general, employers may condition FMLA leave approval upon an employee's adherence to the employer's policy for requesting leave.[54] For example, if established in employer policy, an employer may require written request for leave, or require the employee to call-in prior to an absence when using intermittent leave.

There are limits, however, on when employer policy can be used to deny or delay FMLA leave. Employers may not apply a longer notice period than the 30-day notice provided in the act (e.g., the employer cannot require a 45-day notice). An FMLA leave request that does not meet employer policy may not be denied if unusual circumstances prevent the employee from following employer policy (e.g., emergency medical treatment is required).

Scheduling Planned Medical Treatment and Leave

When the need for FMLA leave is based on a planned medical treatment and is foreseeable, the employee must make a reasonable effort to schedule the treatment so as not to disrupt unduly the business operations.[55] Plans made between the employer and employee regarding scheduling of leave and the timing of planned medical treatment are subject to the approval of the employee's health care provider.

Employer Rights to Require Certification

In some instances, employers may require that an employee's request for FMLA leave be supported by medical certification (e.g., that a serious health condition exists) or other certification (e.g., to determine active duty status of a military member).[56] Employers must notify employees each time certification is required, and inform employees of the anticipated consequences should the employee fail to provide certification (e.g., denial of leave).

Medical Certification of a Serious Health Condition

An employer may require an employee requesting leave for a serious health condition—his or her own, or that of a family member—to provide medical certification verifying that such a condition

(...continued)

information to determine whether the leave request qualifies under FMLA.

[52] 29 U.S.C. §2612(e) and 29 C.F.R. §825.302-303.

[53] *As soon as practicable* generally means within the same or next business day of learning of the need to take FMLA leave; the precise definition depends on the individual case. 29 C.F.R. §825.302 (b).

[54] 29 C.F.R. §825.302(d) and 29 C.F.R. §825.303(c).

[55] 29 U.S.C. §2612(e)(2) and 29 C.F.R. §825.302(e).

[56] 29 U.S.C. §2613 and 29 C.F.R. §825.305-313.

exists, and related information.[57] A new certification of a serious health condition can be required every 12 months.

Medical certification of a serious health condition must be obtained from a health care provider (selected by the employee), and may contain the following information:[58]

- the provider's contact information and details about the provider's practice and medical specialty;
- the date the serious health condition began;
- the likely duration of the serious health condition;
- appropriate medical facts;
- a statement that the employee is unable to perform at least one essential job function, or if leave is take to care for a family member a statement that the employee is needed to care for the relative in question;
- in the case of intermittent leave or leave on a reduced schedule, a statement that the leave is medically necessary and, if possible, the expected dates and duration of leave; and
- for planned medical treatment, the expected dates for treatment and duration of leave.

Second and Third Opinions of a Serious Health Condition

An employer may require a second opinion, at the employer's expense, when the employer has reason to doubt the validity of the medical certification provided. The employer may select the health care professional providing the second opinion, but may not select a provider who is "employed on a regular basis by the employer" (i.e., cannot use the company doctor). Conflicting opinions are resolved by a third medical opinion, obtained at the employer's expense. The third opinion is final and binding.

Recertification of a Serious Health Condition

Employers have the right to request recertification of a medical condition "on a reasonable basis," thus allowing them to confirm that a certified condition is still present.[59] DOL regulations permit employers to require recertification of a medical condition only in connection with an absence.[60] Employers may require recertification every 30 days (in connection with an absence), unless the original certification indicated that the medical condition is expected to be more than 30 days in duration. Recertification may be required in 30 or fewer days, however, if (1) the employee requests an extension of leave, (2) circumstances related to the original certification have changed

[57] 29 U.S.C. §2613 and 29 C.F.R. §825.305-308.

[58] 29 C.F.R. §825.306(a) describes the required information. The employer may not request additional information for a complete and sufficient certification. However, certain employer representatives—other than the employee's direct supervisor—may contact the health professional providing the medical certification to authenticate the certification or request clarification. 29 C.F.R. §825.307(a). DOL optional form WH_380E (for an employee with a serious health condition) and WH_380F (for a family member with a serious health condition) may be used to collect this information.

[59] 29 U.S.C. §2613(e)

[60] 29 C.F.R. §825.308. "In connection with an absence" means, for example, that if an employee provides medical certification of a serious health condition on January 1st, the employer may request recertification on January 31st only if the employee requests a leave of absence (for January 31st) for the same serious health condition.

significantly (e.g., a change in the employee's health requires three days of leave per week instead of two days of leave per week), or (3) the employer has acquired information that calls into question the employee's need for leave or the "continuing validity" of the original certification. In all cases, employers may require recertification every six months, regardless of the expected duration of the medical condition.

A key difference between certification and recertification of a serious health condition is that employers may not request a second opinion on a recertification.

Certification for Leave Taken to Care for a Covered Servicemember

When FMLA leave is sought to care for a covered servicemember with a serious injury or illness, employers may require military and medical certification that the servicemember for whom the employee requires leave is a *covered servicemember* with a *serious injury or illness*.[61]

This information can be provided by a U.S. Department of Defense (DOD) health care provider; a U.S. Department of Veterans Affairs (VA) health care provider; a DOD TRICARE network or non-network authorized private health care provider; or any health care provider as defined in the act.[62]

The employer may collect the following information from the health care provider:[63]

- the provider's contact information, and details concerning the provider's practice, medical specialty, and provider type (e.g., DOD health care provider, VA health care provider);
- whether the covered servicemember's injury or illness was incurred in the line of duty on active duty or, if not, whether the covered servicemember's injury or illness existed before the beginning of the servicemember's active duty and was aggravated by service in the line of duty on active duty;
- the approximate start date of the serious injury or illness, or when it was aggravated, and its expected duration;
- appropriate medical facts regarding the covered servicemember's health condition that are sufficient to support the need for leave;[64]
- information sufficient to establish that the covered servicemember is in need of care;
- for a single continuous period of care, the dates and duration of the care period or planned treatments; and,
- for intermittent or reduced schedule leave, a statement indicating that care is need on this basis, and estimated frequency, dates, and duration of care.

[61] 29 C.F.R. §825.310. See section "Serious Injury or Illness of a Covered Servicemember" of this report for definitions of these terms.

[62] DOL defines the term *health care provider* for FMLA purposes in 29 C.F.R. §825.125. Health care providers who are not able to make military-related determinations for servicemember (e.g., whether the injury or illness interferes with the performance of duties) may use information provided by an authorized DOD or VA representative.

[63] 29 C.F.R. §825.310(b). DOL optional form WH_385 may be used to collect this information.

[64] The set of medical facts sufficient to establish an FMLA-qualifying need for leave are different for servicemembers who are current members of the Armed Forces and those who are veterans of the Armed Forces. See "Covered Servicemember" section of this report for more details.

The employer may collect certain additional information from the employee or the covered servicemember for whom the employee would provide care.[65] These include contact information, a statement of the relationship between the employee and covered servicemember, and the covered servicemember's current Armed Forces status, among others.

Second and Third Opinions and Recertification of Leave to Care for a Covered Servicemember

An employer may not require second and third opinions for FMLA leave to care for a covered servicemember with a serious injury or illness when the certification has been completed by a DOD health care provider, a VA health care provider, or a DOD TRICARE network or non-network authorized private health care provider. Second and third opinions are permitted, however, when the certification has been completed by another type of health care provider.

Recertifications are not permitted for leave to care for a covered servicemember.

Sufficient Certifications that Must be Accepted by Employers

Employers must accept invitational travel orders (ITOs) or invitational travel authorizations (ITAs) issued to any family member (including someone other than the employee requesting leave) to join an injured or ill servicemember at his or her bedside, as sufficient certification of the need for leave to care for a covered servicemember with a serious injury or illness. Employees may use FMLA leave to care for the covered servicemember named on the ITO or ITA for the time period indicated on the order or authorization; leave may be used in one block, intermittently, or to work a reduced schedule during the indicated time period. Employers may require additional certification for leave that continues beyond the time period indicated on the ITO or ITA.

Employers must accept documentation that shows a veteran servicemember's enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers as certification of the servicemember's serious injury or illness. However, employers may require additional certification that the covered veteran was discharged or released under conditions other than dishonorable.

Certification of a Qualifying Military Exigency

An employer may require an employee who requests FMLA leave for a qualifying military exigency to provide a copy of the military member's active duty orders or other military documentation that demonstrates that the military member is on covered active duty or has received a call to covered active duty status, and provides the dates of the military member's covered active duty service.[66]

An employee seeking leave for a qualified military exigency may be required to supply his or her employer the following information:[67]

- appropriate facts describing the qualifying exigency for which FMLA leave is requested that are sufficient to support the need for leave;

[65] 29 C.F.R. §825.310(c).

[66] 29 U.S.C. §2613(f).

[67] 29 C.F.R. §825.309. DOL optional form WH-384 may be used by employees to obtain certification that meets FMLA's certification requirements.

- the approximate or expected start date of the qualifying exigency;
- expected date(s) of leave;
- in the case of intermittent or reduced schedule leave, the expected frequency and duration of the qualifying exigency;
- where the qualifying exigency involves meeting with a third party (e.g., school counselor), appropriate contact information for the individual or entity with whom the employee is meeting and a brief description of the meeting's purpose; and
- where the qualifying exigency involves rest and recuperation leave, a copy of the military member's rest and recuperation orders (or similar military documentation) and the dates of the military member's rest and recuperation leave.

Fitness-for-Duty Certification

An employer may condition job-reinstatement on a health care provider certification that an employee is fit to return to work, as long as the requirement is part of a uniformly-applied employer policy or practice.[68] Fitness-for-duty certification can be required only from an employee who uses FMLA leave to attend to his or her own serious health condition, and employers must notify employees that a certificate will be required as part of the designation notice (see "Employer Notification Requirements"). In general, an employer may not require fitness-for-duty certification for use of intermittent or reduced schedule leave; special rules apply, however, if reasonable safety concerns exist.[69]

Employers may not require second or third opinions on a fitness-for-duty certification.

Employer Recordkeeping Responsibilities

Employers are required to maintain certain records, as determined by DOL regulations, and make them available to DOL for inspection on an annual basis.[70]

DOL regulations require that covered employers with eligible employees maintain the following records:[71]

- basic payroll and employee data;[72]
- FMLA leave dates;
- hours of FMLA leave if taken in increments of less than one full day;
- copies of employees' requests for FMLA leave (if provided in writing), and all written notices provided to employees by the employer;

[68] 29 C.F.R. §825.312.

[69] 29 C.F.R. §825.312(f).

[70] 29 U.S.C. §2616 and 29 C.F.R. §825.500. Per 29 U.S.C. §2616(c) and 29 C.F.R. §825.500(a), DOL may require the employer to produce records more frequently than once a year if it has cause to believe the employer has violated an FMLA provision or regulation.

[71] 29 C.F.R. §825.500(c).

[72] Covered employers with no eligible employees must also maintain basic payroll and employee data. 29 C.F.R. §825.500(d).

- any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding leave usage (paid and unpaid);
- premium payments of employee benefits; and,
- records of any dispute regarding designation of leave as FMLA leave.

Records containing medical histories of employees or their family members (e.g., medical certifications) created for FMLA purpose must be maintained as confidential medical records and stored separately from usual personnel files.[73]

Special rules regarding recordkeeping apply to airline flight crew employers (see **Appendix A**).

Prohibited Acts, Enforcement, and Remedies

FMLA prohibits the interference, restraint, or denial of rights provided through the act, and the dismissal of or discrimination against those who protests a prohibited act.[74] For example, employers cannot take adverse employment actions (e.g., refuse to promote, institute disciplinary action) against employees for taking FMLA leave. Efforts to disqualify an employee from FMLA leave eligibility (e.g., by manipulating work hours or moving employees to another worksite to avoid employing 50 workers within 75 miles of a worksite) may be interpreted as interference with employee rights under FMLA. Interference with proceedings or inquires is further prohibited.

Employees cannot waive, nor may employers induce employees to waive, their prospective rights under FMLA.[75]

Employees who believe their rights under the FMLA have been violated have two courses of action. Employees may (1) file a complaint with the DOL Wage and Hour Division or (2) bring a private civil action against an employer for violations.[76] Legal action must be taken within two years from the date of the last violation, or within three years for a willful violation.

FMLA provides two remedy categories for violations. Employees may be awarded[77]

1. damages equal to lost compensation *or* actual monetary losses sustained as a direct result of violation (e.g., the cost of hiring a nurse to care for a spouse with a serious health conditions), interest on damages, and liquidated damages for willful violations,[78] and

[73] 29 C.F.R. §825.500(g). Requirements of the Genetic Information Nondiscrimination Act of 2008 (P.L. 110-233) and the Americans with Disabilities Act of 1990 (P.L. 101-336) may also apply, with some exceptions.

[74] 29 U.S.C. §2615 and 29 C.F.R. §825.220. The right to sue an employer is a key difference in Title I and Title II provisions. Although Title II bans coercion with the purpose of interfering with an employee's rights under the act (5 U.S.C. §6385), employees covered by Title II (i.e., most civil service employees) are not afforded the right to sue for FMLA violations.

[75] 29 C.F.R. §825.400(d).

[76] 29 C.F.R. §825.400. The right to sue an employer is a key difference in Title I and Title II provisions. Although Title II bans coercion with the purpose of interfering with an employee's rights under the act (5 U.S.C. §6385), employees covered by Title II (i.e., most federal civil service employees) are not afforded the right to sue for FMLA violations.

[77] 29 U.S.C. §2617.

[78] 29 U.S.C. §2617(a)(1)(A) defines *liquidated damages* as an additional amount equal to the sum of damages (e.g., lost compensation or actual monetary losses sustained as a direct result of violation) and interest on damages. Courts may reduce liquidated damages if it is demonstrated to the court's satisfaction that the violation was "in good faith and that (continued...)

2. equitable relief, as appropriate, including employment, reinstatement, and promotion.[79]

In addition, an employee may recoup reasonable court fees and expenses from an employer who violates the act.

(...continued)

the employer had reasonable grounds for believing that" it was not a violation.

[79] 29 U.S.C. §2617(a)(1)(B). At least one court has determined that front pay—a monetary award to compensate a plaintiff when reinstatement is not possible—is an equitable remedy under FMLA. See Bordeau v. Saginaw Control & Engineering, Inc., No. 04-10312-BC, 2006 U.S.Dist. LEXIS 59774 (E.D.Mich. August 24, 2006).

Appendix A. Special Rules for Airline Flight Crew Employees

The Airline Flight Crew Technical Correction Act (AFCTCA) of 2009 (P.L. 111-119) amended FMLA to establish special rules regarding the "hours of service" eligibility criterion for airline flight crew employees, and authorized the Secretary of Labor provide a method for calculating the leave entitlement for airline flight crews. Employers of airline flight crew also have additional recordkeeping requirements.

Congress passed the AFCTCA to address unique scheduling and timekeeping practices for airline flight crew that effectively curtailed access to FMLA protections for this group of workers. The act was viewed as a technical correction to extend eligibility to airline flight crew employees.

Hours of Service Rule for Airline Flight Crew

A two-part test determines whether an airline flight crew employee meets the hours-of-service requirement for FMLA eligibility. A crewmember meets this requirement if, in the previous 12 months, he or she worked or was paid by the employer for (1) at least 60% of the *applicable total monthly guarantee*[80] and (2) at least 504 hours (not counting personal commute time, vacation leave, medical leave, or sick leave).

Calculation of Leave Entitlement

DOL adopted a uniform leave entitlement for airline flight crew employees that is based on the assumption of a six-day workweek.[81] As such, an eligible airline flight crew employee is entitled to 72 days of leave (=12 workweeks x 6 days/workweek) during a 12-month period:

- for the birth and care of the employee's child, provided leave is taken within 12 months of the child's birth;
- for the placement of an adopted or fostered child with the employee, provided leave is taken within 12 months of the child's placement;
- to care for a spouse, child, or parent with a serious health condition;
- for the employee's own serious health condition that renders the employee unable to perform at least one essential functions of his or her job; and
- for qualified military exigencies related to the covered active duty status of the employee's spouse, son, daughter, or parent who is a covered military member.

In addition, DOL regulations provide 156 days of leave (= 26 workweeks x 6 days/workweek) in a single 12-month period to eligible airline flight crew employees for the care of a covered military servicemember with a serious injury or illness.

[80] The applicable total monthly guarantee is the minimum number of hours an employer has agreed to schedule an employee who is not on reserve status in a given month or the minimum number of hours an employer has agreed to pay an employee on reserve status in a given month. See 29 C.F.R. §825.801(b).

[81] 29 C.F.R. §825.802.

Maximum Increment of Leave for Intermittent or Reduced Schedule Leave

Employers may record FMLA leave for airline flight crew employees in one-day increments, even if the employee's need for leave is less than one day.[82] This means that an eligible airline flight crew employee who has a need for two hours of FMLA-qualifying leave can be required to use one full day of leave, which would then be counted against the employee's FMLA leave entitlement. Following intermittent or reduced schedule leave, the airline flight crew employee must be permitted to return to work in the same or equivalent position, unless it is physically impossible to do so (e.g., the flight is in air); in such an event the full period of physically impossibility would be counted as FMLA leave and deducted from the employee's entitlement.

Additional Record Keeping Requirements

In addition to standard recording keeping requirements, covered employers of airline flight crew employees must maintain records on the applicable monthly guarantee (including relevant collective bargaining agreements and employer policy materials), and a record of hours worked and hours paid for each employee.

[82] 29 C.F.R. §825.802(b).

Appendix B. Special Rules for Local Educational Agency Employees

FMLA applies special rules to employees of local educational agencies (e.g., local school boards, and public and private elementary and secondary schools) regarding job restoration; a sub-group of these employees—instructional employees—have special rules concerning the use of intermittent leave and reduced leave schedules, and the timing of FMLA leave use.[83] Through these provisions, Congress sought to recognize the "unique educational mission of ... elementary and secondary schools ... [and] balance the educational needs of children with the family leave needs of teachers."[84]

Job Restoration

Local educational agencies may use established policies and practices, or collective bargaining agreements to determine how to restore an employee to an equivalent position. These policies must be available in writing, be made known to the employee prior to the start of FMLA leave, explain clearly the employee's restoration rights, and provide *substantially the same protections as provided in the act for reinstated employees*.

Instructional Employees' Use of Intermittent Leave or Reduced Leave Schedules

Under certain conditions, local educational agencies may require instructional employees with a foreseeable need for intermittent leave or a reduced leave schedule to instead take a block (or blocks) of leave or accept a temporary reassignment to an alternate position.[85] If the employee elects to take a block of leave (i.e., instead of temporary reassignment) the entire period of leave will count as FMLA leave and be deducted from the employee's FMLA entitlement. Local educational agencies may apply this restriction on intermittent leave or reduced leave schedules if the need for FMLA is based on a serious health condition or serious injury or illness that is foreseeable based on planned medical treatment and the employee would be on leave for more than 20% of the total number of working days in the leave period.

Instructional Employee's Use of Leave Near the End of an Academic Term

In some circumstances, local educational agencies may require instructional employees returning from FMLA leave near the end of an academic term to continue leave until the term concludes. If the agency elects to continue leave, only the leave actually used for an FMLA qualifying reason may be deducted from the employee's leave entitlement. However, the employee receives the same protections as those provided under FMLA concerning the continuation of group health insurance and job restoration for the entire leave period.

[83] 29 U.S.C. §2618. The term *local educational agency* is defined by 20 U.S.C. §7801(26).

[84] See House Committee on Education and Labor Report, p. 48.

[85] The employee must qualify for the alternate position; the alternative position must offer equivalent pay and benefits, and better accommodate recurring leave periods.

A local educational agency may require an instructional employee to continue leave through the end of an academic term when:

- leave begins more than five weeks before the end of term, lasts at least three weeks, and concludes during the three-week period before the end of term.
- leave is taken to bond with a newborn or newly-placed child, to care for a family member with a serious health condition, or to care for a seriously injured or ill covered servicemember; begins during the five-week period before the end of term; lasts more than two weeks; and concludes during the two-week period before the end of term.
- leave is taken to bond with a newborn or newly-placed child, to care for a family member with a serious health condition, or to care for a seriously injured or ill covered servicemember; begins during the three-week period before the end of term; and lasts more than five working days.

Appendix C. Legislative History

Table C-1. FMLA Legislative History

Public Law	Date Signed into Law	Effect
P.L. 103-1, Family and Medical Leave Act	February 5, 1993	Created an entitlement for eligible employees to unpaid, job-protected leave for certain medical and family caregiving purposes, with continuation of group health plan benefits.
P.L. 104-1, Congressional Accountability Act	January 23, 1995	Amended the FMLA to add coverage of Title I provisions to the Library of Congress and the Government Accountability Office. Provides that FMLA Sections 101-105 (29 U.S.C. §2611-2615) apply to certain congressional employees.
P.L. 110-181, National Defense Authorization Act for Fiscal Year 2008	January 28, 2008	Created two types of military family leave: • qualifying military exigency leave, available only to private-sector employees with a close family member in the National Guard or Reserves; and • leave to care for a covered servicemember with a serious injury or illness.
P.L. 111-84, National Defense Authorization Act for Fiscal Year 2010	October 28, 2009	Modified and expanded the military family leave provisions. For military exigency leave it: • added a foreign deployment requirement for military members for whom employees use FMLA leave; • extended leave to private-sector employees with a close family member who is a member of the regular Armed Forces (in addition to Reserve members), • provided leave for federal civil service employees with a close family member in regular Armed Forces and National Guard or Reserve components, For military caregiver leave, it: • provided the option to use leave for the care of a covered servicemember with a serious injury or illness that was sustained before service but aggravated in the line of duty while on active duty. • extended leave to family members of certain veterans with a serious illness or injury.
P.L. 111-119, The Airline Flight Crew Technical Correction Act	December 21, 2009	Amended the FMLA to include a separate hours-of-service eligibility criterion for airline flight crew employees; charged the DOL with developing a method for calculating the leave entitlement for these employees; and created new reporting requirements for airline flight crew employers.

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