



# **FMLA Compliance Checklist with Forms (updated 2013)**

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## FMLA Compliance Checklist with Forms

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APPENDICES

- Sample FMLA Policy
- FMLA Employer Required Notice Flow Chart
- FMLA Eligibility and Leave Qualification Worksheet
- Request for Authentication/Clarification Form Letter
- Letter to Physician Seeking Information to Confirm Need for Indefinite Leave
- End of Leave Termination Letter (2 versions: Benefits Only Employee Status /No Benefits Only Employee Status
- End of Leave-Position Held Pending Further Evaluation

AVAILABLE AT USDOL WEB SITE, [www.dol.gov](http://www.dol.gov):

- Revised FMLA Poster (WH Publication 1420)
- WH-380-E Certification of Health Care Provider for Employee’s Serious Health Condition
- WH-380-F Certification of Health Care Provider for Family Member’s Serious Health Condition
- WH-381 Notice of Eligibility and Rights & Responsibilities
- WH-382 Designation Notice
- WH-384 Certification of Qualifying Exigency For Military Family Leave
- WH-385 Certification for Serious Injury or Illness of a Current Servicemember  
    –for Military Family Leave
- WH-385-V Certification for Serious Injury or Illness of a Veteran or Military Caregiver Leave



## FMLA COMPLIANCE CHECKLIST

### FMLA POLICY CHECKLIST

#### Essential Provisions (sample policy attached)

1. Types of absences covered:
  - Birth of child/newborn care
  - Adoption/foster placement
    - Leave may be taken before actual placement for required pre-placement activities (-.121)
  - Employee's own serious health condition
  - Care for spouse, child (under age 18, or age 18 or older and incapable of self-care because of a disability) or parent (in-laws not included) with serious health condition
  - Active duty leave qualifying exigency
    - Spouse, child or parent call to covered active duty in National Guard, Reserves or, a regular component of the Armed Forces (or as retired member of Regular Armed Forces or Reserves) during deployment to a foreign country
    - List qualifying exigencies: short-notice deployment; military events and related activities; childcare and school activities; financial and legal arrangements; counseling; rest and recuperation; post-deployment activities; parental care; and other activities approved by employer
  - Servicemember family leave
    - Care for spouse, child, parent or next of kin serious illness or injury incurred or aggravated during active duty (Armed Forces including National Guard and Reserves)
    - Current servicemember rendered medically unfit for duty by



serious illness or injury and is undergoing medical treatment, recuperation or therapy; in outpatient status; or on temporary disability retired list – or – Qualified veteran who was member of Armed Forces at any time during the five years preceding the date of such treatment, recuperation or therapy for qualified serious injury or illness

2. Employee Eligibility requirements (must satisfy all three):

- Cumulative total of service of at least 12 months;
- Worked at least 1250 hours in preceding 12 month period; and
- Works at site with at least 50 employees within a 75 mile radius
  - Although public agencies are covered without regard to number of employees, i.e., not subject to the 50 employee/20 week coverage threshold, public agency employees must meet the 50 employees within 75 mile radius to be eligible (-.108(d))

3. Amount of leave provisions

- Up to 12 weeks per 12-month FMLA period for: birth/newborn care (must be completed within 12 months of birth); adoption/foster placement (must be completed within 12 months of placement); employee's own serious health condition; care for family member with serious health condition; and covered active duty qualifying exigencies
  - Employees who are spouses: couple is limited to combined total of 12 weeks for birth/newborn care, adoption/foster placement or care for parent with serious health condition (-.201)
- Up to 26 weeks in a single 12-month period for Servicemember Family Leave (leave for other types of FMLA leave are counted against this cap)
  - Employees who are spouses: couple is limited to combined total of 26 weeks
- Define 12-month FMLA period for leave other than Servicemember Family Leave (calendar, fixed date, looking forward, or rolling backward) (-.200(b))

Notes: 1) Changes in the 12-month period must be made only



after employees have been given 60 days notice of the change and the transition must be implemented so that employees retain the full benefit of 12 weeks under whichever method gives them most benefit. 2) Failure to specify the 12-month period will result in employees being entitled to whichever method gives them the most benefit.

- ❑ Define Servicemember Family Leave single 12-month period as beginning on first day leave is taken and ending 12 months later and, for purposes of determining available leave, period will be measured forward from that first day of leave.

#### 4. Intermittent/Reduced Schedule Leave provisions

- ❑ Available for Active Duty and Servicemember Family Leave (necessity not required)
- ❑ Available for employee or family member's serious health condition, if medically necessary (medical certification must include this certification along with details of duration, dates of treatment (if applicable))
  - ❑ Planned medical treatments, including period of recovery
    - Employee must consult with employer before scheduling planned medical treatment and make reasonable effort to schedule so as not to disrupt business operations (-.203)
    - Employer may temporarily transfer employee to an alternative position (equivalent pay and benefits) that better accommodates the intermittent/reduced schedule (-.204)
- ❑ Employer option as to whether to allow for care for newborn/adopted/foster child—include statement as to whether this will be allowed or not

#### 5. Leave Request/Extension provisions

- ❑ Foreseeable leave: Employee must request foreseeable leave at least 30 days in advance
- ❑ Not foreseeable: Employee must provide notice of unforeseeable leave as soon as practicable and comply with normal call-in procedures



- ❑ Planned medical procedures: Employee must consult with employer in advance of scheduling planned medical procedures and make a reasonable effort to schedule them so as to avoid undue burden on employer
- ❑ Employee must notify employer if absence is for reason for which FMLA leave previously was taken or certified
- ❑ Notice must be sufficient for employer to determine whether absence qualifies and anticipated timing and duration of leave
- ❑ Failure to comply with notice requirements may result in delay or denial of leave
- ❑ Employees who cannot return to work upon expiration of approved leave must request extension of leave as soon as need known and no later than expiration of approved leave period
  - ❑ Employees who fail to return upon expiration of approved leave will be subject to termination (unless they timely request and are approved for an extension)

6. Certifications provisions

- ❑ Upon request, employee must provide:
  - ❑ medical certification or recertification for own serious health condition or that of a family member;
  - ❑ medical certification for care for injured/ill family servicemember (recertifications are not permitted);
  - ❑ certification for active duty qualifying exigency leave; and
  - ❑ physician certification that employee who took leave for his/her own health condition can return to work and perform the essential functions of the job. (Note: Essential function certification only applies if the employer provided a list of essential functions to the employee at the time the employee was notified of his/her eligibility for FMLA leave.)
- ❑ Failure to provide timely or complete certifications may result in denial of



leave or return to work

- Certifications must be provided on forms issued by employer

7. Periodic Status Report provision (optional)

- Upon request, employee must periodically report status and intent to return to work. Failure to comply may result in discontinuation of leave approval, denial of return to work or other disciplinary action, including termination.

8. Substitution of Paid Leave provision

- State whether use of accrued paid leave (sick, vacation, pto) will be substituted for all or part of leave
- If accrued paid leave is substituted, employee must comply with normal paid leave policies

9. Benefits Continuation provision

- Group health coverage continued on same terms as if not on leave; address how premiums will be paid; failure to pay premiums may result in loss of coverage; employee must reimburse employer for any employee premiums that employer pays for employee or, if employee does not return to work for at least 30 days, for the employer's share of the premiums; amounts paid by company will be treated as an advance of wages with reimbursement through payroll deduction or forfeiture or other available means, as permitted by law
- State whether sick, vacation, pto or other benefits will accrue during leave

10. Reinstatement provisions

- Under most circumstances, employees who return to work upon expiration of approved leave and who do not exceed the amount of leave permitted under the FMLA will be reinstated to the same or equivalent position with equivalent pay and benefits
- Certain highly compensated employees may be denied reinstatement





11. Other

- Attach WH Publication 1420 Notice to Employees of Rights Under FMLA



## FMLA PROCEDURES CHECKLISTS

### HR Process Checklist

1. Employee requests leave or employer acquires information that absence may be FMLA qualifying
2. Within 5 business days of request/acquiring knowledge, determine whether employee meets FMLA eligibility requirements (See Eligible Employee Checklist (p. 14)) and issue **WH-381 Notice of Eligibility and Rights and Responsibilities**<sup>1</sup>

See Employer Notice Checklist (p. 11)

If eligible, include applicable Certification forms (unless a current on file, certification covers absence):

- WH-380-E Certification of Health Care Provider for Employee's Serious Health Condition** (include list of employee's essential job functions if you desire the HCP to specify which functions the employee cannot perform)
- WH-380-F Certification of Health Care Provider for Family Member's Serious Health Condition**
- WH-384 Certification of Qualifying Exigency for Military Family Leave**
- WH-385 Certification for Serious Injury or Illness of a Current Servicemember**
- WH-385-V Certification for Serious Injury or Illness of a Veteran or Military Caregiver Leave**

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<sup>1</sup> If a current Notice of Eligibility and applicable certification covers the absence, then: (i) issue a Designation Notice (unless an existing Designation Notice covers the absence), (ii) if circumstances permit, request recertification (applies only to employee's or family member's SHC), and (iii) advise the employee the absence will be counted as FMLA.

If previously issued Notice of Eligibility or Rights & Responsibilities is out of date (more than 1 year), or changes have occurred to information, issue amended notice within 5 business days of notice of leave



Optional: Written notification that you will require employee to provide documentation of family relationship (See Certification/Documentation Checklist, p. 17)

See Certification/Documentation Checklist (p.17)

3. Determine whether employee provided proper notice. (See Employee Notice Checklist (p. 15))
- Foreseeable leave
  - Unforeseeable leave
  - Planned medical treatment
  - Absence covered by existing FMLA Designation Notice<sup>2</sup>

If employee did not provide proper notice, then employer may:

- Require employee to provide explanation as to why proper notice was not given
- Initiate discussion with employee and require him/her to attempt to reschedule planned medical treatment appointments so as not to disrupt business operations (applies only to absences for planned medical treatment)
- Delay or deny FMLA until proper notice is provided (-.100(d), -.304(b)/ -.313(a)(failure to give notice when leave foreseeable 30 days in advance can result in delay of leave until 30 days after date of notice/denial of FMLA protections during that period), -.304(c)/-.313(b)(failure to give notice as soon as practicable when leave foreseeable less than 30 days in advance can result in delay of leave for a period of time equal to time during which notice should have been given but was not given), -.304(d) (failure to give notice as soon as practicable when leave was unforeseeable can result in delay of leave for a period of time equal to time during which notice should have been given but was not given))

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<sup>2</sup> If employee advises that absence is for reason covered by existing FMLA designation, then review existing Notice of Eligibility and Rights and Responsibilities and Designation Notice for possible required amendments and reissue within 5 business days.



- Issue customary corrective action for failure to comply with notice/call-in procedure (-.304(e))

4. If requested, did employee timely submit a certification?

See Certification/Documentation Checklist (p. 17)

See Serious Health Condition Checklist (p. 22)

See Qualifying Exigency (Active Duty) Checklist (p. 24)

See Servicemember Family Leave Checklist (p. 26)

If yes, then within 5 business days issue **WH-382 Designation Notice** (See Employer Notice Checklist (p. 11)):

- If leave qualifies, indicate approval and whether FFD certification will be required for return to work and if employer requires that FFD address ability to perform essential functions, then this requirement also must be stated and list of essential functions attached to the notice
- If leave does not qualify, indicate reason the leave does not qualify
- If submitted certification is incomplete or insufficient, provide employee notice of deficiencies and provide 7 days to cure
  - √ If employee fails to cure within 7 days, then deny (or delay) until sufficient and complete certification is submitted
  - √ Employer HCP, HR or upper manager (not immediate manager) may contact HCP for authentication or clarification of medical certification
- If employer questions correctness of medical certification (employee or family member SHC), then a second opinion may be obtained

See Certification/Documentation Checklist (p. 17)

  - √ If second opinion agrees with employee HCP, original certification is binding
  - √ If second opinion does not agree with employee HCP, then third opinion may be obtained and is binding.
- If employee does not submit certification, deny FMLA leave (-.100(d))



5. Once leave is designated, does employee comply with any requirement to provide periodic status reports or to provide reasonable notice of foreseeable changes (2 business days)? (-.311)
6. Does employee return to work (with any required FFD certification) upon expiration of leave or timely request extension?

Note: FFD certification cannot be required for return from intermittent leave unless employer notified employee in Designation Notice that a reasonable safety concern existed requiring intermittent FFD (intermittent FFD cannot be required more than every 30 days)

- If no, then employee is not entitled to reinstatement under the FMLA and may be terminated (-.100(d), -.313(d))
- If employee seeks extension, then request appropriate recertification (if necessary, to justify extension)

Note: In cases where leave is for employee's own health condition, an individualized assessment must be conducted into whether extended leave must be granted as a reasonable accommodation under the ADA. (See Reasonable Accommodation Individualized Assessment Checklist, p. 32)

If employee does not return after FMLA leave due to continuation of serious health condition (employee, family, servicemember), employer can require employee to provide medical certification of continuation of condition within 30 days of request. If employee fails to do so, employer can recover 100% of its share of group health premium costs paid for employee's coverage during leave. (-.213)

- If employee returns with required FFD, then reinstate in same or equivalent position with equivalent pay, benefits and working conditions
  - √ Exception applies for key employee for whom a determination has been made in writing and mailed to employee by certified mail
- If employee seeks to return to light duty, employer can deny request and require employee to remain on FMLA until a full release is obtained or FMLA is exhausted (unless ADA requires light duty as a reasonable accommodation)



## Employer Notice Checklist

- ❑ **General Notice: Rights and Responsibility Poster** (WH Publication 1420 or another format containing all the same information) (-.300(a))
  - ❑ Must be: 1) posted where employees/applicants can view; electronic posting is permissible; 2) distributed to employees by including it in handbook or other written guidance on leave benefits or by distributing it to each new employee upon hire—either method can be done electronically.
  - ❑ Must be translated into languages understood by significant portion of workforce.
- ❑ **Eligibility Notice: Notice of Eligibility and Rights & Responsibility (WH- 381** or another format containing the same information)(-.300(b))
  - ❑ Must be given within 5 business days of employee requesting FMLA leave or employer acquiring knowledge that leave may be for FMLA-qualifying reason. Eligibility Notice will be good for all absences for same reason during FMLA year, and no additional notice is needed for absences due to another FMLA-qualifying reason unless employee eligibility changes.
  - ❑ If employee not eligible at least 1 reason must be given.
  - ❑ Must be translated into languages understood by significant portion of workforce.
- ❑ **Rights & Responsibility Notice** (is incorporated in **WH-381** and form may be adapted to meet notice requirements of -.300(c)(6))
  - ❑ Must detail specific expectations and obligations of employee and explain consequences of failure to meet them and include key employee designation (if applicable) (See, p. 13)
  - ❑ Must be given each time Eligibility Notice is given.
  - ❑ Must be translated in languages understood by significant portions of workforce.



- Required certification form can be attached.
- Any changes in information provided must be subject of written notice to employee within 5 business days after first notice of leave after changes. (-.300(c)(4))
- **Designation Notice (WH-382)(-.300(d))**
  - Once employer has sufficient information to determine whether leave is FMLA-qualifying (e.g., a complete and sufficient certification is received), then within 5 business days, employer must notify employee in writing that leave is being designated and will be counted against FMLA allotment or that it does not qualify.
  - If fitness-for-duty certification will be required for return to work, then requirement must be included in notice and, if employer will require that certification address ability to perform essential functions, then this requirement must be stated and list of essential functions attached to notice.
  - Employee must be notified of amount of leave counted against FMLA allotment. If known at time of Designation Notice, then must be included in this notice. If not known at this time (e.g., need for intermittent leave), then notice of amount counted must be given upon employee request but no more often than every 30 days and only when leave has been taken in period for which request is made. Notice must be made in writing by payday following oral notice to employee.
  - Any changes in information provided (e.g., FMLA allotment is exhausted) must be subject of written notice to employee within 5 business days after first notice of leave after changes.
  - Only 1 notice is required for each FMLA-qualifying reason per applicable 12-month period regardless of whether it is taken in single block or intermittently or reduced schedule provided that any changes (e.g., exhaustion of leave) must be subject of written notice within 5 business days. (-.300(d)(5))
  - Leave may be retroactively designated as FMLA leave with appropriate notice provided that failure to timely designate does not cause harm to the employee. (-.300(d))



- **Key Employee Designation:**
  - Must notify employee at time leave is requested and warn of consequences if a substantial and grievous determination is made. Make designation on WH-381 Notice of Eligibility and Rights and Responsibilities form.
  - Must notify employee in writing by hand delivery or certified mail of substantial and grievous determination and factual basis for determination, and intent to deny reinstatement and reasonable period to return to work.
  - Employee can request reinstatement even if s/he does not return upon notice and, if s/he does, then employer must reassess the determination, and denial provided in writing in person or by certified mail.
  
- **Change in Benefits and Plans:** Notice of changes/opportunity to change must be given to employees on FMLA leave.





## Eligible Employee Checklist

Employee eligibility requirements (all 3 must be satisfied):

1. Does employee have at least 12 months of cumulative service?
  - Service occurring prior to a 7 year break in service is not counted unless break was due to USERRA-covered service (-.102, -.110)
  - Time served in military leave is counted toward requirement (-.102, -.110)
2. Has employee worked at least 1250 hours in the preceding 12 months (as of the day leave is to start)?
  - Employee returning from military leave is credited with hours that would have been worked had s/he not been on military leave (-.110)
3. Does employee work at site with at least 50 employees within 75 mile radius?
  - Personal residence is not work site; work site is company office to which employee reports or receives assignments. (-.111)
  - Although public agencies are covered without regard to number of employees, i.e., not subject to the 50 employee/20 week coverage threshold, public agency employees must meet the 50 employees within 75 mile radius to be eligible (-.108(d))

## Compliance Tips

- Employees on non-FMLA leave at time they become FMLA eligible: Portion of leave taken for FMLA-qualifying reason after eligibility requirements are met is FMLA leave (-.110(d))
- Employees on lay-off or other circumstance in which employment relationship has been interrupted must be called back to work before being eligible for FMLA leave. (-.112(c))



## Employee Notice Checklist

- Planned medical treatment:** Did the employee consult with employer in advance of scheduling planned medical treatment and make a reasonable effort to avoid unduly disrupting operations (-.203)?

Note: If employee fails to do so, employer can initiate discussion with employee and require employee to attempt to make such arrangements subject to approval of healthcare provider. (-.302(e), (f))

- Foreseeable leave:** Did the employee give at least 30 days advance notice of foreseeable leave?

Note: If s/he fails to do so, then employer can request explanation as to why notice was not given and employee must provide explanation. (-.302)

- Unforeseeable leave:** If the leave was unforeseeable at least 30 days in advance, did the employee give notice as soon as practicable? Typically, this means the same day as, or next business day following, when s/he learns need for leave. (-.302(b))

- Compliance with employer notification requirements:** Did the employee comply with employer's usual and customary notice and procedural requirements for requesting leave such as written notice setting forth reasons for leave, anticipated duration and anticipated start or contact with a specific individual?

Note: The general FMLA rule is that the employee must provide at least verbal notice sufficiently detailed to allow employer to understand leave may be FMLA-qualifying and the anticipated timing and duration of leave. (-.302(c), -.303(b)). However, if the employer requires that employees follow the usual and customary notice procedures, then the employee's failure to comply (unless unusual circumstances justify non-compliance) may allow the employer to delay or deny FMLA leave and/or take appropriate action under its usual and customary policy for failure to comply; provided that such action may not be taken for untimely notice under requirement that notice be given sooner than FMLA requires. (-.302(d))

- Notice of Previously Designated FMLA:** Did the employee specifically reference the qualifying reason or need for FMLA leave (this requirement applies only if there is an existing FMLA Designation for the employee and the absence relates to the previously designated condition)?



Note: For first instance of FMLA-qualifying leave, employee is not required to mention FMLA. If employee has designated FMLA for more than 1 qualifying reason, then employer may need to ask which type of leave is at issue. (-.302(c))

- ❑ **Periodic Status Reports:** Employer may require employee to provide periodic status report on status and intent to return to work and may require employee to provide reasonable notice (2 business days) of changed circumstances, when foreseeable. (-.311)

#### Compliance Tips

- ❑ Employer has duty to make sufficient inquiries to determine whether leave qualifies; employee has duty to answer employer questions. However, calling in “sick” does not trigger obligations. (-.303) Failure to respond to reasonable requests may result in denial of FMLA if employer cannot make determination. (-.301(b), -.302(c))



## Certification/Documentation Checklist

1. Is there uncertainty as to whether the person for whom the employee seeks to take leave to provide care qualifies as a covered family member under the FMLA?
  - Documentation of family relationship (e.g., court document, birth certificate, employee signed statement) may be required by employer to establish (-.122(k)):
    - Spouse (as defined by state law);
    - Parent (biological, adoptive, foster, loco parentis);
    - Son or Daughter (biological, adoptive, step, foster, legal ward loco parentis under age 18 or age 18 or older and incapable of self-care due to disability; no age requirements in active duty or servicemember cases);
    - Next of Kin (nearest blood relative (other than spouse, parent or child) unless servicemember designates other blood relative—more than one individual may qualify) (-.122)
2. Is there uncertainty as to whether the circumstances for which the employee seeks to take leave qualify under the FMLA?
  - The FMLA allows the employer to require the following types of certification. Importantly, no other type of certification is allowed.
    - Certification of Health Care Provider for Employee's Serious Health Condition (WH-380-E)** (another form may be developed for use by employer but no more information can be requested than is specified in -.306, -.307 and -.308)
      - If leave is for workers' comp injury and state law allows additional information to be requested, then employer can consider this additional information in connection with FMLA leave. Same applies when leave is for condition covered by STD/LTD, but employer must notify employee that the additional information is required only for application of STD/LTD benefit and failure to provide it will



not affect FMLA leave eligibility. Same applies when condition is covered by ADA. (-.306)

- Statement of Functions: Employer may elect to provide a statement of essential functions of the employee's job as part of the medical certification in which case a sufficient medical certification would have to specify which functions of the job the employee is unable to perform. (-.123)
- **Certification of Health Care Provider for Family Member's Serious Health Condition (WH-380-F)** (another form may be developed for use by employer but no more information can be requested than is specified in -.306, -.307 and -.308)
- **Certification of Qualifying Exigency for Military Family Leave (WH-384)** (another form may be used by employer but no more information can be requested than is specified in -.309)
  - Copy of active duty orders or other military documentation (establishing dates of duty) needs to be provided to employer only once. (-.309)
  - Supporting documentation may be required to be submitted with certification. (-.309)
  - Employer may contact third parties to verify employee meeting and subject of meeting and may contact DOD to verify active duty status; employer permission is not required. (-.309)
- **Certification for Serious Injury or Illness of a Current Servicemember (WH-385, WH-385-V)** (another form may be used but it may not request any information other than that specified in -.310; employer must accept an invitational travel order (ITO) or invitational travel authorization (ITA) without further inquiry during the time period specified in the document, except that employer may seek authentication or clarification and require confirmation of family relationship)
  - Certification may be made by DOD, VA, DOD TRICARE network or non-network authorized HCP (second or third opinions not allowed) or by a healthcare provider authorized to provide non-military-related FMLA



certifications (second and third opinions allowed) (-.310)

- Certification is limited only to information specified in -.310; recertifications are not permitted

3. Does the employer desire to require the employee to provide a release to return to work from leave for his/her own health condition?

Fitness-for-Duty Certifications

- Must certify that employee is able to resume work; alternatively, employer may provide list of essential functions with the Designation Notice and notify employee in that notice that FFD must address all the listed functions. (-.312)
- Employer may contact employee HCP for clarification and authentication, but employee return may not be delayed during the contact period. (-.312) Second and third opinions are not permitted. (-.312)
- FFD certification cannot be required for intermittent or reduced schedule leave unless reasonable safety concerns exist regarding ability of employee to perform duties and employer gives notice of such concern at time of Designation Notice. In these cases, FFD certification can be required, but no more often than every 30 days. Employee cannot be terminated while FFD certification is pending. (-.312)
- If employee received timely notice of FFD certification requirement and employee fails to provide it or request leave extension, then employee is not entitled to reinstatement. (-.216(b), -.312, -.313(d))
- Upon return to work from FMLA, medical exams at the employer's expense can be conducted as long as the ADA medical exam requirements are met. (-.312(h))



## General Certification Requirements

- ❑ Timing: Issued within 5 business days after employee gives notice of need for leave or leave begins, but may be later if employer has reason to question appropriateness of leave or duration. Employee must return within 15 calendar days unless employer gives more time. (-.305) If medical condition of employee or family member lasts beyond single FMLA year, then employer may require new certification once each subsequent year. (-.305(e))
- ❑ Notification of Consequences: At time of certification request, employer must provide employee notice of consequences for failing to provide adequate certification. (-.305)
- ❑ Insufficient and incomplete certifications: Employer must notify employee of deficiencies in writing and give employee 7 days to cure. Certification is incomplete if 1 or more applicable entries have not been made, and insufficient if information is vague, ambiguous or non-responsive. If resubmitted certification does not cure deficiencies, then leave may be denied until sufficient certification is provided. (-.305(c); -.313)
- ❑ Failure to return certification: Is considered failure to provide, and not an incomplete or insufficient, certification. (-.305)
- ❑ Obtaining additional information (medical certification for employee/family member/servicemember only): If complete and sufficient certification is submitted, employer cannot request additional information. After employee has been given notice of deficiencies and opportunity to cure, employer may contact HCP to seek clarification (decipher handwriting or explain meaning of entry) or authentication (confirming HCP completed or authorized completion of form). (-.307(a))
  - ❑ Employer HCP, HR or upper level manager may make contact; immediate supervisor is prohibited from contacting HCP.
  - ❑ If employee does not provide authorization to permit clarification, then FMLA leave may be denied.
  - ❑ In cases in which additional health information is obtained relating to workers compensation, company paid benefits or ADA issues, the additional information may be considered in determining FMLA eligibility. (-.306(c))
  - ❑ Employees may not be required to authorize the health care



provider to communicate directly with the employer in lieu of submission of the certification form. (-.306(e))

- It is the employee's responsibility to provide a complete and sufficient certification and failure to do so may result in denial of FMLA. (-.306(e))
- Second opinion (medical certification for employee/family member/servicemember non-DOD/VA/TRICARE providers only): HCP can be chosen by employer but cannot be someone regularly employed by, contracted with or utilized by, employer. (-.307)
- Third opinion (medical certification for employee/family member /servicemember non-DOD/VA/TRICARE providers only): HCP must be jointly approved by employer and employee.
- Recertification (medical certification for employee/family member only): Employer may request no more often than every 30 days and only then when an absence has occurred; provided that if medical certification indicates minimum duration is more than 30 days, then employer must wait for specified period unless employee requests extension, circumstances of leave have changed including frequency or duration of absences, or information is received that casts doubt on stated reason for absence. But, regardless of specified minimum duration, employer can request recertification every 6 months in connection with an absence. Employer may provide HCP with employee attendance record and ask whether condition is consistent with attendance. No second or third opinions permitted. (-.308)





## Serious Health Condition Checklist

To qualify as a serious health condition under the FMLA one of the following must apply:

- Inpatient care (-.114): Does the condition involve an overnight stay in a hospital, hospice, or residential medical care facility? Or is the absence in connection with any related period of incapacity or subsequent **treatment** for a condition for which there is/was/will be an overnight stay in a hospital, hospice or residential medical care facility?
- Continuing treatment (-.115):
  - Does the condition involve incapacity for more than 3 full consecutive calendar days, plus 2 or more treatments (in-person visit) by healthcare provider within 30 days of first day of incapacity, the first of which is within 7 days of the first day of incapacity?
  - Does the condition involve incapacity for more than 3 full consecutive calendar days, plus 1 treatment (in-person visit) by healthcare provider which occurs within 7 days of the first day of incapacity and results in regimen of continuing care (prescription medication or therapy)?

Notes: a) Time periods may be waived if extenuating circumstances beyond employee's control prohibited compliance. b) Leave is available for absences in connection with any related period of incapacity or subsequent treatment for a condition that meets one of the above continuing treatment categories.

- Pregnancy or prenatal care (-.115): Is the absence for any period of incapacity due to pregnancy or for prenatal care?

Note: a) Treatment by healthcare provider during absence is not required (-.102, -.115). b) Available to husband needing to care for pregnant wife during prenatal care (-.120).

- Chronic condition (-.115): Is the absence related to any period of incapacity or treatment for a condition that meets the following requirements: a) requires at least 2 annual visits to healthcare provider; b) continues over extending period of time; and c) may cause episodic rather than continuous incapacity?



Note: Treatment by healthcare provider during absence is not required (-.102, -.115).

- ❑ Permanent or long-term conditions (-.115): Is the absence related to a period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (e.g., Alzheimer's, stroke, terminal illness)?
- ❑ Conditions requiring multiple treatments (-.115): Is the absence related to the receipt of multiple treatments (including period to recover) by healthcare provider for restorative surgery or a condition that likely would cause incapacity of more than 3 consecutive days in absence of treatment?

#### Compliance Tips

- ❑ An employee's own serious health condition must render him/her unable to perform essential functions of his/her position (-.123)
- ❑ Care for family member with a serious health condition may be care for physical needs, psychological comfort or reassurance. Employee need not be only family member available to provide care and leave is available in situations where employee is needed to substitute for normal caregiver. Intermittent leave applies to situations in which condition is intermittent or need for employee to provide care is intermittent. (-.124)
- ❑ Ordinarily cold, flu, allergies, ear ache, upset stomach, minor ulcers, headache (not migraine), routine dental/orthodontal, periodontal and conditions for which cosmetic treatments are administered are not serious health conditions UNLESS they meet the inpatient or continuing treatment requirements. (-.113)
- ❑ Absences due to substance abuse are not covered, but absences for treatment of substance abuse are covered if they meet the inpatient or continuing treatment requirements (-.119)
- ❑ Use DOL-issued certification forms (WH-380-E; WH-380-F)



### Qualifying Exigency (Active Duty) Checklist

To qualify for active duty qualifying exigency, the both of the following must apply (-.126):

- Is the employee the spouse, son, daughter or parent of a servicemember on, or called to, covered active duty in the National Guard or Reserves or, a regular component of the Armed Forces (or as a retired member of Regular Armed Forces or Reserves) during deployment to a foreign country?
- Is the leave for one of the following qualifying exigencies?
  - Short-notice deployment: Notice of 7 days or less before deployment (available in the 7 days before deployment)
  - Military events and related activities: official military ceremonies, programs or events related to the active duty; or family support, assistance or briefing programs sponsored by military, military service organizations or American Red Cross related to the active duty
  - Childcare and school activities: To arrange alternative childcare when active duty necessitates a change for servicemember's child; to provide urgent, immediate need (not regular everyday) care when need arises from active duty; to enroll or transfer child to new school or daycare when necessitated by active duty; to attend meetings at school or daycare facility regarding child matters when meetings necessitated by active duty
  - Parental care: To arrange alternative parental care when active duty necessitates a change for servicemember's parent; to provide urgent, immediate need (not regular everyday) care when need arises from active duty; to transfer parent in new care facility or hire home health assistance when necessitated by active duty; to attend meetings at care facility regarding parent matters when meetings necessitated by active duty
  - Financial and legal arrangements: To make or update financial or legal arrangements to address the active duty; to cover as servicemember's representative before government agencies for obtaining military service benefits during active duty or 90 days thereafter



- ❑ Counseling: To attend counseling for employee, servicemember or child resulting from active duty
- ❑ Rest and recuperation: To spend time with servicemember who is on short-term R&R leave during deployment during the 15 calendar day period commencing on date R&R begins
- ❑ Post-deployment activities: To attend arrival ceremonies, reintegration and other events for 90 days following termination of deployment; to address issues arising from death of servicemember while on active duty
- ❑ Other activities: To address other events that the employer and employee agree should be covered

Compliance Tip

- ❑ Use DOL-approved certification form (WH-384)



### **Servicemember Family Leave Checklist**

To qualify for servicemember family leave, the following must apply:

- Is the employee the spouse, son, daughter, parent or next of kin of the member or veteran of Armed Forces including National Guard or Reserves (members of Regular Armed Forces are covered) (“servicemember”)?
- If the servicemember is a current member of the Armed Forces: Does the servicemember have a qualifying serious injury or illness incurred or aggravated in active duty that may render him/her medically unfit to perform duties of office, grade, rank or rating for which s/he is undergoing medical treatment, recuperation or therapy; in outpatient status (assigned to military medical facility or unit); or otherwise on temporary disability retired list?
- If the servicemember is a veteran of the Armed Forces (discharged other than dishonorably): Was the veteran a member of the Armed Forces at any time during the five years preceding the date of such treatment, recuperation or therapy for a qualifying serious injury or illness?

### Compliance Tips

- Leave is available on a per-covered servicemember or per-injury basis, but no more than 26 weeks can be taken in a single 12-month period.
  - Use DOL-approved certification form (WH-385, WH-385-V)



## FMLA COMPLIANCE TIPS

### Counting FMLA absences

- ❑ Leave qualifying as both leave for family member with serious health condition and Servicemember Family Leave must be designated as Servicemember Family Leave (and not counted as both types of leave). (-.127)
- ❑ Holidays occurring in a week of FMLA leave count as FMLA leave unless the employee is using increments of leave less than a week in which case the holiday will not count against FMLA unless s/he was scheduled and expected to work the holiday. (-.200)
- ❑ If leave occurs during employer temporary shutdown, the shutdown days do not count against FMLA leave. (-.200)
- ❑ Intermittent/reduced schedule leave must be tracked in an increment no greater than the shortest increment used to track other types of leave, provided that it cannot be tracked in increments of greater than 1 hour and the increment cannot be greater than the amount of leave actually taken. (-.205)
- ❑ FMLA leave must be tracked in terms of the amount of the employee's actual workweek. The individual's workweek can be converted to hours such that an employee regularly scheduled to work a 40-hour week converts to 480 hours, a 48 hour week to 576 hours, a 37.5 hour week to 450 hours, etc. (-.205(b))
- ❑ If employee's scheduled weekly hours vary, then an average over the 12-month period before leave starts is used to determine the number of hours when converting FMLA weeks to hours. (-.205(b))
- ❑ Employees who are normally required to work overtime but who are unable to do so for FMLA-qualifying reasons can be charged FMLA leave for the missed overtime. Missed voluntary overtime cannot be charged against FMLA. (-.205(c)).

### Pay Issues

- ❑ FLSA exempt employees can be docked pay for FMLA absences. (-.206)
- ❑ Employees are permitted to substitute accrued paid leave for unpaid FMLA leave. (-.207) If they choose not to use their accrued paid leave, the employer may require them to do so.



- ❑ Substitution of paid leave is determined by the terms of the employer's normal leave policy. (-.207)
- ❑ If accrued paid leave is to be substituted, then the employer must notify the employee that the procedural requirements of the paid leave policy apply only to the receipt of payment. Employees who do not comply may not receive the pay and leave will be unpaid. (-.207)
- ❑ Substitution of accrued paid leave cannot be mandated by either the employee or employer during leave covered by a paid STD plan benefit or workers' compensation benefit; however, the employee and employer can agree, where permitted by state law, to supplement the STD or workers' comp benefit with paid leave. (-.207)

#### **Benefits Issues**

- ❑ Employer must maintain employee coverage under group health plan as if employee had not gone on leave. (-.209)
- ❑ If leave is unpaid, then employer must provide advance written notice of benefit premium payment obligation and specify method for premium payment (prepayment before leave commences is not permitted). Terms of payment may not be more onerous than those applying to employees on other paid leave. (-.210)
- ❑ If employee chooses not to remain on group health plan during FMLA leave/coverage lapses for non-payment, s/he must be reinstated to plan upon return on same terms as prior to taking leave without any qualification period or pre-existing exclusion terms. (-.209)
- ❑ If employee is more than 30 days (longer period applies if plan offers longer grace period) late in paying group health premium, then employer may drop coverage upon giving employee at least 15 days written notice advising employee that coverage will end if payment is not received in 15 days. Coverage ends at the end of 30-day grace period unless employer has established policy with regard to other forms of leave that termination is retroactive to original payment due date. (-.212)
- ❑ Obligation to maintain group health benefit (or reinstate employee) ends when employment relationship would have ended had employee not taken leave (e.g., RIF), employee notifies employer of intent not to return to work, employee fails to return from leave or continues on leave after exhausting annual 12-week FMLA



allotment.

- ❑ Employer's maintenance of other benefits during FMLA leave is determined by employer's policy for providing such benefits during other forms of leave (paid or unpaid, as appropriate). (-.209)
- ❑ If employer continues employee's coverage for other benefits during unpaid leave by paying the employee's share of premiums, then upon conclusion of leave employer may recover the costs incurred in paying the employee's share of these premiums whether or not the employee returns to work. Recoupment must be by method allowed by state law. (-.213)

### **Light Duty Issues**

- ❑ Employees released to return light duty who cannot perform their regular job duties can decline a light duty assignment and remain on FMLA leave. (-.207)
- ❑ Light duty is not counted against FMLA and, if employee accepts light duty in lieu of FMLA leave, then employee retains right to reinstatement to prior position until end of applicable 12-month FMLA leave year. (-.220)

### **Reinstatement**

- ❑ Equivalent position is one that is virtually identical to former position in terms of pay, benefits and working conditions. (-.215)
- ❑ If leave rendered employee unable to qualify for return to position (e.g., renew license), then employee must be given reasonable period to fulfill conditions upon return to work. (-.215)
- ❑ Reinstated position must have similar duties, responsibilities, conditions, status and privileges. Typically, this means same work site or one within close proximity, same shift and work schedule, same opportunity for bonuses. Restoration to job slated for lay-off when original position would not be so slated is not equivalent. Employee has no greater rights in reinstatement than s/he would have had if leave had not been taken. (-.215, -.216)
- ❑ Equivalent pay requires receipt of unconditional pay increases, restoration of same pay premiums and shift differentials, same amount of overtime and unconditional bonus (whether discretionary or not).
- ❑ Increases based on seniority, length of service or work performed must be granted in accordance with how other types of equivalent leave are handled. (-





.215)

- ❑ Bonuses based on achievement of specific goal (e.g., hours worked, product sold, perfect attendance) which was not met due to FMLA leave can be denied unless paid to employees on equivalent leave status that does not qualify for FMLA. (-.215)
- ❑ Unpaid leave is not counted as break in service for purposes of pension or retirement plan vesting or eligibility to participate. If plan requires employee to be employed on specific date to be credited for year of service for vesting, contributions or participation, employee is deemed to be employed on that date. Unpaid leave is not required to be treated as credited service for purposes of benefit accrual, vesting and eligibility to participate. (-.215)
- ❑ Employees on unpaid leave are treated as if they continued to work for purposes of changes in benefits plans and are entitled to changes upon return, except those dependent on seniority or accrual during leave period (e.g., benefit is lost if employee does not have required number of hours worked due to leave). (-.215)
- ❑ If employee cannot return to prior job because of health condition, s/he has no FMLA right to reinstatement to another position (if condition qualifies as disability under the ADA, the ADA may require transfer to another position). (-.216)
- ❑ If employee fraudulently obtains FMLA, s/he has no right to reinstatement. (-.216)
- ❑ Key employee (salaried within top 10% most highly paid in 75 mile radius) may be denied reinstatement if s/he was notified in writing at time of leave that employer had determined reinstatement would cause substantial and grievous economic injury. (-.218) (Note: This standard is more stringent than ADA undue hardship.)

#### **Other**

- ❑ Employer may have uniform policy against outside employment and, if so, policy can be enforced during FMLA leave. If employer does not have such a policy, then it cannot deny FMLA rights to employee on grounds of outside employment unless the FMLA leave was fraudulently obtained. (-.216)
- ❑ Employer must coordinate FMLA leave with ADA requirements and provide benefit afforded under whichever law offers greatest benefit. (-.702)



## Recordkeeping

- Record retention period: 3 years (-.500)
- Leave must be designated as FMLA leave in company records; dates of leave and hours of leave must be recorded, if taken in less than 1 day increment. (-.500)
- If employee is exempt under FLSA and has been employed for at least 12 months, s/he is presumed to have worked 1250 hours in the last 12 month period. (-.500)
- If employee is exempt under the FLSA and taking intermittent or reduced schedule leave, then employer and employee must agree on employee's normal/average weekly schedule and reduce agreement to writing. Alternatively, employer must keep record of actual hours worked by exempt employee. (-.500)
- Copies of all notices provided by employer to employee, and copies of all notices by employee to employer; maybe maintained in personnel file. (-.500)
- Disagreements with employee about leave must be documented and documentation retained. (-.300(c), -.500)
- Certifications, recertifications, medical histories and related documents with health information must be maintained as confidential medical records and retained in separate medical files. (-.500)



**LEAVE AS REASONABLE ACCOMMODATION INDIVIDUAL ASSESSMENT CHECKLIST  
(Applies When Employee Exhausts FMLA or Otherwise is Not Eligible for FMLA Leave)**

*Note: This checklist is designed to comply with obligations to provide reasonable accommodations under the Americans with Disabilities Act, as amended (ADAA). In most cases, the company will not conduct an analysis to determine whether the condition/injury for which employee is seeking leave qualifies as an ADA disability and, therefore, use of this checklist is not an indication that the condition/injury was considered to so qualify. In cases in which the company does undertake such an analysis and determines that such condition/injury does not qualify, then the process below may be modified or disregarded.*

1. Can the employee's healthcare provider provide an estimated return to work date? Use the **Letter to Physician Seeking Information to Confirm Need for Indefinite Leave** to obtain this information.

- No => Once the provider's certification of cannot estimate/unknown return to work date/indefinite leave is received, send **End of Leave Termination Letter**.
- Yes => Go to 2.

*Note: If provider indicates that return to work is possible with restrictions **at this time**, then evaluate whether the listed restrictions can be accommodated (i.e., individual can perform the essential functions of the job with or without a reasonable accommodation; any such accommodation must be provided unless the restriction/needed accommodation would be an undue hardship).*

- If listed restrictions can be accommodated => Return employee to work.
- If listed restrictions cannot be accommodated => Go to 2 (using estimated date for return to work without the restrictions that cannot be accommodated).

2. Will holding the position open until the estimated return to work date pose an undue hardship on the organization? See 29 CFR 1630.2(p) for guidance as to standard for undue hardship.

- No => Extend leave pending further evaluation of ability to keep position open and send **End of Leave-Position Held Pending Further Evaluation letter**.
- Yes => Go to 3.



3. Is there an open position for which the individual is qualified which could be held open until the estimated return to work date? *Retain copy of the list of open positions which were available at the time this determination was made.*
- No => Notify employee of voluntary resignation termination.
  - Yes => Transfer the employee to that open position and hold it open for them until they return to work on the estimated return to work date, or until a determination that the position cannot be held open until that date at which time notify employee of voluntary resignation termination.