Women's and Fair Practices Departments

Family Friendly/Medical Leave and FMLA

Women's/Fair Practices Departments
American Federation of Government Employees
80 F. Street, N.W., Washington, D.C. 20001
(202) 639-6417 FAX: (202) 639-6490 TDD: (202) 639-6474
www.afge.org

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Introduction

Every person will at one point face birth, death, or serious illness, whether it is through their own experiences or those of a loved one. While they may not want or choose to take time off work, life may force them to request some form of leave. For this reason, many private employers provide for leave time and the federal and District of Columbia (D.C.) governments mandate it for their employees.

The Family and Medical Leave Act of 1993 (FMLA) is the Act that we will expand on the most because it affects all federal and D.C. employees. We included other laws to show you that there are other choices available if you do not qualify for FMLA. FMLA was intended to benefit workers; however, the eligibility requirements are strict. Some employers may even require you to fill out the form for FMLA even though you are using sick leave.

A Review of the Family Friendly Laws and Regulations Governing Federal and D.C. Leave Entitlements

Several types of leave exist for federal and D.C. government employees to care for themselves and their families. Some of them include:

- Sick Leave (General)
- Sick Leave for Personal Medical Needs
- Sick Leave for Family Care and Bereavement
- Sick Leave to Care for a Family Member with a Serious Health Condition
- Sick Leave for Adoption
- Family and Medical Leave
- Military Family Leave
- Annual Leave
- Donated Leave under the Voluntary Leave Transfer and Leave Bank Programs

Federal Employees Family Friendly Act (FEFFLA)

- The Federal Employees Family Friendly Act was enacted in December of 1994. It authorized federal employees to use their sick leave for family care/bereavement purposes under regulations implementing the Federal Employees Family Friendly Leave Act (FEFFLA) (Public Law 103-388, October 22, 1994).

- FEFFLA was a three year test program that authorized federal employees to use sick leave for family care or bereavement purposes such as caring for an ill family member or making arrangements or attending funerals for family members.

- FEFFLA expired December 2, 1997; however, the U.S. Office of Personnel Management (OPM) extended the use of sick leave for family care or bereavement purposes under its regulations. (5 C.F.R. §630, subpart D).

- This manual will discuss the various leave entitlements for workers as determined by the Office of Personal Management (OPM) and Department of Labor (DOL) concerning family friendly leave.

- To obtain a copy of the actual OPM memorandum, see:

  http://www.opm.gov/oca/compmemo/html/cpm97-13.htm

OPM Regulations Regarding Sick Leave for Family Care or Bereavement (SLFCB) Purposes

- The U.S. Office of Personnel Management (OPM) issued final regulations under its permanent regulatory authority (5 U.S.C. §6311) to permit covered full-time employees to use **sick leave** each year for:

    - personal medical needs;
    - care of a family member;
    - care of a family member with a serious health condition; and
    - adoption related purposes. (5 CFR §630.401)

The OPM regulations regarding **sick leave for family care or bereavement (SLFCB) purposes** allows leave for one of two types of purposes, one for **general health** and one for a **serious medical condition.**

- Under the **General Health** provision - most federal employees may use a total of up to 104 hours (13 workdays) of sick leave each leave year to:

    - **Provide care** for a **family member** who is incapacitated as a result of physical or mental illness, injury, pregnancy, or childbirth;
    - Provide care for a family member receiving medical, dental or optical examination or treatment; or
    - Make arrangements necessitated by the death of a family member or attend the funeral of a family member.

- Under the **Serious Medical Condition** provision, most federal employees may use a total of up to 12 administrative workweeks of sick leave to care for a family member with a **serious health condition**. However, if an employee has already used 12 weeks of sick leave to care for a family member with a serious health condition, he or she cannot use an additional 13 days in the same leave year for general family care purposes. (5 C.F.R. §630.401 & 1202).

- Employees may take sick leave for **adoption-related** purposes.

  This includes time for:
    - appointments with adoption agencies, social workers and attorneys;
    - court proceedings;
    - required travel; and
    - any periods during which an adoptive parent is ordered or required by the adoption agency or by a court to be absent from work to care for the adopted child.

*** See OPM Definitions in Appendix C – Regulations for Sick Leave for Family Care or Bereavement Purposes**

Requesting and Granting Sick Leave for Family Care or Bereavement (SLFCB) Purposes

- Each agency will generally require an employee to request sick leave within a certain time limit and may require that employees request advance approval of sick leave for medical, dental, or optical examination or treatment. 5 C.F.R. §630.402.

- An agency may grant sick leave only when supported by evidence administratively acceptable to the agency. For those absences longer than 3 days, or for a lesser period when determined necessary by the agency, a medical certificate or other administratively acceptable evidence may be required.

    - Each agency is permitted to determine what constitutes "**administratively acceptable evidence"** for sick leave and when/how often such documentation is required. Check your collective bargaining agreement.

    - Generally, a **medical certificate** should certify that:
        - (1) the family member requires psychological comfort and/or physical care,
        - (2) the family member would benefit from the employee's attendance,
        - (3) the employee is needed to care for the family member for a specified period of time, and
        - (4) (if applicable) the family member has a serious health condition.

    - The agency is required to keep all medical certification in confidence. 5 C.F.R. §630.1206 & 1207).

A full-time employee is entitled to a total of 12 weeks of sick leave each year for all family care purposes

The Family and Medical Leave Act (FMLA)

The purpose of FMLA is to allow employees to balance work and family life; promote stability and economic security of families; and to promote the national interest in preserving family integrity. (5 C.F.R. § 630.1201 Subpart L; 29 C.F.R. § 825.101)

Note: workers in the federal and District of Columbia governments and private sector are governed by different FMLA eligibility and administrative requirements. You should ensure that you review and understand the requirements that apply to you.

What Does FMLA Allow?

- This Act, effective on August 5, 1993, entitles employees to take 12 weeks of job-protected, unpaid leave in any 12 month period for one or more of the following reasons:

    - (1) for the birth and care of the newborn child of the employee;

    - (2) for placement with the employee of a **son or daughter** for adoption or foster care;

    - (3) to care for an immediate **family member** (spouse, child, or parent) with a serious health condition; or

    - (4) to take medical leave when the employee is unable to work because of a serious health condition. The **serious health condition** makes the employee unable to perform any one of the **essential functions** of his or her position.

  - If you have one or more of the above reasons to take leave AND are <u>eligible</u>, employers are required to grant you unpaid leave.

  - You do not have to take 12 consecutive weeks off.

  - Please see Appendix E for an Outline of the FMLA Regulations

- Neither Agency policies nor collective bargaining agreements can take away any of these rights, but they can add to these statutory rights. However:

    - The FMLA states that the provision permitting <u>return to work</u> certifications does not supersede "a valid State or local law or collective bargaining agreement that governs the return to work of employees." 29 U.S.C. § 1614. (See "Returning to Work" rules on page 18)

***See Department of Labor's Definitions for the Family and Medical Leave Act in Appendix D**

Who Administers FMLA?

- FMLA is administered by the Department of Labor (DOL) for Title I employees. DOL issues regulations for private employees and certain federal employees (U.S. Postal Service employees and some civilian Department of Defense workers) not covered by Title II, found in Title 29 C.F.R. § 825. DOL issued new regulations effective January19, 2009. For more information on DOL's new FMLA regulations see www.dol.gov/whd/fmla/finalrule.htm

- For most other federal employees, the Office of Personnel Management (OPM) administers FMLA. OPM issues regulations for Title II federal employees found Title 5 C.F.R. Part 630, Subpart L.

- The D.C. Office of Human Rights administers the DC Family Medical Leave Act (DC FMLA) for D.C. employees employed the district on or after April 1, 1991. (*D.C. Code* § 32-516(2)) D.C. employees are not covered by Title II of the FMLA. For more information on DC FMLA, please refer to Appendix E in the manual. Please check your state's laws for potential FMLA legislation relevant to your employment.

Coverage – FMLA is separated into 5 sections:

- Title I covers private employees and certain federal employees not covered by Title II. This includes (a) Postal Service employees; (b) Postal Regulatory Commission employees; (c) part-time employees who do not have an established regular tour of duty during the administrative workweek; and (d) employees serving under temporary or intermittent employment with a time limitation of one year or less. (29 C.F.R. §825)

- Title II covers most federal employees covered by annual and sick leave system established under Title 5 U.S.C. Chapter 63. OPM Regulations published in 5 C.F.R. §630 Subpart L. Employees of the Government Printing Office are covered under Title II.

- Title III establishes the Commission on Leave.

- Title IV contains miscellaneous provisions, including rules governing the effect of the Act on more generous leave policies, other laws, and existing employment benefits.

- Title V covers entitlement to family medical leave for certain employees of the U.S. Senate and House of Representatives.

Are You Covered by FMLA? – Eligibility Requirements

FMLA – Title I

- An "eligible employee" is an employee of a covered employer who:
    - (1) Has been employed by the employer for at least 12 months, and
    - (2) Has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, and
    - (3) Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. (29 C.F.R. §825.110) (See § 825.105(b) regarding employees who work outside the U.S.)

- The 12 months do not need to be consecutive months worked for you to be eligible. Employment before a break in service is counted as well. According to new regulations, the 12 months does not include employment periods prior to a break in services of 7 years or more unless:
    - (1) The break in service was for National Guard or Reserve military service;
    - (2) There was a written agreement stating the employer's intention to rehire the employee after a break in service; or
    - (3) The employer chooses to recognize such prior employment so long as the employer acts uniformly. (29 C.F.R. §825.110)

- To determine whether an employee has worked 1,250 hours in the 12 months immediately preceding the beginning of leave, you must only count hours in which the employee performs work. This means that the 1,250 hours does not include time like holidays or vacations even if they are paid because the employee is not performing any work. The exception is time that would have been worked during a period of National Guard or Reserve military service is included in the 1,250 hours. (29 C.F.R. §825.110).

FMLA – Title II

- Title II - Employees must have worked as a civil servant for 12 months. (most federal employees) (5 C.F.R. §630.1201(b)).

- The 12 months do not have to be consecutive or recent.

- All time worked for the employer is counted.

Is Your Employer Covered by FMLA?

- An “employer” is defined under the FMLA as any person engaged in commerce or in any industry or activity affecting commerce, who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.

- Employers covered by FMLA also include any person acting, directly or indirectly, in the interest of a covered employer to any of the employees of the employer, any successor in interest of a covered employer, and any public agency.

- Public agencies are covered employers without regard to the number of employees employed. Public as well as private elementary and secondary schools are also covered employers without regard to the number of employees employed. (See 29 C.F.R §825.600; 29 C.F.R. §825.104 – Covered Employer).

- Federal and D.C. governments are covered and must satisfy FMLA requirements. An "employee" means - an employee as defined by section 2105(c) of title 5.

- To qualify for DCFMLA family and medical leave, an employee must have (1) been employed by the employer for at least one year without a break in service and (2) worked for at least 1,000 hours during the 12-month period immediately preceding the requested medical leave. *DC Code* § 32-501(1).
- The DCFMLA applies to any employer that employs 20 or more employees in the District of Columbia.
- The requirements to obtain DCFMLA are very similar to those of FMLA: notification and medical certification must be provided

See Appendix for more information about DC. Government workers.

Requesting or Invoking FMLA

If you find that you and your employer are eligible, and you need to invoke FMLA for the reasons that FMLA covers, there are steps that you must take before you can actually take FMLA leave. It is the employees' responsibility to know, understand, and invoke their rights to leave under FMLA. While an employer can waive an employee's FMLA notice requirements, an employer cannot require an employee to comply with stricter FMLA requirements if a collective bargaining agreement, State law, or the employer's leave policies allow less notice.

- **Notice**
  - Title II employees - If FMLA leave is foreseeable (e.g., based on birth, adoption or planned medical care), employees must give 30 days notice.
    - If the leave isn't foreseeable and the employee cannot provide 30 days notice, the employee must provide notice within a timeframe reasonable under the circumstances.
    - Employees must specifically invoke the FMLA in requesting leave. OPM regulations require an employee to invoke his or her entitlement to FMLA leave subject to the notification and medical certificate requirements. 5 U.S.C. § 6382(e)(1); 5 C.F.R. § 630.1206(b)), 630.1206(c), 630.1203 (b)).
  - Title I employees - DOL's new regulations state that at the employer's request, an employee who does not give 30 days notice must explain why such notice was not possible. In addition, the new regulations provide that an employee needing FMLA leave must follow the employer's usual and customary call-in procedures for reporting an absence, absent unusual circumstances. 29 C.F.R.§825.302(b)
  - The employee must be notified in writing that an absence is being designated as FMLA leave. (e.g., "designation notice"). (29 C.F.R. § 825.300(d)).

Check your collective bargaining agreement for your notice requirements.

- **Medical Certification**
  - Employee must provide a medical certification signed by the health care provider within 15 calendar days of the employer's request. The employer may request that the employee, for any leave taken due to a serious health condition, provide a medical certification confirming that a serious health condition exists.

- If it is not practical to provide the medical certification within 15 days, despite good faith efforts, the employee has up to 30 calendar days after the request to submit medical certification.
- Medical certification regarding a serious health condition should include:
  - (1) the date the serious health problem began;
  - (2) the probable duration, or when the condition is chronic and continuing in nature, the probable duration of the current episode; and
  - (3) appropriate medical facts regarding incapacitation and treatment.
- A standard medical certification form for your health provider to fill out for your employer can be found in **Appendix G** and **http://www.dol.gov/regs/compliance/whd/fmla/wh380.pdf**
- While this form was intended for use in the private sector, OPM has instructed federal employees to use the form to meet the needs and limits of medical certification required for FMLA.
- Check your collective bargaining agreement for any additional certification requirements.

(5 U.S.C. § 6383; 5 C.F.R. § 630.1207)

■ Recertification

- OPM regulations allow an agency to require "recertification" of a serious health condition every 30 calendar days at its own expense.
- If an agency has already approved FMLA leave based on the medical documentation provided, it can ask for follow up medical documentation to make sure the medical problem still requires leave.
- However, recertification is NOT usually permitted before the end of the minimum duration period of incapacity that the health care provider has stated on the initial medical certification.
- Exceptions to this exist as well: If the agency obtains information that casts doubt upon the continuing validity of the original medical certification, including the need for care, it may: (1) require recertification more frequently than every 30 calendar days; or (2) require an employee to recertify the care he or she will be provided and to estimate the amount of time needed to provide such care.

OPM's regulations also allow a health care provider, human resource professional, a leave administrator, or management official representing the agency to contact the health care provider of the employee, with the employee's permission, to clarify medical information pertaining to the serious health condition. In no case may the employee's direct supervisor make contact.

Retroactivity and Exceptions

- Normally, employees may not invoke entitlement to FMLA leave retroactively for any previous absence of work, **however, there are exceptions.** The employee and employer can both mutually agree that leave be retroactively designated as FMLA leave.

- Exceptions to retroactively invoking FMLA:

    - The employer is awaiting receipt of the medical certification to confirm the existence of a serious health condition;
    - The employer was unaware that leave was for a FMLA reason, and later gets information from the employee such as when the employee requests additional or extensions of leave; or
    - The employer was unaware that the leave was for a FMLA reason, and the employee notifies the employer within 2 days after return to work that the leave was FMLA leave.

(5 C.F.R § 630.1203(b); 29 C.F.R. §825.301(d)).

- Check your collective bargaining agreement.

Requiring a Second or Third Opinion

- If an employee submits a complete and sufficient certification signed by the health care provider, an agency may not require a second or third opinion on the medical certification to return to work. However, the employer is allowed to contact the health care provider for purposes of clarification and authentication of the medical certification after the employer has given the employee the opportunity to cure any deficiencies. (29 C.F.R. § 825.307).

- An agency may take appropriate action if the agency thinks that the employee may be a danger to himself or others, or is a disruptive force in the worksite (e.g., adverse action).

- An agency may offer a medical or psychiatric examination under 5 C.F.R. § 339.302, if the agency believes additional medical documentation is helpful to determine appropriate action.

Confidentiality

- You do not have to provide medical records.
- Employers are not allowed to ask health care providers for additional information beyond that required by the certification form. (5 C.F.R. § 630.1207(c); 29 C.F.R. § 825.307).
- Only those people with a need to know may see the documentation requested by the agency (e.g. supervisory, timekeeper).
- The information within the medical records is protected by the Privacy Act.
- Check collective bargaining agreements and agency internal procedures for how that information would be released.
- Your employer is allowed to make inquiries about your leave during your absence only to you.
- Your employer may ask you questions to confirm whether the leave needed or being taken qualifies for FMLA purposes and may require periodic reports on your status and intent to return to work after your leave.

-It is very IMPORTANT that an employee complies with the medical certification and notice requirements. If an employee does not comply with the notification requirements in 5 C.F.R. § 630.1206, and does not provide medical certification signed by a health care provider that includes all the information required in 5 C.F.R. § 630.1207(b) then the employee is NOT entitled to FMLA.

-An agency CAN deny the continuation of FMLA leave due to a serious health condition if the employee fails to fulfill any obligations to provide supporting medical certification.

Use of FMLA Leave

- For Title I Employees:
  - The employer designates leave, paid or unpaid, as FMLA-qualifying, and gives notice of the designation to the employee.
  - The employer may require that paid leave taken under an existing leave plan be counted as FMLA leave. (29 C.F.R. § 825.207(a)).
  - The employer has five business days (up from two days) in which to notify the employee of the employee's eligibility to take FMLA leave, absent extenuating circumstances. (29 C.F.R. § 825.300(b)).

- For Title II Employees:
  - An employee cannot be required to substitute paid leave for unpaid FMLA leave.
  - An employee must invoke FMLA to give the agency permission to deduct FMLA leave from an employee's 12-week entitlement.
  - A Title II employee may elect to separately (consecutively) use paid leave before using unpaid FMLA leave. (5 C.F.R. § 630.1205(d), 630.1203(h)).

- **Usage of FMLA and Benefits**
  - Federal employees may take a total of 12 administrative workweeks of unpaid leave (leave without pay) during any 12-month period. The 12-month period begins on the first day that FMLA leave is taken.
  - An employee may request to use only part of his or her FMLA leave.
  - Under certain conditions, FMLA leave may be taken intermittently, or the employee may work under a work schedule that is reduced by the number of hours of leave taken as family and medical leave.
  - By law, employees retain health benefits during the entire period they are on family and medical leave.
  - Employees are responsible for paying their share of the premiums.
  - Employees may pay their share of the premiums on a current basis or upon return to work.

-Employees who apply for and are granted 12 weeks of paid sick leave under the OPM regulations are still entitled to apply for and use 12 weeks of unpaid leave under the FMLA. (See page 6 – *OPM Regulations regarding Sick Leave for Family or Bereavement Purposes*)

-Donated annual leave may be used if an employee is affected by a family medical emergency and has exhausted his or her available sick leave for family care purposes, even if he or she still has additional sick leave accrued. (See page 3 – *Introduction*)

Returning to Work

Before you return to work, most agencies establish a uniformly applied practice or policy that requires all similarly situated employees who take family and medical leave for a serious health condition to provide medical certification to return to work (one of the requirements for invoking FMLA). Information on the medical certification must relate only to the serious health condition for which FMLA leave was taken. (5 C.F.R. § 630.1208(h)). Check your collective bargaining agreement for additional information.

- The FMLA prevents an agency from denying return to work by an employee who has been absent on FMLA leave and who presents, upon return, the requisite certification from his or her physician or health care provider.
- The FMLA states that the provision permitting return to work certifications does not supersede "a valid State or local law or **collective bargaining agreement** that governs the return to work of employees." 29 U.S.C. § 1614.
- Requisite certifications may be affected by collective bargaining agreements. (*Harrell v. United States Postal Service,* 415 F.3d 700 (7th Cir. 2005)). The court ruled that through its collective bargaining agreements, the Postal Service could impose stricter "return to work" requirements on employees than those provided for in the FMLA. At this time, this decision still stands. The case is limited only to "return to work" provisions – meaning if the terms of a collective bargaining agreement diminish an employee's substantive rights under the FMLA in areas other than medical certifications, they may violate the FMLA.
- An agency may not require an employee to return to work early by offering him or her a light duty assignment.

Denial of Reinstatement, Status, Etc.

- An employer MUST take an employee back into the same or equivalent position with equivalent benefits, pay, status, and other terms and conditions of employment at the end of FMLA leave. However, there are exceptions to this rule.

- Exceptions:
    - Under limited circumstances, an employer may deny reinstatement to work – but not the use of FMLA leave – to a certain highly-paid, salaried "key" employee if "substantial and grievous injury results to the employer to do so." However, an employer must notify the key employee before he or she takes leave that it will not restore the employee to his or her former position. (29 C.F.R. §825.219)

    - Employers are not required to continue FMLA benefits and reinstate employees who would have been laid off or otherwise had their employment terminated had they continued to work during the FMLA leave period as, e.g., due to a general layoff. (5 C.F.R. §630.1208(f)).

    - Employees who give unequivocal notice that they do not intend to return to work lose their entitlement to FMLA leave and its benefits.

    - Employees who are unable to return to work and have exhausted their 12 weeks of FMLA leave in the designated 12-month period no longer have FMLA protections of leave or job restoration. (5 C.F.R. §630.1208).

Additions and Amendments to FMLA

On January 28, 2008, the National Defense Authorization Act for FY 2008 (NDAA), Pub. L. 110-181 was signed into law. Section 585 of the NDAA amends the FMLA.

The two most significant changes are dubbed the "military caregiver" and "qualifying exigency" leave provisions and they provide for:

- 26 workweeks of leave during a 12-month period for family members to care for a **covered services member** who suffers a serious injury or illness on active duty. Qualified family members include the spouse, child, parent, or next of kin of the service member.
    - This new law adds FMLA entitlement to care for seriously injured or ill service members.
    - This leave may only be taken once during a single 12 month period.
    - The 26 weeks of leave are a maximum entitlement, so employees couldn't use the 26 weeks and then another 12 weeks in any given year.
    - **The new leave provisions apply to both Title I and Title II employees**.

- The new entitlement to the traditional FMLA 12 weeks of leave was made available for a "**qualifying exigency** (as the Secretary [of Labor] shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation."
    - This means that a **qualifying exigency** is essentially added to the other four events that currently entitle an employee to 12 weeks of FMLA leave.
    - A qualifying exigency may include: where the spouse of a deployed service member is managing childcare issues caused by the deployment, a family member is escorting the service member being deployed to the place of departure, the spouse is attending deployment briefings, etc.
    - **This provision does not apply to Title II employees.**

On October 28, 2009, President Barack Obama signed into law H.R. 2647, the National Defense Authorization Act for FY 2010 (NDAA), Pub. L. 111-84. Section 565 of the Act makes significant changes to the military leave entitlements under FMLA. This new law expands on the above two important provisions of NDAA 2008.

- **The Military Caregiver Leave**

    - Under H.R. 2647, the definition of covered **service member** has been extended to include veterans who were members of the Armed Forces (including National Guard and Reserves) at any point in time within 5 years preceding the date on which the veteran undergoes medical treatment, recuperation, or therapy. It formerly only applied to active members.
    - **"Covered service member"** is defined by the military family leave provisions of H.R. 4986 as a member of the Armed Forces (including National Guard or Reserves) "who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness."
    - In addition, the definition of **serious health condition** for active duty covered service members was extended to include any injury or illness that "existed before the beginning of the member's active duty and was aggravated by service in line of duty on active duty in the Armed Forces." For veteran covered service members, a serious health condition includes any injury or illness that "was incurred by the member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty was aggravated by service in the line of duty on active duty in the Armed Forces) and that manifested itself before or after the member became a veteran**.**"

- **Qualifying Exigency Leave (Does not apply to Title II employees)**
    - Under H.R. 2647, those employees with a family member in any **regular component** of the Armed Forces (not just National Guard or Reserves) are eligible for qualified exigency leave.
    - This new law has also removed the requirement that the leave only be taken to support a **contingency operation**. It is now available "because of any qualifying exigency arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces."

Effective January 16, 2009, DOL issued revised regulations for employees covered under Title I. They limit rights of employees. See: www.dol.gov/whd/fmla/finalrule.htm

Employee Rights Under FMLA

- **Entitlement:** Full-time and part-time employees who have completed 12 months of Federal service are entitled to FMLA and a total of 12 administrative workweeks should be made available to the full-time employee.
    - If the employee is an eligible employee who has met FMLA's notice and certification requirements (and he or she has not exhausted their FMLA leave entitlement for the year), the employee may not be denied FMLA leave.
    - Generally, the employee has the burden of proving entitlement.

- **Adverse Employment Actions**: Your employer cannot fire you for complaining about a FMLA violation nor can they take any other adverse employment action against you on this basis.
    - It is unlawful for your employer to discharge or otherwise discriminate against an employee for opposing a practice made unlawful under FMLA.
    - It is unlawful for any employer to interfere with or restrain or deny an employee the exercise of any right provided under this law.
    - Employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies.

- **Substitutions: Compensatory Time, Annual Leave, Sick Leave**
    - An employee may NOT substitute compensatory or credit time for family leave under FMLA.
    - However, an employee may use earned compensatory time off and credit hours in addition to the period of FMLA leave.
    - An employee does not have to use leave without pay (LWOP) rather than annual leave; annual leave may be substituted for unpaid leave under FMLA. Annual leave can be used for any purpose including vacations.
    - An employee may substitute paid sick leave for unpaid leave under the FMLA leave in those situations in which the use of sick leave is permitted.
    - Employees do not have a limit to the amount of sick leave they accumulate.

- **Maternity and Pregnancy Issues**

    - A new mother is allowed to use sick leave for the period of incapacitation following childbirth as certified by a medical professional (generally the recovery period is for no more than 6 weeks, unless there are complications).
    - Pregnancy disability leave or maternity leave for the birth of a child would be considered qualifying FMLA leave for a serious health condition and may be counted in the 12 weeks of leave.
    - The caregiver (e.g. husband or parent) is entitled to use sick leave during her entire period of incapacitation, but only during that period of incapacitation. (5 C.F.R. § 630.1203 & 1206).
    - New mothers and fathers are not permitted to use sick leave following childbirth for bonding with the newborn child.
    - Care for a family member with a "serious health condition" does not include care for a healthy newborn.
    - An agency may request administratively acceptable evidence of the mother's incapacitation prior to approving sick leave

D.C. workers and families have the protections needed to care for family members . The DCFLMA provides that during any 24-month period:

- employers covered under the Act must grant an eligible employee 16 workweeks of **"family" leave** for the birth, foster care placement, or adoption of a child, or to care for the serious health condition of a family member (D.C. Code § 32-502 (2001)); and
- 16 workweeks of **"medical" leave** where the employee may take continuous or intermittent medical leave for his/her own serious medical condition. (D.C. Code § 32-503 (2001)).

See the Review Questions section of this manual and Appendix F if you should have any additional questions regarding these new provisions.

Enforcing FMLA and Leave Rights

If you are a Title I employee and you find that your employer has violated your rights with regard to FMLA, you may file a complaint with the Department of Labor (DOL). Many employees may choose to do this first as it costs nothing and the DOL may be able to persuade your employer to quickly remedy the situation if the DOL believes your employer is not in compliance with FMLA. The EEOC has no enforcement responsibility for FMLA.

If you work for a private employer that is bound by FMLA, you may consider filing a civil suit against your employer. You do not need to exhaust administrative remedies before filing a suit in federal court. (*Edwards v. Heatcraft, Inc.*, 2006 U.S. Dist. LEXIS 80134 (M.D.Ga. Nov. 2, 2006)).

Title I Rights

- Title I employees can sue for civil monetary damages for lost benefits or compensation.
- If the violations are willful, damages may be doubled.
- Attorney's fees, reasonable expert witness fees, and other costs are also available. (See 29 U.S.C. §2617(a)(2); 29 C.F.R.§825.400(c)).

Title II Rights

- Employees under Title II of the FLMA have no right to sue to enforce FMLA rights.
- A Title II employee may file a grievance under the collective bargaining agreement or the agency's administrative grievance process.
- If the local collective bargaining agreement does not address FMLA leave, an employee may file a claim with OPM's Office of General Counsel.
- **For more information about initiating a grievance in your agency, contact your union representative.**

D.C. Workers

If you have a complaint regarding DCFMLA, you may file it with the D.C. Human Rights Commission (HRC), but the complaint must be filed within 1 year of the violation.

Alternative Options

- An employee may file an EEO complaint if the employer discriminates based on the request for a reasonable accommodation.
- Employees can challenge an agency when the agency decides to take an adverse action because the employee is not at work and they are charged with AWOL. An employee can raise the FMLA issue at the **MSPB (Merit Systems Protection Board).** If the administrative judge feels that the employee was entitled to the absence under the FMLA, the agency's decision will be reversed.

Summary

FMLA v. OPM Sick Leave for Family Care and Bereavement (SLFCB)

FMLA	OPM Regulations
The FMLA allows covered employees to take leave if they have a serious health condition or to care for certain family members with a serious health condition. Up to 12 weeks of unpaid leave is available to individuals who qualify.	The SLFCB allows employees to take paid leave to care for a family member (or to attend or arrange a family member's funeral). However, sick leave is only available for up to 13 days. (5 C.F.R.§ 630.401)
Employees can take FMLA leave to care for a spouse, parent or child (younger than 18 or military qualifying exigency, unless incapable of self-care) with a serious health condition. In-laws are specifically excluded as eligible family members under the FMLA and **same-sex partners** and ineligible unless recognized by state law. (29 C.F.R. § 825.113 and 5 C.F.R. § 630.1202 .)	The SLFCB's range of eligible family members is much broader and includes siblings, in-laws, and "any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship." OPM has also recently included **same-sex partners** as one of the qualified relationships to take leave. (5 C.F.R. § 630.201 and 5 C.F.R. § 630.401.)
Another key ingredient of FMLA leave is the requirement of a "serious health condition." This condition, or the employee's care for a family member with this condition, must render the employee unable to perform one or more essential job functions.	A “serious health condition” is not necessary for employees to take leave under the SLFCB provisions. An employee may take leave to care for "a family member receiving medical, dental, or optical examination or treatment," according to 5 C.F.R. § 630.401(3)(i).
Under the FMLA, employees who are asked to submit medical certification may submit one medical certificate every 30 days to cover intermittent absences and absences due to chronic conditions.	However, HR professionals who suspect that employees are abusing the SLFCB's sick leave provisions may issue letters of requirement, which direct employees to obtain medical certification for every instance of sick leave use. So, even if the employee uses one hour to go to a doctor's appointment, he must submit a medical certificate for that absence.

- DCFMLA has broadly interpreted the definition of **family member** to include a person related by “blood, legal custody, or marriage.” D.C. Code § 32-501(4)(A). If an employee “[a]ssumes and discharges parental responsibility” for a child who lives with him or her, the child is considered a family member under the statute. D.C. Code § 32-501(4)(B). In addition, a person is considered a family member if the employee lives or has lived with the person in the past year and “maintains a committed relationship” with the person. D.C. Code § 32-501(4)(C).

Appendix A: Review Questions

Perhaps your questions have not yet been answered by this manual. Or maybe you still don't know how to plan your leave schedule with all these different options. Below are some sample questions that may be similar to your situation and will help you to make better use of your available options. Some have been altered to reflect the new expanded sick leave regulations.

Question 1: Laura is a single mother with two children who has worked for the government for 2 1/2 years. Laura has 201 hours of sick leave and 80 hours of annual leave. Laura's children have problems with recurring ear infections and strep throat, and must occasionally be kept home from school and afternoon day care. What time may Laura use?

Answer: Laura may use up to 13 days (13 x 8 = 104 hours) of sick leave a year to care for her children when they are ill. By doing so, Laura may be able to conserve her annual leave for a possible family vacation or to care for her children when her child care provider is unavailable.

Question 2: Carol is expecting a baby in 4 months. Carol has 260 hours of sick leave and 200 hours of annual leave. She wants to spend as much time as possible with her new baby. Carol's doctor anticipates that she will need 6 weeks to recuperate after the baby's birth. Carol has requested 240 hours (6 weeks) of sick leave. She has also requested 4 weeks of annual leave and 3 months of leave without pay (LWOP). What should Carol do?

Answer: Carol's supervisor approves the sick and annual leave, and informs Carol of her entitlement to unpaid leave under FMLA. Carol decides to invoke her FMLA entitlement and use 4 weeks of leave without pay under the FMLA following her approved annual leave. In addition, she and her supervisor work out a leave schedule that permits Carol to use FMLA leave without pay on an intermittent basis 2 days a week for 3 months following her return to work.

Question 3: Jeff and his wife plan to travel abroad soon to adopt a child. He has a sick leave balance of 280 hours and an annual leave balance of 160 hours. What is Jeff entitled to ask for?

Answer: Jeff may use sick leave for absences related to the adoption, including travel time. His agency may advance him up to 30 days of sick leave if requested. Jeff may also request annual leave to spend time with his new son or daughter after the adoption. In addition, he may invoke his entitlement to leave without pay under the FMLA.

Question 4: Tom fell off his roof while cleaning the gutters and broke his hip. The doctor says Tom will need to be absent from work for at least 16 weeks. Tom has 240 hours of sick leave and 137 hours of annual leave. His installation is understaffed, and Tom is worried that when his sick leave is gone, his supervisor will refuse to grant him

annual leave. He is most concerned about the possibility of losing his job and with it his medical benefits. How can Tom keep his job?

Answer: Tom may use his sick leave and then invoke his entitlement to unpaid leave under the FMLA. He may then substitute his annual leave for part of the FMLA leave without pay. While he is on FMLA leave, his reemployment rights and medical benefits are protected. In addition, Tom may apply for and use donated leave from his agency's leave transfer program.

Question 5: Ruth and her husband have both worked for the government for 10 years. Their daughter was recently diagnosed with a terminal illness. Ruth and her husband want to care for their daughter at home for as long as possible. They have sufficient sick leave in their accounts for each to use 12 weeks to care for their daughter. Ruth has also requested 160 hours of annual leave. Ruth's supervisor was sympathetic, but based on work-related needs, he felt he could only approve the sick leave and 80 hours of annual leave. What can Ruth and her husband do?

Answer: Ruth can notify her supervisor of her intent to invoke her entitlement to leave without pay under FMLA. Ruth used her 12 weeks of sick leave, used her 80 hours of approved annual leave, and then substituted her remaining annual leave for FMLA leave without pay. Her husband may also invoke his entitlement to FMLA leave. When their annual leave is exhausted, Ruth and her husband may each apply for and receive donated leave from their agencies' leave transfer programs. In this way, they will be able to care for their daughter at home until hospitalization is necessary.

Question 6: Emilio's sister needs a kidney transplant, and Emilio has decided to donate his kidney to her. How would he get the time to do this?

Answer: Emilio may use up to 30 days of paid (administrative) leave to be an organ donor. This includes the time required for testing to see if he is a compatible donor, plus the time required to undergo the transplant procedure and recuperate. Emilio may get additional time off from work by requesting annual and/or sick leave, advanced leave, and donated leave through his agency's leave transfer program (if he exhausts his own available paid leave).

-The above questions 1 through 6 as well as additional information regarding leave can be found at: http://www.afm.ars.usda.gov/hrd/payleave/family/policy.htm

Question 7: My supervisor placed me on leave restriction 3 months ago and said I must call him at least 2 hours before the beginning of my shift if I cannot be at work that day. In addition, I must provide medical documentation for each unscheduled absence. Earlier this month I hurt my back, and my doctor certified that my condition qualifies as a chronic serious health condition under the Family and Medical Leave Act. My agency agreed to give me intermittent leave under the FMLA, but my supervisor says I must still follow the conditions of the letter of restriction. Is this legal?

Answer: When the need for leave is foreseeable, an employee must give 30 days notice of his or her intent to take FMLA leave. When the need for leave is not foreseeable, an employee must provide notice as soon as is practicable. In addition, an agency may require an employee on leave for a serious health condition to provide initial medical certification and recertification every 30 calendar days. If the health care provider has specified on the initial medical certification a minimum duration of the period of incapacity, the agency may not request recertification until that period has passed unless other conditions arise that permit the agency to require recertification more frequently. (See 5 C.F.R..§630.1207(h)(2)(i))

An agency's policies or procedures for notification of FMLA leave or medical certification may not be more stringent than required by OPM's regulations. If an employee who has been placed on leave restriction invokes his or her entitlement to FMLA leave, the agency must follow OPM's rules for notification and medical certification of FMLA leave.

Question 8: I forfeited sick leave in 1991 when I returned to Federal employment after a break in service of more than 3 years. Can I now have that sick leave recredited in light of OPM's new sick leave regulations, which remove the 3-year break-in-service limitation?

Answer: Previously, OPM's regulations in 5 C.F.R. §630.502(b) provided that an employee was entitled to a re-credit of sick leave if he or she was reemployed in another Federal position within 3 years after separation. On December 2, 1994, OPM issued final regulations that removed the 3-year break-in-service limitation on the re-credit of sick leave for former employees who are reemployed on or after December 2, 1994. Sick leave may not be re-credited to employees who were reemployed in the Federal service before December 2, 1994, and who previously forfeited sick leave under the former rule.

Question 9: How much leave is an employee working two part-time Federal jobs entitled to use under the Family and Medical Leave Act?

Answer: Under the Family and Medical Leave Act of 1993 (FMLA), a covered employee is entitled to use a total of 12 administrative workweeks of unpaid leave (leave without pay) during any 12-month period for certain family and medical needs. For a part-time employee, the 12 administrative workweeks of unpaid leave is calculated on an hourly basis and equals 12 times the average number of hours in the employee's regularly scheduled administrative workweek. An employee working two part-time positions may use only the amount of FMLA leave earned in each part-time position for absences from that position.

-The above questions 7 through 9 as well as additional information can be found at: **http://main.opm.gov/oca/leave/html/LeavQA.asp**

Question 10: If I have to miss work due to National Guard or Reserve duty, will this affect my eligibility for FMLA leave?

Answer: No. The regulations make clear the protections for our men and women serving in the military by stating that a break in service due to an employee's fulfillment of military obligations must be taken into consideration when determining whether an employee has been employed for 12 months or has the required 1,250 hours of service. Under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), hours that an employee would have worked but for his or her military service are credited toward the employee's required 1,250 hours worked for FMLA eligibility. Similarly, the time in military service also must be counted in determining whether the employee has been employed at least 12 months by the employer.

Example:
Dean worked for his employer for six months in 2008, then was called to active duty status with the Reserves and deployed to Iraq. In 2009, Dean returned to his employer, requesting to be reinstated under the USERRA. Both the hours and the months that Dean would have worked, but for his military status, must be counted in determining his FMLA eligibility.

Question 11: How soon after an employee provides notice of the need for leave must an employer determine whether someone is eligible for FMLA leave?

Answer: Absent extenuating circumstances, the regulations require an employer to notify an employee of whether the employee is eligible to take FMLA leave (and, if not, at least one reason why the employee is ineligible) within five business days of the employee requesting leave or the employer learning that an employee's leave may be for a FMLA-qualifying reason.

Question 12: If an employer fails to tell an employee that leave has been designated as FMLA leave, can the employer count the leave against the employee's FMLA leave entitlement?

Answer: The DOL regulations revise the designation provisions to comply with the U.S. Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002). In *Ragsdale*. the Court ruled that a "categorical" penalty for failure to appropriately designate FMLA leave was inconsistent with the statutory entitlement to only 12 weeks of FMLA leave and contrary to the statute's remedial requirement to demonstrate individual harm. Under the regulations, retroactive designation is permitted if an employer fails to timely designate leave as FMLA leave (and notify the employee of the designation). The employer may be liable, however, if the employee can show that he or she has suffered harm or injury as a result of the failure to timely designate the leave as FMLA. Additionally, an employee and employer may agree to retroactively designate an absence as FMLA-protected.

Example:

Henry plans to take 12 weeks of FMLA leave beginning in August for the birth of his second child. Earlier in the leave year, however, Henry took two weeks of annual leave to care for his mother following her hospitalization for a serious health condition. Henry's employer failed to notify him at the time of his mother's hospitalization that the time he spent caring for his mother would be counted as FMLA leave. If Henry can establish that he would have made other arrangements for the care of his mother if he had known that the time would be counted against his FMLA entitlement, the two weeks his employer failed to appropriately designate may not count against his FMLA entitlement.

Question 13: Must I sign a medical release as part of a medical certification?

Answer: No. An employer may not require an employee to sign a release or waiver as part of the medical certification process. The regulations specifically state that completing any such authorization is at the employee's discretion. Whenever an employer requests a medical certification, however, it is the employee's responsibility to provide the employer with a complete and sufficient certification. If an employee does not provide either a complete and sufficient certification or an authorization allowing the health care provider to provide a complete and sufficient certification to the employer, the employee's request for FMLA leave may be denied.

-Questions 11 through 13 as well as additional information can be found at:

http://www.dol.gov/whd/fmla/finalrule/NonMilitaryFAQs.pdf

Question 14: What is "active duty or call to active duty status"?

Answer: Active duty or call to active duty status refers to a member of the National Guard or Reserves who is under a call or order to active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation.

Question 15: Are families of service members in the Regular Armed Forces eligible for qualifying exigency leave?

Answer: No. The statute passed by Congress providing these new military family leave entitlements only extended the right to take FMLA leave because of a qualifying exigency to family members of National Guard and Reserves, and certain retired military. By law, an agency does not have the authority to extend the entitlement to take FMLA leave because of a qualifying exigency to family members of service members in the Regular Armed Forces.

Question 17: Can I take qualifying exigency leave if my son or daughter is 18 years old or older?

Answer: Yes. The new DOL FMLA regulations for Title I employees, contain special definitions for son and daughter for both of the military family leave provisions. For qualifying exigency leave, an eligible employee may take leave for his or her "son or

daughter on active duty or call to active duty status," which is defined as the employee's biological, adopted, or foster child, stepchild, legal ward, or child for whom the employee stood in loco parentis, who is on active duty or call to active duty status, and who is of any age.

Question 18: Can I take qualifying exigency leave if the covered military member is my stepson or stepdaughter? Alternatively, can I take qualifying exigency leave if the covered military member is my stepparent?

Answer: Yes. Under the new DOL FMLA for Title I employees for qualifying exigency leave, a "son or daughter on active duty or call to active duty status" means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on active duty or call to active duty status, and who is of any age. Additionally, under the FMLA for qualifying exigency leave, a "parent" means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee when the employee was a son or daughter. This term does not include parents "in law."

Questions 14 through 18 as well as additional information regarding the new FMLA military and exigency provisions can be found at:

http://www.dol.gov/whd/fmla/finalrule/MilitaryFAQs.pdf

Appendix B: FMLA, ADA, and Title VII Coverage Overlap

The Relationship Between the Requirements of These Laws

- Both FMLA and ADA require a covered employer to grant medical leave to an employee in certain circumstances.
- The FMLA and Title VII have requirements governing leave for pregnancy and pregnancy-related conditions.
- Under Title VII, employers must not discriminate on the basis of race, color, religion, sex, or national origin when they provide family or medical leave.

The ADA and the FMLA Overlap

- FMLA "serious health conditions" may or may not also be ADA disabilities.
  - Most cancers and serious strokes **are** ADA disabilities.
  - Pregnancy, a routine broken leg and hernia are **not** ADA disabilities. Pregnancy is a condition, but it is not an impairment. A routine broken leg or hernia is an impairment, but it is not substantially limiting
  - To determine if a person taking FMLA leave also has an ADA disability, all pertinent evidence, including any information about whether the individual has or had a "serious health condition," should be considered.
  - Under FMLA regulations, employers must allow EEOC investigators to review pertinent FMLA medical certifications and recertifications, and other relevant materials, upon request.

- A record of an ADA disability
  - The fact that an individual has a record of a "serious health condition" does not necessarily mean that s/he has a record of an ADA disability.
  - Under the ADA, an individual must have a record of a substantially limiting impairment in order to be covered.
  - Under the ADA definition of "disability," the individual must have an impairment that substantially limits one or more major life activities.

- Which is better to use?
  - ADA is sometimes more accommodating. In most instances, the ADA can provide more flexibility to the employee.
  - Under the FMLA, agencies are only required to provide leave. If the person's condition qualifies as a disability under the ADA, agencies must also provide reasonable accommodations.

Appendix B Cont'd

Rehabilitation Act and FMLA

- Should employers apply FMLA to an employee covered by the Rehabilitation Act? Perhaps, but there are different standards.
  - The Rehabilitation Act determines whether the employee is a qualified disabled employee entitled to reasonable accommodation. (Pub. L. 93-516, 29 U.S.C. 794).
  - It is a reasonable accommodation under the Rehabilitation Act for the agency to grant a disabled employee sick leave, FMLA leave, LWOP or administrative leave.
  - A reasonable accommodation may include a part-time work schedule for the employee to come back into the workplace.
  - If the employee is a qualified disabled employee, the FMLA will be used to determine if the employee has a serious health condition that requires her to be off work.
  - Although you may come up with the same answers, employees should look and determine which Act applies to their situation best.

Concurrent or Consecutive

- Employees who apply for and are granted 12 weeks of paid sick leave under the **OPM** sick leave regulations are still entitled to apply for and (after the paid leave) use 12 weeks of unpaid leave under the **FMLA**. (29 C.F.R. § 825.207(b)).
- Donated annual leave may be used if an employee is affected by a family medical emergency and has exhausted his or her available **sick leave for family care purposes**, even if he or she still has additional sick leave accrued. (5 C.F.R. § 630.1205(b)(1)).
- FMLA leave and workers' compensation leave can run consecutively and concurrently if the reason for the absence is due to an on-the-job injury or illness and the injury or illness qualifies as a serious health condition. The employer must notify the Title I employees in writing that the leave will be counted concurrently as FMLA leave. (29 C.F.R. § 825)
- Employees protected by Title VII or the ADA must be independently "eligible" for FMLA leave. "Eligibility" for FMLA leave depends on several factors, including, for example, length of service. In addition, an individual must be employed by an FMLA-covered employer with 50 or more employees in order to obtain FMLA leave. (29 C.F.R. § 825.702).
- DCFMLA allows for unpaid leave but an employee may take paid vacation or sick leave while on DCFMLA. However, the leaves will run concurrently and the employee would not be able to add a full 16 weeks of unpaid DCFMLA leave after their paid leave is exhausted. (*DC Code* § 36-1303(b)(2)). See: Appendix F

Appendix C

OPM Definitions

- Under OPM regulations, "[t]o provide care**"** means to give physical assistance or psychological comfort; however, regulations do not specify all examples of providing care. The FMLA does not provide this definition.
    - Some examples (5 C.F.R. §630.1201) of providing care include:
        - Staying with a family member who is hospitalized,
        - Providing assistance during examination and/or treatment,
        - Attending to a family member who is receiving medical, dental, o**r** optical examination or treatment,
        - Providing transportation and/or accompanying a family member to a health care provider's office or to a hospital or other health care facility, or
        - Providing care and assistance during recovery.

- "Kin" includes grandparents, grandchildren, step-children and step-parents. (5 C.F.R. §630.201).

- The OPM uses the same definitions for a "serious health condition**"** and "parent" as the Family and Medical Leave Act. (FMLA) (*see FMLA definitions in Appendix D*).

- Under OPM regulations, "family member**"** is defined more broadly than under the FMLA. A family member is defined as a "spouse, and parents thereof; children, including adopted children, and spouses thereof; your own parents; brothers and sisters, and spouses thereof; and any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship."

- On July 14, 2010, OPM issued a Final Rule, adding **domestic partners** (including same sex partners and opposite sex partners) to the list of relationships that allow a federal worker to take leave. The term domestic partner is now a part of the definition of family member and immediate relative for the use of sick leave, funeral leave, voluntary leave transfer, voluntary leave bank, and emergency leave transfer.

- The definition of a **domestic partner** means "an adult in a committed relationship with another adult, including both same-sex and opposite-sex relationships." "A committed relationship means that the employee, and the domestic partner of the employee, are each other's sole domestic partner (and not married to or domestic partners with anyone else); and share responsibility for a significant measure of each other's common welfare and financial obligations." These changes do NOT affect the Family and Medical Leave Act (FMLA) – this law must be changed by Congress. (5 C.F.R. §630).

Appendix D

Definitions for FMLA

- A **serious health condition** is defined as an illness, injury, impairment, or physical mental condition that involves:
  - (1) inpatient care (e.g., overnight stay) in a hospital, hospice, or other residential medical care facility;
  - (2) any period of incapacity (defined as the inability to work, attend school, or perform other regular daily activities because of a serious health condition or treatment for or recovery from a serious health condition) requiring an absence of more than 3 consecutive calendar days and involving continuing (**at least 2 visits within 30 days**) treatment by a health care provider. The first visit must occur within 7 days of the onset of incapacity. Partial days do not count; or
  - (3) any chronic or long-term health condition requiring continuing treatment or supervision by a health care provider.
    - Some examples of serious health conditions include: appendicitis, asthma, diabetes, dialysis, emphysema, heart attacks, heart conditions involving operations, most cancers and chemotherapy, back conditions requiring extensive therapy or surgery, stroke, severe respiratory conditions, treatment for substance abuse, spinal injuries, severe allergies, severe arthritis, pneumonia, severe nervous disorders and mental illness, injuries caused by serious accidents on or off the job, and pregnancy. Thus, FMLA may even be used to see the physical therapist if it involves recurring absences for treatments ordered by a physician. This list is not all inclusive.
    - The following are NOT considered serious health conditions: the common cold, flu, earaches, upset stomach, headaches (other than migraines), routine dental or orthodontia problems. 5 C.F.R. § 630.202

- A **spouse** is defined as an individual who is a husband or wife pursuant to a marriage that is a legal union between one man and one woman, including common law marriage between one man and one woman, in states that recognize it. (Defense of Marriage Act (Public Law 104-199, September 21, 1996))

- **Same sex couples** are not recognized under the FMLA unless the state in which you are employed recognizes same sex marriages; however, OPM regulations do recognize same sex marriages. As for legal adoption, that's not affected by whether the couple is of the same sex or not, nor does it matter if the legally adopted child suffers a serious health condition.

- A **parent** is defined as the biological parent or an individual who stands or stood as a parent to an employee when the employee was a child (i.e.*, in loco parentis*). Persons who are *in loco parentis* include those with day-to-day responsibilities to care for and financially support a child or, in the case of an employee, who has such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary. This term does not include parent-in-laws.
- A **son or daughter** is defined as a biological child, adopted child, foster child, step child, legal ward, or child or a person standing *in loco parentis* who is:
    - (1) under 18 years of age, or
    - (2) 18 years or older, but incapable of self care due to mental or physical disability.
- A **family member** is defined much more narrowly under FMLA than it is under SLFCB. Thus, if the person you wish to care for is not covered under FMLA, you may need to use SLFCB to take leave.
    - Parent-in-laws are not included under FMLA, you must use SLFCB to care for them.
    - The terms son or daughter do not include individuals age 18 or older unless they are "incapable of self-care due to mental or physical disability" that limits one or more of the "major life activities" as those terms are defined in regulations issued by the Equal Employment Opportunity Commission (EEOC) under the ADA.
- An employee requesting FMLA because of serious medical health conditions must be unable to perform the **essential functions** of the position when he or she is absent from work in order to receive medical treatment. Essential functions are defined as the fundamental job duties of the employee's position, as defined in 29 C.F.R. §1630.2(n). (See also 5 C.F.R. §630.1202).
- **Covered Service Member** means a current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness incurred in the line of duty on active duty. (See also 29 C.F.R. § 825.127(a)).
- A **qualifying exigency** has been defined by the DOL by providing a specific and exclusive list of reasons for which an eligible employee can take leave. (29 C.F.R. § 825.126). The following general categories are qualifying exigencies:
    - (1) Short-notice deployment (7 or less calendar days notice);
    - (2) Military events and related activities;
    - (3) Childcare and school activities;
    - (4) financial and legal arrangements;
    - (5) Counseling;
    - (6) Rest and recuperation (eligible employees may take up to 5 days);
    - (7) Post-deployment activities; and
    - (8) Additional activities – left open for the employer and employee to agree that such leave will qualify as an exigency.

Appendix E

The Family and Medical Leave Act of 1993 - Outline

Public Law 103-3 Enacted February 5, 1993

An Act

To grant family and temporary medical leave under certain circumstances.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.--This Act may be cited as the "Family and Medical Leave Act of 1993".

(b) TABLE OF CONTENTS.--The table of contents is as follows:

- Sec. 305. Powers.
- Sec. 306. Termination.

TITLE IV--MISCELLANEOUS PROVISIONS

- Sec. 401. Effect on other laws.
- Sec. 402. Effect on existing employment benefits.
- Sec. 403. Encouragement of more generous leave policies.
- Sec. 404. Regulations.
- Sec. 405. Effective dates.

TITLE V--COVERAGE OF CONGRESSIONAL EMPLOYEES

- Sec. 501. Leave for certain Senate employees.
- Sec. 502. Leave for certain House employees.

TITLE VI--SENSE OF CONGRESS

- Sec. 601. Sense of Congress.

DOL FMLA Regulations – 29 CFR § 825

OPM FMLA Regulations – 5 CFR § 630.1201

Appendix F

The D.C. Family and Medical Leave Act (DCFMLA)

- The Act ensures that families have the protections needed to care for family members and provides that during any 24-month period:
    - employers covered under the Act must grant an eligible employee 16 workweeks of **"family" leave** for the birth, foster care placement, or adoption of a child, or to care for the serious health condition of a family member (D.C. Code § 32-502 (2001)); and
    - 16 workweeks of **"medical" leave** where the employee may take continuous or intermittent medical leave for his/her own serious medical condition. (D.C. Code § 32-503 (2001)).
- The DCFMLA also requires all employers to provide 24 hours of parental leave per year to allow employees to attend school-related events but they must give ten days of advance notice, unless such notice is not possible. (D.C. Code § 32-1202 (2001))
- To qualify for DCFMLA family and medical leave, an employee must have (1) been employed by the employer for at least one year without a break in service and (2) worked for at least 1,000 hours during the 12-month period immediately preceding the requested medical leave. *DC Code* § 32-501(1).
- The DCFMLA applies to any employer that employs 20 or more employees in the District of Columbia.
- The requirements to obtain DCFMLA are very similar to those of FMLA: notification and medical certification must be provided.
- DCFMLA is unpaid leave but an employer may take paid vacation or sick leave while on DCFMLA. However, the leaves will run concurrently and the employee would not be able to add a full 16 weeks of unpaid DCFMLA leave after their paid leave is exhausted. (DC Code § 36-1303(b)(2)).
- Currently, an employee of a D.C.-based company who works in Maryland or Virginia is not eligible for leave under DCFMLA but there are proposed regulations that seek to expand coverage to those employees. (The D.C. Office of Human Rights issued its notice of intent to amend the current regulations on May 7, 2010.)
- If you have a complaint regarding DCFMLA, you may file it with the D.C. Human Rights Commission (HRC), but the complaint must be filed within 1 year of the violation.

Definitions

- A **serious medical condition** is defined in the same way that FMLA has defined it.
- DCFMLA has broadly interpreted the definition of **family member** to include a person related by "blood, legal custody, or marriage." D.C. Code § 32-501(4)(A). If an employee "[a]ssumes and discharges parental responsibility" for a child who lives with him or her, the child is considered a family member under the statute. D.C. Code § 32-501(4)(B). In addition, a person is considered a family member if the employee lives or has lived with the person in the past year and "maintains a committed relationship" with the person. D.C. Code § 32-501(4)(C).

Appendix G
(next page)

Certification of Health Care Provider
(Family and Medical Leave Act of 1993)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

*(When completed, this form goes to the employee, **Not to the Department of Labor.**)*

OMB No.: 1215-0181
Expires: 09-30-2010

1. Employee's Name	2. Patient's Name *(If different from employee)*

3. Page 4 describes what is meant by a **"serious health condition"** under the Family and Medical Leave Act. Does the patient's condition[1] qualify under any of the categories described? If so, please check the applicable category.

(1)_____ (2) _____ (3) _____ (4)_____(5)_____ (6) _____ , or None of the above _____

4. Describe the **medical facts** which support your certification, including a brief statement as to how the medical facts meet the criteria of one of these categories:

5. a. State the approximate **date** the condition commenced, and the probable duration of the condition (and also the probable duration of the patient's present **incapacity**[2] if different):

b. Will it be necessary for the employee to take work only **intermittently or to work on a less than full schedule** as a result of the condition (including for treatment described in Item 6 below)?

If yes, give the probable duration:

c. If the condition is a **chronic condition** (condition #4) or **pregnancy**, state whether the patient is presently incapacitated[2] and the likely duration and frequency of **episodes of incapacity**[2]:

[1] Here and elsewhere on this form, the information sought relates **only** to the condition for which the employee is taking FMLA leave.

[2] "Incapacity," for purposes of FMLA, is defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom.

6. a. If additional **treatments** will be required for the condition, provide an estimate of the probable number of such treatments.

If the patient will be absent from work or other daily activities because of **treatment** on an **intermittent** or **part-time** basis, also provide an estimate of the probable number of and interval between such treatments, actual or estimated dates of treatment if known, and period required for recovery if any:

b. If any of these treatments will be provided by **another provider of health services** (e.g., physical therapist), please state the nature of the treatments:

c. **If a regimen of continuing treatment** by the patient is required under your supervision, provide a general description of such regimen (*e.g.*, prescription drugs, physical therapy requiring special equipment):

7. a. If medical leave is required for the employee's **absence from work** because of the **employee's own condition** (including absences due to pregnancy or a chronic condition), is the employee **unable to perform work** of any kind?

b. If able to perform some work, is the employee **unable to perform any one or more of the essential functions of the employee's job** (the employee or the employer should supply you with information about the essential job functions)? If yes, please list the essential functions the employee is unable to perform:

c. If neither a. nor b. applies, is it necessary for the employee to be **absent from work for treatment?**

8. a. If leave is required to **care for a family member** of the employee with a serious health condition, **does the patient require assistance** for basic medical or personal needs or safety, or for transportation?

b. If no, would the employee's presence to provide **psychological comfort** be beneficial to the patient or assist in the patient's recovery?

c. If the patient will need care only **intermittently** or on a part-time basis, please indicate the probable **duration** of this need:

Signature of Health Care Provider

Type of Practice

Address

Telephone Number

Date

To be completed by the employee needing family leave to care for a family member:

State the care you will provide and an estimate of the period during which care will be provided, including a schedule if leave is to be taken intermittently or if it will be necessary for you to work less than a full schedule:

Employee Signature

Date

A **"Serious Health Condition"** means an illness, injury impairment, or physical or mental condition that involves one of the following:

1. Hospital Care

   Inpatient care (*i.e.*, an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity[2] or subsequent treatment in connection with or consequent to such inpatient care.

2. Absence Plus Treatment

   (a) A period of incapacity[2] of **more than three consecutive calendar days** (including any subsequent treatment or period of incapacity[2] relating to the same condition), that also involves:

   (1) **Treatment**[3] **two or more times** by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral by, a health care provider; or

   (2) **Treatment** by a health care provider on **at least one occasion** which results in a **regimen of continuing treatment**[4] under the supervision of the health care provider.

3. Pregnancy

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

4. Chronic Conditions Requiring Treatments

   A **chronic condition** which:

   (1) Requires **periodic visits** for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

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

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

5. Permanent/Long-term Conditions Requiring Supervision

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

6. Multiple Treatments (Non-Chronic Conditions)

   Any period of absence to receive **multiple treatments** (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for **restorative surgery** after an accident or other injury, **or** for a condition that **would likely result in a period of incapacity**[2] **of more than three consecutive calendar days in the absence of medical intervention or treatment**, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), and kidney disease (dialysis).

This optional form may be used by employees to satisfy a mandatory requirement to furnish a medical certification (when requested) from a health care provider, including second or third opinions and recertification (29 CFR 825.306).

Note: Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number.

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

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

Public Burden Statement

We estimate that it will take an average of 20 minutes to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

DO NOT SEND THE COMPLETED FORM TO THIS OFFICE; IT GOES TO THE EMPLOYEE.

*U.S. GPO: 2000-461-954/25505