

§ 825.100 The Family and Medical Leave Act.

(a) The Family and Medical Leave Act of 1993 (FMLA or Act) allows “eligible” employees of a covered employer to take job-protected, unpaid leave, or to substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 12 workweeks in any 12 months because of the birth of a child and to care for the newborn child, because of the placement of a child with the employee for adoption or foster care, because the employee is needed to care for a family member (child, spouse, or parent) with a serious health condition, or because the employee’s own serious health condition makes the employee unable to perform the functions of his or her job (see § 825.306(b)(4)). In certain cases, this leave may be taken on an intermittent basis rather than all at once, or the employee may work a part-time schedule.

(b) An employee on FMLA leave is also entitled to have health benefits maintained while on leave as if the employee had continued to work instead of taking the leave. If an employee was paying all or part of the premium payments prior to leave, the employee would continue to pay his or her share during the leave period. The employer may recover its share only if the employee does not return to work for a reason other than the serious health condition of the employee or the employee’s covered family member, or another reason beyond the employee’s control.

(c) An employee generally has a right to return to the same position or an equivalent position with equivalent pay, benefits and working conditions at the conclusion of the leave. The taking of FMLA leave cannot result in the loss of any benefit that accrued prior to the start of the leave.

(d) The employer has a right to 30 days advance notice from the employee where practicable. In addition, the employer may require an employee to submit certification from a health care provider to substantiate that the leave is due to the serious health condition of the employee or the employee’s covered family member. Failure to comply with these requirements may result in

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a delay in the start of FMLA leave. Pursuant to a uniformly applied policy, the employer may also require that an employee present a certification of fitness to return to work when the absence was caused by the employee's serious health condition (see §§ 825.310 and .311(d)). The employer may delay restoring the employee to employment without such certificate relating to the health condition which caused the employee's absence.

### § 825.122 Definitions of spouse, parent, son or daughter, adoption and foster care.

(a) Spouse. Spouse means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.

(b) Parent. 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 as defined in paragraph (c) of this section. This term does not include parents "in law."

(c) Son or daughter. Son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and "incapable of self-care because of a mental or physical disability" at the time that FMLA leave is to commence.

(1) "Incapable of self-care" means that the individual requires active assistance or supervision to provide daily self-care in three or more of the "activities of daily living" (ADLs) or "instrumental activities of daily living" (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public

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transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

(2) “Physical or mental disability” means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 CFR 1630.2(h), (i), and (j), issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq., define these terms.

(3) 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 had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

(d) Adoption. “Adoption” means legally and permanently assuming the responsibility of raising a child as one’s own. The source of an adopted child (e.g., whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for FMLA leave. See § 825.121 for rules governing leave for adoption.

(e) Foster care. Foster care is 24-hour care for children in substitution for, and away from, their parents or guardian. Such placement is made by or with the agreement of the State as a result of a voluntary agreement between the parent or guardian that the child be removed from the home, or pursuant to a judicial determination of the necessity for foster care, and involves agreement between the State and foster family that the foster family will take care of the child. Although foster care may be with relatives of the child, State action is involved in the removal of the child from parental custody. See § 825.121 for rules governing leave for foster care.

(f) Documenting relationships. For purposes of confirmation of family relationship, the employer may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a

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child's birth certificate, a court document, a sworn notarized statement, a submitted and signed tax return, etc. The employer is entitled to examine documentation such as a birth certificate, etc., but the employee is entitled to the return of the official document submitted for this purpose.

§ 825.200 Amount of leave.

(a) An eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks of leave during any 12-month period for any one, or more, of the following reasons:

- (1) The birth of the employee's son or daughter, and to care for the newborn child;
- (2) The placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child;
- (3) To care for the employee's spouse, son, daughter, or parent with a serious health condition; and,
- (4) Because of a serious health condition that makes the employee unable to perform one or more of the essential functions of his or her job.

(b) An employer is permitted to choose any one of the following methods for determining the "12-month period" in which the 12 weeks of leave entitlement occurs:

- (1) The calendar year;
- (2) Any fixed 12-month "leave year," such as a fiscal year, a year required by State law, or a year starting on an employee's "anniversary" date;
- (3) The 12-month period measured forward from the date any employee's first FMLA leave begins; or,

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(4) A “rolling” 12-month period measured backward from the date an employee uses any FMLA leave.

(c) Under methods in paragraphs (b)(1) and (b)(2) of this section an employee would be entitled to up to 12 weeks of FMLA leave at any time in the fixed 12-month period selected. An employee could, therefore, take 12 weeks of leave at the end of the year and 12 weeks at the beginning of the following year. Under the method in paragraph (b)(3) of this section, an employee would be entitled to 12 weeks of leave during the year beginning on the first date FMLA leave is taken; the next 12-month period would begin the first time FMLA leave is taken after completion of any previous 12-month period. Under the method in paragraph (b)(4) of this section, the “rolling” 12-month period, each time an employee takes FMLA leave the remaining leave entitlement would be any balance of the 12 weeks which has not been used during the immediately preceding 12 months. For example, if an employee has taken eight weeks of leave during the past 12 months, an additional four weeks of leave could be taken. If an employee used four weeks beginning February 1, 2007, four weeks beginning June 1, 2007, and four weeks beginning December 1, 2007, the employee would not be entitled to any additional leave until February 1, 2008. However, beginning on February 1, 2008, the employee would be entitled to four weeks of leave, on June 1 the employee would be entitled to an additional four weeks, etc.

(d)(1) Employers will be allowed to choose any one of the alternatives in paragraph (b) of this section provided the alternative chosen is applied consistently and uniformly to all employees. An employer wishing to change to another alternative is required to give at least 60 days notice to all employees, and the transition must take place in such a way that the employees retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the

employee. Under no circumstances may a new method be implemented in order to avoid the Act's leave requirements.

(2) An exception to this required uniformity would apply in the case of a multi-State employer who has eligible employees in a State which has a family and medical leave statute. The State may require a single method of determining the period during which use of the leave entitlement is measured. This method may conflict with the method chosen by the employer to determine "any 12 months" for purposes of the Federal statute. The employer may comply with the State provision for all employees employed within that State, and uniformly use another method provided by this regulation for all other employees.

(e) If an employer fails to select one of the options in paragraph (b) of this section for measuring the 12-month period, the option that provides the most beneficial outcome for the employee will be used. The employer may subsequently select an option only by providing the 60-day notice to all employees of the option the employer intends to implement. During the running of the 60-day period any other employee who needs FMLA leave may use the option providing the most beneficial outcome to that employee. At the conclusion of the 60-day period the employer may implement the selected option.

(f) For purposes of determining the amount of leave used by an employee, the fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave. However, if an employee is using FMLA leave in increments of less than one week, the holiday will not count against the employee's FMLA entitlement unless the employee was otherwise scheduled and expected to work during the holiday. Similarly, if for some reason the employer's business activity has temporarily ceased and employees generally are not expected to report for work for one or more weeks (e.g., a school closing two weeks for

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the Christmas/New Year holiday or the summer vacation or an employer closing the plant for retooling or repairs), the days the employer's activities have ceased do not count against the employee's FMLA leave entitlement. Methods for determining an employee's 12-week leave entitlement are also described in § 825.205.

### § 825.212 Employee failure to pay health plan premium payments.

(a)(1) In the absence of an established employer policy providing a longer grace period, an employer's obligations to maintain health insurance coverage cease under FMLA if an employee's premium payment is more than 30 days late. In order to drop the coverage for an employee whose premium payment is late, the employer must provide written notice to the employee that the payment has not been received. Such notice must be mailed to the employee at least 15 days before coverage is to cease, advising that coverage will be dropped on a specified date at least 15 days after the date of the letter unless the payment has been received by that date. If the employer has established policies regarding other forms of unpaid leave that provide for the employer to cease coverage retroactively to the date the unpaid premium payment was due, the employer may drop the employee from coverage retroactively in accordance with that policy, provided the 15-day notice was given. In the absence of such a policy, coverage for the employee may be terminated at the end of the 30-day grace period, where the required 15-day notice has been provided.

(2) An employer has no obligation regarding the maintenance of a health insurance policy which is not a "group health plan." See § 825.209(a).

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(3) All other obligations of an employer under FMLA would continue; for example, the employer continues to have an obligation to reinstate an employee upon return from leave.

(b) The employer may recover the employee's share of any premium payments missed by the employee for any FMLA leave period during which the employer maintains health coverage by paying the employee's share after the premium payment is missed.

(c) If coverage lapses because an employee has not made required premium payments, upon the employee's return from FMLA leave the employer must still restore the employee to coverage/benefits equivalent to those the employee would have had if leave had not been taken and the premium payment(s) had not been missed, including family or dependent coverage. See § 825.215(d)(1) - (5). In such case, an employee may not be required to meet any qualification requirements imposed by the plan, including any new preexisting condition waiting period, to wait for an open season, or to pass a medical examination to obtain reinstatement of coverage. If an employer terminates an employee's insurance in accordance with this section and fails to restore the employee's health insurance as required by this section upon the employee's return, the employer may be liable for benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable relief tailored to the harm suffered.

### § 825.219 Rights of a key employee.

(a) An employer who believes that reinstatement may be denied to a key employee, must give written notice to the employee at the time the employee gives notice of the need for FMLA leave (or when FMLA leave commences, if earlier) that he or she qualifies as a key employee. At the

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same time, the employer must also fully inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employer should determine that substantial and grievous economic injury to the employer's operations will result if the employee is reinstated from FMLA leave. If such notice cannot be given immediately because of the need to determine whether the employee is a key employee, it shall be given as soon as practicable after being notified of a need for leave (or the commencement of leave, if earlier). It is expected that in most circumstances there will be no desire that an employee be denied restoration after FMLA leave and, therefore, there would be no need to provide such notice. However, an employer who fails to provide such timely notice will lose its right to deny restoration even if substantial and grievous economic injury will result from reinstatement.

(b) As soon as an employer makes a good faith determination, based on the facts available, that substantial and grievous economic injury to its operations will result if a key employee who has given notice of the need for FMLA leave or is using FMLA leave is reinstated, the employer shall notify the employee in writing of its determination, that it cannot deny FMLA leave, and that it intends to deny restoration to employment on completion of the FMLA leave. It is anticipated that an employer will ordinarily be able to give such notice prior to the employee starting leave. The employer must serve this notice either in person or by certified mail. This notice must explain the basis for the employer's finding that substantial and grievous economic injury will result, and, if leave has commenced, must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the length of the leave and the urgency of the need for the employee to return.

(c) If an employee on leave does not return to work in response to the employer's notification of intent to deny restoration, the employee continues to be entitled to maintenance of health

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benefits and the employer may not recover its cost of health benefit premiums. A key employee's rights under FMLA continue unless and until the employee either gives notice that he or she no longer wishes to return to work, or the employer actually denies reinstatement at the conclusion of the leave period.

(d) After notice to an employee has been given that substantial and grievous economic injury will result if the employee is reinstated to employment, an employee is still entitled to request reinstatement at the end of the leave period even if the employee did not return to work in response to the employer's notice. The employer must then again determine whether there will be substantial and grievous economic injury from reinstatement, based on the facts at that time. If it is determined that substantial and grievous economic injury will result, the employer shall notify the employee in writing (in person or by certified mail) of the denial of restoration.

### § 825.300 Employer notice requirements.

#### (a) General notice.

(1) Every employer covered by the FMLA is required to post and keep posted on its premises, in conspicuous places where employees are employed, a notice explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act with the Wage and Hour Division. The notice must be posted prominently where it can be readily seen by employees and applicants for employment. The poster and the text must be large enough to be easily read and contain fully legible text. Electronic posting is sufficient to meet this posting requirement as long as it otherwise meets the requirements of this subsection. An

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employer that willfully violates the posting requirement may be assessed a civil money penalty by the Wage and Hour Division not to exceed \$110 for each separate offense.

(2) Covered employers must post this general notice even if no employees are eligible for FMLA leave.

(3) If an FMLA-covered employer has any eligible employees, it shall also provide this general notice to each employee by either including the notice in employee handbooks distributed to all employees or distributing a copy of the general notice to each employee at least annually (distribution may be by electronic mail).

(4) To meet the general notice requirements of this section, employers may duplicate the text of the notice contained in Appendix C of this part. Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer shall be responsible for providing the general notices in a language in which the employees are literate. Prototypes are available in several languages from the nearest office of the Wage and Hour Division or on the Internet at [www.wagehour.dol.gov](http://www.wagehour.dol.gov). Employers furnishing FMLA notices to sensory impaired individuals must also comply with all applicable requirements under Federal or State law.

### (b) Eligibility notice.

(1) When an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying condition, the employer must notify the employee within five business days of the employee's eligibility to take FMLA leave and any additional requirements for qualifying for such leave. This eligibility notice shall provide information regarding the employee's eligibility for FMLA leave, detail the specific

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responsibilities of the employee, and explain any consequences of a failure to meet these responsibilities. See § 825.110 for definition of an eligible employee.

(2) Specifically, the eligibility notice must state whether the employee is eligible for FMLA leave and whether the employee still has FMLA leave available in the current applicable 12-month FMLA leave period. If the employee is not eligible for FMLA leave, the notice must state the reasons why the employee is not eligible, including as applicable that the employee has no remaining FMLA leave available in the 12-month period, the number of months the employee has been employed by the employer, the number of hours of service during the 12-month period, and whether the employee is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.

(3) If the employee is eligible for FMLA leave and has FMLA leave available, the eligibility notice must detail the specific expectations and obligations of the employee and explain any consequences of a failure to meet these obligations. Such specific notice must include, as appropriate:

(i) that the leave may be designated and counted against the employee's annual FMLA leave entitlement if qualifying (see §§ 825.300(c) and .301);

(ii) any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so (see § 825.305);

(iii) the employee's right to substitute paid leave, whether the employer will require the substitution of paid leave, the conditions related to any substitution, and the employee's entitlement to take unpaid FMLA leave if the employee does not comply;

(iv) any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments (see § 825.210), and the possible

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consequences of failure to make such payments on a timely basis (i.e., the circumstances under which coverage may lapse);

(v) any requirement for the employee to present a fitness-for-duty certificate to be restored to employment and a list of the essential functions of the employee's position if the employer will require that the fitness-for-duty certification address those functions (see § 825.310);

(vi) the employee's status as a "key employee" and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial (see § 825.218);

(vii) the employee's rights to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave (see §§ 825.214 and .604); and

(viii) the employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave (see § 825.213).

(4) The eligibility notice may include other information – e.g., whether the employer will require periodic reports of the employee's status and intent to return to work – but is not required to do so.

(5) The eligibility notice should be accompanied by any required medical certification form.

(6) Except as provided in this section, the eligibility notice must be provided to the employee no less often than the first time in each six-month period that an employee gives notice of the need for FMLA leave (if FMLA leave is taken during the six-month period). The notice shall be given within a reasonable time after notice of the need for leave is given by the employee -- within five business days if feasible. If leave has already begun, the notice should be mailed to the employee's address of record.

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(7) If the specific information provided by the notice changes with respect to a subsequent period of FMLA leave during the six-month period, the employer shall, within five business days of receipt of the employee's notice of need for leave, provide written notice referencing the prior notice and setting forth any of the information in the eligibility notice which has changed. For example, if the initial leave period was paid leave and the subsequent leave period would be unpaid leave, the employer may need to give notice of the arrangements for making premium payments.

(8)(i) Except as provided in paragraph (b)(8)(ii) of this section, if the employer is requiring medical certification or a "fitness-for-duty" report, written notice of the requirement shall be given with respect to each employee notice of a need for leave.

(ii) Subsequent written notification shall not be required if the initial eligibility notice in the six-month period and the employer handbook or other written documents (if any) describing the employer's leave policies, clearly provided that certification or a "fitness-for-duty" report would be required (e.g., by stating that certification would be required in all cases, by stating that certification would be required in all cases in which leave of more than a specified number of days is taken, or by stating that a "fitness-for-duty" report would be required in all cases for back injuries for employees in a certain occupation). Where subsequent written notice is not required, at least oral notice shall be provided. See § 825.305(a).

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

(10) A prototype eligibility notice is contained in Appendix D of this part; the prototype may be obtained from local offices of the Wage and Hour Division or from the Internet at

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[www.wagehour.dol.gov](http://www.wagehour.dol.gov). Employers may adapt the prototype notice as appropriate to meet these notice requirements.

### (c) Designation notice.

(1) When the employer has enough information to determine whether the leave qualifies as FMLA leave (after receiving a medical certification, for example), the employer must notify the employee within five business days of making such determination whether the leave has or has not been designated as FMLA leave and the number of hours, days or weeks that will be counted against the employee's FMLA leave entitlement. If it is not possible to provide the hours, days or weeks that will be counted against the employee's FMLA leave entitlement (such as in the case of unforeseeable intermittent leave), then such information must be provided every 30 days to the employee if leave is taken during the prior 30-day period. If the employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this designation also must be made at the time of the FMLA designation.

(2) This designation notice must be in writing, but may be in any form, including a notation on the employee's pay stub. See §825.301 for rules on leave designation. If the leave is not designated as FMLA leave because it does not meet the requirements of the Act, the notice to the employee that the leave is not designated as FMLA leave may be in the form of a simple written statement.

(3) If the employer has sufficient information to designate the leave as FMLA leave immediately after receiving notice of the employee's need for leave, an employer may provide an employee with the designation notice immediately, and also must provide the employee with the information required in the eligibility notice as set forth in paragraph (b)(3) of this section.

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(4) A prototype designation notice is contained in Appendix E of this part; the prototype designation notice may be obtained from local offices of the Wage and Hour Division or from the Internet at [www.wagehour.dol.gov](http://www.wagehour.dol.gov).

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

### § 825.301 Employer designation of FMLA leave.

(a) Employer responsibilities. In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee as provided in § 825.300. In the case of intermittent leave or leave on a reduced schedule, only one such notice is required unless the circumstances regarding the leave have changed. The employer's designation decision must be based only on information received from the employee or the employee's spokesperson (e.g., if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc., may provide notice to the employer of the need to take FMLA leave). In any circumstance where the employer does not have sufficient information about the reason for an employee's use of leave, the employer should inquire further of the employee or the spokesperson to ascertain whether paid leave is potentially FMLA-qualifying. Once the employer has acquired knowledge that the leave is being taken for

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an FMLA required reason, the employer must notify the employee within five business days, absent extenuating circumstances, that the leave is designated and will be counted as FMLA leave.

(b) Employee responsibilities. As noted in §§ 825.302(c) and .303(b), an employee giving notice of the need for FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave and otherwise satisfy the notice requirements set forth in § 825.302 or § 825.303 depending on whether the need for leave is foreseeable or unforeseeable. An employee giving notice of the need for FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine that the leave qualifies under the Act. If the employee fails to explain the reasons, leave may be denied. In many cases, in explaining the reasons for a request to use paid leave, especially when the need for the leave was unexpected or unforeseen, an employee will provide sufficient information for the employer to designate the paid leave as FMLA leave. An employee using accrued paid leave, especially vacation or personal leave, may in some cases not spontaneously explain the reasons or their plans for using their accrued leave. An employee requesting or notifying the employer of an intent to use accrued paid leave, even if for a purpose covered by FMLA, would not need to assert such right either. However, if an employee requesting to use paid leave for an FMLA-qualifying purpose does not explain the reason for the leave -- consistent with the employer's established policy or practice -- and the employer denies the employee's request, the employee will need to provide sufficient information to establish an FMLA-qualifying reason for the needed leave so that the employer is aware of the employee's entitlement (i.e., that the leave may not be denied) and, then, may designate that the paid leave be appropriately counted against

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(substituted for) the employee's 12-week entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for an FMLA-qualifying purpose will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employer may count the leave used after the FMLA-qualifying event against the employee's 12-week entitlement.

(c) Disputes. If there is a dispute between an employer and an employee as to whether paid leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employer. Such discussions and the decision must be documented.

(d) Retroactive designation. If an employer does not designate leave as required by § 825.300, the employer may retroactively designate leave as FMLA leave with appropriate notice to the employee as required by § 825.300 provided that the employer's failure to timely designate leave does not cause harm or injury to the employee. In all cases where leave would qualify for FMLA protections, an employer and an employee can mutually agree that leave be retroactively designated as FMLA leave.

(e) Remedies. If an employer's failure to timely designate leave in accordance with § 825.300 causes the employee to suffer harm, it may constitute an interference with, restraint of or denial of the exercise of an employee's FMLA rights. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered (see § 825.400(c)). For example, if an employer that was put on notice that an employee needed FMLA leave failed to designate the leave properly, but the employee's own serious health condition prevented the employee from returning to work during that time period regardless of the designation, an

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employee may not be able to show that the employee suffered harm as a result of the employer's actions. However, if an employee took leave to provide care for a son or daughter with a serious health condition believing it would not count toward the employee's FMLA entitlement, and the employee planned to later use that FMLA leave to provide care for a spouse who would need assistance when recovering from surgery planned for a later date, the employee may be able to show that harm has occurred as a result of the employer's failure to designate properly. The employee might establish this by showing that he or she would have arranged for an alternative caregiver for the seriously-ill son or daughter if the leave had been designated timely.

### § 825.302 Employee notice requirements for foreseeable FMLA leave.

(a) Timing of notice. An employee must provide the employer at least 30 days' advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or of a family member. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable. For example, an employee's health condition may require leave to commence earlier than anticipated before the birth of a child. Similarly, little opportunity for notice may be given before placement for adoption. Whether the leave is to be continuous or is to be taken intermittently or on a reduced schedule basis, notice need only be given one time, but the employee shall advise the employer as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown. In those cases where the employee does not provide at least 30 days notice of

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foreseeable leave, the employee shall explain the reasons why such notice was not practicable upon a request from the employer for such information.

(b) “As soon as practicable” means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. For example, where an employee learns during the work day on Monday that a scheduled doctor appointment has been rescheduled from Friday to Wednesday of the same week, it would ordinarily be practicable for the employee to provide notice of the schedule change to the employer before the end of the work day. If the employee did not learn of the change in the scheduled appointment until after work hours, the employee should be able to provide the employer with notice the next business day.

(c) Content of notice. An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under the FMLA or even mention the FMLA. The employee must provide sufficient information that indicates that a condition renders the employee unable to perform the functions of the job, or if the leave is for a family member, that the condition renders the family member unable to perform daily activities; the anticipated duration of the absence; and whether the employee or the employee’s family member intends to visit a health care provider or has a condition for which the employee or the employee’s family member is under the continuing care of a health care provider. The employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. In the case of medical conditions, the employer may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave (see § 825.305). An employee has an obligation

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to respond to an employer's questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employer inquiries regarding the leave request may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying.

(d) Complying with employer policy. An employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. For example, an employer may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave. An employee also may be required by an employer's policy to contact a specific individual. Unusual circumstances would include situations such as when an employee is unable to call in due to his/her medical condition and his/her spouse calls the direct supervisor to report the absence instead of calling the human resources department as required by the employer policy. Where an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied. However, FMLA-protected leave may not be delayed or denied where the employer's policy requires notice to be given sooner than set forth in paragraph (a) of this section and the employee provides timely notice as set forth in paragraph (a) of this section.

(e) Scheduling planned medical treatment. When planning medical treatment, the employee must consult with the employer and make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations, subject to the approval of the health care provider. Employees are ordinarily expected to consult with their employers prior to the scheduling of treatment in order to work out a treatment schedule which best suits the needs of both the employer and the employee. If an employee who provides notice of the need to take FMLA

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leave on an intermittent basis for planned medical treatment neglects to consult with the employer to make a reasonable effort to arrange the schedule of treatments so as not to unduly disrupt the employer's operations, the employer may initiate discussions with the employee and require the employee to attempt to make such arrangements, subject to the approval of the health care provider. See §§ 825.203, .205.

(f) In the case of intermittent leave or leave on a reduced leave schedule which is medically necessary, an employee shall advise the employer, upon request, of the reasons why the intermittent/reduced leave schedule is necessary and of the schedule for treatment, if applicable. The employee and employer shall attempt to work out a schedule which meets the employee's needs without unduly disrupting the employer's operations, subject to the approval of the health care provider.

(g) An employer may waive employees' FMLA notice requirements.

### § 825.303 Employee notice requirements for unforeseeable FMLA leave.

(a) Timing of notice. When the approximate timing of the need for leave is not foreseeable, an employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case. Where the need for leave is unforeseeable, it is expected that an employee will give notice to the employer promptly. Notice may be given by the employee's spokesperson (e.g., spouse, adult family member or other responsible party) if the employee is unable to do so personally. For example, if an employee's child has a severe asthma attack and the employee takes the child to the emergency room, the employee would not be required to leave his or her child in order to report the absence while the child is receiving

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emergency treatment. However, if the child's asthma attack required only the use of an inhaler at home followed by period of rest, the employee would be expected to call the employer promptly after ensuring the child has used the inhaler.

(b) Content of notice. An employee shall provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request. The employee need not expressly assert rights under the FMLA or even mention the FMLA. The employee must provide sufficient information that indicates that a condition renders the employee unable to perform the functions of the job, or if the leave is for a family member, that the condition renders the family member unable to perform daily activities; the anticipated duration of the absence; and whether the employee or the employee's family member intends to visit a health care provider or has a condition for which the employee or the employee's family member is under the continuing care of a health care provider. Calling in "sick" without providing more information will not be considered sufficient notice to trigger an employer's obligations under the Act. The employer will be expected to obtain any additional required information through informal means. An employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employer inquiries regarding the leave request may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying.

(c) Complying with employer policy. When the need for leave is not foreseeable, an employee must comply with the employer's usual and customary notice and procedural requirements for requesting leave, except when extraordinary circumstances exist. For example, an employer may require employees to call a designated number or a specific individual to request leave. However, if an employee requires emergency medical treatment, he or she would not be required to follow

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the call-in procedure until his or her condition is stabilized and he or she has access to, and is able to use, a phone. FMLA-protected leave may not be delayed or denied where the employer's policy requires notice to be given sooner than set forth in paragraph (a) of this section and the employee provides timely notice as set forth in paragraph (a) of this section. In the case of a medical emergency requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved.

### § 825.304 Employee failure to provide notice.

(a) Waiver of notice. An employer may waive employees' FMLA notice obligations or the employer's own internal rules on leave notice requirements. If an employer does not waive the employee's obligations under its internal leave rules, the employer may take appropriate action under its internal rules and procedures for failure to follow its usual and customary notification rules as long as the actions are taken in a manner that does not discriminate against employees taking FMLA leave and the rules are not inconsistent with § 825.303(a).

(b) Foreseeable leave -- 30 days. When the need for FMLA leave is foreseeable at least 30 days in advance and an employee fails to give timely advance notice with no reasonable excuse, the employer may delay FMLA coverage until 30 days after the date the employee provides notice. The need for leave and the approximate date leave would be taken must have been clearly foreseeable to the employee 30 days in advance of the leave. For example, knowledge that an employee would receive a telephone call about the availability of a child for adoption at

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some unknown point in the future would not be sufficient to establish the leave was clearly foreseeable 30 days in advance.

(c) Foreseeable leave -- less than 30 days. When the need for FMLA leave is foreseeable fewer than 30 days in advance and an employee fails to give notice as soon as practicable under the particular facts and circumstances, the extent to which an employer may delay FMLA coverage for leave depends on the facts of the particular case. For example, if an employee reasonably should have given the employer two weeks notice but instead only provided one week notice, then the employer may delay FMLA-protected leave for one week (thus, if the employer elects to delay FMLA coverage and the employee nonetheless takes leave one week after providing the notice (i.e., a week before the two week notice period has been met) the leave will not be FMLA-protected).

(d) Unforeseeable leave. When the need for FMLA leave is unforeseeable and an employee fails to give notice in accordance with § 825.303, the extent to which an employer may delay FMLA coverage for leave depends on the facts of the particular case. For example, if it would have been practicable for an employee to have given the employer notice of the need for leave promptly, but instead the employee provided notice two days after the leave began, then the employer may delay FMLA coverage of the leave by two days.

(e) Proper notice required. In all cases, in order for the onset of an employee's FMLA leave to be delayed due to lack of required notice, it must be clear that the employee had actual notice of the FMLA notice requirements. This condition would be satisfied by the employer's proper posting of the required notice at the worksite where the employee is employed and the employer's provision of the required notice in either an employee handbook or annual distribution, as required by § 825.300.

§ 825.305 Medical certification, general rule.

(a) General. An employer may require that an employee's leave to care for the employee's seriously-ill spouse, son, daughter, or parent, or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's ill family member. An employer must give notice of a requirement for medical certification each time a certification is required; such notice must be written notice whenever required by § 825.300(b). An employer's oral request to an employee to furnish any subsequent medical certification is sufficient.

(b) Timing. In most cases, the employer should request that an employee furnish certification from a health care provider at the time the employee gives notice of the need for leave or within five business days thereafter, or, in the case of unforeseen leave, within five business days after the leave commences. The employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration. The employee must provide the requested certification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(c) Complete and sufficient certification. The employee must provide a complete and sufficient medical certification to the employer if required by the employer in accordance with § 825.306. The employer shall advise an employee whenever the employer finds a certification

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incomplete or insufficient, and shall state in writing what additional information is necessary to make the certification complete and sufficient. A certification is considered incomplete if the employer receives a certification, but one or more of the applicable entries have not been completed. A certification is considered insufficient if the employer receives a complete certification, but the information provided is vague, ambiguous or non-responsive. The employer must provide the employee with seven calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any such deficiency. If the deficiencies specified by the employer are not cured in the resubmitted certification, the employer may deny the taking of FMLA leave, in accordance with §825.311. A certification that is not returned to the employer is not considered incomplete or insufficient, but constitutes a failure to provide certification.

(d) Consequences. At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. If the employee fails to provide the employer with a complete and sufficient medical certification, despite the opportunity to cure the certification as provided in paragraph (c) of this section, or fails to provide any certification, the employer may deny the taking of FMLA leave, in accordance with § 825.311. It is the employee's responsibility either to furnish a complete and sufficient certification or to furnish the health care provider providing the certification with any necessary authorization from the employee or the employee's family member in order for the health care provider to release a complete and sufficient certification to the employer to support the employee's FMLA request. This provision will apply in any case where an employer requests a certification permitted by these regulations, whether it is the initial certification, a recertification, a second or third opinion, or a fitness for duty certificate, including

any clarifications necessary to determine if such certifications are authentic and sufficient. See §§ 825.306, .307, .308, and .310.

(e) Annual medical certification. Where the employee's need for leave due to the employee's own serious health condition, or the serious health condition of the employee's spouse, son, daughter, or parent lasts beyond a single leave year (as defined in § 825.200), the employer may require the employee to provide a new medical certification in each subsequent leave year.

§ 825.306 Content of medical certification.

(a) Required information. An employer may require an employee to obtain a medical certification from a health care provider that sets forth the following information:

(1) The name, address, telephone number, and fax number of the health care provider and type of medical practice, including pertinent specialization;

(2) The approximate date on which the serious health condition commenced, and its probable duration;

(3) A statement or description of appropriate medical facts regarding the patient's health condition for which FMLA leave is requested. The medical facts must be sufficient to support the need for leave. Such medical facts may include information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation or treatment (physical therapy, for example), or any other regimen of continuing treatment;

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(4) If the employee is the patient, information sufficient to establish that the employee cannot perform the functions of the employee's job as well as the nature of any other work restrictions, and the likely duration of such inability (see § 825.123(b) and (c));

(5) If the patient is a qualified family member, information sufficient to establish that the family member is in need of care, as described in section 825.124, and an estimate of the frequency and duration of the leave required to care for the family member;

(6) If an employee requests leave on an intermittent or reduced schedule basis for planned medical treatment of the employee or a qualified family member, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the dates and duration of such treatments and any periods of recovery;

(7) If an employee requests leave on an intermittent or reduced schedule basis for the employee's health condition, including pregnancy, that may result in unforeseeable episodes of incapacity, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the frequency and duration of the episodes of incapacity; and

(8) If an employee requests leave on an intermittent or reduced schedule basis to care for a qualified family member, a statement that such leave is medically necessary to care for the family member, as described in §§ 825.124 and 825.203(b), which can include assisting in the family member's recovery, and an estimate of the frequency and duration of the required leave.

(b) DOL has developed an optional form (Form WH-380, as revised) for employees' (or their family members') use in obtaining medical certification, including second and third opinions, from health care providers that meets FMLA's certification requirements. (See Appendix B to these regulations.) This optional form reflects certification requirements so as to permit the

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health care provider to furnish appropriate medical information within his or her knowledge.

Form WH-380, as revised, or another form containing the same basic information, may be used by the employer; however, no information may be required beyond that specified in §§ 825.306, 825.307, and 825.308. In all instances the information on the form must relate only to the serious health condition for which the current need for leave exists.

(c) If an employee is on FMLA leave running concurrently with a workers' compensation absence, and the provisions of the workers' compensation statute permit the employer or the employer's representative to request additional information from the employee's workers' compensation health care provider, the FMLA does not prevent the employer from following the workers' compensation provisions. Similarly, an employer may request additional information in accordance with a paid leave policy or disability plan that requires greater information to qualify for payments or benefits, provided that the employer informs the employee that the additional information only needs to be provided in connection with receipt of such payments or benefits. If the employee fails to provide the information required for receipt of such payments or benefits, the employee's entitlement to take unpaid FMLA leave will not be affected. See § 825.207(a).

(d) If an employee's serious health condition may also be a disability within the meaning of the Americans with Disabilities Act (ADA), the FMLA does not prevent the employer from following the procedures for requesting medical information under the ADA.

(e) While an employee may choose to comply with the certification requirement by providing the employer with an authorization release or waiver allowing the employer to communicate directly with the employee's health care provider, the employee may not be required to provide such an authorization release or waiver. In all instances in which certification is requested, it is

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the employee's responsibility to provide the employer with complete and sufficient certification and failure to do so may result in the denial of FMLA leave. See § 825.305(d).

### § 825.307 Authentication and clarification of medical certification.

(a) Clarification and authentication. If an employee submits a complete and sufficient certification signed by the health care provider, the employer may not request additional information from the employee's health care provider. However, the employer may contact the employee's health care provider for purposes of clarification and authentication of the medical certification (whether initial certification or recertification) after the employer has given the employee an opportunity to cure any deficiencies as set forth in § 825.305(c). For purposes of these regulations, "authentication" means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document; no additional medical information may be requested and the employee's permission is not required. "Clarification" means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response. Employers may not ask health care providers for additional information beyond that required by the certification form. Contact between the employer and the employee's health care provider for purposes of clarification must comply with the requirements of the Health Insurance Portability and Accountability Act ("HIPAA") Privacy Rule (see 45 CFR parts 160 and 164). If an employee chooses not to provide the employer with authorization allowing the employer to clarify the certification with the employee's health care provider, and does not otherwise clarify the certification, the

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employer may deny the taking of FMLA leave if the certification is unclear. See § 825.305(d). It is the employee's responsibility to provide the employer with a complete and sufficient certification or to provide the health care provider with sufficient authorization from the employee or the employee's family member to clarify the certification so that it is complete and sufficient.

### (b) Second opinion.

(1) An employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employer's expense. Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits of the Act, including maintenance of group health benefits. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave and may be treated as paid or unpaid leave under the employer's established leave policies. In addition, the consequences set forth in § 825.305(d) will apply if the employee or the employee's family member fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a second opinion in order to render a sufficient and complete second opinion.

(2) The employer is permitted to designate the health care provider to furnish the second opinion, but the selected health care provider may not be employed on a regular basis by the employer. The employer may not regularly contract with or otherwise regularly utilize the services of the health care provider furnishing the second opinion unless the employer is located in an area where access to health care is extremely limited (e.g., a rural area where no more than one or two doctors practice in the relevant specialty in the vicinity).

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(c) Third opinion. If the opinions of the employee's and the employer's designated health care providers differ, the employer may require the employee to obtain certification from a third health care provider, again at the employer's expense. This third opinion shall be final and binding. The third health care provider must be designated or approved jointly by the employer and the employee. The employer and the employee must each act in good faith to attempt to reach agreement on whom to select for the third opinion provider. If the employer does not attempt in good faith to reach agreement, the employer will be bound by the first certification. If the employee does not attempt in good faith to reach agreement, the employee will be bound by the second certification. For example, an employee who refuses to agree to see a doctor in the specialty in question may be failing to act in good faith. On the other hand, an employer that refuses to agree to any doctor on a list of specialists in the appropriate field provided by the employee and whom the employee has not previously consulted may be failing to act in good faith. In addition, the consequences set forth in § 825.305(d) will apply if the employee or the employee's family member fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a third opinion in order to render a sufficient and complete third opinion.

(d) Copies of opinions. The employer is required to provide the employee with a copy of the second and third medical opinions, where applicable, upon request by the employee. Requested copies are to be provided within five business days unless extenuating circumstances prevent such action.

(e) Travel expenses. If the employer requires the employee to obtain either a second or third opinion the employer must reimburse an employee or family member for any reasonable "out of

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pocket” travel expenses incurred to obtain the second and third medical opinions. The employer may not require the employee or family member to travel outside normal commuting distance for purposes of obtaining the second or third medical opinions except in very unusual circumstances.

(f) Medical certification abroad. In circumstances when the employee or a family member is visiting in another country, or a family member resides in another country, and a serious health condition develops, the employer shall accept a medical certification as well as second and third opinions from a health care provider who practices in that country.

### § 825.308 Recertifications.

(a) 30-day rule. Generally, an employer may request recertification no more often than every 30 days and only in connection with an absence by the employee.

(b) More than 30 days. If the medical certification indicates that the minimum duration of incapacity is more than 30 days, an employer must wait until that minimum duration expires before requesting a recertification, unless paragraph (c) applies. For example, if the medical certification states that an employee will be unable to work, whether continuously or on an intermittent basis, for 40 days, the employer must wait 40 days before requesting a recertification. In all cases, an employer may request a recertification every six months in connection with an absence by the employee.

(c) Less than 30 days. An employer may request recertification in less than 30 days if:

- (1) The employee requests an extension of leave;
- (2) Circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of the absence, the nature or severity of the illness, complications). For

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example, if a medical certification stated that an employee would need leave for one to two days when the employee suffered a migraine headache and the employee's absences for his/her last two migraines lasted four days each, then the increased duration of absence might constitute a significant change in circumstances allowing the employer to request a recertification in less than 30 days. Likewise, if an employee had a pattern of using unscheduled FMLA leave for migraines in conjunction with his/her scheduled days off, then the timing of the absences also might constitute a significant change in circumstances sufficient for an employer to request a recertification more frequently than every 30 days; or

(3) The employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification. For example, if an employee is on FMLA leave for four weeks due to the employee's knee surgery, including recuperation, and the employee plays in company softball league games during the employee's third week of FMLA leave, such information might be sufficient to cast doubt upon the continuing validity of the certification allowing the employer to request a recertification in less than 30 days.

(d) Timing. The employee must provide the requested recertification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(e) Content. The employer may ask for the same information when obtaining recertification as that permitted for the original certification as set forth in § 825.306. The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or adequate authorization to the health care provider) in the recertification process as in the initial certification process. See § 825.305(d). As part of the information allowed to be

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obtained on recertification, the employer may provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern.

(f) Any recertification requested by the employer, shall be at the employee's expense unless the employer provides otherwise. No second or third opinion on recertification may be required.

### § 825.309 Intent to return to work.

(a) An employer may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work. The employer's policy regarding such reports may not be discriminatory and must take into account all of the relevant facts and circumstances related to the individual employee's leave situation.

(b) If an employee gives unequivocal notice of intent not to return to work, the employer's obligations under FMLA to maintain health benefits (subject to COBRA requirements) and to restore the employee cease. However, these obligations continue if an employee indicates he or she may be unable to return to work but expresses a continuing desire to do so.

(c) It may be necessary for an employee to take more leave than originally anticipated. Conversely, an employee may discover after beginning leave that the circumstances have changed and the amount of leave originally anticipated is no longer necessary. An employee may not be required to take more FMLA leave than necessary to resolve the circumstance that precipitated the need for leave. In both of these situations, the employer may require that the employee provide the employer reasonable notice (i.e., within two business days) of the changed

circumstances where foreseeable. The employer may also obtain information on such changed circumstances through requested status reports.

§ 825.310 Fitness-for-duty certification.

(a) As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employer may have a uniformly-applied policy or practice that requires all similarly-situated employees (i.e., same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work. The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or providing sufficient authorization to the health care provider to provide the information directly to the employer) in the fitness-for-duty certification process as in the initial certification process. See § 825.305(d).

(b) If State or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied. Similarly, requirements under the Americans with Disabilities Act (ADA) that any return-to-work physical be job-related and consistent with business necessity apply. For example, an attorney could not be required to submit to a medical examination or inquiry just because her leg had been amputated. The essential functions of an attorney's job do not require use of both legs; therefore such an inquiry would not be job related. An employer may require a warehouse laborer, whose back impairment affects the ability to lift, to be examined by an orthopedist, but may not require this employee to

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submit to an HIV test where the test is not related to either the essential functions of his/her job or to his/her impairment.

(c) An employer may seek fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification from the employee's health care provider must certify that the employee is able to resume work. An employer may require that the certification address the employee's ability to perform the essential functions of the employee's job by providing a list of essential functions with the eligibility notice required by § 825.300(b). If the employer timely provides such a list, the employee's health care provider must certify that the employee can perform the identified essential functions of his or her job. Following the procedures set forth in § 825.307(a), the employer may contact the employee's health care provider for purposes of clarifying and authenticating the fitness-for-duty certification. Clarification may be requested only for the serious health condition for which FMLA leave was taken. The employer may not delay the employee's return to work while contact with the health care provider is being made.

(d) The cost of the certification shall be borne by the employee, and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification.

(e) The eligibility notice required in § 825.300(b) shall advise the employee if the employer will require fitness-for-duty certification to return to work. No second or third fitness-for-duty certification may be required.

(f) An employer may delay restoration to employment until an employee submits a required fitness-for-duty certification unless the employer has failed to provide the notice required in paragraph (e) of this section. If an employer provides the notice required, an employee who does

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not provide a fitness-for-duty certification or request additional FMLA leave is no longer entitled to reinstatement under the FMLA. See § 825.311(d).

(g) An employer is not entitled to certification of fitness to return to duty for each absence taken on an intermittent or reduced leave schedule as set forth in §§ 825.203-.205. However, an employer is entitled to a certification of fitness to return to duty for such absences up to once every 30 days if reasonable safety concerns exist regarding the employee's ability to perform his or her duties, based on the serious health condition for which the employee took such leave. The employer may not terminate the employment of the employee while awaiting such a certification of fitness to return to duty for an intermittent or reduced schedule leave absence.

### § 825.311 Failure to provide medical certification.

(a) Foreseeable leave. In the case of foreseeable leave, if an employee fails to provide certification in a timely manner as required by § 825.305, then an employer may deny FMLA coverage until the required certification is provided. For example, if an employee has 15 days to provide a certification and does not provide the certification for 45 days without sufficient reason for the delay, the employer can deny FMLA protections for the 30 day period following the expiration of the 15 day time period, if the employee takes leave during such period.

(b) Unforeseeable leave. In the case of unforeseeable leave, an employer may deny FMLA coverage for the requested leave if the employee fails to provide a medical certification within 15 calendar days from receipt of the request for certification unless not practicable due to extenuating circumstances. For example, in the case of a medical emergency, it may not be practicable for an employee to provide the required certification within 15 calendar days. Absent

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such extenuating circumstances, if the employee fails to timely return the certification, the employer can deny FMLA protections for the leave following the expiration of the 15-day time period until a sufficient certification is provided. If the employee never produces the certification, the leave is not FMLA leave.

(c) Recertification. An employee must provide recertification within the time requested by the employer (which must allow at least 15 calendar days after the request) or as soon as practicable under the particular facts and circumstances. If an employee fails to provide a recertification within a reasonable time under the particular facts and circumstances, then the employer may deny continuation of the FMLA leave protections until the employee produces a sufficient recertification. If the employee never produces the recertification, the leave is not FMLA leave.

(d) When requested by the employer pursuant to a uniformly applied policy for similarly-situated employees, the employee must provide medical certification at the time the employee seeks reinstatement at the end of FMLA leave taken for the employee's serious health condition, that the employee is fit for duty and able to return to work (see § 825.310(a)) if the employer has provided the required notice (see § 825.300(c)); the employer may delay restoration until the certification is provided. In this situation, unless the employee provides either a fitness-for-duty certification or a new medical certification for a serious health condition at the time FMLA leave is concluded, the employee may be terminated. See also § 825.213(a) (3).

### § 825.500 Record-keeping requirements.

(a) FMLA provides that covered employers shall make, keep, and preserve records pertaining to their obligations under the Act in accordance with the recordkeeping requirements of section

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11(c) of the Fair Labor Standards Act (FLSA) and in accordance with these regulations. FMLA also restricts the authority of the Department of Labor to require any employer or plan, fund or program to submit books or records more than once during any 12-month period unless the Department has reasonable cause to believe a violation of the FMLA exists or the DOL is investigating a complaint. These regulations establish no requirement for the submission of any records unless specifically requested by a Departmental official.

(b) Form of records. No particular order or form of records is required. These regulations establish no requirement that any employer revise its computerized payroll or personnel records systems to comply. However, employers must keep the records specified by these regulations for no less than three years and make them available for inspection, copying, and transcription by representatives of the Department of Labor upon request. The records may be maintained and preserved on microfilm or other basic source document of an automated data processing memory provided that adequate projection or viewing equipment is available, that the reproductions are clear and identifiable by date or pay period, and that extensions or transcriptions of the information required herein can be and are made available upon request. Records kept in computer form must be made available for transcription or copying.

(c) Items required. Covered employers who have eligible employees must maintain records that must disclose the following:

(1) Basic payroll and identifying employee data, including name, address, and occupation; rate or basis of pay and terms of compensation; daily and weekly hours worked per pay period; additions to or deductions from wages; and total compensation paid.

(2) Dates FMLA leave is taken by FMLA eligible employees (e.g., available from time records, requests for leave, etc., if so designated). Leave must be designated in records as FMLA

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leave; leave so designated may not include leave required under State law or an employer plan which is not also covered by FMLA.

(3) If FMLA leave is taken by eligible employees in increments of less than one full day, the hours of the leave.

(4) Copies of employee notices of leave furnished to the employer under FMLA, if in writing, and copies of all eligibility notices given to employees as required under FMLA and these regulations (see § 825.300(b)). Copies may be maintained in employee personnel files.

(5) Any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves.

(6) Premium payments of employee benefits.

(7) Records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and for the disagreement.

(d) Covered employers with no eligible employees must maintain the records set forth in paragraph (c)(1) of this section.

(e) Covered employers in a joint employment situation (see § 825.106) must keep all the records required by paragraph (c) of this section with respect to any primary employees, and must keep the records required by paragraph (c)(1) with respect to any secondary employees.

(f) If FMLA-eligible employees are not subject to FLSA's recordkeeping regulations for purposes of minimum wage or overtime compliance (i.e., not covered by or exempt from FLSA), an employer need not keep a record of actual hours worked (as otherwise required under FLSA, 29 CFR 516.2(a)(7)), provided that:

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(1) eligibility for FMLA leave is presumed for any employee who has been employed for at least 12 months; and

(2) with respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written record maintained in accordance with paragraph (b) of this section.

(g) Records and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements (see 29 CFR 1630.14(c)(1)), except that:

(1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;

(2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and

(3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.