SAN ANTONIO HUMAN RESOURCES MANAGEMENT ASSOCIATION

EMPLOYMENT LAW UPDATE
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THE FAMILY MEDICAL LEAVE ACT: RECENT DEVELOPMENTS AND COMMON PITFALLS

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In summary, the Family Medical Leave Act ("FMLA" or "Act") permits eligible employees working for covered employers to take a set amount of leave for qualifying events without the risk of losing their job. Specifically, if an employer is covered by the Act, an eligible employee is entitled to take up to 12 weeks of unpaid leave every 12 months to bond with a new child, care for their own serious health condition, care for a family member with a serious health condition, or handle qualifying exigencies arising from a family member's military duty. Moreover, employees are entitled to take up to 26 weeks, in a single 12-month period, to care for a family member who suffers or aggravates a serious illness or injury in the line of duty while on active military duty. *See* 29 U.S.C. §2601 *et seq.*

Ideally, the Act helps employees balance the demands of work with personal and family needs. 29 U.S.C. §2601(b); 29 C.F.R. §825.101. With this purpose in mind, the law includes mandates that assist in balancing the needs of the employer and the employee while recognizing that an employee who needs time off for health concerns may not be able to meet the Act's requirements perfectly. Thus, the Act imposes many obligations on the employer. If the FMLA is violated, the Act provides for two types of claims: (1) interference claims, which include interfering with or denying the employee's rights under the law; and (2) retaliation claims, which include actions taken against an employee for engaging in protected activities under Act. 29 U.S.C. §2615; 29 C.F.R. §825.220. To avoid liability, it is imperative that an employer, and pertinent individuals, be familiar with an employer's obligations under the FMLA.

This paper should serve as a step-by-step overview of the FMLA process; however, it should **not** serve as legal advice or a substitute for legal advice. Every circumstance is different and every fact important. If you have concerns regarding your obligations under the FMLA, you should consult with an attorney. Namely, mishandling FMLA-leave issues can give rise to lawsuits not only against the employer, but against an individual who made the wrong decision. 29 U.S.C. §2611(4)(ii)(I); *Brewer v. Jefferson-Pilot Standard Life Ins. Co.*, 333 F.Supp.2d 433 (M.D. N.C. 2004).

I. ARE YOU A COVERED EMPLOYER?

A. THE ACT'S DEFINITION OF EMPLOYER

Under the Act, an employer means any person engaged in commerce, or an industry 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. 29 U.S.C. §2611(4)(A); 29 C.F.R. §825.104. When determining the number of employees, the employer must count: (1) full-time employees; (2) part-time employees; (3) employees on leave that are expected to return; and (4) joint employees such as temporary employees. 29 C.F.R. §825.105; 29 C.F.R. §825.106. The employer should not count the following as employees: (1) independent contractors; (2) employees working outside the United States or its territories; and (3) employees hired or terminated during a calendar week for that week.

Importantly, the 20 calendar weeks do not have to be consecutive so long as they occur in the current or preceding year. 29 C.F.R. §825.105(e). For example, employers that employ persons only during certain seasons may be covered if the 20-week requirement is met. Likewise, if an employer reduces its workforce down below 50 employees, but had 50 employees for 20 weeks, it will be a covered employer under the Act. *See* 29 C.F.R. §825.105(f).

B. WAYS TO AVOID COMMON PITFALLS

- ✓ Make a determination as to whether the employer is covered and re-evaluate that determination if the workforce changes.

- ✓ Count joint employees when making a determination regarding employer coverage.

II. IS THE EMPLOYEE COVERED?

A. THE ACT'S DEFINITION OF EMPLOYEE

Not all employees who work for a covered employer are entitled to leave under the Act. To be eligible to take FMLA leave, an employee must:

(1) have been employed at a worksite where 50 or more employees are employed by the employer within a 75-mile radius;

(2) have been employed for at least 12 months; and

(3) have worked at least 1,250 hours in the 12-month period preceding the leave.

29 U.S.C. §2611(2); 29 C.F.R. §825.110(a).

With regard to the 75-mile radius analysis, the determination should be made at the time of the employee's request; therefore, even if the company makes reductions in force after the initial request, this element would still be met. Moreover, when measuring the 75-mile radius remember: (1) unconnected buildings within the city limits are considered one worksite; (2) if there are 50 employees within 75 miles of any related building, all employees who work in one the buildings meet this element; (3) the 75 miles is measured by actual routes that can be traveled between worksites not as the "crow flies"; (4) if an employee does not have a "fixed" worksite, consider the employee's worksite to be where the employee reports or from work is assigned to the employee. 29 C.F.R. §825.110(e); 29 C.F.R. §825.111.

When determining whether the employee has worked for the company for 12 months, the analysis is made as of the date the employee will begin taking leave. All months the employee has worked for the employer are counted; the months do not need to be consecutive. Even if an employee had a break in service, all of his/her months count so long as the break in service was less than 7 years. If the employee had a break in service that last 7 or more years, the employer does not need to count the months the employee was with the company as part of the 12 months unless the break in service was due to USERRA-covered service or pursuant to a collective bargaining agreement, which states that the employer was agreeing to bring the employee back to work. Furthermore, an employer should count

the following when making this determination: (1) any week the employee works toward the 12 month requirement even if they came in only one day that week; (2) time the employee took for military leave; and (3) leave time if your company provided compensation or benefits during the employee's leave time. An employer does not need to count the following in the 12-month analysis: (1) time an employee is on suspension; (2) layoff periods; or (3) leave periods where no compensation or benefits were paid. 29 C.F.R. §825.110(b).

Finally, when making the determination regarding the number of hours worked, the employer must make the determination as of the date the employee will begin taking leave. The following count toward the 1,250-hour minimum: (1) hours the employee was paid for working; (2) overtime hours worked for exempt employees even though compensation is not received; (3) work-related travel time; (3) time at mandatory or required training sessions; and (5) hours the employee would have worked if she was not on military leave. 29 C.F.R. §825.110(c).

Importantly, in 2013, special rules were added for the hours of service requirement for airline flight crew employees. Specifically, the hours of service criteria will be met if during the previous 12-month period the airline flight crew employee has worked or been paid for not less than 60% of the applicable monthly guarantee, or the equivalent, and has worked or been paid for not less than 504 hours (not including commute time, vacation, sick, or medical leave). 29 U.S.C. §2611(D); 29 C.F.R. §825.801.

B. WAYS TO AVOID COMMON PITFALLS

- ✓ Know that although the use of intermittent leave may affect one's 1,250-hours requirement, if the employee needs additional leave for the same condition, the employee remains eligible. If the leave is needed for a different condition, the employer can count the use of intermittent leave against the 1,250-hour requirement.
- ✓ Keep track of hours worked by FLSA exempt employees for the purpose of FMLA eligibility only.
- ✓ Make the 75-mile determination as of the date when the request is made.
- ✓ Make the 12-month and 1,250 hour requirement as of the date of the requested leave.

III. IS THE LEAVE FMLA-PROTECTED?

A. SERIOUS HEALTH CONDITION

An employee is entitled to leave under the Act to care for his or her own serious health condition, or to care for a family member who has a serious health condition. If any employee is requesting leave to care for a family member, that family member must be the employee's spouse, parent or child. Unmarried copies are not entitled to leave to care for each other. Importantly, the Department of Labor ("DOL") has clarified that a "parent" includes those who have taken day-to-day care of, or provide financial support for, a child, whether or not the person has a

biological or legal relationship to the child. 29 U.S.C. §2611(7, 12); 29 C.F.R. §825.122. Moreover, a child includes a biological, adopted, or foster child; a step-child; a legal ward; or a child of a person standing in *loco parentis* of a child who is: (1) under 18 years of age; or (2) 18 years of age or older and incapable of self-care because of a mental or physical disability. 29 U.S.C. §2611(12); 29 C.F.R. §825.122(d).

If any employee is requesting leave for his own serious health condition, the employee must be unable to perform the functions of his/her job. The employer may look to the employee's essential job functions to make this determination. Moreover, "caring" for a family member means that the employee is providing physical or psychological care, arranging for care or changes in care, providing necessary transportation or filling in for other care providers. The employee requesting leave does not have to be the only person available to provide care. 29 C.F.R. §825.124.

The Act defines a "serious health condition" as an illness, injury, impairment, or physical or mental condition that involves: (1) inpatient care in a hospital, hospice or residential medical care facility; or (2) continuing treatment by a health care provider. *See* 29 U.S.C. §2611(11). The DOL regulations provide additional guidance on what constitutes such a condition. That is, a "serious health condition" includes the following:

(1) inpatient care at a hospital, hospice, or residential medical care facility no matter the amount of time of incapacity and any period of incapacity or subsequent treatment connected to the inpatient care;

(2) incapacity for more than three consecutive full calendar days *with* continuing treatment by a health care provider;

(3) incapacity relating to pregnancy or prenatal care;

(4) incapacity or treatment for chronic serious health conditions;

(5) permanent or long-term incapacity for a condition for which treatment may not be effective; and

(6) absence for multiple treatments for either: (a) restorative surgery following an injury or accident; or (b) a condition that would require an absence of more than three days if not treated.

29 C.F.R. §825.102; 29 C.F.R. §825.114.

Pursuant to the applicable regulations and case precedent, a person is incapacitated if she is unable to work, attend school or perform regular daily actions due to the condition, treatment for the condition or recovery from the condition. 29 C.F.R. §825.113(b). Moreover, the applicable regulations define "continuing treatment" as follows: (1) at least 2 treatments, by a health care provider, a nurse of the health care provider, or a provider of heath care services under order/referral of the health care provider with the first treatment occurring within 7 days of the first day of incapacity (barring extenuating circumstances) and the second treatment occurring no later than 30 days of the first day of incapacity; or (2) at least 1 treatment by a health care provider, within 7 days of the first day of

incapacity which results in a regimen of continuing treatment under the provider's supervision. 29 C.F.R. §825.102; 29 C.F.R. §825.115. Importantly, "treatment" means an actual in-person appointment with the health care provider. 29 C.F.R. §825.115(a)(3). Examples of a continuing regimen of treatment include prescription medications and any form of therapy. Furthermore, a "chronic serious health condition" under the FMLA: (1) requires at least 2 visits per year with a health care provider or nurse acting under a provider's supervision; (2) continues over an extended period of time; and (3) may cause episodic incapacity. 29 C.F.R. §825.115(c).

B. LEAVE FOR A NEW CHILD

Under the Act, both the mother and father are eligible to take leave for the birth, adoption (via a licensed placement agency or private arrangement) or foster placement (state involvement required) of a child. 29 C.F.R. §825.120; 29 C.F.R. §825.121; 29 C.F.R. §825.122(f, g). One purpose of this form of leave is to allow a time period for bonding or caring for the child. Parents who adopt or serve as foster parents are permitted to take leave for the following: (1) to attend adoption or foster proceedings; (2) to attend counseling sessions; (3) to meet with attorneys; (4) to meet with doctors; (5) to attend court hearings; or (6) to attend to other matters necessary for the placement of the child. 29 C.F.R. §825.121(a)(1). The employee must conclude the parenting leave within one year of the date of the birth, adoption or foster placement. 29 C.F.R. §825.120(a)(2); 29 C.F.R. §825.121(a)(2).

Remember that a "parent" includes those who have taken day-to-day care of, or provide financial support for, a child, whether or not the person has a biological or legal relationship to the child. *See* 29 U.S.C. §2611(7, 12). Therefore, an employee who intends to act as a child's parent is entitled to new child leave. Under this definition, the following may qualify as parents under the FMLA: (1) unmarried same or opposite sex partners of the child; (2) step-parents of the child; and (3) grandparents of the child. 29 C.F.R. §825.102.

C. MILITARY-RELATED LEAVE

1. MILITARY CAREGIVER LEAVE (2013 CHANGES)

An eligible employee who is the spouse, child, parent or next of kin of a covered servicemember with a serious injury or illness incurred in the line of duty on active duty for which the servicemember is receiving medical treatment, recuperation or therapy, is on outpatient status, or is on temporary disability retired list, may take time to care for the servicemember. 29 C.F.R. §825.127. This form of leave is available only once per servicemember, per injury. 29 C.F.R. §825.127(e)(2). This leave applies to the parent of an adult child. 29 C.F.R. §825.222(i); 29 C.F.R. §825.127(d)(1). Moreover, unlike with other forms of leave, an employee is entitled to leave if they are the "next of kin" to the covered family member. 29 C.F.R. §825.122(e); 29 C.F.R. §825.127(d)(3).

A covered servicemember under the Act is any person who is in the regular Armed Forces, the National Guard and Reserves. 29 C.F.R. §825.122(a)(1); 29 C.F.R. §825.127(b). Due to 2013 changes, the definition of "servicemember" includes a covered veteran who was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the veteran. Importantly, the period between enactment of this rule on October 28, 2009 and the effective date of the 2013 Final Rule is excluded in the determination of the five-year period for covered veteran status. 29 U.S.C. §2611(15); 29 C.F.R. §825.122(a)(2); 29 C.F.R. §825.127(b).

With regard to a current servicemember, a "serious injury or illness" means an injury or illness incurred by a covered servicemember in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of his/her office, grade, rank, or rating, including injuries or illnesses that existed before the beginning of the member's active duty and were aggravated by service in the line of duty on active duty. 29 C.F.R. §825.127(c)(1). Moreover, with regard to a covered veteran, a "serious injury or illness" means an injury or illness that was incurred or aggravated by the member in the line of duty on active duty in the Armed Forces and manifested itself before or after the member became a veteran and is: (1) a continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank or rating; (2) a physical or mental condition for which the covered veteran has received a VA Service Related Disability Rating ("VASRD") of 50 percent or greater and such VASRD rating is based, in whole or in part, on the condition precipitating the need for caregiver leave; (3) a physical or mental condition that substantially impairs the veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service or would do so absent treatment; or (4) an injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers. 29 C.F.R. §825.127(c)(2).

2. QUALIFYING EXIGENCY LEAVE (2013 CHANGES)

An eligible employee may take FMLA leave for qualifying exigencies arising out of the fact that the employee's family member (spouse, child or parent) is on active duty or has been notified of an impending call or order to covered active duty. 29 C.F.R. §825.126. For purposes of this type of leave, adult children qualify as a family member. 29 C.F.R. §825.122(h). Under the FMLA, an employee may take qualifying exigency leave for the following reasons:

(1) to address issues that arise from short notice deployment;

(2) to attend military events related to the family member's active duty such as official events related to active duty or to attend family support programs promoted by the military;

(3) to arrange for childcare for the family member's child, to provide childcare for the family member's child on an urgent basis due to the active duty, to transfer the family member's child to a new school/day care or to attend meetings with school/day care staff regarding the family member's child if the meeting is necessitated due to the active duty (for this type of leave, the child must be under the age of 18 or incapable of self-care due to a disability);

(4) to attend to financial and legal arrangements needed as a result of the active duty such as preparing a will, executing a power of attorney, transferring bank accounts and the like;

(5) to attend counseling for the employee, for the family member or the family member's child if the need for counseling arises out of the family member's active duty;

(6) to be with a family member that is on Rest and Recuperation for no more than 15 calendar days;

(7) to attend post-deployment activities sponsored by the military or to attend to matters arising from the death of a family member on active duty for up to 90 days;

(8) to care for a family member's parent who is incapable of self-care when the care is necessitated by the member's covered active duty, which includes arranging for alternative care, providing care on an immediate need basis, admitting or transferring the parent to a care facility, or attending meetings with state at the parent's care facility; and

(9) to attend to additional activities that both the employer and employee agree is a qualifying exigency.

29 C.F.R. §825.126(b)(1-9).

To qualify for this leave, the employee's family member must be a member of the National Guard, Reserves or regular Armed Forces. If a retired member of the regular Armed Forces is called to duty, the leave is available. Additionally, this leave is available for family members retired after 20 years in the Reserves and who are called to active duty. 29 C.F.R. §825.126. In 2013 the subject regulation changed to provide that "active duty" requires deployment to a foreign country or international waters. 29 U.S.C. §2611(14); 29 C.F.R. §825.126(a)(3). Finally, for those in the National Guard or Reserves, the family member must be serving in support of a contingency operation, under a federal call or an order to active duty. 29 C.F.R. §825.126(a)(2).

D. WAYS TO AVOID COMMON PITFALLS

- ✓ Be sure to recognize that the FMLA may apply to an employee's leave request. Do not play doctor. All that is required is that the employer recognizes the FMLA may be applicable.

- ✓ Know that a health care provider is any provider from whom the employer or the employer's group health plan will accept certification of a serious health condition for verifying a claim for health care benefits. 29 C.F.R. §825.102; 29 C.F.R. §825.125.

- ✓ Remember that a female employee may take leave for the birth of a child as well as for conditions related to pregnancy or prenatal care. *See* 29 C.F.R. §825.120(a)(4).

- ✓ Know that when a parent requests new child leave, the parent does not need to show the child is sick.

- ✓ Remember that after the birth of a child, an employee may be entitled to another form of leave if complications arise from the birth of the child or for the care of the child.

- ✓ Know that a husband can take leave to care for the serious health condition of his wife related to her pregnancy. 29 C.F.R. §825.120(a)(5).

- ✓ Remember that the "three-day" rule does not apply to all serious health conditions, only one type of serious health condition.

- ✓ Know that an employer is required to provide FMLA leave for substance abuse treatment, if it qualifies as a serious health condition, but does not need to provide leave for the effects of substance abuse. 29 C.F.R. §825.119.

- ✓ Remember that military-related leave applies to more family members than other forms of leave such as grandparents and next of kin.

- ✓ Know that it is not an employer's job to determine whether a person was injured in the line of duty on active duty. Rather, this determination is made by the family member's health care provider or by an authorized representative of the Defense Department if the health care provider cannot make that call.

IV. HOW MUCH LEAVE IS PERMITTED AND HOW CAN THE LEAVE BE TAKEN?

A. AMOUNT OF TIME PERMITTED

Generally, the Act allows a total of 12 weeks of leave for qualifying circumstances in a 12-month period; however, if the employee is taking military caregiver leave, the employee may take up to 26 weeks to care for the servicemember in a single 12-month period. 29 C.F.R. §825.127(e); 29 C.F.R. §825.200(a). The general 12-week leave allotment renews every 12-month period; however, the 26-week military caregiver allotment is available only once per servicemember per injury. 29 C.F.R. §825.127(e)(2); 29 C.F.R. §825.200. An employee can never take more than 12 weeks in one 12-month period unless the employee is taking military caregiver leave, which allows the employee a total of 26 weeks in one 12-month period for all types of leave combined, but no more than 12 weeks for leave other than military caregiver leave. 29 C.F.R. §825.127(e)(3).

With the exception of military caregiver leave, the 12-month period can be measured in the following ways: (1) the calendar year; (2) any fixed 12-month period (fiscal year, anniversary date); (3) 12 months counted from the date the employee begins FMLA leave ("counting forward" method); or (4) twelve months backwards from the date an employee uses the leave ("rolling" leave year). 29 C.F.R. §825.200(b). For military caregiver leave, the employer is required to begin the 12-month period from the date the employee begins leave. 29 C.F.R. §825.127(e)(1). With these mandates in mind, no matter which way an employer measures the general 12-month period, it must define the method it is using in its FMLA policy, use the same method for all employees and give employees 60-days notice if it intends to change the way it measures the 12-month period. 29 C.F.R. §825.200(d). If the employer does not define the method it is using it its FMLA policy, the employee will be permitted to use the method that benefits the employee the most. 29 C.F.R. §825.200(e).

With regard to airline flight crew employees, an employee is entitled to 72 days for one or more of the FMLA-qualifying reasons other than military caregiver leave and 156 days for military caregiver leave. 29 C.F.R. § 825.802.

B. INTERMITTENT AND REDUCED-SCHEDULE

The Act provides that leave taken for a "serious health condition" or a military caregiver leave can be taken intermittently or on a reduced schedule basis if it is medically necessary. The FMLA also provides that employees may take intermittent or reduced-schedule leave for military qualifying exigency leave if necessary. If new child leave is taken, the leave can be taken intermittently or on a reduced schedule only if the employer agrees unless the employee is a foster parent taking leave for separately placed children. 29 C.F.R. §825.120(b); 29 C.F.R. §825.121(b); 29 C.F.R. §825.202; 29 C.F.R. §825.203.

Importantly, the Act provides that the minimum increment of FMLA leave to be used when taken intermittently or on a reduced schedule as an increment no greater than the shortest period of time that the employer uses to account for other forms of leave, provided that is not greater than one hour; however, the 2013 regulation provides that an employer may not require the employee to take more leave than necessary to address the circumstances that precipitated the need for leave. 29 C.F.R. §825.205. Additionally, employers must account for FMLA leave for intermittent or reduced schedule leave for airline flight crew employees in an increment no greater than one day. 29 C.F.R. §825.802.

An employee who needs intermittent or reduced-schedule leave must try to schedule leave so that it does not disrupt the employer's operations. For example, an employer can ask the employee to reschedule an appointment or procedure if the employer will be completely understaffed. Of course, if the employee's health care provider will not approve the rescheduling of an appointment or procedure, the employer cannot require it. 29 C.F.R. §825.203; 29 C.F.R. §825.302(e).

Finally, an employer can transfer an employee to another position that would best accommodate the reduced-schedule leave. If the employer does so, it must provide the same pay and benefits and the employee must be qualified for the position. Most importantly, although the job duties do not have to be the same, the transfer should not serve as a pseudo-demotion, which would discourage employees from seeking FMLA leave. The employee must be restored to the same or equivalent position after the leave ends. 29 C.F.R. §825.120(b); 29 C.F.R. §825.204.

C. WAYS TO AVOID COMMON PITFALLS

- ✓ Remember that if an employer employs both a mother and father, the employer can require the parents share the 12-weeks permitted for a new child, but that each parent is entitled to 12-weeks of leave to care for their own serious health condition. 29 U.S.C. §2612(f); 29 C.F.R. §825.120(a)(3); 29 C.F.R. §825.121(a)(3); 29 C.F.R. §825.202.

- ✓ Maintain accurate records regarding how much time each parent has for other types of leave after the shared leave is taken.

- ✓ Know that an employer cannot require unmarried parents who both work for the employer to share leave entitlement.

- ✓ Remember that employees entitled to military caregiver leave may take other types of FMLA leave, but can take no more than 26 weeks off, total, in a single 12-month period for all leave under the Act.

- ✓ Know that if an employer employs spouses who are eligible for military caregiver leave, the employer may require the employees to share their military caregiver leave entitlement. 29 C.F.R. §825.127(f).

- ✓ Make sure employees that are on FMLA leave are not working because time spent working cannot be counted toward FMLA leave.

- ✓ Remember that if an employer requests that the employee take more time than is needed, the time taken over and above the time needed cannot be counted as FMLA leave.

- ✓ Know that if an employee takes a full week of leave, all actual workweeks are counted even if a holiday falls within one of the weeks. 29 C.F.R. §825.200(h).

- ✓ Remember for purposes of intermittent leave an employee's workweek is based on the number of hours that person works per week. For example, if a person works 44 hours per week, they are entitled to 528 hours of leave based on the 12-week allotment.

- ✓ Remember for purposes of intermittent leave an exempt employee's workweek is based on the number of hours that person works per week. For example, if a person works 60 hours per week and they take 4 hours of

intermittent leave, they have taken 1/15 of a workweek.

- ✓ Keep accurate records of intermittent and reduced-schedule leave.

- ✓ Know that there are special rules that apply to teachers when they take intermittent leave. 29 C.F.R. §825.601.

V. WHAT IS REQUIRED FROM THE EMPLOYER?

A. NOTICE REQUIREMENTS FOR ALL COVERED EMPLOYERS

All covered employers must post a notice of employees' rights under the FMLA at every worksite. The poster must be in a "conspicuous" place where it can be seen by employees and job applicants. Failure to post could result in a $110 penalty for each posting violation. The DOL has approved a poster, which can be found at on the DOL website, http://www.dol.gov/whd/regs/compliance/posters/fmla.htm. The poster is available in a number of languages and should be posted in a language employees can understand. For example, if employees speak both English and Spanish at an employer's worksite, the employer should hang both the English and Spanish versions. 29 C.F.R. §825.300.

Under the Act, a covered employer must also provide written notice to all employees regarding their rights. An employer can provide the written notice in its company policies or separately to all new employees. Providing a copy of the FMLA poster to each employee will satisfy this obligation, but the employer should have the employee acknowledge receipt of the policy or poster. 29 C.F.R. §825.300(a).

These obligations on the employer are extremely important. If an employer fails to provide this information, it cannot deny FMLA leave to employees who fail to meet their obligations under the law. Why? Because the employer did not notify the employee of his/her rights and obligations. Moreover, an employee may be able to successfully argue the employer interfered with his/her FMLA rights if these mandates are not met.

For example, in *Taylor v. Invacare Corp.*, 64 Fed.Appx. 516 (6th Cir. 2003), an employer terminated an employee for taking leave to care for his wife. When the employee sued, the employer claimed that the employee failed to provide 30-days notice of the required leave. The court found that because the employer failed to inform its employees of their obligations under the Act, the employer could not fire the employee for failing to meet those obligations.

B. REQUIREMENTS RELATED TO LEAVE REQUESTS

When an employee requests leave, the employer must determine if FMLA leave applies. The employee does not have to explicitly ask for FMLA leave; rather, the employer must determine whether the employee's time off is protected under the Act. Therefore, it is imperative that when an employee asks for worker's compensation leave, disability leave, sick leave or leave to care for a family member, the employer begins analyzing whether the leave is FMLA-protected.

First and foremost, the employer must provide individual information to the employee requesting leave that may be covered by the Act. The information should include:

(1) an *eligibility notice*, which should be given at the start of the first leave taken in the leave year, and for each qualifying reason and within 5 business days of the request for leave absent extenuating circumstances;

(2) a *rights and responsibilities notice*, which should be given with the eligibility notice and should state the employee's rights and obligations under the FMLA and any consequences the employee faces if he/she does not meet his/her obligations (ex. Leave may count against FMLA leave time, certification obligations, right to substitute paid leave or if that is required, right to benefits, right to restoration, etc.); and

(3) a *designation notice* within 5 business days (barring extenuating circumstances) of receiving sufficient information to determine whether the leave request is protected by the Act.

29 C.F.R. §825.300(b-d).

Moreover, if the leave is protected, the employer will need to ensure the employee's rights are protected and that time is counted against any leave allotment required under the Act. Once all required documentation is provided by the employee, an employer must designate FMLA leave, manage and track intermittent leave, and pay the employee accrued paid leave if required by the employer or elected by the employee. The employer must notify the employee that the leave is being designated as FMLA leave. 29 C.F.R. §825.301.

C. WAYS TO AVOID COMMON PITFALLS

- ✓ Post the required notice at all worksites. Remember, even if the employer does not have any eligible employees at a particular worksite, it must still hang the FMLA poster.

- ✓ Know that employers may give more rights than the Act provides, but may not give less.

- ✓ Be aware that even though an employee may not have an actual FMLA claim, the employee may still be able to sue under a theory of promissory estoppel if the employee relies on promises made in the employer handbook. *See Peters v. Gilead Sciences, Inc.*, 533 F.3d 594 (7th Cir. 2008)(finding that employer handbook and letter promised that employee was entitled to reinstatement after 12 weeks of leave).

- ✓ Give all newly hired employees notice of their FMLA rights.

- ✓ Give an employee requesting leave the 3 required notice forms in a language the employee understands.

- ✓ Make sure the eligibility notice states why an employee is not eligible for FMLA leave.

- ✓ Remember an employer must give the 3 required notice forms to an employee if the employer intends to retroactively designate FMLA for leave it learns qualified for FMLA or if circumstances change

making the leave protected under the Act. 29 C.F.R. §825.301(d).

✓ Be sure to document employer records to formally designate time off as FMLA leave.

VI. WHAT IS REQUIRED FROM THE EMPLOYEE?

An employee requesting FMLA leave must give an employer sufficient information to enable the employer to determine that the FMLA applies; however, the employee does not have to give detailed information or refer to the FMLA. An employee is required to give reasonable notice of the need for leave Normally, the employee must give the employer a 30-day notice of the need for foreseeable leave. This 30-day notice requirement is not necessary if: (1) the leave is not certain in time; (2) there is a change in circumstances; or (3) as a result of a medical emergency, 30-day notice is not practicable. If one of these exceptions applies, the employee must provide notice as soon as practicable, usually the same or next business day of when the need arises. The employee can give this notice orally or in writing and through a spokesperson if the employee is incapacitated. The employee is required to keep the employer informed when leave for an unforeseeable reason occurs. 29 C.F.R. §825.301(b); 29 C.F.R. §825.302; 29 C.F.R. §825.303; 29 C.F.R. §825.304; Righi *v. SMC Corp*, 632 F.3d 404 (7th Cir. 2011)(finding that an employee failed to meet his notice obligations when he ignored his employer's message for 9 days after the need for unforeseeable leave).

Additionally, depending on the type of leave request, an employer can request any of the following from the employee:

(1) certification of a serious health condition or need for military caregiver leave signed by a health care provider;

(2) certification of a qualifying exigency signed by the employee;

(3) reasonable documentation confirming a family relationship such as a birth certificate, papers documenting the placement of a foster child or even a written statement confirming a family relationship;

(4) documentation certifying an employee is a new biological, adopted or foster parent;

(5) a copy of a covered military member's active duty orders to support request for qualifying exigency leave including upon request a certification containing the following information: (a) a statement or description of appropriate facts regarding the qualifying exigency for which leave is needed; (b) the approximate date on which the qualifying exigency commenced or will commence; (c) beginning and end dates for leave to be taken for a single continuous period of time; (d) an estimate of the frequency and duration of the qualifying exigency if leave is needed on a reduced scheduled basis or intermittently; and (e) if the qualifying exigency requires meeting with a third party, the contact information for the third party and description of the purpose of meeting;

(6) with regard to Rest and Recuperation leave, a copy of the military member's Rest and Recuperation leave orders or other documentation issued by the military setting forth the dates of the military member's leave;

(7) an actual or estimated return date;

(8) additional information if certification forms are insufficient or incomplete;

(9) a second opinion, at the employer's expense, if the employer has reason to doubt medical certification for a serious health condition;

(10) a third opinion, at the employer's expense, if the first and second opinions conflict;

(11) recertification only after the duration of the condition expires or once every 30 days unless the employee requests an extension, circumstances have changed significantly or the employer has reasons to suspect the validity of the certification; and

(12) certification for chronic or lifelong conditions once every 6 months in connection with an absence.

29 C.F.R. §825.305-§825.310.

C. WAYS TO AVOID COMMON PITFALLS

- ✓ Be familiar with what qualifies as FMLA-protected leave.
- ✓ Request additional information if it is needed to make a FMLA determination.
- ✓ Do not assume an employee does not want to exercise his/her FMLA rights because his/her request is vague.
- ✓ Delay leave, if you must, instead of denying leave when the employee has not given proper notice for foreseeable events.
- ✓ Request a certification **in writing** within 5 business days after learning of the employee's need for leave. Oral requests do not satisfy this requirement.
- ✓ Allow the employee at least 15 calendar days to return certification forms, including recertification forms.
- ✓ Give an employee notice **in writing** that additional or complete information is needed on certification forms and allow the employee 7 calendar days to return the information.
- ✓ Know that an employer can only verify a need for qualifying exigency leave by calling the Department of Defense to confirm the family member's duty status and/or by contacting persons named on certification forms.
- ✓ Use the Department of Labor's Certification Forms (Form WH-380, Form WH-384, Form WH-385). Do not ask for more information than requested in these forms.

- ✓ Do NOT request certification for new child leave, but do request certification for other types of leave.

- ✓ Know that a FMLA policy in a handbook, no matter how extensive, does not take the place of a written request for certification or for the notice of rights and responsibilities required to be given at the time of an employee's request for leave.

- ✓ Remember that an employer cannot ask for more information than the certification form requires; however, the employer can ask for clarification or authentication after giving the employee an opportunity to cure the problem. Only a health care provider, human resources professional, leave administrator or management official may contact the employee's health care provider to obtain clarification or authentication.

- ✓ Do NOT use the company doctor for second opinions.

VII. MUST THE EMPLOYEE RECEIVE WAGES AND BENEFITS DURING THE LEAVE?

Leave under the Act is unpaid; however, an employee may choose, or an employer may require, that the employee use accrued paid leave. An employer can require that a parent taking new child leave to use paid vacation, personal leave or family leave, but it cannot require the parent to use sick leave. Of course, if the parent is taking leave to care for the child who has a serious health condition, the use of accrued sick leave may be required. An employer can require that the employee meet all requirements of the paid leave program. An employer may deny paid leave if the employee fails to meet the requirements to receive paid leave, but it cannot deny FMLA-qualified leave. 29 C.F.R. §825.207.

Moreover, the employer must continue the employee's group health coverage during leave, but may require the employee to pay their portion of premiums for said coverage. If the employee is more than 30 days late in paying premiums, the employer can cancel the medical coverage after providing notice to the employee and 15 additional days to make the premium payments. This notice must be in writing. 29 C.F.R. §825.209; 29 C.F.R. §825.210; 29 C.F.R. §825.212. Under certain circumstances, an employer can recover premiums made for group health care plans if the employee does not return to work after FMLA-leave. 29 C.F.R. §825.213.

VIII. WHAT IS REQUIRED WHEN THE EMPLOYEE RETURNS FROM LEAVE?

A. RESTORATION TO POSITION

An employee must be reinstated to his/her former position, or an equivalent position, upon the employee's return from FMLA leave unless an exception applies. 29 C.F.R. §825.214. An equivalent position means equivalent pay, opportunities to earn more pay, benefits, job duties and responsibilities, shift and schedule, and worksite in relation to the employee's commute distance and time. 29 C.F.R. §825.215. If an employee agrees or requests, the employer can provide the returning employee with a promotion or

transfer to another location; however, the employer should not pressure an employee to accept a promotion. 29 C.F.R. §825.2015(e)(4). An employer may require the employee to give at least a 2 day notice of his/her plan to return to work where the return to work date was not otherwise established. The employer can require employees to provide a fitness-for-duty report before returning to work from leave for the employee's own serious health condition. 29 C.F.R. §825.216; 29 C.F.R. §825.312.

The only exceptions to restoring the employee to the same or equivalent position are the following:

(1) the employee would have lost the job even if the employee had not taken leave;

(2) the employee cannot perform the essential functions of the job (CAVEAT: ADAAA);

(3) the employee unequivocally notifies the employer that he/she is not returning to work;

(4) the employee takes FMLA-leave fraudulently;

(5) the employee is a "key employee" (the highest-paid 10% of the employer's employees within 75-mile radius) and returning the employee to work would cause substantial and grievous economic harm to the employer.

29 C.F.R. §825.216-§825.218.

The restoration issue was recently analyzed in *Gerdin v. CEVA Freight LLC,* 908 F. Supp. 2d 821 (S.D. Tex. 2012). In that case, the plaintiff notified her employer that she was pregnant and would be taking FMLA leave. Prior to her leave, the plaintiff trained another employee to do some of her duties. When the employee returned after her leave, her job title remained the same; however, her duties changed and only one of her former tasks was returned to her. Two weeks after her return, the plaintiff was terminated because her position was allegedly eliminated. The plaintiff filed suit against the employer alleging that the employer interfered with her FMLA rights and retaliated against her for asserting her FMLA rights.

The court denied the employer's motion for summary judgment emphasizing that an employee is entitled to reinstatement to her former position, or to an equivalent one, with the same terms and benefits. The court found that the plaintiff's job duties still existed, but were given to other employees. Additionally, the court determined that the following evidence created a genuine issue of material fact regarding the plaintiff's retaliation claim: (1) contradictions in the employer's reason for termination; (2) the only position eliminated was the plaintiff's position; (3) the employer did not follow its internal procedures when terminating the plaintiff; and (4) the plaintiff's supervisor stated that "I hope having kids is not going to interfere with your ability to work full time" and even suggested she consider part-time work.

B. WAYS TO AVOID COMMON PITFALLS

- ✓ Do NOT coerce a returning employee into taking another position or promotion.
- ✓ Do NOT require employees to reapply or requalify for benefits they had before their leave.

- ✓ Immediately return the employee to their position or within 2 working days of receiving notice of the employee's intent to return to work.

- ✓ Do NOT count an employee's time on FMLA leave as a break in service for pension or retirement plans.

- ✓ Upon request for leave, notify "key employees" that they are "key employees" and may not have the right to restoration. 29 C.F.R. §825.219.

- ✓ If and when determination of substantial and grievous economic injury is made, notify the key employee in writing. 29 C.F.R. §825.219.

- ✓ If a "key employee" requests reinstatement even after receiving the required 2 notices, redetermine if a substantial and grievous economic injury will occur with reinstatement. 29 C.F.R. §825.219.

PRESENTATION NOTES: