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ADVAP 2-16

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Family Medical Leave

Citation: Federal Family Medical Leave Act of 1993 29 CFR § 825

1. General: This law allows individuals or family members with medical needs to take time off from work in order to receive medical care, to provide medical support to a family member or to provide care to a newborn child or adopted child.
2. Definitions:
 - a. Serious Health Condition - An illness, injury, impairment, or physical or mental condition that involves:
 - 1) Inpatient care: Any period of incapacity or treatment in connection with or consequent to inpatient care in a hospital, hospice or residential medical care facility;
 - 2) Continuing treatment by a health care provider: Any period of incapacity of more than three consecutive calendar days, that also involves continuing treatment as follows:
 - 3) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g. physical therapist) under orders of, or on referral by, a health care provider; or

- 4) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under supervision of a health care provider. A regimen of continuing treatment includes, for example, a course of prescription medication or therapy requiring special equipment to resolve or alleviate the health condition. It does not include the taking of over-the-counter medications or other similar activities that can be initiated without a visit to a health care provider.
- b. Any period of incapacity due to pregnancy.
 - c. Treatment for a chronic health condition that
 - 1) requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider,
 - 2) continues over an extended period of time (including recurring episodes of a single underlying condition), and
 - 3) may cause episodic rather than a continuing period of incapacity (asthma, diabetes, epilepsy, etc.);
 - d. A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective: The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include: Alzheimer's', severe stroke or the terminal stages of a disease.
 - e. Multiple treatments for non-chronic conditions: Any period of absence to receive multiple treatments (including any period of recovery) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition such as cancer, severe arthritis, or kidney disease that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment.
 - f. Continuing supervision of, but not necessarily active treatment by, a health care provider due to a serious long-term or chronic condition or disability which cannot be cured.

The FMLA only allows leave for substance abuse in order to undergo treatment by a health care provider and specifically excludes employee absence because of the use of the substance. Stress qualifies as a serious health condition only if it rises to the level of a mental illness or results in a physical illness.

- a. Period of Incapacity - A period of time when an employee or family member is unable to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery there from.
- b. Treatment - For purposes of FMLA, includes examinations to determine if a serious health condition exists and evaluations of the condition, but does not include routine physical examinations, eye examinations, or dental examinations.
- c. Health Care Provider - A doctor of medicine or osteopathy who is authorized to practice medicine or surgery by the State in which the doctor practices; or any other person determined by the United States Department of Labor to be capable of providing health care services. Included in the second part of that definition are podiatrists, dentists, clinical psychologists, clinical social workers, optometrists and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated to exist by x-ray), nurse practitioners and nurse-midwives and Christian Science Practitioners.
- d. Spouse – Determined by applicable State law. It is clear from the legislative history that same-sex partners that are married and unmarried domestic partners do not qualify for family/medical leave to care for their partner.
- e. Parent - The biological parent of an employee, or an individual who stands or who stood in loco parentis to an employee, when the employee was a son or daughter. It does not include parents-in-law.
- f. Son or Daughter - A biological, adopted, foster child, stepchild, legal ward or a child of a person standing in loco parentis.
 - 1) Under eighteen (18) years of age; or
 - 2) Eighteen (18) years of age or older and incapable of self-care because of mental or physical disability.
- g. Group Health Plan - For purposes of FMLA, this includes an insurance program providing health coverage under which employees purchase individual policies from insurers provided that:
 - 1) No contributions are made by the employer.

- 2) Participation in the program is completely voluntary for employees.
- 3) The sole functions of the employer with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions and to remit them to the insurer.
- 4) The employer receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deduction.
- 5) The premium charged with respect to such coverage does not increase in the event the employment relationship terminates. The same group health plan benefits provided to the employee prior to taking FMLA leave must be maintained during the FMLA leave. Therefore, if family member coverage is provided to an employee, family member coverage must be maintained during the FMLA leave. Similarly, benefit coverage during FMLA leave for medical care, surgical care, hospital care, dental care, eye care, mental health counseling, substance abuse treatment, etc. must be maintained during leave if provided in an employer's group health plan, including a supplement to a group health plan whether or not provided through a flexible spending account or other component of a cafeteria plan.

3. Entitlements under The Family and Medical Leave Act

- a. The Family and Medical Leave of 1993 (FMLA), codified at 29CFR §825 entitles "eligible" employees to a total of twelve (12) workweeks of leave during any 12-month period for one of the following reasons:
 - 1) The birth of a 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;
 - 3) The care of the employee's spouse, son, daughter or parent with a serious health condition; and,
 - 4) A serious health condition that makes the employee unable to perform the functions of the employee's.

The 12-month period used by the state for determining eligibility is the calendar year. In the case of birth or adoption eligibility for FMLA leave shall expire at the end of the 12-

month period beginning on the date of a child's birth or placement. However, leave used for this purpose shall also be calculated on a calendar year basis.

b. The National Defense Authorization Act of 2008 amended the Family Medical Leave Act to provide eligible employees leave rights related to military service. The new leave entitlements are:

1) Qualifying Exigency Leave - Eligible employees are entitled to up to 12 weeks of leave in a calendar year because of "any qualifying exigency" arising out of the fact that the spouse, son, daughter, or parent of the employee is on active duty, or has been notified of an impending call to active duty status, in support of a contingency operation. The qualifying exigency's for which employees can use FMLA leave are:

- a) Short-notice deployment
- b) Military events and related activities
- c) Childcare and school activities
- d) Financial and legal arrangements
- e) Counseling
- f) Rest and recuperation
- g) Post-deployment activities
- h) Additional activities not encompassed in the other categories, but agreed to by the employer and employee

c. Military Caregiver Leave - Eligible employees who are the spouse, parent, child, or next of kin of a service member who incurred a serious injury or illness on active duty in the Armed Forces may take up to 26 weeks of leave in a calendar year to care for the injured service member. Military Caregiver Leave is used in combination with regular FMLA leave.

4. Designation of Family and Medical Leave

a. FMLA leave is without pay. However if an eligible employee has accumulated, unused sick or annual leave, the employee is required to substitute such paid leave, including any paid catastrophic leave benefits, for any FMLA leave taken during the 12 –week period, with the exception that an employee taking maternity leave may elect to not substitute accrued, unused sick and annual leave while on FMLA leave. Paid leave to handle personal

and family medical needs is currently available under existing sick, annual and catastrophic leave policies. If the agency has knowledge that an employee's requested leave period is covered by FMLA, it is the responsibility of the agency to notify the employee that they have been placed on FMLA leave. The agency/institution must determine whether leave will be counted within two business days of the time the employee gives notice of the need for leave, or if the employer does not initially have sufficient information to make a determination, at the point this information become available. If the employer learns that the leave is for an FMLA purpose after leave has begun or within two days of the employee's return to work, the entire or some portion of the leave period may be retroactively counted as FMLA. An employee desiring to have a leave period designated as FMLA and obtain FMLA protections for the absence must so notify the employer within two business days of returning to work.

- b. FMLA may be taken "intermittently or on a reduced leave schedule" under certain circumstances.
 - 1) Leave may be taken on an intermittent or a reduced leave (part-time) schedule so long as this does not result in a reduction in the total amount of leave to which the employee is entitled. Only the amount of leave taken may be counted toward the 12 weeks of leave to which an employee is entitled. For example, if an employee who normally works five days a week takes one day, the employee would use 1/5 of a week of FMLA Leave.
 - 2) Leave may be taken intermittently when medically necessary. If an employee requests intermittent leave that is foreseeable based on planned medical treatment, the employer may require such employee to transfer temporarily to an available alternative position with equivalent pay and benefits but which better accommodates recurring periods of leave.
 - 3) When leave is taken after the birth or placement of a child for adoption or foster care, an employee may take leave intermittently or on a reduced leave schedule only if the employer agrees. Such a schedule reduction might occur where an employee, with the employer's agreement, works part-time after the birth of a child, or takes leave in several segments. The employer's agreement is not required for leave during which the mother has a serious health condition in connection with the birth of her child or if the newborn child has a serious health condition.

- 4) An expectant mother may take FMLA leave before the birth of the child for prenatal care or if her condition makes her unable to work.
- 5) An employee may request leave before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed. For example, the employee may be required to attend counseling sessions, appear in court, consult with his or her attorney or doctor(s) representing the birth parent, or submit to a physical examination.
- 6) An employee may request intermittent or reduced leave schedule to care for a family member in situations where the family member's condition itself is intermittent or where the employee may be needed to share care responsibilities with another party or to make arrangements for changes in care, such as transfer to a nursing home.
- 7) Intermittent leave may be taken for a serious health condition which requires treatment by a health care provider periodically, rather than for one continuous period of time.
- 8) Intermittent or reduced schedule leave may be taken for absences where the employee or family member is incapacitated or unable to perform the essential functions of the position because of a chronic serious health condition even if he/she does not receive treatment by a health care provider.

5. Eligibility

- a. To be eligible for leave under this policy an employee must have been employed by the state for at least twelve (12) months and must have worked at least 1250 hours during the twelve month period preceding the commencement of the leave.
- b. Spouses who are both employed by the state are entitled to a total of twelve weeks of leave (rather than twelve weeks each) for the birth or adoption of a child or for care of a sick parent. However, each spouse would be entitled to twelve (12) weeks for their own serious health condition or the care of a child or spouse. Each employee is entitled to FMLA for the care of his/her parent only. Nevertheless, the husband and wife are limited to a combined 12 weeks for this purpose regardless of which parent or the number of parents involved.
- c. Certification: A request for leave for an employee's own serious health condition or to care for seriously ill child, spouse or parent must be supported

by a certificate issued by a health care provider. The certificate must contain the following information:

- 1) The date on which the serious health condition commenced.
- 2) The probable duration of the condition.
- 3) The appropriate medical facts within the knowledge of the health care provider regarding the condition.
- 4) If the leave is to care for a family member, the certificate must contain a statement that the eligible employee is needed to care for the son, daughter, spouse or parent and an estimate of the amount of time required.
- 5) If the leave is due to the employee's illness, a statement that the employee is unable to perform the functions of the position must be included.

If an employee submits a complete certification signed by a health care provider, the agency/institution may not request additional information from the employee's health care provider. However, a health care provider may contact the employee's health care provider, with the employee's permission, for purposes of clarification and authenticity of the medical certificate.

If there is reason to doubt the validity of a medical certification, the agency/institution may require a second opinion from a health care provider designated or approved by the agency/institution so long as that provider is not employed by the state on a regular basis. If that opinion differs, the opinion of a third health care provider jointly approved by the agency/institution and employee may be solicited. That opinion shall be final and binding. The opinions of both the second and third health care providers shall be obtained at the agency/institution expense.

The employer and the employee must each act in good faith to attempt to reach agreement on whom to select for the third health care 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.

- d. The employee shall provide the agency/institution with a completed Certification of Physician or Practitioner form thirty (30) days prior to the date leave begins and make efforts to schedule leave so as not to disrupt agency/institution operations when the necessity for leave is foreseeable such as for the birth or adoption of a child, or planned medical treatment. If

circumstances require that leave begin in less than 30 days, the employee shall provide such notice as is practical. In cases of illness, the employee will be required to report periodically on his or her status and intention to return to work.

- e. The approving agency director or institution head may require that the employee obtain subsequent re-certification on a reasonable basis, but not more often than thirty (30) days.
- f. Medical information as a result of the serious health condition is considered confidential.

6. Employment and Benefits Protection

- a. Upon return from Family and Medical Leave an employee shall be entitled to be restored to (a) the position formerly occupied or (b) an equivalent employment benefits, pay and other terms and conditions of employment.
- b. Apart from the paid leave actually used during the Family or Medical Leave period, the taking of leave shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced. However, no seniority or employment benefits shall be accrued during the period of leave. The employee is not entitled to any right, benefit, or position of employment other than any right, benefit or position to which the employee would have been entitled had the employee not taken leave.
- c. The agency/institution shall maintain benefits coverage for the employee under its group health plan at the same level and under the conditions coverage would have been provided if the employee had continued in employment. The agency/institution shall continue to pay the "employer matching" portion of the health insurance premium and the employee will pay the employee's portion if such was the arrangement prior to leave. If the agency/institution paid the full premium it must continue to do so.
- d. An employee may choose not to retain health coverage during leave. However, when the employee returns from leave, the employee is entitled to be reinstated on the same terms as prior to taking the leave, without any qualifying period, physical examination, exclusion of preexisting conditions, etc.
- e. The agency/institution's obligation to maintain health insurance coverage ceases under FMLA if an employee's premium payment is more than 30 days late. Written notice to the employee that the payment has not been received must be mailed at least 15 days before coverage is to cease.
- f. The agency/institution may recover any payments made by the agency/institution to cover the employee's share of the premium once the

employee returns to work. An employer may recover its share of health plan premiums paid during unpaid FMLA if the employee fails to return to work unless the failure to return to work is due to a serious health condition or other circumstances beyond an employee's control. If an employer has maintained other benefits such as life or disability insurance in order to meet its responsibilities to provide equivalent benefits to the employee upon return from FMLA leave, the employer is entitled to recover the costs incurred for paying the premium whether or not the employee returns to work.

7. Family and Medical Leave Act Record Keeping Requirements

Employers must keep the following records for no less than three years and make them available for inspection, copying and transcription by the Department of Labor representatives upon request:

- a. Basic payroll and identifying employee data, including name, address and occupation; rate or basis of pay in terms of compensation; daily and weekly hours per pay period (unless FLSA exempt); additions to or deductions from wages; and total compensation paid;
- b. Dates FMLA leave is taken.
- c. If FMLA is taken in increments of less than on full day, the hours of the leave.
- d. Copies of employee notices of leave furnished to the agency/institution, if in writing and copies of all general and specific notices given to employees as required under FMLA and its regulations.
- e. Any documents describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leave.
- f. Premium payments of employee benefits.
- g. Records of any dispute between the employer and the employee regarding designation of leave as FMLA leave including employer requests for second or third medical opinions.
- h. Employer/employee agreement on work schedules during intermittent or reduced schedule leave.

Records and documents relating to medical certifications, re-certifications or medical histories of employees or employees' family members, must be maintained in separate files and be treated as confidential medical records. The only persons who can obtain access to these confidential records are:

- 1) supervisors and managers who need to be informed of restrictions on the work or duties of an employee and necessary accommodations;
- 2) first aid and safety personnel if an employee's physical or medical condition might require emergency treatment; and
- 3) government officials investigating compliance with the FMLA (29 CFR 825.500(a)).

The general rule established by the statute is that the Department of Labor may only require an employer to submit its books or records for review once during any 12-month period. However, if the Department of Labor has reasonable cause to believe an employer has violated the FMLA or its regulations, or if the DOL is investigating an employee complaint, it may request or subpoena an employer's books or records at any time.

8. The Affect of Other Laws and Employer Practices on FMLA Employee Rights

- a. **State Law:** Nothing in FMLA supersedes any provision of state law that provides greater family or medical leave rights than those provided by FMLA. For example, State of Arkansas employees who take maternity leave have the option to reserve annual and sick leave balances when on FMLA leave. Even though the agency would normally require employees to use their leave balances during FMLA leave, state law, with regard to maternity leave, extends certain exceptions.
- b. **Americans with Disabilities Act (ADA):** ADA's "disability" and FMLA "serious health condition" are different concepts and must be analyzed separately. FMLA entitles eligible employees to 12 weeks of leave in any 12-month period, whereas the ADA allows an indeterminate amount of leave, barring undue hardship, as a reasonable accommodation. FMLA requires employers to maintain employees' group health plan coverage during FMLA leave on the same conditions as coverage would have been provided if the employee had been continuously employed during the leave period, whereas ADA does not require maintenance of health insurance unless other employees receive health insurance during leave under the same circumstances.

In cases where the two laws interact, i.e. the employee is eligible under both, the employer should provide the greater right to the employee. A disabled employee may be entitled to continuous, reduced schedule, or intermittent leave as "reasonable accommodation", and that leave may also be counted as FMLA. Since FMLA requires insurance coverage the disabled employee

would receive health insurance during the 12 week FMLA eligibility period even though that is not an ADA requirement.

FMLA requires reinstatement to the same or equivalent position. If the employee were unable to perform the essential functions of that equivalent position even with reasonable accommodation, because of a disability, the ADA may require the employer to make a reasonable accommodation at that time by allowing the employee to work part-time or by reassigning the employee to a vacant position, barring undue hardship.

9. Workers' Compensation

- a. Workers' Compensation absence and FMLA leave may run concurrently (subject to proper notice and designation by the employer). Under Workers' Compensation the agency/institution may offer a medically certified employee a "light duty" position. Under FMLA the employee is permitted, but not required, to accept the position. Thus it is possible that the worker will no longer qualify for Workers' Compensation, but is still entitled to FMLA.
- b. Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA): An employer's obligation under FMLA ceases and a COBRA qualifying event may occur when and if 1) the employment relationship would have terminated if the employee had not taken FMLA (i.e. his/her position eliminated due to Reduction in Force and no transfer is available), 2) an employee informs the employer of his or her intent not to return from leave (which may be before the leave starts), or the employee fails to return from leave after exhausting his or her FMLA entitlement.
- c. Employee Retirement Security Act (ERISA): There is no requirement that unpaid FMLA leave be counted as additional service for eligibility, vesting, or benefit accrual purposes. However, the final regulations clarify that if a plan requires an employee to be employed on a specific date in order to be credited with a year of service for participation, vesting, or contribution purposes, an employee on FMLA leave is deemed to have been employed on that date. Previously, employees were required to return to work in order to receive the year of service.

10. Family and Medical Leave Act Posting Requirements

All state agencies and institutions are 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 of the Department of Labor. The notice must be posted prominently where it can be readily seen by employees and applicants for employment. Agencies/institutions may duplicate the text of the notice

contained in "YOUR RIGHTS FORM", or copies of the required notice may be obtained from local offices of the Wage and Hour Division (Telephone: 501-324-5292).

SUPERSESSON: This procedure supersedes ADVAP 2-16, May 1, 1996, in its entirety.

1. FORMS PRESCRIBED:

- a. FMLA-Certification of Qualifying Exigency for Military Family Leave
- b. FMLA-Certification of Serious Injury or Illness of Covered Military Family Leave
- c. FMLA-Designation Notice
- d. FMLA-Health Care Provider for Employee Serious Health Condition
- e. FMLA-Health Care Provider for Family Member Serious Health Condition
- f. FMLA-Leave Request
- g. FMLA-Notice of Eligibility and Rights and Responsibilities
- h. Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave

By:

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Director

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