

FAMILY AND MEDICAL LEAVE ACT
UAH Management Training Seminar - April 18, 1996
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1. **Basic Entitlements for a Covered Employee of a Covered Employer**

- a. Up to 12 weeks of **unpaid** leave in any 12 month period for:
 - i. birth and first year care of a **child**
 - ii. adoption or foster placement of a **child** in employee's home
 - iii. care of **spouse, child or parent** with a **serious health condition**
 - iv. **serious health condition of the employee**
- b. Employee may maintain health insurance during the leave (Employer must pay its share of premiums during the leave)
- c. Employee, with limited exceptions, must be reinstated to the **same or an equivalent position** at the end of the FMLA leave period

2. **Legislative Background**

- a. First family and medical leave bill (Parental and Disability Leave Act) introduced in 1985
 - i. Required **all employers** to provide at least 18 weeks of leave within a 2 yr period to an employee to care for a newborn, newly adopted, or seriously ill child
 - ii. Employee could have been on leave and part-time status up to 39 weeks total.
 - iii. Employee entitled to be returned to same job or an equivalent position
 - iv. Employee entitled to health benefits during the leave period
- b. New bill each year until became law in 1993 with Clinton's election
 - i. Varied in terms of number of employees necessary for employer to be covered
 - ii. Varied in terms of the length of leave and reasons for it
- c. Bills in 1990 and 1992 were passed but were vetoed by Bush
- d. One earlier version provided for 39 weeks of leave and part-time status

3. **Covered Employers**

- a. Must have employed 50 or more employees for each working day during each of the 20 or more calendar work weeks in the current or preceding calendar year.
- b. DOL considers each level of government to be a single public agency for purposes of meeting the 50 employee test
- c. UAH is covered since it is part of the state for employee counting purposes

4. **Covered Employees**

- a. To be covered, an employee

- i. must have worked for the employer for at least 12 months (need **not** be consecutive months) **and**
 - ii. must have worked for at least 1,250 hours during the year preceding the start of the leave **and**
 - (1) **For hourly employees**, use Fair Labor Standards Act rules for counting hours worked
 - (2) **For exempt employees**, DOL says working for 12 months creates a presumption that 1,250 hours have been worked
 - (a) **Faculty members of higher educational institutions are deemed to meet the 1,250 requirement in view of time spent reviewing homework, grading tests, etc.**
 - (b) Employer would have to produce compelling evidence to refute presumption that faculty members meet hours worked requirement
 - iii. must be employed at a work site where the employer employs at least 50 employees within a 75 mile radius
 - (1) DOL uses road miles, not as crow flies miles
- b. Right to take leave applies equally to male and female employees, including leave for birth, placement for adoption or foster care of a child

5. **Family Member Definitions**

- a. **Child**
 - i. Includes biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis who is under 18 or 18 or older if incapable of self-care because of mental or physical disability.
 - (1) "self care" means grooming, hygiene, dressing, eating cooking, cleaning, paying bills, using a post office, maintaining a residence
 - (2) "physical or mental disability" is one that substantially limits one or more major life activity as per the ADA regulations
- b. **Spouse**
 - i. Defined by state law.
 - ii. Includes common law marriages where recognized by the State
 - iii. Does **not** include an unmarried domestic partnership which is not "consecrated by ceremony" or otherwise recognized under State law.
 - (1) Intended to preclude recognition of gay and lesbian relationships
 - iv. Alabama recognized common law marriages when there is capacity to enter into a marriage, present agreement or consent to be husband and wife, public recognition of the existence of marriage, and consummation
- c. **Parent**
 - i. Includes a biological parent or an individual who stands **or stood in loco parentis** to an employee when the employee was a child
 - (1) In loco parentis if gave day-to-day care and financially supported the employee/child

- (2) In loco parentis does **not** require a legal relationship such as guardian
- ii. Does **not** include parents-in-law

6. **Serious Health Condition**

- a. FMLA says condition which requires either "inpatient care" or "continuing treatment by a health care provider"
- b. RULES expand to include those under "supervision" of a health care provider.
Includes
 - i. Overnight stay in hospital, hospice, or residential medical care facility with either "any period of incapacity" or "any subsequent treatment in connection with such inpatient care."
 - ii. Being under "continuing treatment" of a health care provider incident to being incapacitated for more than 3 consecutive calendar days
 - iii. Pregnancy and chronic serious health conditions requiring periodic visits to a health care provider such as asthma, diabetes, epilepsy
 - iv. Permanent or long-term incapacity for which treatment may not be effective, such as Alzheimer's, severe stroke, or terminal cancer
 - v. Restorative surgery after an accident or injury which is needed to avoid a period of incapacity of more than 3 consecutive calendar days
 - vi. Severe morning sickness that incapacitating
 - vii. Severe asthma attack or high pollen count
- c. RULES exclude
 - i. Cosmetic surgery (absent serious complications), routine physical exams, eye exams, dental exams
 - ii. Self-prescribed bed rest or exercise
 - iii. Common cold, flu, earaches, upset stomach, minor ulcers and minor headaches
 - iv. Absence due to substance abuse UNLESS receiving treatment by health care provider or by provider of health care services on referral from a health care provider AND meets other conditions of definition of serious health condition

7. **Employee's Own Illness as Basis FMLA**

- i. Serious health condition only if the employee is incapacitated from performing one of the essential functions of the position
- ii. Employer can provide list of essential functions to HCP for certification of incapacity regarding them

8. **Employee's Caring for Family Member as Basis for FMLA**

- a. Rules are very broad in favor of the employee being "needed"
- b. Includes both physical and psychological care

- c. Includes situations where family member cannot care of own basic medical, hygienic, or nutritional needs or safety or is unable to transport self to doctor
- d. Includes psychological comfort and reassurance to a family member receiving inpatient care
- e. Includes filling in for others caring for the family member
- f. Includes making arrangements for care of the family member, such as arranging for admission to nursing home
- g. Intermittent leave is appropriate either for intermittent physical problem or if employee is only needed intermittently due to sharing of responsibility for care with others

9. **Medical Certifications**

- a. Employer can require employee to furnish medical certification of serious health condition
- b. Generally must give employee 15 days to provide certification
- c. RULES provide standard form for obtaining certification

10. **Who is Health Care Provider?**

- a. Act says any licensed MD or DO and any other person determined by the Sec of Labor
- b. RULES say
 - i. podiatrists, dentists, clinical psychologists, and optometrists authorized by state law to practice without medical supervision
 - ii. chiropractors only for purposes of correcting a subluxation of the spine by manipulation (where x-ray has demonstrated subluxation to exist)
 - iii. Nurse practitioners and nurse-midwives authorized to practice by state law
 - iv. Christian Science Practitioners listed with First Church of Christ Scientists in Boston, Mass, provided employer may require a 2d or 3d opinion from other than a Christian Science Practitioner

11. **Second Opinions**

- a. Employer who doubts opinion may **not** request additional info from the employee's HCP
- b. Employer may request second opinion **at employer's expense**
 - i. HCP must not be employed on regular basis by employer
 - ii. Employer must not routinely use the HCP to provide second opinions, unless shortage of HCPs in the area

12. **Third Opinions**

- a. If first and second opinion differ, employer may request third opinion
- b. Third opinion is final and binding
- c. Employer must pay for third opinion

- d. Employer and employee must jointly select the HCP who provides third opinion
 - i. Both must act in good faith to reach agreement
 - ii. Absence of good faith means other side wins

13. Recertification of Medical Condition

- a. ACT: Employer may request recertification on reasonable basis
- b. RULES: No more often than every 30 days unless
 - i. employee requests extension of FMLA leave
 - ii. changed circumstances occur
 - iii. employer has info casting doubt on continuing validity of most recent certification

14. Contact with Employee's HCP Following Medical Certification

- a. Employer may not request additional info from employee's HCP
- b. With permission of employee, employer's HCP can contact employee's HCP for clarification/authentication
- c. BUT - Restrictions on contact are waived if employee is on worker's compensation and state law permits such contact

15. Computation of 12 Weeks of FMLA Leave

- a. 12 Weeks in any 12 month period
- b. Employer may use
 - i. Fixed period for all employees
 - (1) Calendar year
 - (2) Fiscal year
 - (3) Simplest way to keep records
 - ii. 12 months measured forward from first date FMLA leave is used
 - iii. rolling 12 month period measured backward from date leave is used
- c. Only rolling 12 month period prevents stacking of 2 12 month periods under proper circumstances
- d. If employer fails to choose a method, the most advantageous will be used.

16. FMLA Leave for Prenatal Care

- a. Employee need not wait until actual birth to qualify
- b. Begins when prenatal care is needed or if condition makes employee unable to work

17. FMLA for Care of Child

- a. Leave for birth or adoption/foster care placement in employee's home must be concluded within 12 months of the beginning date of the birth or placement,

unless state law or employer practice permit longer period

18. FMLA for Foster Placement or Adoption

- a. May begin before actual placement
- b. Includes counselling sessions, court appearances, consultations with doctors/lawyers, physical examinations

19. FMLA Where Husband and Wife Work for Same Employer

- a. Employer is **permitted** (not required) to limit the combined total FMLA leave for first year child care or adoption/foster placement to 12 weeks in any 12 month period
- b. No such combined limit permitted for own conditions or for care of other or for care of child with serious health condition
- c. **WHAT METHOD HAS UAH CHOSEN?????????**

20. Intermittent and Reduced Schedule FMLA

- a. **Intermittent leave:** leave taken in separate blocks of time due to a single illness or injury and may range from an hour to several weeks.
 - i. Includes medical appointments and chemotherapy
- b. **Reduced Schedule:** a schedule reducing usual number of working hours per work week or hours per work day.
 - i. Usually is matter of going from full to part time
 - ii. Includes employee whose recovery is not sufficient to permit full time work
- c. **Medical Certification:** Employer may request certification from employee's HCP that intermittent or reduced leave schedule is **medically necessary** and a description of the expected duration and schedule of such leave.
- d. **Employee Obligation:** Employee is obligated to attempt to schedule intermittent or reduced schedule FMLA so as not to disrupt operations of employer
- e. **Child Care and Adoption/Foster Placement:** Employer must agree to intermittent and reduced schedule leave for first-year care or placement. This is different from care for sick family member or employee's own condition
- f. **Minimum Leave Increments:** Employer may limit accountable increments to shortest period of time that the employer's payroll system used to account for absences or use of leave (basically 1 hour or less). Employers had tried to get minimum 4 hour increments
- g. **Transfer to Alternative Position:**
 - i. Can be done temporarily if alternative position has equivalent pay and benefits
 - ii. Employee must be qualified for the alternative position and the position must better accommodate the intermittent or reduced schedule leave
 - iii. **COULD HAVE ADA IMPLICATIONS IN CASE OF EMPLOYEE'S**

OWN CONDITION

- h. **Exempt Employees and FLSA:** FMLA provides that deductions for intermittent or reduced leave schedule work do **not** cause employee to lose status as exempt employee for FLSA purposes

21. Substitution of Paid Leave for Unpaid FMLA Leave

- a. **Employee** may elect to substitute accrued paid leave where such leave is available under terms of the employer's family leave policy for a purpose authorized under the FMLA.
- b. **Employer** may require the employee to substitute paid vacation, personal or family leave for all or part of FMLA leave related to birth, adoption/foster care placement, or care for seriously ill family member
- c. **Employee or employer** may choose to have FMLA leave run concurrently with worker's compensation absence where injury is serious health condition under FMLA
- d. **Employee or employer** may choose to substitute vacation, personal, or earned leave for any qualified FMLA leave.

22. Employer's Designation of Leave as FMLA Leave

- a. Employer must make designation based solely on info provided by employee or the employee's spokesperson
- b. After making decision to designate paid leave as FMLA leave, employer has (generally) two days to notify the employee of the designation.
 - i. Initial notification may be oral but must be confirmed in writing no later than following payday, or 2d payday if next payday is less than 1 week away
- c. Once employer has necessary information upon which to make FMLA designation and notify employee, employer may not designate retroactively
- d. Employer cannot designate leave as FMLA leave after employee has returned to work except
 - i. Employer did not learn of reason for absence until employee's return to work
 - ii. Employer knew of FMLA reason before the leave but was unable to confirm that it would qualify before employee returned to work.
 - (1) Example, Waiting for medical certification or 2d or 2/3d opinion

23. Continuation of Group Health Benefits During FMLA Leave

- a. Employer must maintain employee's coverage (to include family coverage) on same conditions as if employee were not on leave

- b. Employee must pay his/her share of premium
- c. Employee can elect not to maintain coverage and employer can stop making payments if employee fails to pay his/her share as agreed
 - i. However, employer must restore employee to same position at end of leave.
 - ii. Employer may have to pay all to keep employee's status current if policy will not permit reinstatement without waiting periods, physical exams, pre-existing condition exclusions, etc
 - iii. No way to recover payments it appears
- d. Employer can recover payments made if employee fails to return to work or returns and stays less than 30 days **unless** failure is
 - i. due to FMLA condition
 - ii. due to circumstances beyond employee's control, such as unexpected transfer of spouse to job location over 75 miles away

24. Return to Work from FMLA Leave

- a. Employee entitled to reinstatement to same position or equivalent position with equivalent benefits, pay, and other terms and conditions of employment.
 - i. No right to return to same exact position by virtue of FMLA
 - ii. **HOWEVER** return to that same exact position may under some conditions be a reasonable accommodation required by the ADA
 - iii. Must be reinstated to all fringe benefits
- b. Employer may require periodic reports regarding status and intent to return to work
- c. Employer may decline restoration to employment until employee has submitted to fitness-for-duty medical certification provided
 - i. Employer has uniformly applied policy or practice requiring all similarly situated employees taking leave to obtain and provide such certification from HCP
 - ii. Certification relates only to the condition requiring the FMLA leave and there is not conflict with ADA requirement that any such certification be job-related and consistent with business necessity
 - iii. Employer gives general notice of such requirement and includes requirements in handbook
 - iv. Employer gives specific notice to employee at time leave is requested or immediately after leave begins that certification will be required

25. Interrelationship of FMLA with ADA

- a. **Extension of FMLA Leave via ADA:** When 12 weeks of FMLA runs out and employee is unable to return, ADA and FMLA RULES indicate (act does not so provide) that extension of leave with or without pay would be a reasonable accommodation under the ADA absent a showing of undue hardship to the employer as a result

- b. **Extension of FMLA Intermittent and Reduced Schedule via ADA:** Appears that extension would be reasonable accommodation unless produces undue hardship
- c. **Return to Exact Position via ADA:** As noted above, return to the exact position might be a reasonable accommodation absent showing of undue hardship
- d. **Blocking Move to Alternative Position During Intermittent FMLA Leave via ADA:** Employer would have to show would be undue hardship to keep in same job

26. FMLA and Faculty Members

- a. Lack of formal paid vacation or sick leave for faculty makes it difficult to apply FMLA to faculty in the case of typical absence
- b. Probably not worth the trouble to institute detailed records necessary to track and designate short absences as FMLA leave
- c. Consider designation of lengthy absence, such as for semester, as FMLA leave.
- d. Good idea to consider extending date for tenure decision if FMLA leave has occurred since RULES say can't use taking of FMLA leave as a negative factor in employment actions such as promotion, etc and must reinstate employee to position virtually identical

27. Enforcement

- a. Employees denied leave or denied reinstatement in violation of FMLA may
 - i. file complaint with DOL OR
 - ii. file private lawsuit against the employer
- b. Damages/relief available include
 - i. lost wages and interest
 - ii. liquidated damages equaling lost wages and interest
 - iii. Reinstatement
 - iv. Reasonable attorney fees