



FMLA & ADA

SCO Payroll Conference 2013

presented by

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OFFICE OF THE STATE CONTROLLER

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FMLA BASICS

COVERED EMPLOYERS

PRIVATE EMPLOYER:

- Employs 50 or more employees for at least 20 calendar work weeks per year
- Includes part-time employees and anyone on the payroll
- Continuous coverage until failure to meet criteria for calendar year occurs

PUBLIC EMPLOYER:

- All federal, state and local public agencies are included in definition of “Employer” under FMLA
- “Local and educational agencies”
- 50 employee requirement does not apply

FMLA BASICS

EMPLOYEE ELIGIBILITY

1. Have been employed by employer for at least 12 months (52 weeks)
 - Excludes breaks in service < 7 years
 - Except: Military Service or Written Agreements
2. Have at least 1250 hours worked during the 12-month period immediately preceding commencement of leave; and
3. Be employed at worksite where employer employs at least 50 employees within 75-mile radius.
 - *Except: Public Employers; state or political subdivision considered a single employer*

IDAPA 15.04.01.242.01 Re: State Employees

DURATION & TRIGGERING EVENTS

Eligible employees are entitled to 12 work weeks of *unpaid* leave during a 12-month period for:

- Birth of employee's child and care of infant
- Placement of child with employee for adoption or foster care
- Care of spouse, employee's child or employee's parent who has a "serious health condition"
- Employee's own "serious health condition"
- Any qualifying exigency arising out of the fact that employee's spouse, son, daughter or parent is a servicemember on active duty (or notified of a call to active duty)
- 26 work weeks of leave during a single 12 month period to care for a covered service member with a serious illness or injury

BIRTH, ADOPTION OR PLACEMENT OF CHILD FOR FOSTER CARE



- No distinction between male and female employees
- Leave must be taken within 12 months of birth or placement
- In some instances, leave may begin before
- Special rule for spouses employed by same employer

SERIOUS HEALTH CONDITION

Any illness, impairment or physical or mental condition that involves:



- Inpatient care
- Continuing treatment by a “health care provider”
- Employee’s inability to perform the functions of their position
- “Treatment for substance abuse?”

HEALTH CARE PROVIDER

Medical doctor and any other person determined by the Secretary of Labor to be capable of providing health care services



INTERMITTENT LEAVE

REDUCED LEAVE SCHEDULE

- Only when “medically necessary” for serious health conditions of employee or family member
- Including treatment regimen & recovery
- Eligibility established only once
- *Not available* for birth, adoption or foster care placement *unless* employer agrees

NOTICE REQUIRED FROM EMPLOYEE

Notice may be verbal, by phone, fax or even third party.



Foreseeable:

Must provide 30-day notice,
if no reasonable excuse



Not foreseeable:

As much notice
“as is practical”

EMPLOYEE NOTICE CONT.

- Employee must provide “sufficient information” to decide if FMLA is warranted
- Employee must comply with employer’s “usual and customary” notice policy, except emergencies
- Calling in “sick” is not enough
- Employee failure to comply=loss of FMLA
- Explain failure to provide 30 day notice for foreseeable leave

EMPLOYER NOTICE REQUIREMENTS

- General Notice (employee handbook, poster, and/or upon hire)
- Eligibility Notice
- “Right and Responsibilities” notice
- Designation Notice

EMPLOYER NOTICE CONT. ELIGIBILITY NOTICE

- Must occur within 5 business days of request for leave or learning leave may be FMLA
- Whether employee is eligible or not
- If not eligible, must give reason
- Medical Certification requirement and consequences
- Fitness for duty certification requirement and consequences (addressing the essential functions of the job)

EMPLOYER NOTICE CONT.

DESIGNATION NOTICE

- Must occur within 5 business days of having enough information to determine leave is FMLA
- Must state whether or not leave designated FMLA
- Provisional Designation is okay
- Designation may be retroactive, but must be timely not to cause harm or injury to employee; or if employee and employer mutually agree
- Can be given along with eligibility notice

MEDICAL CERTIFICATIONS

- Employer can require medical certification of employees own serious health condition or that of a family member or servicemember
- Employer must notify of requirement and consequences within 5 days of employee's request for FMLA
- Employee must provide within 15 days of employer's request

FAILURE TO PROVIDE . . .

- If foreseeable: Employer may deny or delay leave
- If not foreseeable: Employee must provide "as soon as reasonably possible" (at least 15 days) – may be more.

MEDICAL CERTIFICATIONS CONTENT

- 29CFR §825.306 provides list of things that may be asked of the health care provider
- Should include:
 - Date on which serious health condition commenced
 - Probable duration of the condition, and
 - A statement that the employee is unable to perform the functions of the position because of the condition.
- Where providing care for family members, an estimate of the amount of time the employee needs to care for them, and
- A statement that the serious health condition warrants the participation of a family member to provide care during the period of treatment

MEDICAL CERTIFICATIONS

Additional Requirements For Intermittent Leave

- The medical necessity for this kind of leave
- The expected duration of intermittent or reduced schedule, and, if applicable,
- The date on which the treatment is to be given; and
- The duration of the treatment

MEDICAL CERTIFICATIONS CONT. COMPLETENESS

- Incomplete Certification:
 - If one or more of the entries not completed, or
 - Information provided is vague, ambiguous, or non-responsive
- You must advise employee in writing what additional information is necessary to make certification complete
- You must allow 7 calendar days to cure any deficiency, unless not practicable (possibly more)
- Failure to cure = denial of FMLA

MEDICAL CERTIFICATIONS CONT.

CLARIFICATION

- Direct contact with doctor allowed to authenticate or clarify a complete certification only. (Employee consent not required).
- But only if you have given employee opportunity to cure any deficiencies.
- Cannot ask for additional medical information beyond that required on certification forms.
- The only people that may contact health care provider:
 - Human Resources Professional
 - A leave administrator
 - A management official
- Employee's direct supervisor may never contact the health care provider

MEDICAL CERTIFICATIONS CONT. SUBSEQUENT RECERTIFICATION

- May request no more than every 30 days, unless minimum duration on original certification is longer than 30 days.
- In all instances; every 6 months for conditions that extend beyond 6 months
- Anytime the employee asks to extend the period of leave; or obtain information that casts doubt on employee's stated reason for leave
- 15 calendar days to provide recertification

MEDICAL CERTIFICATION CONT. FITNESS FOR DUTY CERTIFICATIONS

- May require fitness for duty certifications so long as:
 - You require them for all similarly situated employees
 - The certification is limited to medical condition that necessitated the leave.
 - Employee was notified of requirement to provide one in your first notice granting FMLA.
 - Must comply with ADA, i.e. must be job related and consistent with business necessity.

SECOND OPINIONS AND DISPUTES

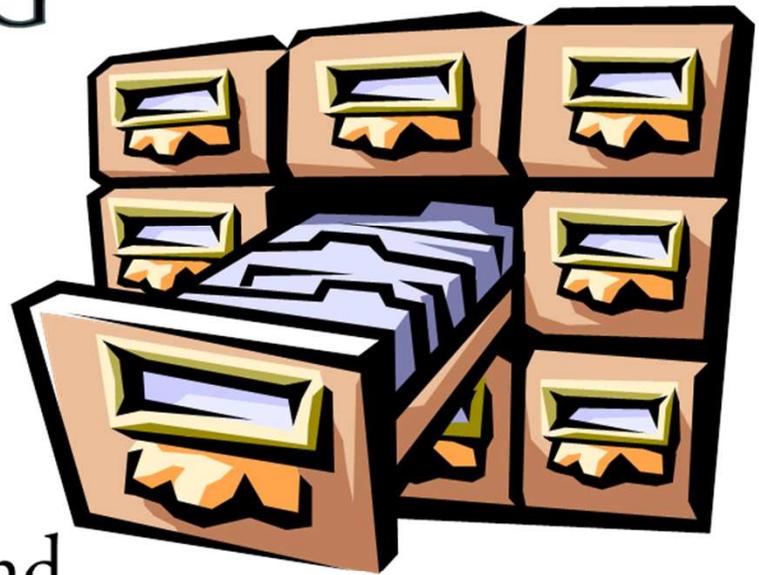
- Must be chosen and paid for by employer
- Must reimburse employee for any expenses
- Third certification: Binding on both employer and employee



RECORD-KEEPING

DOL Regulations require employers to maintain as *confidential* all “medical certification, recertification and medical histories of employees or employees’ families.”

Records *must* be maintained *separate* from personnel files.



QUALIFYING EXIGENCY LEAVE

- Like traditional FMLA, up to 12 weeks unpaid leave for the spouse, son, daughter, or parent of a servicemember on active duty (or notified of impending call to active duty) to address family circumstances (exigencies) arising as a result.
- “Qualifying Exigency”
 - List of non-medical events defined 29 CFR § 825.126

QUALIFYING EXIGENCY LEAVE NOTICE AND CERTIFICATION

- Employee must give reasonable and practicable notice, if foreseeable, including:
 - Military status of employee's spouse, parent, son, or daughter (on active duty or called to active duty)
 - Reason for Leave
 - Anticipated length of leave
- Employer may require certification
 - DOL optional form (WH-384)
 - Can request service member's order's
 - Can ask 3rd parties for verification (i.e. teacher, child care appointments)

MILITARY CAREGIVER LEAVE

- Up to 26 weeks of unpaid leave during a single 12-month period for employee who is the spouse, son, daughter, parent or next of kin, of a covered service member with a serious injury or illness

MILITARY CAREGIVER LEAVE COVERED SERVICE MEMBER

- Includes members of the Armed Forces who are undergoing medical treatment or recuperation for a serious injury or illness.
 - Including a veteran who was a member of the military in the five preceding years.
- Serious injury or illness is covered if incurred in the line of duty or renders them medically unfit to perform military duties (does not need to be injured at war).
- Like traditional FMLA, can designate leave retroactively.

MILITARY CAREGIVER LEAVE EMPLOYEE ELIGIBILITY

- Spouse, child, parent, or next of kin of covered Servicemember
- Next of kin: nearest blood relative, other than service member's spouse, parent, son, or daughter.
 - Service member can designate blood relative as next of kin
 - Order of priority in regs. 29 CFR § 825. 122
 - If no designation, relatives with same priority may take leave consecutively or simultaneously
- Employer may require confirmation of relationship

MILITARY CAREGIVER LEAVE

26 WORKWEEKS OF UNPAID LEAVE

- Employer must designate leave first as military caregiver leave when it qualifies as both military and traditional FMLA
- May be intermittent (same as traditional FMLA)
- Total leave during 12 months (alone or in combination with other FMLA leave) is 26 work weeks
- Husband and wife at same employer split 26 work weeks (similar to traditional FMLA)

MILITARY CAREGIVER LEAVE SINGLE 12- MONTH PERIOD

- Separate “FMLA Year” for this leave.
 - Starts on first day of military caregiver leave and ends 12 months later
 - Traditional FMLA year can continue as previously designated
- Doesn’t preclude use of traditional 12 week caregiver leave to care for injured or ill family members in next or other years.
- Doesn’t preclude use of another 26 work week leave for a separate illness/injury of same service member, or for another covered service member, up to 26 work weeks in 12 months.

MILITARY CAREGIVER LEAVE TIMING AND CERTIFICATION

- Leave is on a per-covered service member, per injury or illness basis.
 - Employee may take multiple leaves totaling 26 weeks in each 12 month period (overlap situations)
- Employer can require detailed certification, but cannot require second opinion or recertification of illness/injury.

FMLA & ADA

- Many (but not all) serious health conditions requiring FMLA also qualify as a “disability” under ADA
- Leave may be a “reasonable accommodation” under the ADA
- Employers must be careful to comply with both FMLA and ADA *separately*

QUESTIONS?

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