Handbook on the Family and Medical Leave Act

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I. INTRODUCTION

The Family and Medical Leave Act ("FMLA") was signed into law by President Clinton on February 5, 1993, and became effective for postal employees on August 5, 1993 by order of Postmaster General Marvin Runyon. The United States Postal Service is a "covered employer" for purposes of the FMLA.

The FMLA allows an employee to balance work and family obligations by taking up to twelve weeks of unpaid leave per year for the employee's own illness, the illness of a family member, or the birth or adoption of a child and the care of that child for up to one year. Under appropriate circumstances, this leave may be taken on an intermittent basis (for medical appointments) or in the form of a reduced work schedule and earned or accrued paid leave may be substituted for unpaid leave. The FMLA entitles the employee to the continuation of health benefits on the same terms as if he or she were working, and to be placed in the same or an equivalent position upon return from leave. An employee cannot be penalized in any way for exercising his or her rights under the FMLA.

The family and health related rights and benefits created by the FMLA are the minimum benefits that the Postal Service is required to provide to all employees. These rights and benefits may be expanded and built upon through collective bargaining, and the parties are free to establish policies that create greater (but not lesser) benefits for employees. The employee is entitled to the benefit of the most favorable provisions of the FMLA, the National Agreement, and the Employee and Labor Relations Manual ("ELM").

The purpose of this Manual is to assist Local Unions, their officers, representatives, and members in understanding the FMLA and enforcing its provisions. The Manual's contents are based on the FMLA itself, 29 U.S.C. § 2601 et seq., attached as Appendix A, the Department of Labor (DOL) Wage and Hour Division's regulations, 29 C.F.R. § 825.100, et seq., (07/01/1998), attached as Appendix B, and the ELM, which is incorporated into the National Agreement between the NPMHU and the Postal Service, relevant portions of which are attached as Appendix C. In addition, where appropriate, we have relied on the National Agreement itself, on court and arbitration decisions

interpreting the FMLA, and on policy statements of the Postal Service regarding implementation of the FMLA. The Manual presents the information contained in all of these source materials in outline form for quick reference. Because the source materials themselves are the actual authority for interpretation of the FMLA, we cite the source for each representation made in the Manual, and the source materials themselves should be relied on in any grievance, arbitration, or other legal proceeding. Citations beginning "29 C.F.R." are the DOL regulations contained in Appendix B. Citations beginning ELM are to the Employee and Labor Relations Manual. Other source materials are either cited in full or as they appear in the Appendix.

II. EMPLOYEE ELIGIBILITY

An employee is eligible for family and medical leave ("FML") under the FMLA if he or she has:

A. a total of 12 months of service with the Postal Service; and

B. worked in the Postal Service for at least 1,250 hours during the 12 months immediately preceding the start of the leave.

29 U.S.C. § 2611 29 C.F.R. § 825.110 ELM 515.3

There are no exclusions in the Postal Service for "key employees" or employees in work sites with fewer than 50 employees within 75 miles.

Definitions and Explanations

- ***The 12 months of service need not be consecutive, nor worked within any particular period of time in the past; 52 weeks of employment is the equivalent of 12 months.***
  29 C.F.R. § 825.110 ***The 12 months include any time off spent on Continuation of Pay ("COP"), workers' compensation ("OWCP"), military leave or court leave.***
  [APP. G at 3]

- ***The 1,250 hours are counted as they would be under the Fair Labor Standards Act ("FLSA") and include only those hours actually worked.* 29 C.F.R. § 825.110 *Thus, overtime hours are counted in determining FMLA eligibility, while no type of leave -- paid or unpaid -- is counted. [Robbins v. Bureau of National Affairs 896 F. Supp. 18, 21 (D.D. C. 1995)] Similarly, as under the FLSA, union steward time is counted as hours worked toward the 1250 hours (while union official time is not). [D at 8; App. G at 2]***

    - ***The 12 month period runs backward from the date leave commences.***

    - ***If the supervisor has failed to keep adequate records of hours worked by an employee, the supervisor has the burden of showing that the employee has not worked the requisite number of hours.***

    - ***The calculation of the 1250 hours must be made by the supervisor at or about the time that the leave is requested; f the supervisor fails at that time to notify the employee that he or she is ineligible for FML because he or she has not worked the requisite 1250 hours, the supervisor cannot argue later that the employee was ineligible for that reason.***

      29 C.F.R. § 825.110(d); Robbins, 896 F. Supp. at 22-23] ***[Note: at least two district courts have held that the DOL overstepped its authority in holding the employer responsible for making an immediate eligibility determination, and the Postal Service takes the same position. The regulation is still in effect, however, and NPMHU believes that it controls].***

III. CIRCUMSTANCES JUSTIFYING LEAVE

An eligible employee may take leave for any of the following reasons:

A. For the birth of a son or daughter and to care for the newborn child (up to one year following the birth).

B. For placement with the employee of a son or daughter for adoption or foster care (up to one year following the placement).

C. Where the employee is needed to care for the employee's spouse, son, daughter or parent with a serious health condition.

D. Because of a serious health condition that makes the employee unable to perform the functions of the employee's job.

29 U.S.C. § 2612 29 C.F.R. § 825.112 29 C.F.R. § 825.200 29 C.F.R. § 825.201 ELM § 515.41

Definitions and Explanations

- ***A "spouse" is a husband or wife as defined under the law of the state in which the employee resides and includes common-law marriage in states in which such a marriage is recognized.*** **29 C.F.R. § 825.113(a)**

- ***A "parent" is the biological parent or individual who had the day-to-day responsibility to care for and financially support the employee when the employee was a child.*** **29 C.F.R. § 825.113(b)**

- ***A "son or daughter" is the biological, adopted or foster child, stepchild, legal ward, or a child for whom the employee has the day-to-day responsibility to care for and financially support, who is under age 18, or who is 18 or older and incapable of self care due to a mental or physical disability.*** **29 C.F.R. § 825.113(c)**

- ***A "serious health condition" is an illness, injury, impairment, or physical or mental condition involving one or more of the following:***

    - ***In-patient care in a hospital, hospice or residential care facility of at least one night.***

    - ***A period of incapacity (i.e. absence from work, school or regular daily activities) of more than 3 calendar days and***

        -- ***treatment two or more times by a health care provider, or***

        -- ***treatment on at least one occasion by a health care provider that results in a regimen of continuing treatment (e.g., a course of prescription medications) under the supervision of the health care provider.***

    - ***Any period of incapacity due to pregnancy, or for pre-natal care.***

    - ***A period of incapacity due to a chronic condition that:***

        -- ***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;***

        -- ***continues over an extended period of time (including recurring episodes of a single underlying condition); and***

        -- ***may cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).***

- ***A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective, so long as the employee or family member is under continuing supervision of (but not necessarily receiving active treatment by) a health care provider (e.g., Alzheimer's, terminal stages of a disease).***

- ***A period of absence to receive multiple treatments (and recovery from such treatments) by or under supervision of a health care provider following an accident or for a condition that would result in incapacity for more than 3 days chemotherapy treatments for cancer, dialysis for kidney disease, physical therapy for arthritis).***
  29 C.F.R. § 825.114 ELM 515.2

- ***Stress, substance abuse, pre-natal care, and allergies can constitute "serious health conditions" if they otherwise fulfill the above criteria.***
  29 C.F.R. § 825.112(g) 29 C.F.R. § 825.114(c) and (d)

- ***A "health care provider" is a doctor of medicine or other attending practitioner, including podiatrists, dentists, optometrists, clinical psychologists, chiropractors (under limited circumstances), nurse practitioners, nurse-midwives, clinical social workers (under limited circumstances), Christian Science practitioners, and any other health care provider from whom the employer or group health plan will accept certification of a serious health condition to substantiate a claim for benefits.***
  29 C.F.R. § 825.118 ELM 515.2

- ***An employee is "unable to perform the functions" of his or her job when a health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act.***
  29 C.F.R. § 825.115

- ***"Needed to care for a family member" with a serious health condition encompasses both physical and psychological care and includes provision of basic medical, hygienic or nutritional needs or safety; transportation to doctors; filling in for a regular caretaker; and providing psychological comfort.*** **29 C.F.R. § 825.116**

IV. LEAVE ENTITLEMENT

A. Amount of Leave

An eligible employee is entitled to a total of twelve workweeks (12 times the employee's normal scheduled hours per week, up to 40 hours) absence per leave year for one or more of the conditions described in Section III A-D above.

1. Full time employees are entitled to up to 480 hours of leave (i.e. 12 weeks times 40 hours per week) within a leave year.

2. Employees with weekly schedules of less than 40 hours are entitled to 12 times the number of hours normally scheduled in their work week.

3. A part time employee with no weekly schedule is entitled to the total number of hours worked in the previous 12 weeks. 29 C.F.R. § 825.200 ELM 515.41 ELM 515.43

Definitions and Explanations

- ***The Postal Service leave year starts with the first pay period that begins in a calendar year and ends with the start of the next leave year.*** **ELM 512.12**

- ***An employee may take 12 weeks of leave at the end of the leave year and another 12 weeks at the beginning of the following year.*** **[App. G at 3]**

- ***Though the FMLA only entitles a husband and wife who work for the same employer to a combined total of 12 weeks of FML per year for the birth or placement of a child and the care of a parent,* 29 C.F.R. § 825.202 *the Postal Service allows a husband and wife who are both employed by the Postal Service and are both eligible for FMLA leave each to take 12 workweeks of leave.* [App. F at 4]**

- ***Leave taken for the birth or adoption/foster care placement of a child must be taken within 12 months of the date of the birth or placement.* 29 C.F.R. § 825.201**

B. <u>Leave Taken on an Intermittent or Reduced Schedule Basis</u>

1. FML may be taken intermittently (<u>i.e.</u> in separate blocks of time due to a single illness -- for medical appointments, physical therapy, etc.) or on a reduced schedule basis (<u>i.e.</u> a reduced number of hours per workday or workweek) under the following circumstances:

a. when medically necessary to care for a family member with a serious health condition;
29 C.F.R. § 825.117 29 C.F.R. § 825.203(c)
ELM 515.62

b. when medically necessary to accommodate an employee's own serious health condition; or
29 C.F.R. § 825.203(c) 29 C.F.R. § 825.117 ELM 515.62

c. for birth or placement of a child for foster care or adoption only if the supervisor agrees (unless the mother or the child has a serious health condition for which intermittent or reduced schedule leave is medically necessary). Approval is based on employee need, Postal Service need, and costs to the Postal Service. 29 C.F.R. § 825.203(b) ELM 515.61

2. An employee taking intermittent FML must schedule the leave so as not to unduly disrupt the employer's operations.
29 C.F.R. § 825.117 29 C.F.R. § 825.302(e)

3. The supervisor may transfer an employee on intermittent or reduced schedule FML to an available alternative position (including a part-time position) which better accommodates the intermittent or reduced schedule so long as:

a. the position has equivalent pay and benefits;

b. the transfer is in compliance with the collective bargaining agreement and applicable law (such as the Americans with Disabilities Act); and

c. the employee is transferred back to the original or an equivalent position once the leave is over.
29 C.F.R. § 825.117 29 C.F.R. § 825.204
ELM 515.63

4. Only the amount of leave actually taken on an intermittent or reduced schedule basis is counted toward the employee's 12 week entitlement. Thus, if a full-time employee that ordinarily works eight hours a day reduces his schedule to 4 hours per day, he or she is using up 1/2 week of FML per each week worked.
29 C.F.R. § 825.205

C. <u>Paid Versus Unpaid Leave</u> -- The FMLA guarantees 12 weeks of unpaid leave.

1. An employee may choose to substitute earned or accrued paid leave for unpaid leave under the following circumstances:

a. Annual leave may be substituted for any leave without pay to which the employee is entitled under the FMLA. 29 C.F.R. § 825.207

b. Sick leave may be substituted for leave without pay subject to the employer's usual requirements for the use of sick leave. 29 C.F.R. § 825.207(c) The ELM permits use of sick leave:

i. for the employee's illness or injury;

ii. for the employee's pregnancy or confinement;

iii. for the employee's medical, dental, or optical exams; and

iv. where the employee is exposed to, or caring for a family member with, a contagious disease ruled as requiring quarantine or restriction of movement of the patient for a particular period by the health authorities.

ELM 513.32 In addition, the Postal Service and NPMHU have entered into a Memorandum of Understanding that permits an employee to use up to 80 hours of sick leave:

v. where the employee is needed to give care to a family member having an illness, injury, or other condition which, if the employee had such a condition, would justify the use of sick leave under Postal Service policies.

App. D at 5 App. H at 3 Thus, sick leave may be substituted for unpaid leave where the employee has a serious health condition, and up to 80 hours of sick leave may be substituted where the employee is

needed to care for a family member with a serious health condition.

2. Under the FMLA, a supervisor may require the substitution of earned or accrued paid leave for unpaid leave, even where the employee requests unpaid leave.

29 C.F.R. § 825.207 The Postal Service and NPMHU have entered into a Memorandum of Understanding which provides that an employee "need not exhaust annual leave and/or sick leave before requesting leave without pay," subject to the "administrative discretion set forth in ELM Part 514.22."

App. H at 1 Thus, the Postal Service has no policy requiring the substitution of paid for unpaid leave. Nonetheless, ELM 514.22 provides that the decision to grant a request for LWOP is a matter of administrative discretion made "based on the needs of the employee, the needs of the USPS, and the cost to the USPS." Thus, the Postal Service retains the discretion to deny a request for unpaid FML and require the use of accrued paid leave.

An exception to this discretion is contained in Section 10.6(B) of the National Agreement, which provides that an approved absence for which the employee has insufficient sick leave may be charged to annual leave or leave without pay "at the employee's option." Thus, where an employee has insufficient sick leave to cover his or her FML, the employee has the choice to take unpaid or accrued annual leave, and the supervisor may not require that the accrued annual leave be exhausted before the employee is placed on leave without pay.

3. Either an employee or the supervisor may choose to have the employee's 12-week leave entitlement run concurrently with a worker's compensation absence when the injury is one that meets the criteria for a serious health condition under the FMLA.
29 C.F.R. § 825.207(d)(2)

4. If neither the employee nor the supervisor elects at or about the time of the request to substitute paid leave for unpaid leave, the employee remains entitled to all accrued or earned paid leave, in addition to whatever portion of the 12 weeks of unpaid FML he has not already used. 29 C.F.R. § 825.207(f)

5. If the employee uses paid leave that does not qualify as FMLA leave -- for example, if the employee uses paid sick leave for something that does not qualify as a "serious health condition," like a dental appointment - the employee remains entitled to the full 12 weeks of unpaid FMLA leave.
29 C.F.R. § 825.207(g)

V. BENEFITS

A. <u>Benefits While on FML</u>

1. The FMLA guarantees that an employee is entitled to the continuation of all benefits under his or her group health plan on the same terms as if the employee were not on FML – <u>i.e.</u> the employee must continue to pay his or her portion of the premium.
29 C.F.R. § 825.209
An employee's entitlement to benefits other than group health benefits during a period of FML is to be determined by the employer's established policy for providing such benefits when the employee is on other

forms of leave (paid or unpaid, as appropriate).
29 C.F.R. § 825.209(h)

2. **Postal employees on FML continue to receive benefits according to their leave status (j annual, sick, or leave without pay) as set forth in the ELM. ELM 515.8 Postal workers on leave without pay are entitled to the continuation of health care benefits for a one-year period, ELM 525.21 and the continuation of life insurance benefits for a one-year period.**
ELM 534.11

B. <u>Benefits Returning From FML</u>

Upon return from FML, the employee is entitled to the same benefits to which the employee would have been entitled had he or she not taken FML.

1. **All benefits accrued prior to the FML must be restored. Leave accrues during FML according to Postal Service policy regarding the type of leave charged – <u>e.g.</u> annual, sick, or leave without pay.**

2. **If an employee has elected not to continue health care coverage during FML or coverage has been terminated, coverage under the same terms as applied prior to the FML must be provided upon the employee's return to work.**
29 U.S.C. § 2614(a)(2) 29 C.F.R. § 825.215 ELM 515.8

C. <u>Restoration to Employment</u>

Upon returning from FML, an employee must be reinstated to the same position that the employee held when the leave commenced or to an "equivalent position" with equivalent benefits, pay and other terms and conditions of employment, including the same or a geographically proximate location, the same or an equivalent shift or work schedule, and the same or an equivalent opportunity for overtime, bonuses, etc.

29 U.S.C. § 2614(a)(1) 29 C.F.R. § 825.214
29 C.F.R. § 825.215 ELM 515.7

1. **If the employee is no longer qualified for his or her original position or an equivalent position due to an inability to attend a course or training session, renew a license, etc., as a result of the leave, the employee must be given the opportunity to fulfill those conditions upon return to work. 29 C.F.R. § 825.215(b) If the employee is no longer qualified due to a physical or mental condition, the situation may be governed by ADA.**

2. **If the employee would have been laid off or subjected to a change in working conditions had the employee not taken FML in the first place, the Postal Service is not required to reinstate him or her into the same position.**
   29 C.F.R. § 825.216 ELM 515.7

VI. PROCEDURES

A. <u>Employee's Obligations</u>

1. **The employee is required to provide adequate notice that he or she will require leave, as follows:**

   a. **Where the leave is foreseeable, an employee should request the leave 30 days before it is to begin, unless it is not practicable to do so, in which case leave should ordinarily be requested no later than 1 to 2 work days after the need for leave becomes known. 29 C.F.R. § 825.302 ELM 515.51 Failure to request foreseeable leave 30 days in advance may result in the supervisor delaying the leave until 30 days after the request is made. 29 C.F.R. § 825.304**

   b. **Where the leave is not foreseeable, an employee**

should request leave as soon as practicable under the circumstances, but absent extraordinary circumstances no later than 1 to 2 workdays after the need for leave becomes known to the employee. 29 C.F.R. § 825.303

c. The Postal Service requires all requests for leave to be made on a Form 3971 "Request for or Notification of Absence," and one of those forms should be submitted where practicable. ELM 515.51 The FMLA does not require a written request, however, and therefore FML cannot be denied based on the failure to use the required form. 29 C.F.R. § 825.302(d)

2. The employee requesting FML should describe the reason for the leave sufficiently so that the supervisor can determine whether it qualifies as FML. Under the regulations, the employee need not expressly assert that the leave requested is FML; it is sufficient that the employee indicate that the leave is requested for one of the purposes permitted under the FMLA. 29 C.F.R. § 825.302(c)

However, in arbitrations involving discipline based on absences that arguably qualify as FMLA absences, arbitrators frequently find that the employee failed to put the employer on notice that his or her absence was for an FMLA purpose, and therefore that the absence is not excused, and the discipline is justified. <u>See</u> arbitration decisions collected and summarized in Appendix I. Moreover, Form 3971 does not necessarily call for the information that would allow a supervisor to determine whether or not the leave qualifies as FML. Therefore, the NPMHU has developed "FMLA Notification" forms that have been approved by the Postal Service and that should be

utilized by the employee wherever practicable. The Forms are listed below in Section VII and are contained in Appendix K. To be on the safe side, the employee should submit both the Form 3971 and the appropriate "FMLA Notification" form, and should retain copies of each for his or her records.

3. The employee must provide, at the supervisor's written request (i.e. the provision of Postal Service Publication 71) 29 C.F.R. § 825.301 (b)(1)(ii) the following documentation:

a. For the birth or placement for adoption of a child (see III-A and B above), the employee may be required to provide the birth or placement date, but is not required to produce any medical certification. ELM 515.52

b. For the care or psychological support of a spouse, son, daughter, or parent with a serious health condition (see III-C above), the employee may be required to provide a medical certification from a health care provider (see definition under III above) stating:

i) the definitional category into which the serious health condition falls;

ii) the probable duration of the illness and the need for care and/or psychological support;

iii) appropriate medical facts; and

iv) the schedule on which the employee is needed.

Where the request is to care for someone other than a biological parent or child, appropriate explanation of the relationship may be required. ELM 515.53

c. For the employee's own serious health condition, (see III-D above), the employee must satisfy documentation requirements for sick leave in ELM 513.31 through 513.38 or for leave without pay in 514.4. ELM 515.55
see also Publication 71

d. Where the employee requests intermittent or reduced schedule leave, the employee must supply a medical certification stating the medical necessity for such leave.
29 U.S.C. § 2613(a) and (b)
29 C.F.R. § 825.305 29 C.F.R. § 825.306

The Postal Service agrees that, because of privacy issues, a medical certification need not contain a diagnosis. App. D at 151 The Postal Service had also initially taken the position that a medical certification need not contain a prognosis, but rather only need contain a statement of the likely duration of the condition. The Postal Service now concludes that a prognosis is simply a statement of the likely duration of the condition, and therefore now takes the position that it is appropriate to require a prognosis. DOL regulations do allow an employer to require a medical certification containing a statement of the likely duration of the condition and NPMHU has never objected to providing such information.
29 C.F.R. § 825.306(b)(2)(i)

Thus, an appropriate certification includes a statement of medical facts that places the illness into one of the definitional categories of a "serious health condition" and a statement of the likely duration of the illness. The NPMHU has developed a medical certification form that contains questions eliciting all information to which the Postal Service is entitled. A copy is included in Appendix K, and all members should use this form.

4. **Upon the supervisor's oral or written request, the employee must provide recertification of the conditions in 3(b), (c), and (d) above. Such recertifications may not be required more than every 30 days unless:**

   i) **the employee requests an extension of leave;**

   ii) **circumstances described by the previous certification have changed substantially; or**

   iii) **the supervisor receives information that casts doubt on the validity of the original certification.**

   29 U.S.C. § 2613(e) 29 C.F.R. § 825.308

5. **If the employer has reason to doubt the validity of a medical certification:**

   a. **The supervisor may require the employee to obtain a second opinion from a health care provider chosen by the supervisor (but not in the employ of the Postal Service).**

   b. **If the two health care providers disagree, a third opinion may be sought from a jointly chosen health care provider. The third opinion**

is final and binding on the employer and employee.

c. The second and third opinions are to be obtained at Postal Service expense, but on the employee's own time.

d. Pending receipt of the second and third opinions, the employee is provisionally entitled to FML. If the second and third opinions do not ultimately establish the right to FML, the used leave will be treated as paid or unpaid leave under Postal Service policies.

29 U.S.C. § 2613(c) and (d)
29 C.F.R. § 825.307 ELM 515.54

6. Upon the supervisor's request, the employee must submit a "fitness for duty" certification that establishes the employee's ability to do his or her job. Under DOL regulations, the fitness for duty certification is to be a simple statement that relates exclusively to the "serious health condition" for which the employee was on FML, and the employee's return to work is not to be delayed pending receipt of the completed certification. 29 C.F.R. § 825.310(c) The Postal Service, however, requires a detailed medical examination for any absence exceeding 21 days that is not limited to the condition for which the employee took FML and that must be approved before the employee can return to work. ELM 515.55 see also Publication 71 at Appendix K The NPMHU has filed a grievance (currently pending at Step 4) arguing that DOL regulations control. At least one court has upheld NPMHU's position, and held that the Postal Service may not require more in the way of a fitness for duty examination that is allowed under DOL regulations, and that it may not delay return to work

based on the failure to submit to such an examination. Albert v. Runyon No. 98-10246, 1998 U.S. Dist. LEXIS 7505 (D. Mass. May 5, 1998), attached as Appendix J.

B. <u>Supervisor's Obligations</u>

1. The Postal Service is required to post WH Publication 1420 "Your Rights under the FMLA of 1993" at each postal facility in a prominent position.
29 U.S.C. § 2619 29 C.F.R. § 825.300
Appendix E at 7

2. Promptly following the employee's oral or written leave request (usually within two business days, the supervisor must provide the employee with the following:

a. If the supervisor has sufficient information to make a determination of whether the absence is FML, a designation on Form 3971 of the leave as FML or not.

b. If the supervisor needs additional documentation, including medical certification, a written request for any additional documentation, allowing at least 15 days for the provision of such documentation.

c. A Publication 71 or other written statement setting forth information regarding the employee's rights under the FMLA.

d. Notification as to whether the employee will be required to use annual and\or sick leave (may be made within 2 business days of the

supervisor's determination that the leave is FML). 29 C.F.R. § 825.208 ELM 515.51 App. E at 7

3. Under all circumstances, it is the supervisor's responsibility to designate leave as FML and count it against the employee's 12- week entitlement.

a. Once a supervisor is aware that leave is being taken for an FMLA covered reason, the supervisor must notify (in writing, or orally, confirmed in writing by the next payday) the employee within 2 business days (absent extenuating circumstances) that the leave is being counted as FML against the employee's 12-week entitlement.

b. If the supervisor learns that leave is for an FMLA purpose after leave has begun -- for example, if an employee goes on paid vacation, gets into an automobile accident that results in a serious health condition, and requests an extension of leave as unpaid leave -- the supervisor may designate the leave as FML back to the date that the serious health condition began.
29 C.F.R. § 825.208 ELM 515.51 App. E at 8

Under DOL regulations, the failure of the supervisor to promptly designate leave as FML means that the leave cannot be counted against the employee's 12-week entitlement. In other words, leave cannot be designated FML retroactively. <u>But</u> <u>see</u> Note at p. 3 above.

VII. FORMS

The following forms are included in Appendix K:

A. WH Publication 1420 (formerly USPS Poster 43) -- Your Rights Under the FMLA. Required to be posted in each Postal Service facility.

B. Form PS 3971 "Request for or Notification of Absence" submitted by the employee for each pay period for which the employee seeks leave.

C. Publication 71 "Notice for Employees Requesting Leave for Conditions Covered by the Family and Medical Leave Act." To be provided to each employee that requests leave arguably covered under the FMLA.

D. NPMHU Form 1 "FMLA Notification of Leave Requested for Birth, Placement, or Care of Child." This is the only form that must be submitted for a request for FML for the birth or placement of a child. The employee need not supply a medical certification.

E. NPMHU Form 2 "FMLA Notification of Leave Requested for Care of Family Member." The employee must provide a medical certification establishing that the family member has a serious health condition, and that the employee is needed to care for the family member.

F. NPMHU Form 3 "FMLA Notification of Leave Requested for Employee's Serious Health Condition." The employee must provide a medical certification establishing that he or she has a serious health condition.

G. NPMHU Form 4 "FMLA Certification of Health Care Provider." A medical certification must be completed by a health care provider (see definition at III above) and supplied

upon request when the employee requests FML for a serious health condition or to care for a family member.

VIII. PROTECTIONS AND REMEDIES

A. Protections

The FMLA prohibits interference with an employee's exercise of rights protected under the FMLA. An employer may neither penalize the employee for the exercise of any rights under the FMLA, nor for complaining about any unlawful practice under the FMLA. 29 U.S.C. § 2615 29 C.F.R. § 825.220 An issue that frequently arises in grievance and arbitration proceedings is Postal Service discipline of an employee based on excessive absences. Assuming that the employee has complied with all of his or her obligations under the FMLA, see VI-A above, no absence that qualifies for protection under the FMLA can be considered in any way by the Postal Service in disciplining an employee for excessive absences.

B. Remedies

An employee who believes that his or her rights under the FMLA have been violated has the choice of:

1. Filing a Grievance.

If management violates the FMLA, the law may be enforced through the National Agreement by filing a grievance alleging violations of two Articles in the National Agreement:

a. Article 3 -- "Management Rights." Article 3 provides that the Postal Service must be managed ". . . consistent with applicable laws and regulations." A violation of the FMLA would thus automatically constitute a violation of Article 3.

b. Article 19 -- "Handbooks and Manuals." Article 19 incorporates all Postal Service Handbooks and Manuals into the National Agreement. The ELM contains numerous rules regarding the FMLA, and a violation of any provision of the ELM or other handbooks is a violation of the National Agreement.

Arbitrators have generally found that the ELM incorporates the FMLA and that FMLA issues are therefore arbitrable indirectly through Article 19. See Appendix I.

2. Filing, or having another person file on his or her behalf, a complaint with the Secretary of Labor.

3. Filing a private lawsuit pursuant to Section 107 of the FMLA.

The employee may receive reimbursement for any monetary loss, including wages, benefits, or other compensation, interest, and reinstatement, employment, and/or promotion as appropriate. The employer may also be required to pay the attorney fees for the employee. 29 U.S.C. § 2617 29 C.F.R. § 825.400

Partnership Act (29 U.S.C. 1501(5)),[1] that has demonstrated experience administering programs that train women for apprenticeable occupations or other nontraditional occupations.

(2) The term "nontraditional occupation" means jobs in which women make up 25 percent or less of the total number of workers in that occupation.

(3) The term "Secretary" means the Secretary of Labor.

(Pub. L. 102–530, § 9, Oct. 27, 1992, 106 Stat. 3468.)

REFERENCES IN TEXT

Section 4(5) of the Job Training Partnership Act (29 U.S.C. 1501(5)), referred to in par. (1), was classified to section 1503(5) of this title and was repealed by Pub. L. 105–220, title I, § 199(b)(2), Aug. 7, 1998, 112 Stat. 1059, effective July 1, 2000. Pursuant to section 2940(b) of this title, references to a provision of the Job Training Partnership Act, effective Aug. 7, 1998, are deemed to refer to that provision or the corresponding provision of the Workforce Investment Act of 1998, Pub. L. 105–220, Aug. 7, 1998, 112 Stat. 936, and effective July 1, 2000, are deemed to refer to the corresponding provision of the Workforce Investment Act of 1998. For complete classification of the Workforce Investment Act of 1998 to the Code, see Short Title note set out under section 9201 of Title 20, Education, and Tables.

§ 2509. Technical assistance program authorization

There is authorized to be appropriated $1,000,000 to carry out section 2503 of this title.

(Pub. L. 102–530, § 10, Oct. 27, 1992, 106 Stat. 3468.)

CHAPTER 28—FAMILY AND MEDICAL LEAVE

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in title 3 sections 412, 415.

§ 2601. Findings and purposes

(a) Findings

Congress finds that—

(1) the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly;

(2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early child-rearing and the care of family members who have serious health conditions;

(3) the lack of employment policies to accommodate working parents can force individ-

[1] See References in Text note below.

uals to choose between job security and parenting;

(4) there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods;

(5) due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men; and

(6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.

(b) Purposes

It is the purpose of this Act—

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;

(3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;

(4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and

(5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

(Pub. L. 103–3, §2, Feb. 5, 1993, 107 Stat. 6.)

REFERENCES IN TEXT

This Act, referred to in subsec. (b), is Pub. L. 103–3, Feb. 5, 1993, 107 Stat. 6, known as the Family and Medical Leave Act of 1993, which enacted this chapter, sections 60m and 60n of Title 2, The Congress, and sections 6381 to 6387 of Title 5, Government Organization and Employees, amended section 2105 of Title 5, and enacted provisions set out as notes below. For complete classification of this Act to the Code, see Short Title note set out below and Tables.

EFFECTIVE DATE

Section 405 title IV of Pub. L. 103–3 provided that:

"(a) TITLE III.—Title III [enacting subchapter II of this chapter] shall take effect on the date of the enactment of this Act [Feb. 5, 1993].

"(b) OTHER TITLES.—

"(1) IN GENERAL.—Except as provided in paragraph (2), titles I, II, and V and this title [enacting subchapters I and III of this chapter, sections 60m and 60n of Title 2, The Congress, and sections 6381 to 6387 of Title 5, Government Organization and Employees, and amending section 2105 of Title 5] shall take effect 6 months after the date of the enactment of this Act.

"(2) COLLECTIVE BARGAINING AGREEMENTS.—In the case of a collective bargaining agreement in effect on the effective date prescribed by paragraph (1), title I [enacting subchapter I of this chapter] shall apply on the earlier of—

"(A) the date of the termination of such agreement; or

"(B) the date that occurs 12 months after the date of the enactment of this Act."

SHORT TITLE

Section 1(a) of Pub. L. 103–3 provided that: "This Act [enacting this chapter, sections 60m and 60n of Title 2, The Congress, and sections 6381 to 6387 of Title 5, Government Organization and Employees, amending section 2105 of Title 5, and enacting provisions set out above] may be cited as the 'Family and Medical Leave Act of 1993'."

ACT REFERRED TO IN OTHER SECTIONS

The Family and Medical Leave Act of 1993 is referred to in title 2 sections 1302, 1312, 1371, 1434; title 3 section 402; title 40 section 207b.

SUBCHAPTER I—GENERAL REQUIREMENTS FOR LEAVE

SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in sections 2632, 2654 of this title; title 42 section 12631.

§ 2611. Definitions

As used in this subchapter:

(1) Commerce

The terms "commerce" and "industry or activity affecting commerce" mean any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include "commerce" and any "industry affecting commerce", as defined in paragraphs (1) and (3) of section 142 of this title.

(2) Eligible employee

(A) In general

The term "eligible employee" means an employee who has been employed—

(i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and

(ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

(B) Exclusions

The term "eligible employee" does not include—

(i) any Federal officer or employee covered under subchapter V of chapter 63 of title 5; or

(ii) any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50.

(C) Determination

For purposes of determining whether an employee meets the hours of service requirement specified in subparagraph (A)(ii), the legal standards established under section 207 of this title shall apply.

(3) Employ; employee; State

The terms "employ", "employee", and "State" have the same meanings given such

terms in subsections (c), (e), and (g) of section 203 of this title.

(4) Employer

(A) In general

The term "employer"—

(i) means any person engaged in commerce or in any industry or activity 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;

(ii) includes—

(I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and

(II) any successor in interest of an employer;

(iii) includes any "public agency", as defined in section 203(x) of this title; and

(iv) includes the General Accounting Office and the Library of Congress.

(B) Public agency

For purposes of subparagraph (A)(iii), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.

(5) Employment benefits

The term "employment benefits" means all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer or through an "employee benefit plan", as defined in section 1002(3) of this title.

(6) Health care provider

The term "health care provider" means—

(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(B) any other person determined by the Secretary to be capable of providing health care services.

(7) Parent

The term "parent" means the biological parent of an employee or an individual who stood in loco parentis to an employee when the employee was a son or daughter.

(8) Person

The term "person" has the same meaning given such term in section 203(a) of this title.

(9) Reduced leave schedule

The term "reduced leave schedule" means a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee.

(10) Secretary

The term "Secretary" means the Secretary of Labor.

(11) Serious health condition

The term "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves—

(A) inpatient care in a hospital, hospice, or residential medical care facility; or

(B) continuing treatment by a health care provider.

(12) Son or daughter

The term "son or daughter" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is—

(A) under 18 years of age; or

(B) 18 years of age or older and incapable of self-care because of a mental or physical disability.

(13) Spouse

The term "spouse" means a husband or wife, as the case may be.

(Pub. L. 103–3, title I, § 101, Feb. 5, 1993, 107 Stat. 7; Pub. L. 104–1, title II, § 202(c)(1)(A), Jan. 23, 1995, 109 Stat. 9.)

AMENDMENTS

1995—Par. (4)(A)(iv). Pub. L. 104–1 added cl. (iv).

EFFECTIVE DATE OF 1995 AMENDMENT

Amendment by Pub. L. 104–1 effective one year after transmission to Congress of the study under section 1371 of Title 2, The Congress, see section 1312(e)(2) of Title 2. The study required under section 1371 of Title 2, dated Dec. 31, 1996, was transmitted to Congress by the Board of Directors of the Office of Compliance on Dec. 30, 1996.

EFFECTIVE DATE

Subchapter effective 6 months after Feb. 5, 1993, except that, in the case of collective bargaining agreements in effect on that effective date, subchapter applicable on the earlier of (1) the date of termination of such agreement, or (2) the date that occurs 12 months after Feb. 5, 1993, see section 405(b) of Pub. L. 103–3, set out as a note under section 2601 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 2 section 1312; title 3 section 412; title 42 section 12631.

§ 2612. Leave requirement

(a) In general

(1) Entitlement to leave

Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(2) Expiration of entitlement

The entitlement to leave under subparagraphs (A) and (B) of paragraph (1) for a birth

or placement of a son or daughter shall expire at the end of the 12-month period beginning on the date of such birth or placement.

(b) Leave taken intermittently or on reduced leave schedule

(1) In general

Leave under subparagraph (A) or (B) of subsection (a)(1) of this section shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise. Subject to paragraph (2), subsection (e)(2) of this section, and section 2613(b)(5) of this title, leave under subparagraph (C) or (D) of subsection (a)(1) of this section may be taken intermittently or on a reduced leave schedule when medically necessary. The taking of leave intermittently or on a reduced leave schedule pursuant to this paragraph shall not result in a reduction in the total amount of leave to which the employee is entitled under subsection (a) of this section beyond the amount of leave actually taken.

(2) Alternative position

If an employee requests intermittent leave, or leave on a reduced leave schedule, under subparagraph (C) or (D) of subsection (a)(1) of this section, that is foreseeable based on planned medical treatment, the employer may require such employee to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified and that—

(A) has equivalent pay and benefits; and

(B) better accommodates recurring periods of leave than the regular employment position of the employee.

(c) Unpaid leave permitted

Except as provided in subsection (d) of this section, leave granted under subsection (a) may consist of unpaid leave. Where an employee is otherwise exempt under regulations issued by the Secretary pursuant to section 213(a)(1) of this title, the compliance of an employer with this subchapter by providing unpaid leave shall not affect the exempt status of the employee under such section.

(d) Relationship to paid leave

(1) Unpaid leave

If an employer provides paid leave for fewer than 12 workweeks, the additional weeks of leave necessary to attain the 12 workweeks of leave required under this subchapter may be provided without compensation.

(2) Substitution of paid leave

(A) In general

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph (A), (B), or (C) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection.

(B) Serious health condition

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under subparagraph (C) or (D) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection, except that nothing in this subchapter shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.

(e) Foreseeable leave

(1) Requirement of notice

In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) of this section is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(2) Duties of employee

In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) of this section is foreseeable based on planned medical treatment, the employee—

(A) shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate; and

(B) shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(f) Spouses employed by same employer

In any case in which a husband and wife entitled to leave under subsection (a) of this section are employed by the same employer, the aggregate number of workweeks of leave to which both may be entitled may be limited to 12 workweeks during any 12-month period, if such leave is taken—

(1) under subparagraph (A) or (B) of subsection (a)(1) of this section; or

(2) to care for a sick parent under subparagraph (C) of such subsection.

(Pub. L. 103–3, title I, § 102, Feb. 5, 1993, 107 Stat. 9.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 2611, 2613, 2614, 2618 of this title; title 2 section 1312; title 3 section 412.

§ 2613. Certification

(a) In general

An employer may require that a request for leave under subparagraph (C) or (D) of section

2612(a)(1) of this title be supported by a certification issued by the health care provider of the eligible employee or of the son, daughter, spouse, or parent of the employee, as appropriate. The employee shall provide, in a timely manner, a copy of such certification to the employer.

(b) Sufficient certification

Certification provided under subsection (a) of this section shall be sufficient if it states—

(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)(A) for purposes of leave under section 2612(a)(1)(C) of this title, 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 that such employee is needed to care for the son, daughter, spouse, or parent; and

(B) for purposes of leave under section 2612(a)(1)(D) of this title, a statement that the employee is unable to perform the functions of the position of the employee;

(5) in the case of certification for intermittent leave, or leave on a reduced leave schedule, for planned medical treatment, the dates on which such treatment is expected to be given and the duration of such treatment;

(6) in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 2612(a)(1)(D) of this title, a statement of the medical necessity for the intermittent leave or leave on a reduced leave schedule, and the expected duration of the intermittent leave or reduced leave schedule; and

(7) in the case of certification for intermittent leave, or leave on a reduced leave schedule, under section 2612(a)(1)(C) of this title, a statement that the employee's intermittent leave or leave on a reduced leave schedule is necessary for the care of the son, daughter, parent, or spouse who has a serious health condition, or will assist in their recovery, and the expected duration and schedule of the intermittent leave or reduced leave schedule.

(c) Second opinion

(1) In general

In any case in which the employer has reason to doubt the validity of the certification provided under subsection (a) of this section for leave under subparagraph (C) or (D) of section 2612(a)(1) of this title, the employer may require, at the expense of the employer, that the eligible employee obtain the opinion of a second health care provider designated or approved by the employer concerning any information certified under subsection (b) of this section for such leave.

(2) Limitation

A health care provider designated or approved under paragraph (1) shall not be employed on a regular basis by the employer.

(d) Resolution of conflicting opinions

(1) In general

In any case in which the second opinion described in subsection (c) of this section differs from the opinion in the original certification provided under subsection (a) of this section, the employer may require, at the expense of the employer, that the employee obtain the opinion of a third health care provider designated or approved jointly by the employer and the employee concerning the information certified under subsection (b) of this section.

(2) Finality

The opinion of the third health care provider concerning the information certified under subsection (b) of this section shall be considered to be final and shall be binding on the employer and the employee.

(e) Subsequent recertification

The employer may require that the eligible employee obtain subsequent recertifications on a reasonable basis.

(Pub. L. 103–3, title I, § 103, Feb. 5, 1993, 107 Stat. 11.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2612 of this title; title 2 section 1312; title 3 section 412.

§ 2614. Employment and benefits protection

(a) Restoration to position

(1) In general

Except as provided in subsection (b) of this section, any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave—

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

(2) Loss of benefits

The taking of leave under section 2612 of this title shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

(3) Limitations

Nothing in this section shall be construed to entitle any restored employee to—

(A) the accrual of any seniority or employment benefits during any period of leave; or

(B) 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 the leave.

(4) Certification

As a condition of restoration under paragraph (1) for an employee who has taken leave under section 2612(a)(1)(D) of this title, the employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the health

care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.

(5) Construction

Nothing in this subsection shall be construed to prohibit an employer from requiring an employee on leave under section 2612 of this title to report periodically to the employer on the status and intention of the employee to return to work.

(b) Exemption concerning certain highly compensated employees

(1) Denial of restoration

An employer may deny restoration under subsection (a) of this section to any eligible employee described in paragraph (2) if—

(A) such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer;

(B) the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that such injury would occur; and

(C) in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice.

(2) Affected employees

An eligible employee described in paragraph (1) is a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed.

(c) Maintenance of health benefits

(1) Coverage

Except as provided in paragraph (2), during any period that an eligible employee takes leave under section 2612 of this title, the employer shall maintain coverage under any "group health plan" (as defined in section 5000(b)(1) of title 26) for the duration of such leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave.

(2) Failure to return from leave

The employer may recover the premium that the employer paid for maintaining coverage for the employee under such group health plan during any period of unpaid leave under section 2612 of this title if—

(A) the employee fails to return from leave under section 2612 of this title after the period of leave to which the employee is entitled has expired; and

(B) the employee fails to return to work for a reason other than—

(i) the continuation, recurrence, or onset of a serious health condition that entitles the employee to leave under subparagraph (C) or (D) of section 2612(a)(1) of this title; or

(ii) other circumstances beyond the control of the employee.

(3) Certification

(A) Issuance

An employer may require that a claim that an employee is unable to return to work because of the continuation, recurrence, or onset of the serious health condition described in paragraph (2)(B)(i) be supported by—

(i) a certification issued by the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(1)(C) of this title; or

(ii) a certification issued by the health care provider of the eligible employee, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(1)(D) of this title.

(B) Copy

The employee shall provide, in a timely manner, a copy of such certification to the employer.

(C) Sufficiency of certification

(i) Leave due to serious health condition of employee

The certification described in subparagraph (A)(ii) shall be sufficient if the certification states that a serious health condition prevented the employee from being able to perform the functions of the position of the employee on the date that the leave of the employee expired.

(ii) Leave due to serious health condition of family member

The certification described in subparagraph (A)(i) shall be sufficient if the certification states that the employee is needed to care for the son, daughter, spouse, or parent who has a serious health condition on the date that the leave of the employee expired.

(Pub. L. 103–3, title I, §104, Feb. 5, 1993, 107 Stat. 12.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 2618, 2632 of this title; title 2 section 1312; title 3 section 412.

§ 2615. Prohibited acts

(a) Interference with rights

(1) Exercise of rights

It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

(2) Discrimination

It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

(b) Interference with proceedings or inquiries

It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual—

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter;

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter.

(Pub. L. 103–3, title I, §105, Feb. 5, 1993, 107 Stat. 14.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2617 of this title; title 2 section 1312; title 3 section 412.

§ 2616. Investigative authority

(a) In general

To ensure compliance with the provisions of this subchapter, or any regulation or order issued under this subchapter, the Secretary shall have, subject to subsection (c) of this section, the investigative authority provided under section 211(a) of this title.

(b) Obligation to keep and preserve records

Any employer shall make, keep, and preserve records pertaining to compliance with this subchapter in accordance with section 211(c) of this title and in accordance with regulations issued by the Secretary.

(c) Required submissions generally limited to annual basis

The Secretary shall not under the authority of this section require any employer or any plan, fund, or program to submit to the Secretary any books or records more than once during any 12-month period, unless the Secretary has reasonable cause to believe there may exist a violation of this subchapter or any regulation or order issued pursuant to this subchapter, or is investigating a charge pursuant to section 2617(b) of this title.

(d) Subpoena powers

For the purposes of any investigation provided for in this section, the Secretary shall have the subpoena authority provided for under section 209 of this title.

(Pub. L. 103–3, title I, §106, Feb. 5, 1993, 107 Stat. 15.)

§ 2617. Enforcement

(a) Civil action by employees

(1) Liability

Any employer who violates section 2615 of this title shall be liable to any eligible employee affected—

(A) for damages equal to—

(i) the amount of—

(I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or

(II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages or salary for the employee;

(ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and

(iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer who has violated section 2615 of this title proves to the satisfaction of the court that the act or omission which violated section 2615 of this title was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of section 2615 of this title, such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively; and

(B) for such equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(2) Right of action

An action to recover the damages or equitable relief prescribed in paragraph (1) may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of—

(A) the employees; or

(B) the employees and other employees similarly situated.

(3) Fees and costs

The court in such an action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action to be paid by the defendant.

(4) Limitations

The right provided by paragraph (2) to bring an action by or on behalf of any employee shall terminate—

(A) on the filing of a complaint by the Secretary in an action under subsection (d) of this section in which restraint is sought of any further delay in the payment of the amount described in paragraph (1)(A) to such employee by an employer responsible under paragraph (1) for the payment; or

(B) on the filing of a complaint by the Secretary in an action under subsection (b) of this section in which a recovery is sought of the damages described in paragraph (1)(A) owing to an eligible employee by an employer liable under paragraph (1),

unless the action described in subparagraph (A) or (B) is dismissed without prejudice on motion of the Secretary.

(b) Action by Secretary

(1) Administrative action

The Secretary shall receive, investigate, and attempt to resolve complaints of violations of

section 2615 of this title in the same manner that the Secretary receives, investigates, and attempts to resolve complaints of violations of sections 206 and 207 of this title.

(2) Civil action

The Secretary may bring an action in any court of competent jurisdiction to recover the damages described in subsection (a)(1)(A) of this section.

(3) Sums recovered

Any sums recovered by the Secretary pursuant to paragraph (2) shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to each employee affected. Any such sums not paid to an employee because of inability to do so within a period of 3 years shall be deposited into the Treasury of the United States as miscellaneous receipts.

(c) Limitation

(1) In general

Except as provided in paragraph (2), an action may be brought under this section not later than 2 years after the date of the last event constituting the alleged violation for which the action is brought.

(2) Willful violation

In the case of such action brought for a willful violation of section 2615 of this title, such action may be brought within 3 years of the date of the last event constituting the alleged violation for which such action is brought.

(3) Commencement

In determining when an action is commenced by the Secretary under this section for the purposes of this subsection, it shall be considered to be commenced on the date when the complaint is filed.

(d) Action for injunction by Secretary

The district courts of the United States shall have jurisdiction, for cause shown, in an action brought by the Secretary—

(1) to restrain violations of section 2615 of this title, including the restraint of any withholding of payment of wages, salary, employment benefits, or other compensation, plus interest, found by the court to be due to eligible employees; or

(2) to award such other equitable relief as may be appropriate, including employment, reinstatement, and promotion.

(e) Solicitor of Labor

The Solicitor of Labor may appear for and represent the Secretary on any litigation brought under this section.

(f) General Accounting Office and Library of Congress

In the case of the General Accounting Office and the Library of Congress, the authority of the Secretary of Labor under this subchapter shall be exercised respectively by the Comptroller General of the United States and the Librarian of Congress.

(Pub. L. 103–3, title I, §107, Feb. 5, 1993, 107 Stat. 15; Pub. L. 104–1, title II, §202(c)(1)(B), Jan. 23, 1995, 109 Stat. 9.)

AMENDMENTS

1995—Subsec. (f). Pub. L. 104–1 added subsec. (f).

EFFECTIVE DATE OF 1995 AMENDMENT

Amendment by Pub. L. 104–1 effective one year after transmission to Congress of the study under section 1371 of Title 2, The Congress, see section 1312(e)(2) of Title 2. The study required under section 1371 of Title 2, dated Dec. 31, 1996, was transmitted to Congress by the Board of Directors of the Office of Compliance on Dec. 30, 1996.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 2616, 2618 of this title; title 2 section 1312; title 3 section 412.

§ 2618. Special rules concerning employees of local educational agencies

(a) Application

(1) In general

Except as otherwise provided in this section, the rights (including the rights under section 2614 of this title, which shall extend throughout the period of leave of any employee under this section), remedies, and procedures under this subchapter shall apply to—

(A) any "local educational agency" (as defined in section 8801 of title 20) and an eligible employee of the agency; and

(B) any private elementary or secondary school and an eligible employee of the school.

(2) Definitions

For purposes of the application described in paragraph (1):

(A) Eligible employee

The term "eligible employee" means an eligible employee of an agency or school described in paragraph (1).

(B) Employer

The term "employer" means an agency or school described in paragraph (1).

(b) Leave does not violate certain other Federal laws

A local educational agency and a private elementary or secondary school shall not be in violation of the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.), section 794 of this title), or title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), solely as a result of an eligible employee of such agency or school exercising the rights of such employee under this subchapter.

(c) Intermittent leave or leave on reduced schedule for instructional employees

(1) In general

Subject to paragraph (2), in any case in which an eligible employee employed principally in an instructional capacity by any such educational agency or school requests leave under subparagraph (C) or (D) of section 2612(a)(1) of this title that is foreseeable based on planned medical treatment and the employee would be on leave for greater than 20 percent of the total number of working days in the period during which the leave would extend, the agency or school may require that such employee elect either—

(A) to take leave for periods of a particular duration, not to exceed the duration of the planned medical treatment; or

(B) to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified, and that—

(i) has equivalent pay and benefits; and

(ii) better accommodates recurring periods of leave than the regular employment position of the employee.

(2) Application

The elections described in subparagraphs (A) and (B) of paragraph (1) shall apply only with respect to an eligible employee who complies with section 2612(e)(2) of this title.

(d) Rules applicable to periods near conclusion of academic term

The following rules shall apply with respect to periods of leave near the conclusion of an academic term in the case of any eligible employee employed principally in an instructional capacity by any such educational agency or school:

(1) Leave more than 5 weeks prior to end of term

If the eligible employee begins leave under section 2612 of this title more than 5 weeks prior to the end of the academic term, the agency or school may require the employee to continue taking leave until the end of such term, if—

(A) the leave is of at least 3 weeks duration; and

(B) the return to employment would occur during the 3-week period before the end of such term.

(2) Leave less than 5 weeks prior to end of term

If the eligible employee begins leave under subparagraph (A), (B), or (C) of section 2612(a)(1) of this title during the period that commences 5 weeks prior to the end of the academic term, the agency or school may require the employee to continue taking leave until the end of such term, if—

(A) the leave is of greater than 2 weeks duration; and

(B) the return to employment would occur during the 2-week period before the end of such term.

(3) Leave less than 3 weeks prior to end of term

If the eligible employee begins leave under subparagraph (A), (B), or (C) of section 2612(a)(1) of this title during the period that commences 3 weeks prior to the end of the academic term and the duration of the leave is greater than 5 working days, the agency or school may require the employee to continue to take leave until the end of such term.

(e) Restoration to equivalent employment position

For purposes of determinations under section 2614(a)(1)(B) of this title (relating to the restoration of an eligible employee to an equivalent position), in the case of a local educational agency or a private elementary or secondary school, such determination shall be made on the basis of established school board policies and practices, private school policies and practices, and collective bargaining agreements.

(f) Reduction of amount of liability

If a local educational agency or a private elementary or secondary school that has violated this subchapter proves to the satisfaction of the court that the agency, school, or department had reasonable grounds for believing that the underlying act or omission was not a violation of this subchapter, such court may, in the discretion of the court, reduce the amount of the liability provided for under section 2617(a)(1)(A) of this title to the amount and interest determined under clauses (i) and (ii), respectively, of such section.

(Pub. L. 103–3, title I, § 108, Feb. 5, 1993, 107 Stat. 17; Pub. L. 103–382, title III, § 394(e), Oct. 20, 1994, 108 Stat. 4027.)

REFERENCES IN TEXT

The Individuals with Disabilities Education Act, referred to in subsec. (b), is title VI of Pub. L. 91–230, Apr. 13, 1970, 84 Stat. 175, as amended, which is classified generally to chapter 33 (§ 1400 et seq.) of Title 20, Education. For complete classification of this Act to the Code, see section 1400 of Title 20 and Tables.

The Civil Rights Act of 1964, referred to in subsec. (b), is Pub. L. 88–352, July 2, 1964, 78 Stat. 241, as amended. Title VI of the Act is classified generally to subchapter V (§ 2000d et seq.) of chapter 21 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 2000a of Title 42 and Tables.

AMENDMENTS

1994—Subsec. (a)(1)(A). Pub. L. 103–382 substituted "section 8801 of title 20" for "section 2891(12) of title 20".

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2632 of this title.

§ 2619. Notice

(a) In general

Each employer shall post and keep posted, in conspicuous places on the premises of the employer where notices to employees and applicants for employment are customarily posted, a notice, to be prepared or approved by the Secretary, setting forth excerpts from, or summaries of, the pertinent provisions of this subchapter and information pertaining to the filing of a charge.

(b) Penalty

Any employer that willfully violates this section may be assessed a civil money penalty not to exceed $100 for each separate offense.

(Pub. L. 103–3, title I, § 109, Feb. 5, 1993, 107 Stat. 19.)

SUBCHAPTER II—COMMISSION ON LEAVE

§ 2631. Establishment

There is established a commission to be known as the Commission on Leave (referred to in this subchapter as the "Commission").

(Pub. L. 103–3, title III, § 301, Feb. 5, 1993, 107 Stat. 23.)

§ 2632. Duties

The Commission shall—

(1) conduct a comprehensive study of—

(A) existing and proposed mandatory and voluntary policies relating to family and temporary medical leave, including policies provided by employers not covered under this Act;

(B) the potential costs, benefits, and impact on productivity, job creation and business growth of such policies on employers and employees;

(C) possible differences in costs, benefits, and impact on productivity, job creation and business growth of such policies on employers based on business type and size;

(D) the impact of family and medical leave policies on the availability of employee benefits provided by employers, including employers not covered under this Act;

(E) alternate and equivalent State enforcement of subchapter I of this chapter with respect to employees described in section 2618(a) of this title;

(F) methods used by employers to reduce administrative costs of implementing family and medical leave policies;

(G) the ability of the employers to recover, under section 2614(c)(2) of this title, the premiums described in such section; and

(H) the impact on employers and employees of policies that provide temporary wage replacement during periods of family and medical leave.

(2) not later than 2 years after the date on which the Commission first meets, prepare and submit, to the appropriate Committees of Congress, a report concerning the subjects listed in paragraph (1).

(Pub. L. 103–3, title III, §302, Feb. 5, 1993, 107 Stat. 23.)

REFERENCES IN TEXT

This Act, referred to in par. (1)(A), (D), is Pub. L. 103–3, Feb. 5, 1993, 107 Stat. 6, known as the Family and Medical Leave Act of 1993, which enacted this chapter, sections 60m and 60n of Title 2, The Congress, and sections 6381 to 6387 of Title 5, Government Organization and Employees, amended section 2105 of Title 5, and enacted provisions set out as notes under section 2601 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2601 of this title and Tables.

§ 2633. Membership

(a) Composition

(1) Appointments

The Commission shall be composed of 12 voting members and 4 ex officio members to be appointed not later than 60 days after February 5, 1993, as follows:

(A) Senators

One Senator shall be appointed by the Majority Leader of the Senate, and one Senator shall be appointed by the Minority Leader of the Senate.

(B) Members of House of Representatives

One Member of the House of Representatives shall be appointed by the Speaker of the House of Representatives, and one Member of the House of Representatives shall be appointed by the Minority Leader of the House of Representatives.

(C) Additional members

(i) Appointment

Two members each shall be appointed by—

(I) the Speaker of the House of Representatives;

(II) the Majority Leader of the Senate;

(III) the Minority Leader of the House of Representatives; and

(IV) the Minority Leader of the Senate.

(ii) Expertise

Such members shall be appointed by virtue of demonstrated expertise in relevant family, temporary disability, and labor management issues. Such members shall include representatives of employers, including employers from large businesses and from small businesses.

(2) Ex officio members

The Secretary of Health and Human Services, the Secretary of Labor, the Secretary of Commerce, and the Administrator of the Small Business Administration shall serve on the Commission as nonvoting ex officio members.

(b) Vacancies

Any vacancy on the Commission shall be filled in the manner in which the original appointment was made. The vacancy shall not affect the power of the remaining members to execute the duties of the Commission.

(c) Chairperson and vice chairperson

The Commission shall elect a chairperson and a vice chairperson from among the members of the Commission.

(d) Quorum

Eight members of the Commission shall constitute a quorum for all purposes, except that a lesser number may constitute a quorum for the purpose of holding hearings.

(Pub. L. 103–3, title III, §303, Feb. 5, 1993, 107 Stat. 24.)

§ 2634. Compensation

(a) Pay

Members of the Commission shall serve without compensation.

(b) Travel expenses

Members of the Commission shall be allowed reasonable travel expenses, including a per diem allowance, in accordance with section 5703 of title 5 when performing duties of the Commission.

(Pub. L. 103–3, title III, §304, Feb. 5, 1993, 107 Stat. 25.)

§ 2635. Powers

(a) Meetings

The Commission shall first meet not later than 30 days after the date on which all mem-

bers are appointed, and the Commission shall meet thereafter on the call of the chairperson or a majority of the members.

(b) Hearings and sessions

The Commission may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission considers appropriate. The Commission may administer oaths or affirmations to witnesses appearing before it.

(c) Access to information

The Commission may secure directly from any Federal agency information necessary to enable it to carry out this subchapter, if the information may be disclosed under section 552 of title 5. Subject to the previous sentence, on the request of the chairperson or vice chairperson of the Commission, the head of such agency shall furnish such information to the Commission.

(d) Use of facilities and services

Upon the request of the Commission, the head of any Federal agency may make available to the Commission any of the facilities and services of such agency.

(e) Personnel from other agencies

On the request of the Commission, the head of any Federal agency may detail any of the personnel of such agency to serve as an Executive Director of the Commission or assist the Commission in carrying out the duties of the Commission. Any detail shall not interrupt or otherwise affect the civil service status or privileges of the Federal employee.

(f) Voluntary service

Notwithstanding section 1342 of title 31, the chairperson of the Commission may accept for the Commission voluntary services provided by a member of the Commission.

(Pub. L. 103–3, title III, § 305, Feb. 5, 1993, 107 Stat. 25.)

§ 2636. Termination

The Commission shall terminate 30 days after the date of the submission of the report of the Commission to Congress.

(Pub. L. 103–3, title III, § 306, Feb. 5, 1993, 107 Stat. 25.)

SUBCHAPTER III—MISCELLANEOUS PROVISIONS

§ 2651. Effect on other laws

(a) Federal and State antidiscrimination laws

Nothing in this Act or any amendment made by this Act shall be construed to modify or affect any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability.

(b) State and local laws

Nothing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act.

(Pub. L. 103–3, title IV, § 401, Feb. 5, 1993, 107 Stat. 26.)

REFERENCES IN TEXT

This Act, referred to in text, is Pub. L. 103–3, Feb. 5, 1993, 107 Stat. 6, known as the Family and Medical Leave Act of 1993, which enacted this chapter, sections 60m and 60n of Title 2, The Congress, and sections 6381 to 6387 of Title 5, Government Organization and Employees, amended section 2105 of Title 5, and enacted provisions set out as notes under section 2601 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2601 of this title and Tables.

EFFECTIVE DATE

Subchapter effective 6 months after Feb. 5, 1993, see section 405(b)(1) of Pub. L. 103–3, set out as a note under section 2601 of this title.

§ 2652. Effect on existing employment benefits

(a) More protective

Nothing in this Act or any amendment made by this Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act or any amendment made by this Act.

(b) Less protective

The rights established for employees under this Act or any amendment made by this Act shall not be diminished by any collective bargaining agreement or any employment benefit program or plan.

(Pub. L. 103–3, title IV, § 402, Feb. 5, 1993, 107 Stat. 26.)

REFERENCES IN TEXT

This Act, referred to in text, is Pub. L. 103–3, Feb. 5, 1993, 107 Stat. 6, known as the Family and Medical Leave Act of 1993, which enacted this chapter, sections 60m and 60n of Title 2, The Congress, and sections 6381 to 6387 of Title 5, Government Organization and Employees, amended section 2105 of Title 5, and enacted provisions set out as notes under section 2601 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2601 of this title and Tables.

§ 2653. Encouragement of more generous leave policies

Nothing in this Act or any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act.

(Pub. L. 103–3, title IV, § 403, Feb. 5, 1993, 107 Stat. 26.)

REFERENCES IN TEXT

This Act, referred to in text, is Pub. L. 103–3, Feb. 5, 1993, 107 Stat. 6, known as the Family and Medical Leave Act of 1993, which enacted this chapter, sections 60m and 60n of Title 2, The Congress, and sections 6381 to 6387 of Title 5, Government Organization and Employees, amended section 2105 of Title 5, and enacted provisions set out as notes under section 2601 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2601 of this title and Tables.

§ 2654. Regulations

The Secretary of Labor shall prescribe such regulations as are necessary to carry out subchapter I of this chapter and this subchapter not later than 120 days after February 5, 1993.

(Pub. L. 103–3, title IV, § 404, Feb. 5, 1993, 107 Stat. 26.)

CHAPTER 29—WORKERS TECHNOLOGY SKILL DEVELOPMENT

§ 2701. Findings

The Congress finds and declares the following:

(1) In an increasingly competitive world economy, the companies and nations that lead in the rapid development, commercialization, and application of new and advanced technologies, and in the high-quality, competitively priced production of goods and services, will lead in economic growth, employment, and high living standards.

(2) While the United States remains the world leader in science and invention, it has not done well in rapidly making the transition from achievement in its research laboratories to high-quality, competitively priced production of goods and services. This lag and the unprecedented competitive challenge that the United States has faced from abroad have contributed to a drop in real wages and living standards.

(3) Companies that are successfully competitive in the rapid development, commercialization, application, and implementation of advanced technologies, and in the successful delivery of goods and services, recognize that worker participation and labor-management cooperation in the deployment, application, and implementation of advanced workplace technologies make an important contribution to high-quality, competitively priced production of goods and services and in maintaining and improving real wages for workers.

(4) The Federal Government has an important role in encouraging and augmenting private sector efforts relating to the development, application, manufacture, and deployment of new and advanced technologies. The role should be to—

(A) work with private companies, States, worker organizations, nonprofit organizations, and institutions of higher education to ensure the development, application, production, and implementation of new and advanced technologies to promote the improvement of workers' skills, wages, job security, and working conditions, and a healthy environment;

(B) encourage worker and worker organization participation in the development, commercialization, evaluation, selection, application, and implementation of new and advanced technologies in the workplace; and

(C) promote the use and integration of new and advanced technologies in the workplace that enhance workers' skills.

(5) In working with the private sector to promote the technological leadership and economic growth of the United States, the Federal Government has a responsibility to ensure that Federal technology programs help the United States to remain competitive and to maintain and improve living standards and to create and retain secure jobs in economically stable communities.

(Pub. L. 103–382, title V, § 542, Oct. 20, 1994, 108 Stat. 4051.)

SHORT TITLE

Section 541 of Pub. L. 103–382 provided that: "This part [part D (§§ 541–547) of title V of Pub. L. 103–382, enacting this chapter] may be cited as the 'Workers Technology Skill Development Act'."

STUDY AND REPORT ON THE "DIGITAL DIVIDE"

Pub. L. 106–313, title I, § 115, Oct. 17, 2000, 114 Stat. 1262, provided that:

"(a) STUDY.—The Secretary of Commerce shall conduct a review of existing public and private high-tech workforce training programs in the United States.

"(b) REPORT.—Not later than 18 months after the date of enactment of this Act [Oct. 17, 2000], the Secretary of Commerce shall submit a report to Congress setting forth the findings of the study conducted under subsection (a)."

REPORT ON OLDER WORKERS IN INFORMATION TECHNOLOGY FIELD

Pub. L. 105–277, div. C, title IV, § 417, Oct. 21, 1998, 112 Stat. 2681–656, provided that:

"(a) STUDY.—The Director of the National Science Foundation shall enter into a contract with the President of the National Academy of Sciences to conduct a study, using the best available data, assessing the status of older workers in the information technology field. The study shall consider the following:

"(1) The existence and extent of age discrimination in the information technology workplace.

"(2) The extent to which there is a difference, based on age, in—

"(A) promotion and advancement;

"(B) working hours;

"(C) telecommuting;

"(D) salary; and

"(E) stock options, bonuses, and other benefits.

"(3) The relationship between rates of advancement, promotion, and compensation to experience, skill level, education, and age.

"(4) Differences in skill level on the basis of age.

"(b) REPORT.—Not later than October 1, 2000, the Director of the National Science Foundation shall submit to the Committees on the Judiciary of the United States House of Representatives and the Senate a report containing the results of the study described in subsection (a)."

REPORT ON HIGH TECHNOLOGY LABOR MARKET NEEDS

Pub. L. 105–277, div. C, title IV, § 418(a), Oct. 21, 1998, 112 Stat. 2681–656, provided that:

complaint under the Act, and agreed to and signed by the parties.

I acknowledge that I have received a copy of the above notice, and that it has been read to me.

(Date)

(Signature)

[56 FR 9064, Mar. 4, 1991; 56 FR 14469, Apr. 10, 1991]

PART 825—THE FAMILY AND MEDICAL LEAVE ACT OF 1993

Subpart A—What is the Family and Medical Leave Act, and to Whom Does It Apply?

Sec.

Subpart B—What Leave Is an Employee Entitled to Take Under the Family and Medical Leave Act?

AUTHORITY: 29 U.S.C. 2654; Secretary's Order 1–93 (58 FR 21190).

SOURCE: 60 FR 2237, Jan. 6, 1995, unless otherwise noted.

Subpart A—What is the Family and Medical Leave Act, and to Whom Does It Apply?

§825.100 What is the Family and Medical Leave Act?

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

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

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

(d) The employer has a right to 30 days advance notice from the employee where practicable. In addition, the employer may require an employee to submit certification from a health care provider to substantiate that the leave is due to the serious health condition of the employee or the employee's immediate family member. Failure to comply with these requirements may result in a delay in the start of FMLA leave. Pursuant to a uniformly applied policy, the employer may also require that an employee present a certification of fitness to return to work when the absence was caused by the employee's serious health condition (*see* §825.311(c)). The employer may delay restoring the employee to employment without such certificate relating to the health condition which caused the employee's absence.

[60 FR 2237, Jan. 6, 1995; 60 FR 16383, Mar. 30, 1995]

§825.101 What is the purpose of the Act?

(a) FMLA is intended to allow employees to balance their work and family life by taking reasonable unpaid leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition. The Act is intended to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. It was intended that the Act accomplish these purposes in a manner that accommodates the legitimate interests of employers, and in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment in minimizing the potential for employment discrimination on the basis of sex, while promoting equal employment opportunity for men and women.

(b) The enactment of FMLA was predicated on two fundamental concerns—the needs of the American workforce, and the development of high-performance organizations. Increasingly, America's children and elderly are dependent upon family members who must spend long hours at work. When a family emergency arises, requiring workers to attend to seriously-ill children or parents, or to newly-born or adopted infants, or even to their own serious illness, workers need reassurance that they will not be asked to choose between continuing their employment, and meeting their

personal and family obligations or tending to vital needs at home.

(c) The FMLA is both intended and expected to benefit employers as well as their employees. A direct correlation exists between stability in the family and productivity in the workplace. FMLA will encourage the development of high-performance organizations. When workers can count on durable links to their workplace they are able to make their own full commitments to their jobs. The record of hearings on family and medical leave indicate the powerful productive advantages of stable workplace relationships, and the comparatively small costs of guaranteeing that those relationships will not be dissolved while workers attend to pressing family health obligations or their own serious illness.

§825.102 When was the Act effective?

(a) The Act became effective on August 5, 1993, for most employers. If a collective bargaining agreement was in effect on that date, the Act's effective date was delayed until February 5, 1994, or the date the agreement expired, whichever date occurred sooner. This delayed effective date was applicable only to employees covered by a collective bargaining agreement that was in effect on August 5, 1993, and not, for example, to employees outside the bargaining unit. Application of FMLA to collective bargaining agreements is discussed further in §825.700(c).

(b) The period prior to the Act's effective date must be considered in determining employer coverage and employee eligibility. For example, as discussed further below, an employer with no collective bargaining agreements in effect as of August 5, 1993, must count employees/workweeks for calendar year 1992 and calendar year 1993. If 50 or more employees were employed during 20 or more workweeks in *either* 1992 or 1993(through August 5, 1993), the employer was covered under FMLA on August 5, 1993. If not, the employer was not covered on August 5, 1993, but must continue to monitor employment levels each workweek remaining in 1993 and thereafter to determine if and when it might become covered.

§825.103 How did the Act affect leave in progress on, or taken before, the effective date of the Act?

(a) An eligible employee's right to take FMLA leave began on the date that the Act went into effect for the employer (*see* the discussion of differing effective dates for collective bargaining agreements in §§825.102(a) and 825.700(c)). Any leave taken prior to the Act's effective date may not be counted for purposes of FMLA. If leave qualifying as FMLA leave was underway prior to the effective date of the Act and continued after the Act's effective date, only that portion of leave taken on or after the Act's effective date may be counted against the employee's leave entitlement under the FMLA.

(b) If an employer-approved leave was underway when the Act took effect, no further notice would be required of the employee unless the employee requested an extension of the leave. For leave which commenced on the effective date or shortly thereafter, such notice must have been given which was practicable, considering the foreseeability of the need for leave and the effective date of the statute.

(c) Starting on the Act's effective date, an employee is entitled to FMLA leave if the reason for the leave is qualifying under the Act, even if the event occasioning the need for leave (e.g., the birth of a child) occurred before the effective date (so long as any other requirements are satisfied).

§825.104 What employers are covered by the Act?

(a) An employer covered by FMLA is any person engaged in commerce or in any industry or activity 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. Employers covered by FMLA also include any person acting, directly or indirectly, in the interest of a covered employer to any of the employees of the employer, any successor in interest of a covered employer, and any public agency. Public agencies are covered employers without regard to the number of employees employed. Public as well as private elementary and secondary schools are also covered employers

without regard to the number of employees employed. (See §825.600.)

(b) The terms ''commerce'' and ''industry affecting commerce'' are defined in accordance with section 501(1) and (3) of the Labor Management Relations Act of 1947 (LMRA) (29 U.S.C. 142 (1) and (3)), as set forth in the definitions at section 825.800 of this part. For purposes of the FMLA, employers who meet the 50-employee coverage test are deemed to be engaged in commerce or in an industry or activity affecting commerce.

(c) Normally the legal entity which employs the employee is the employer under FMLA. Applying this principle, a corporation is a single employer rather than its separate establishments or divisions.

(1) Where one corporation has an ownership interest in another corporation, it is a separate employer unless it meets the ''joint employment'' test discussed in §825.106, or the ''integrated employer'' test contained in paragraph (c)(2) of this section.

(2) Separate entities will be deemed to be parts of a single employer for purposes of FMLA if they meet the ''integrated employer'' test. Where this test is met, the employees of all entities making up the integrated employer will be counted in determining employer coverage and employee eligibility. A determination of whether or not separate entities are an integrated employer is not determined by the application of any single criterion, but rather the entire relationship is to be reviewed in its totality. Factors considered in determining whether two or more entities are an integrated employer include:

(i) Common management;

(ii) Interrelation between operations;

(iii) Centralized control of labor relations; and

(iv) Degree of common ownership/financial control.

(d) An ''employer'' includes any person who acts directly or indirectly in the interest of an employer to any of the employer's employees. The definition of ''employer'' in section 3(d) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 203(d), similarly includes any person acting directly or indirectly in the interest of an employer in relation to an employee. As under the FLSA, individuals such as corporate officers ''acting in the interest of an employer'' are individually liable for any violations of the requirements of FMLA.

§825.105 In determining whether an employer is covered by FMLA, what does it mean to employ 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year?

(a) The definition of ''employ'' for purposes of FMLA is taken from the Fair Labor Standards Act, §3(g). The courts have made it clear that the employment relationship under the FLSA is broader than the traditional common law concept of master and servant. The difference between the employment relationship under the FLSA and that under the common law arises from the fact that the term ''employ'' as defined in the Act includes ''to suffer or permit to work''. The courts have indicated that, while ''to permit'' requires a more positive action than ''to suffer'', both terms imply much less positive action than required by the common law. Mere knowledge by an employer of work done for the employer by another is sufficient to create the employment relationship under the Act. The courts have said that there is no definition that solves all problems as to the limitations of the employer-employee relationship under the Act; and that determination of the relation cannot be based on ''isolated factors'' or upon a single characteristic or ''technical concepts'', but depends ''upon the circumstances of the whole activity'' including the underlying ''economic reality.'' In general an employee, as distinguished from an independent contractor who is engaged in a business of his/her own, is one who ''follows the usual path of an employee'' and is dependent on the business which he/she serves.

(b) Any employee whose name appears on the employer's payroll will be considered employed each working day of the calendar week, and must be counted whether or not any compensation is received for the week. However, the FMLA applies only to employees who are employed within any State of

the United States, the District of Columbia or any Territory or possession of the United States. Employees who are employed outside these areas are not counted for purposes of determining employer coverage or employee eligibility.

(c) Employees on paid or unpaid leave, including FMLA leave, leaves of absence, disciplinary suspension, etc., are counted as long as the employer has a reasonable expectation that the employee will later return to active employment. If there is no employer/employee relationship (as when an employee is laid off, whether temporarily or permanently) such individual is not counted. Part-time employees, like full-time employees, are considered to be employed each working day of the calendar week, as long as they are maintained on the payroll.

(d) An employee who does not begin to work for an employer until after the first working day of a calendar week, or who terminates employment before the last working day of a calendar week, is not considered employed on each working day of that calendar week.

(e) A private employer is covered if it maintained 50 or more employees on the payroll during 20 or more calendar workweeks (not necessarily consecutive workweeks) in either the current or the preceding calendar year.

(f) Once a private employer meets the 50 employees/20 workweeks threshold, the employer remains covered until it reaches a future point where it no longer has employed 50 employees for 20 (nonconsecutive) workweeks in the current and preceding calendar year. For example, if an employer who met the 50 employees/20 workweeks test in the calendar year as of August 5, 1993, subsequently dropped below 50 employees before the end of 1993 and continued to employ fewer than 50 employees in all workweeks throughout calendar year 1994, the employer would continue to be covered throughout calendar year 1994 because it met the coverage criteria for 20 workweeks of the preceding (*i.e.,* 1993) calendar year.

§ 825.106 How is "joint employment" treated under FMLA?

(a) Where two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under FMLA. Joint employers may be separate and distinct entities with separate owners, managers and facilities. Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

(1) Where there is an arrangement between employers to share an employee's services or to interchange employees;

(2) Where one employer acts directly or indirectly in the interest of the other employer in relation to the employee; or,

(3) Where the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

(b) A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality. For example, joint employment will ordinarily be found to exist when a temporary or leasing agency supplies employees to a second employer.

(c) In joint employment relationships, only the primary employer is responsible for giving required notices to its employees, providing FMLA leave, and maintenance of health benefits. Factors considered in determining which is the ''primary'' employer include authority/responsibility to hire and fire, assign/place the employee, make payroll, and provide employment benefits. For employees of temporary help or leasing agencies, for example, the placement agency most commonly would be the primary employer.

(d) Employees jointly employed by two employers must be counted by both employers, whether or not maintained on one of the employer's payroll, in determining employer coverage and employee eligibility. For example, an employer who jointly employs 15 workers from a leasing or temporary help agency and 40 permanent workers is covered by FMLA. An employee on leave who is working for a secondary employer is considered employed by the secondary employer, and must be counted for coverage and eligibility purposes, as long as the employer has a reasonable expectation that that employee will return to employment with that employer.

(e) Job restoration is the primary responsibility of the primary employer. The secondary employer is responsible for accepting the employee returning from FMLA leave in place of the replacement employee if the secondary employer continues to utilize an employee from the temporary or leasing agency, and the agency chooses to place the employee with the secondary employer. A secondary employer is also responsible for compliance with the prohibited acts provisions with respect to its temporary/leased employees, whether or not the secondary employer is covered by FMLA (*see* §825.220(a)). The prohibited acts include prohibitions against interfering with an employee's attempt to exercise rights under the Act, or discharging or discriminating against an employee for opposing a practice which is unlawful under FMLA. A covered secondary employer will be responsible for compliance with *all* the provisions of the FMLA with respect to its regular, permanent workforce.

§825.107 What is meant by "successor in interest"?

(a) For purposes of FMLA, in determining whether an employer is covered because it is a ''successor in interest'' to a covered employer, the factors used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Adjustment Act will be considered. However, unlike Title VII, whether the successor has notice of the employee's claim is not a consideration. Notice may be relevant, however, in determining successor liability for violations of the predecessor. The factors to be considered include:

(1) Substantial continuity of the same business operations;
(2) Use of the same plant;
(3) Continuity of the work force;
(4) Similarity of jobs and working conditions;
(5) Similarity of supervisory personnel;
(6) Similarity in machinery, equipment, and production methods;
(7) Similarity of products or services; and
(8) The ability of the predecessor to provide relief.

(b) A determination of whether or not a ''successor in interest'' exists is not determined by the application of any single criterion, but rather the entire circumstances are to be viewed in their totality.

(c) When an employer is a ''successor in interest,'' employees' entitlements are the same as if the employment by the predecessor and successor were continuous employment by a single employer. For example, the successor, whether or not it meets FMLA coverage criteria, must grant leave for eligible employees who had provided appropriate notice to the predecessor, or continue leave begun while employed by the predecessor, including maintenance of group health benefits during the leave and job restoration at the conclusion of the leave. A successor which meets FMLA's coverage criteria must count periods of employment and hours worked for the predecessor for purposes of determining employee eligibility for FMLA leave.

§825.108 What is a "public agency"?

(a) An ''employer'' under FMLA includes any ''public agency,'' as defined in section 3(x) of the Fair Labor Standards Act, 29 U.S.C. 203(x). Section 3(x) of the FLSA defines ''public agency'' as the government of the United States; the government of a State or political subdivision of a State; or an agency of the United States, a State, or a political subdivision of a State, or any interstate governmental agency. ''State'' is further defined in Section 3(c) of the FLSA to include any State of the United States, the District of Columbia, or any Territory or possession of the United States.

(b) The determination of whether an entity is a ''public'' agency, as distinguished from a private employer, is determined by whether the agency has taxing authority, or whether the chief administrative officer or board, etc., is elected by the voters-at-large or their appointment is subject to approval by an elected official.

(c)(1) A State or a political subdivision of a State constitutes a single public agency and, therefore, a single employer for purposes of determining employee eligibility. For example, a State is a single employer; a county is a single employer; a city or town is a single employer. Where there is any question about whether a public entity is a public agency, as distinguished from a part of another public agency, the U.S. Bureau of the Census' ''Census of Governments'' will be determinative, except for new entities formed since the most recent publication of the ''Census.'' For new entities, the criteria used by the Bureau of Census will be used to determine whether an entity is a public agency or a part of another agency, including existence as an organized entity, governmental character, and substantial autonomy of the entity.

(2) The Census Bureau takes a census of governments at 5-year intervals. Volume I, Government Organization, contains the official counts of the number of State and local governments. It includes tabulations of governments by State, type of government, size, and county location. Also produced is a universe list of governmental units, classified according to type of government. Copies of Volume I, Government Organization, and subsequent volumes are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C., 20402, U.S. Department of Commerce District Offices, or can be found in Regional and selective depository libraries. For a list of all depository libraries, write to the Government Printing Office, 710 N. Capitol St., NW, Washington, D.C. 20402.

(d) All public agencies are covered by FMLA regardless of the number of employees; they are not subject to the coverage threshold of 50 employees carried on the payroll each day for 20 or more weeks in a year. However, employees of public agencies must meet all of the requirements of eligibility, including the requirement that the employer (*e.g.*, State) employ 50 employees at the worksite or within 75 miles.

§ 825.109 Are Federal agencies covered by these regulations?

(a) Most employees of the government of the United States, if they are covered by the FMLA, are covered under Title II of the FMLA (incorporated in Title V, Chapter 63, Subchapter 5 of the United States Code) which is administered by the U.S. Office of Personnel Management (OPM). OPM has separate regulations at 5 CFR Part 630, Subpart L. In addition, employees of the Senate and House of Representatives are covered by Title V of the FMLA.

(b) The Federal Executive Branch employees within the jurisdiction of these regulations include:

(1) Employees of the Postal Service;

(2) Employees of the Postal Rate Commission;

(3) A part-time employee who does not have an established regular tour of duty during the administrative workweek; and,

(4) An employee serving under an intermittent appointment or temporary appointment with a time limitation of one year or less.

(c) Employees of other Federal executive agencies are also covered by these regulations if they are not covered by Title II of FMLA.

(d) Employees of the legislative or judicial branch of the United States are covered by these regulations only if they are employed in a unit which has employees in the competitive service. Examples include employees of the Government Printing Office and the U.S. Tax Court.

(e) For employees covered by these regulations, the U.S. Government constitutes a single employer for purposes of determining employee eligibility. These employees must meet all of the requirements for eligibility, including the requirement that the Federal Government employ 50 employees at the worksite or within 75 miles.

§825.110 Which employees are "eligible" to take leave under FMLA?

(a) An ''eligible employee'' is an employee of a covered employer who:

(1) Has been employed by the employer for at least 12 months, and

(2) Has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, and

(3) Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. (*See* §825.105(a) regarding employees who work outside the U.S.)

(b) The 12 months an employee must have been employed by the employer need not be consecutive months. If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (*e.g.*, workers' compensation, group health plan benefits, *etc.*), the week counts as a week of employment. For purposes of determining whether intermittent/occasional/casual employment qualifies as ''at least 12 months,'' 52 weeks is deemed to be equal to 12 months.

(c) Whether an employee has worked the minimum 1,250 hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA) for determining compensable hours of work (see 29 CFR Part 785). The determining factor is the number of hours an employee has worked for the employer within the meaning of the FLSA. The determination is not limited by methods of recordkeeping, or by compensation agreements that do not accurately reflect all of the hours an employee has worked for or been in service to the employer. Any accurate accounting of actual hours worked under FLSA's principles may be used. In the event an employer does not maintain an accurate record of hours worked by an employee, including for employees who are exempt from FLSA's requirement that a record be kept of their hours worked (*e.g.*, bona fide executive, administrative, and professional employees as defined in FLSA Regulations, 29 CFR Part 541), the employer has the burden of showing that the employee has not worked the requisite hours. In the event the employer is unable to meet this burden the employee is deemed to have met this test. See also §825.500(f). For this purpose, full-time teachers (see §825.800 for definition) of an elementary or secondary school system, or institution of higher education, or other educational establishment or institution are deemed to meet the 1,250 hour test. An employer must be able to clearly demonstrate that such an employee did not work 1,250 hours during the previous 12 months in order to claim that the employee is not ''eligible'' for FMLA leave.

(d) The determinations of whether an employee has worked for the employer for at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months must be made as of the date leave commences. If an employee notifies the employer of need for FMLA leave before the employee meets these eligibility criteria, the employer must either confirm the employee's eligibility based upon a projection that the employee will be eligible on the date leave would commence or must advise the employee when the eligibility requirement is met. If the employer confirms eligibility at the time the notice for leave is received, the employer may not subsequently challenge the employee's eligibility. In the latter case, if the employer does not advise the employee whether the employee is eligible as soon as practicable (*i.e.*, two business days absent extenuating circumstances) after the date employee eligibility is determined, the employee will have satisfied the notice requirements and the notice of leave is considered current and outstanding until the employer does advise. If the employer fails to advise the employee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible. The employer may not, then, deny the leave. Where the employee does not give notice of the need for leave more than two business days prior to commencing leave, the employee will be deemed to be eligible if

the employer fails to advise the employee that the employee is not eligible within two business days of receiving the employee's notice.

(e) The period prior to the FMLA's effective date must be considered in determining employee's eligibility.

(f) Whether 50 employees are employed within 75 miles to ascertain an employee's eligibility for FMLA benefits is determined when the employee gives notice of the need for leave. Whether the leave is to be taken at one time or on an intermittent or reduced leave schedule basis, once an employee is determined eligible in response to that notice of the need for leave, the employee's eligibility is not affected by any subsequent change in the number of employees employed at or within 75 miles of the employee's worksite, for that specific notice of the need for leave. Similarly, an employer may not terminate employee leave that has already started if the employee-count drops below 50. For example, if an employer employs 60 employees in August, but expects that the number of employees will drop to 40 in December, the employer must grant FMLA benefits to an otherwise eligible employee who gives notice of the need for leave in August for a period of leave to begin in December.

[60 FR 2237, Jan. 6, 1995; 60 FR 16383, Mar. 30, 1995]

§ 825.111 In determining if an employee is "eligible" under FMLA, how is the determination made whether the employer employs 50 employees within 75 miles of the worksite where the employee needing leave is employed?

(a) Generally, a worksite can refer to either a single location or a group of contiguous locations. Structures which form a campus or industrial park, or separate facilities in proximity with one another, may be considered a single site of employment. On the other hand, there may be several single sites of employment within a single building, such as an office building, if separate employers conduct activities within the building. For example, an office building with 50 different businesses as tenants will contain 50 sites of employment. The offices of each employer will be considered separate sites of employment for purposes of FMLA. An employee's worksite under FMLA will ordinarily be the site the employee reports to or, if none, from which the employee's work is assigned.

(1) Separate buildings or areas which are not directly connected or in immediate proximity are a single worksite if they are in reasonable geographic proximity, are used for the same purpose, and share the same staff and equipment. For example, if an employer manages a number of warehouses in a metropolitan area but regularly shifts or rotates the same employees from one building to another, the multiple warehouses would be a single worksite.

(2) For employees with no fixed worksite, *e.g.*, construction workers, transportation workers (*e.g.*, truck drivers, seamen, pilots), salespersons, etc., the ''worksite'' is the site to which they are assigned as their home base, from which their work is assigned, or to which they report. For example, if a construction company headquartered in New Jersey opened a construction site in Ohio, and set up a mobile trailer on the construction site as the company's on-site office, the construction site in Ohio would be the worksite for any employees hired locally who report to the mobile trailer/company office daily for work assignments, etc. If that construction company also sent personnel such as job superintendents, foremen, engineers, an office manager, etc., from New Jersey to the job site in Ohio, those workers sent from New Jersey continue to have the headquarters in New Jersey as their ''worksite.'' The workers who have New Jersey as their worksite would not be counted in determining eligibility of employees whose home base is the Ohio worksite, but would be counted in determining eligibility of employees whose home base is New Jersey. For transportation employees, their worksite is the terminal to which they are assigned, report for work, depart, and return after completion of a work assignment. For example, an airline pilot may work for an airline with headquarters in New York, but the pilot regularly reports for duty and originates or begins flights from the company's facilities located in an

airport in Chicago and returns to Chicago at the completion of one or more flights to go off duty. The pilot's worksite is the facility in Chicago. An employee's personal residence is not a worksite in the case of employees such as salespersons who travel a sales territory and who generally leave to work and return from work to their personal residence, or employees who work at home, as under the new concept of flexiplace. Rather, their worksite is the office to which the report and from which assignments are made.

(3) For purposes of determining that employee's eligibility, when an employee is jointly employed by two or more employers (*see* §825.106), the employee's worksite is the primary employer's office from which the employee is assigned or reports. The employee is also counted by the secondary employer to determine eligibility for the secondary employer's full-time or permanent employees.

(b) The 75-mile distance is measured by surface miles, using surface transportation over public streets, roads, highways and waterways, by the shortest route from the facility where the eligible employee needing leave is employed. Absent available surface transportation between worksites, the distance is measured by using the most frequently utilized mode of transportation (*e.g.*, airline miles).

(c) The determination of how many employees are employed within 75 miles of the worksite of an employee is based on the number of employees maintained on the payroll. Employees of educational institutions who are employed permanently or who are under contract are ''maintained on the payroll'' during any portion of the year when school is not in session. *See* §825.105(c).

[60 FR 2237, Jan. 6, 1995; 60 FR 16383, Mar. 30, 1995]

§825.112 Under what kinds of circumstances are employers required to grant family or medical leave?

(a) Employers covered by FMLA are required to grant leave to eligible employees:

(1) For birth of a son or daughter, and to care for the newborn child;

(2) For placement with the employee of a son or daughter for adoption or foster care;

(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition; and

(4) Because of a serious health condition that makes the employee unable to perform the functions of the employee's job.

(b) The right to take leave under FMLA applies equally to male and female employees. A father, as well as a mother, can take family leave for the birth, placement for adoption or foster care of a child.

(c) Circumstances may require that FMLA leave begin before the actual date of birth of a child. An expectant mother may take FMLA leave pursuant to paragraph (a)(4) of this section before the birth of the child for prenatal care or if her condition makes her unable to work.

(d) Employers covered by FMLA are required to grant FMLA leave pursuant to paragraph (a)(2) of this section 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 counselling sessions, appear in court, consult with his or her attorney or the doctor(s) representing the birth parent, or submit to a physical examination. The source of an adopted child (*e.g.*, whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for leave for this purpose.

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

(f) In situations where the employer/employee relationship has been interrupted, such as an employee who has been on layoff, the employee must be recalled or otherwise be re-employed before being eligible for FMLA leave. Under such circumstances, an eligible employee is immediately entitled to further FMLA leave for a qualifying reason.

(g) FMLA leave is available for treatment for substance abuse provided the conditions of §825.114 are met. However, treatment for substance abuse does not prevent an employer from taking employment action against an employee. The employer may not take action against the employee because the employee has exercised his or her right to take FMLA leave for treatment. However, if the employer has an established policy, applied in a non-discriminatory manner that has been communicated to all employees, that provides under certain circumstances an employee may be terminated for substance abuse, pursuant to that policy the employee may be terminated whether or not the employee is presently taking FMLA leave. An employee may also take FMLA leave to care for an immediate family member who is receiving treatment for substance abuse. The employer may not take action against an employee who is providing care for an immediate family member receiving treatment for substance abuse.

§825.113 What do "spouse," "parent," and "son or daughter" mean for purposes of an employee qualifying to take FMLA leave?

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

(b) Parent means a biological parent or an individual who stands or stood in loco parentis to an employee when the employee was a son or daughter as defined in (c) below. This term does not include parents ''in law''.

(c) Son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and ''incapable of self-care because of a mental or physical disability.''

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

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

(3) Persons who are ''in loco parentis'' include those with day-to-day responsibilities to care for and financially support a child or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

(d) For purposes of confirmation of family relationship, the employer may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, *etc.* The employer is entitled to examine documentation such as a birth certificate, *etc.*, but the employee is entitled to the return of the official document submitted for this purpose.

§825.114 What is a "serious health condition" entitling an employee to FMLA leave?

(a) For purposes of FMLA, ''serious health condition'' entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves:

(1) *Inpatient care* (*i.e.*, an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of *incapacity* (for purposes of this section, defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom), or any subsequent treatment in connection with such inpatient care; or

(2) *Continuing treatment* by a health care provider. A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(i) A period of *incapacity* (*i.e.*, inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(A) 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

(B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

(ii) Any period of incapacity due to pregnancy, or for prenatal care.

(iii) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(A) 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;

(B) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(C) May cause episodic rather than a continuing period of incapacity (*e.g.*, asthma, diabetes, epilepsy, *etc.*).

(iv) 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, a severe stroke, or the terminal stages of a disease.

(v) Any period of absence to receive multiple treatments (including any period of recovery therefrom) 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 that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, *etc.*), severe arthritis (physical therapy), kidney disease (dialysis).

(b) Treatment for purposes of paragraph (a) of this section includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. Under paragraph (a)(2)(i)(B), a regimen of continuing treatment includes, for example, a course of prescription medication (*e.g.*, an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (*e.g.*, oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(c) Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic

surgery) are not ''serious health conditions'' unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, *etc.*, are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness resulting from stress or allergies may be serious health conditions, but only if all the conditions of this section are met.

(d) Substance abuse may be a serious health condition if the conditions of this section are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

(e) Absences attributable to incapacity under paragraphs (a)(2) (ii) or (iii) qualify for FMLA leave even though the employee or the immediate family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

§ 825.115 What does it mean that "the employee is unable to perform the functions of the position of the employee"?

An employee is ''unable to perform the functions of the position'' where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq.*, and the regulations at 29 CFR §1630.2(n). An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment. An employer has the option, in requiring certification from a health care provider, to provide a statement of the essential functions of the employee's position for the health care provider to review. For purposes of FMLA, the essential functions of the employee's position are to be determined with reference to the position the employee held at the time notice is given or leave commenced, whichever is earlier.

§ 825.116 What does it mean that an employee is "needed to care for" a family member?

(a) The medical certification provision that an employee is ''needed to care for'' a family member encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor, etc. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.

(b) The term also includes situations where the employee may be needed to fill in for others who are caring for the family member, or to make arrangements for changes in care, such as transfer to a nursing home.

(c) An employee's intermittent leave or a reduced leave schedule necessary to care for a family member includes not only a situation where the family member's condition itself is intermittent, but also where the employee is only needed intermittently—such as where other care is normally available, or care responsibilities are shared with another member of the family or a third party.

§825.117 For an employee seeking intermittent FMLA leave or leave on a reduced leave schedule, what is meant by "the medical necessity for" such leave?

For intermittent leave or leave on a reduced leave schedule, there must be a medical need for leave (as distinguished from voluntary treatments and procedures) and it must be that such medical need can be best accommodated through an intermittent or reduced leave schedule. The treatment regimen and other information described in the certification of a serious health condition (see §825.306) meets the requirement for certification of the medical necessity of intermittent leave or leave on a reduced leave schedule. Employees needing intermittent FMLA leave or leave on a reduced leave schedule must attempt to schedule their leave so as not to disrupt the employer's operations. In addition, an employer may assign an employee to an alternative position with equivalent pay and benefits that better accommodates the employee's intermittent or reduced leave schedule.

§825.118 What is a "health care provider"?

(a) The Act defines ''health care provider'' as:

(1) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(2) Any other person determined by the Secretary to be capable of providing health care services.

(b) Others ''capable of providing health care services'' include only:

(1) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;

(2) Nurse practitioners, nurse-midwives and clinical social workers who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;

(3) Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employer that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable State or local law or collective bargaining agreement.

(4) Any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and

(5) A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

(c) The phrase ''authorized to practice in the State'' as used in this section means that the provider must be authorized to diagnose and treat physical or mental health conditions without supervision by a doctor or other health care provider.

Subpart B—What Leave Is an Employee Entitled to Take Under the Family and Medical Leave Act?

§825.200 How much leave may an employee take?

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

(1) The birth of the employee's son or daughter, and to care for the newborn child;

(2) The placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child;

(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition; and,

(4) Because of a serious health condition that makes the employee unable to perform one or more of the essential functions of his or her job.

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

(1) The calendar year;

(2) Any fixed 12-month ''leave year,'' such as a fiscal year, a year required by State law, or a year starting on an employee's ''anniversary'' date;

(3) The 12-month period measured forward from the date any employee's first FMLA leave begins; or,

(4) A ''rolling'' 12-month period measured backward from the date an employee uses any FMLA leave (except that such measure may not extend back before August 5, 1993).

(c) Under methods in paragraphs (b)(1) and (b)(2) of this section an employee would be entitled to up to 12 weeks of FMLA leave at any time in the fixed 12-month period selected. An employee could, therefore, take 12 weeks of leave at the end of the year and 12 weeks at the beginning of the following year. Under the method in paragraph (b)(3) of this section, an employee would be entitled to 12 weeks of leave during the year beginning on the first date FMLA leave is taken; the next 12-month period would begin the first time FMLA leave is taken after completion of any previous 12-month period. Under the method in paragraph (b)(4) of this section, the ''rolling'' 12-month period, each time an employee takes FMLA leave the remaining leave entitlement would be any balance of the 12 weeks which has not been used during the immediately preceding 12 months. For example, if an employee has taken eight weeks of leave during the past 12 months, an additional four weeks of leave could be taken. If an employee used four weeks beginning February 1, 1994, four weeks beginning June 1, 1994, and four weeks beginning December 1, 1994, the employee would not be entitled to any additional leave until February 1, 1995. However, beginning on February 1, 1995, the employee would be entitled to four weeks of leave, on June 1 the employee would be entitled to an additional four weeks, etc.

(d)(1) Employers will be allowed to choose any one of the alternatives in paragraph (b) of this section provided the alternative chosen is applied consistently and uniformly to all employees. An employer wishing to change to another alternative is required to give at least 60 days notice to all employees, and the transition must take place in such a way that the employees retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the employee. Under no circumstances may a new method be implemented in order to avoid the Act's leave requirements.

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

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

(f) For purposes of determining the amount of leave used by an employee, the fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave. However, if for some reason the employer's business activity has temporarily ceased and

employees generally are not expected to report for work for one or more weeks (*e.g.*, a school closing two weeks for the Christmas/New Year holiday or the summer vacation or an employer closing the plant for retooling or repairs), the days the employer's activities have ceased do *not* count against the employee's FMLA leave entitlement. Methods for determining an employee's 12-week leave entitlement are also described in §825.205.

§825.201 If leave is taken for the birth of a child, or for placement of a child for adoption or foster care, when must the leave be concluded?

An employee's entitlement to leave for a birth or placement for adoption or foster care expires at the end of the 12-month period beginning on the date of the birth or placement, unless state law allows, or the employer permits, leave to be taken for a longer period. Any such FMLA leave must be concluded within this one-year period. However, see §825.701 regarding non-FMLA leave which may be available under applicable State laws.

§825.202 How much leave may a husband and wife take if they are employed by the same employer?

(a) A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken:

(1) for birth of the employee's son or daughter or to care for the child after birth;

(2) for placement of a son or daughter with the employee for adoption or foster care, or to care for the child after placement; or

(3) to care for the employee's parent with a serious health condition.

(b) This limitation on the total weeks of leave applies to leave taken for the reasons specified in paragraph (a) of this section as long as a husband and wife are employed by the ''same employer.'' It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave.

(c) Where the husband and wife both use a portion of the total 12-week FMLA leave entitlement for one of the purposes in paragraph (a) of this section, the husband and wife would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for a purpose other than those contained in paragraph (a) of this section. For example, if each spouse took 6 weeks of leave to care for a healthy, newborn child, each could use an additional 6 weeks due to his or her own serious health condition or to care for a child with a serious health condition. Note, too, that many State pregnancy disability laws specify a period of disability either before or after the birth of a child; such periods would also be considered FMLA leave for a serious health condition of the mother, and would not be subject to the combined limit.

[60 FR 2237, Jan. 6, 1995; 60 FR 16383, Mar. 30, 1995]

§825.203 Does FMLA leave have to be taken all at once, or can it be taken in parts?

(a) FMLA leave may be taken ''intermittently or on a reduced leave schedule'' under certain circumstances. Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason. A reduced leave schedule is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday. A reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time.

(b) 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, for example, 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, however, 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.

(c) Leave may be taken intermittently or on a reduced leave schedule when medically necessary for planned and/or unanticipated medical treatment of a related serious health condition by or under the supervision of a health care provider, or for recovery from treatment or recovery from a serious health condition. It may also be taken to provide care or psychological comfort to an immediate family member with a serious health condition.

(1) 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, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy. A pregnant employee may take leave intermittently for prenatal examinations or for her own condition, such as for periods of severe morning sickness. An example of an employee taking leave on a reduced leave schedule is an employee who is recovering from a serious health condition and is not strong enough to work a full-time schedule.

(2) 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 or she does not receive treatment by a health care provider.

(d) There is no limit on the size of an increment of leave when an employee takes intermittent leave or leave on a reduced leave schedule. However, an employer may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave, provided it is one hour or less. For example, an employee might take two hours off for a medical appointment, or might work a reduced day of four hours over a period of several weeks while recuperating from an illness. An employee may not be required to take more FMLA leave than necessary to address the circumstance that precipitated the need for the leave, except as provided in §§ 825.601 and 825.602.

§ 825.204 May an employer transfer an employee to an "alternative position" in order to accommodate intermittent leave or a reduced leave schedule?

(a) If an employee needs intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment for the employee or a family member, including during a period of recovery from a serious health condition, or if the employer agrees to permit intermittent or reduced schedule leave for the birth of a child or for placement of a child for adoption or foster care, the employer may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. See § 825.601 for special rules applicable to instructional employees of schools.

(b) Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, federal law (such as the Americans with Disabilities Act), and State law. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave.

(c) The alternative position must have equivalent pay and benefits. An alternative position for these purposes does not have to have equivalent duties. The employer may increase the pay and benefits of an existing alternative position, so as to make them equivalent to the pay and benefits of the employee's regular job. The employer may also transfer the employee to a part-time job with the same hourly rate of pay and benefits, provided the employee is not required to take more leave than is medically necessary. For example, an employee desiring to take leave in increments of four hours per day could be transferred to a half-time job, or could remain in

the employee's same job on a part-time schedule, paying the same hourly rate as the employee's previous job and enjoying the same benefits. The employer may not eliminate benefits which otherwise would not be provided to part-time employees; however, an employer may proportionately reduce benefits such as vacation leave where an employer's normal practice is to base such benefits on the number of hours worked.

(d) An employer may not transfer the employee to an alternative position in order to discourage the employee from taking leave or otherwise work a hardship on the employee. For example, a white collar employee may not be assigned to perform laborer's work; an employee working the day shift may not be reassigned to the graveyard shift; an employee working in the headquarters facility may not be reassigned to a branch a significant distance away from the employee's normal job location. Any such attempt on the part of the employer to make such a transfer will be held to be contrary to the prohibited acts of the FMLA.

(e) When an employee who is taking leave intermittently or on a reduced leave schedule and has been transferred to an alternative position, no longer needs to continue on leave and is able to return to full-time work, the employee must be placed in the same or equivalent job as the job he/she left when the leave commenced. An employee may not be required to take more leave than necessary to address the circumstance that precipitated the need for leave.

§825.205 How does one determine the amount of leave used where an employee takes leave intermittently or on a reduced leave schedule?

(a) If an employee takes leave on an intermittent or reduced leave schedule, only the amount of leave actually 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 off one day, the employee would use 1/5 of a week of FMLA leave. Similarly, if a full-time employee who normally works 8-hour days works 4-hour days under a reduced leave schedule, the employee would use 1/2 week of FMLA leave each week.

(b) Where an employee normally works a part-time schedule or variable hours, the amount of leave to which an employee is entitled is determined on a pro rata or proportional basis by comparing the new schedule with the employee's normal schedule. For example, if an employee who normally works 30 hours per week works only 20 hours a week under a reduced leave schedule, the employee's ten hours of leave would constitute one-third of a week of FMLA leave for each week the employee works the reduced leave schedule.

(c) If an employer has made a permanent or long-term change in the employee's schedule (for reasons other than FMLA, and prior to the notice of need for FMLA leave), the hours worked under the new schedule are to be used for making this calculation.

(d) If an employee's schedule varies from week to week, a weekly average of the hours worked over the 12 weeks prior to the beginning of the leave period would be used for calculating the employee's normal workweek.

§825.206 May an employer deduct hourly amounts from an employee's salary, when providing unpaid leave under FMLA, without affecting the employee's qualification for exemption as an executive, administrative, or professional employee, or when utilizing the fluctuating workweek method for payment of overtime, under the Fair Labor Standards Act?

(a) Leave taken under FMLA may be unpaid. If an employee is otherwise exempt from minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA) as a salaried executive, administrative, or professional employee (under regulations issued by the Secretary), 29 CFR Part 541, providing unpaid FMLA-qualifying leave to such an employee will not cause the employee to lose the FLSA exemption. This means that under regulations currently in effect, where an employee meets the specified duties test, is paid on a salary basis, and is paid a salary of at least the amount specified in the regulations, the employer may make deductions from the employee's salary

for any hours taken as intermittent or reduced FMLA leave within a workweek, without affecting the exempt status of the employee. The fact that an employer provides FMLA leave, whether paid or unpaid, and maintains records required by this part regarding FMLA leave, will not be relevant to the determination whether an employee is exempt within the meaning of 29 CFR Part 541.

(b) For an employee paid in accordance with the fluctuating workweek method of payment for overtime (see 29 CFR 778.114), the employer, *during the period* in which intermittent or reduced schedule FMLA leave is scheduled to be taken, may compensate an employee on an hourly basis and pay only for the hours the employee works, including time and one-half the employee's regular rate for overtime hours. The change to payment on an hourly basis would include the entire period during which the employee is taking intermittent leave, including weeks in which no leave is taken. The hourly rate shall be determined by dividing the employee's weekly salary by the employee's normal or average schedule of hours worked during weeks in which FMLA leave is not being taken. If an employer chooses to follow this exception from the fluctuating workweek method of payment, the employer must do so uniformly, with respect to all employees paid on a fluctuating workweek basis for whom FMLA leave is taken on an intermittent or reduced leave schedule basis. If an employer does not elect to convert the employee's compensation to hourly pay, no deduction may be taken for FMLA leave absences. Once the need for intermittent or reduced scheduled leave is over, the employee may be restored to payment on a fluctuating work week basis.

(c) This special exception to the ''salary basis'' requirements of the FLSA exemption or fluctuating workweek payment requirements applies only to employees of covered employers who are eligible for FMLA leave, and to leave which qualifies as (one of the four types of) FMLA leave. Hourly or other deductions which are not in accordance with 29 CFR Part 541 or 29 CFR §778.114 may not be taken, for example, from the salary of an employee who works for an employer with fewer than 50 employees, or where the employee has not worked long enough to be eligible for FMLA leave without potentially affecting the employee's eligibility for exemption. Nor may deductions which are not permitted by 29 CFR Part 541 or 29 CFR §778.114 be taken from such an employee's salary for any leave which does not qualify as FMLA leave, for example, deductions from an employee's pay for leave required under State law or under an employer's policy or practice for a reason which does not qualify as FMLA leave, *e.g.*, leave to care for a grandparent or for a medical condition which does not qualify as a serious health condition; or for leave which is more generous than provided by FMLA, such as leave in excess of 12 weeks in a year. Employers may comply with State law or the employer's own policy/practice under these circumstances and maintain the employee's eligibility for exemption or for the fluctuating workweek method of pay by not taking hourly deductions from the employee's pay, in accordance with FLSA requirements, or may take such deductions, treating the employee as an ''hourly'' employee and pay overtime premium pay for hours worked over 40 in a workweek.

§ 825.207 Is FMLA leave paid or unpaid?

(a) Generally, FMLA leave is unpaid. However, under the circumstances described in this section, FMLA permits an eligible employee to choose to substitute paid leave for FMLA leave. If an employee does not choose to substitute accrued paid leave, the employer may require the employee to substitute accrued paid leave for FMLA leave.

(b) Where an employee has earned or accrued paid vacation, personal or family leave, that paid leave may be substituted for all or part of any (otherwise) unpaid FMLA leave relating to birth, placement of a child for adoption or foster care, or care for a spouse, child or parent who has a serious health condition. The term ''family leave'' as used in FMLA refers to paid leave provided by the employer covering the particular circumstances for

which the employee seeks leave for either the birth of a child and to care for such child, placement of a child for adoption or foster care, or care for a spouse, child or parent with a serious health condition. For example, if the employer's leave plan allows use of family leave to care for a child but not for a parent, the employer is not required to allow accrued family leave to be substituted for FMLA leave used to care for a parent.

(c) Substitution of paid accrued vacation, personal, or medical/sick leave may be made for any (otherwise) unpaid FMLA leave needed to care for a family member or the employee's own serious health condition. Substitution of paid sick/medical leave may be elected to the extent the circumstances meet the employer's usual requirements for the use of sick/medical leave. An employer is not required to allow substitution of paid sick or medical leave for unpaid FMLA leave ''in any situation'' where the employer's uniform policy would not normally allow such paid leave. An employee, therefore, has a right to substitute paid medical/sick leave to care for a seriously ill family member only if the employer's leave plan allows paid leave to be used for that purpose. Similarly, an employee does not have a right to substitute paid medical/sick leave for a serious health condition which is not covered by the employer's leave plan.

(d)(1) Disability leave for the birth of a child would be considered FMLA leave for a serious health condition and counted in the 12 weeks of leave permitted under FMLA. Because the leave pursuant to a temporary disability benefit plan is not unpaid, the provision for substitution of paid leave is inapplicable. However, the employer may designate the leave as FMLA leave and count the leave as running concurrently for purposes of both the benefit plan and the FMLA leave entitlement. If the requirements to qualify for payments pursuant to the employer's temporary disability plan are more stringent than those of FMLA, the employee must meet the more stringent requirements of the plan, or may choose not to meet the requirements of the plan and instead receive no payments from the plan and use unpaid FMLA leave or substitute available accrued paid leave.

(2) The Act provides that a serious health condition may result from injury to the employee ''on or off'' the job. If the employer designates the leave as FMLA leave in accordance with §825.208, the employee's FMLA 12–week leave entitlement may run concurrently with a workers' compensation absence when the injury is one that meets the criteria for a serious health condition. As the workers' compensation absence is not unpaid leave, the provision for substitution of the employee's accrued paid leave is not applicable. However, if the health care provider treating the employee for the workers' compensation injury certifies the employee is able to return to a ''light duty job'' but is unable to return to the same or equivalent job, the employee may decline the employer's offer of a ''light duty job''. As a result the employee may lose workers' compensation payments, but is entitled to remain on unpaid FMLA leave until the 12-week entitlement is exhausted. As of the date workers' compensation benefits cease, the substitution provision becomes applicable and either the employee may elect or the employer may require the use of accrued paid leave. *See* also §§825.210(f), 825.216(d), 825.220(d), 825.307(a)(1) and 825.702(d) (1) and (2) regarding the relationship between workers' compensation absences and FMLA leave.

(e) Paid vacation or personal leave, including leave earned or accrued under plans allowing ''paid time off,'' may be substituted, at either the employee's or the employer's option, for any qualified FMLA leave. No limitations may be placed by the employer on substitution of paid vacation or personal leave for these purposes.

(f) If neither the employee nor the employer elects to substitute paid leave for unpaid FMLA leave under the above conditions and circumstances, the employee will remain entitled to all the paid leave which is earned or accrued under the terms of the employer's plan.

(g) If an employee uses paid leave under circumstances which do not qualify as FMLA leave, the leave will not count against the 12 weeks of

FMLA leave to which the employee is entitled. For example, paid sick leave used for a medical condition which is not a serious health condition does not count against the 12 weeks of FMLA leave entitlement.

(h) When an employee or employer elects to substitute paid leave (of any type) for unpaid FMLA leave under circumstances permitted by these regulations, and the employer's procedural requirements for taking that kind of leave are less stringent than the requirements of FMLA (*e.g.*, notice or certification requirements), only the less stringent requirements may be imposed. An employee who complies with an employer's less stringent leave plan requirements in such cases may not have leave for an FMLA purpose delayed or denied on the grounds that the employee has not complied with stricter requirements of FMLA. However, where accrued paid vacation or personal leave is substituted for unpaid FMLA leave for a serious health condition, an employee may be required to comply with any less stringent medical certification requirements of the employer's sick leave program. *See* §§ 825.302(g), 825.305(e) and 825.306(c).

(i) Section 7(o) of the Fair Labor Standards Act (FLSA) permits public employers under prescribed circumstances to substitute compensatory time off accrued at one and one-half hours for each overtime hour worked in lieu of paying cash to an employee when the employee works overtime hours as prescribed by the Act. There are limits to the amounts of hours of compensatory time an employee may accumulate depending upon whether the employee works in fire protection or law enforcement (480 hours) or elsewhere for a public agency (240 hours). Compensatory time off is not a form of accrued paid leave that an employer may require the employee to substitute for unpaid FMLA leave. The employee may request to use his/her balance of compensatory time for an FMLA reason. If the employer permits the accrual to be used in compliance with regulations, 29 CFR 553.25, the absence which is paid from the employee's accrued compensatory time ''account'' may not be counted against the employee's FMLA leave entitlement.

[60 FR 2237, Jan. 6, 1995; 60 FR 16383, Mar. 30, 1995]

§ 825.208 Under what circumstances may an employer designate leave, paid or unpaid, as FMLA leave and, as a result, count it against the employee's total FMLA leave entitlement?

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

(1) An employee giving notice of the need for unpaid FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine that the leave qualifies under the Act. If the employee fails to explain the reasons, leave may be denied. In many cases, in explaining the reasons for a request to use paid leave, especially when the need for the leave was unexpected or unforeseen, an employee will provide sufficient information for the employer to designate the paid leave as FMLA leave. An employee using accrued paid leave, especially vacation or personal leave, may in some cases not spontaneously explain the reasons or their plans for using their accrued leave.

(2) As noted in § 825.302(c), an employee giving notice of the need for unpaid FMLA leave does not need to expressly assert rights under the Act or

even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave. An employee requesting or notifying the employer of an intent to use accrued paid leave, even if for a purpose covered by FMLA, would not need to assert such right either. However, if an employee requesting to use paid leave for an FMLA-qualifying purpose does not explain the reason for the leave—consistent with the employer's established policy or practice—and the employer denies the employee's request, the employee will need to provide sufficient information to establish an FMLA-qualifying reason for the needed leave so that the employer is aware of the employee's entitlement (i.e., that the leave may not be denied) and, then, may designate that the paid leave be appropriately counted against (substituted for) the employee's 12-week entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for an FMLA-qualifying purpose will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employer may count the leave used after the FMLA-qualifying event against the employee's 12-week entitlement.

(b)(1) Once the employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave. If there is a dispute between an employer and an employee as to whether paid leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employer. Such discussions and the decision must be documented.

(2) The employer's notice to the employee that the leave has been designated as FMLA leave may be orally or in writing. If the notice is oral, it shall be confirmed in writing, no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday). The written notice may be in any form, including a notation on the employee's pay stub.

(c) If the employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this decision must be made by the employer within two business days of the time the employee gives notice of the need for leave, or, where the employer does not initially have sufficient information to make a determination, when the employer determines that the leave qualifies as FMLA leave if this happens later. The employer's designation must be made before the leave starts, unless the employer does not have sufficient information as to the employee's reason for taking the leave until after the leave commenced. If the employer has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employee either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee in accordance with paragraph (b)), the employer may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the Act, but none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement.

(d) If the employer learns that leave is for an FMLA purpose after leave has begun, such as when an employee gives notice of the need for an extension of the paid leave with unpaid FMLA leave, the entire or some portion of the paid leave period may be retroactively counted as FMLA leave, to the extent that the leave period qualified as FMLA leave. For example, an employee is granted two weeks paid vacation leave for a skiing trip. In midweek of the second week, the employee contacts the employer for an extension of leave as unpaid leave and advises that at the beginning of the second week of paid vacation leave the employee suffered a severe accident requiring hospitalization. The employer

may notify the employee that both the extension and the second week of paid vacation leave (from the date of the injury) is designated as FMLA leave. On the other hand, when the employee takes sick leave that turns into a serious health condition (*e.g.*, bronchitis that turns into bronchial pneumonia) and the employee gives notice of the need for an extension of leave, the entire period of the serious health condition may be counted as FMLA leave.

(e) Employers may not designate leave as FMLA leave after the employee has returned to work with two exceptions:

(1) If the employee was absent for an FMLA reason and the employer did not learn the reason for the absence until the employee's return (*e.g.*, where the employee was absent for only a brief period), the employer may, upon the employee's return to work, promptly (within two business days of the employee's return to work) designate the leave retroactively with appropriate notice to the employee. If leave is taken for an FMLA reason but the employer was not aware of the reason, and the employee desires that the leave be counted as FMLA leave, the employee must notify the employer within two business days of returning to work of the reason for the leave. In the absence of such timely notification by the employee, the employee may not subsequently assert FMLA protections for the absence.

(2) If the employer knows the reason for the leave but has not been able to confirm that the leave qualifies under FMLA, or where the employer has requested medical certification which has not yet been received or the parties are in the process of obtaining a second or third medical opinion, the employer should make a preliminary designation, and so notify the employee, at the time leave begins, or as soon as the reason for the leave becomes known. Upon receipt of the requisite information from the employee or of the medical certification which confirms the leave is for an FMLA reason, the preliminary designation becomes final. If the medical certifications fail to confirm that the reason for the absence was an FMLA reason, the employer must withdraw the designation (with written notice to the employee).

[60 FR 2237, Jan. 6, 1995; 60 FR 16383, Mar. 30, 1995]

§ 825.209 Is an employee entitled to benefits while using FMLA leave?

(a) During any FMLA leave, an employer must maintain the employee's coverage under any group health plan (as defined in the Internal Revenue Code of 1986 at 26 U.S.C. 5000(b)(1)) on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period. All employers covered by FMLA, including public agencies, are subject to the Act's requirements to maintain health coverage. The definition of ''group health plan'' is set forth in §825.800. For purposes of FMLA, the term ''group health plan'' shall not include 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; and,

(5) the premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

(b) The same group health plan benefits provided to an employee prior to taking FMLA leave must be maintained during the FMLA leave. For example, 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.

(c) If an employer provides a new health plan or benefits or changes health benefits or plans while an employee is on FMLA leave, the employee is entitled to the new or changed plan/benefits to the same extent as if the employee were not on leave. For example, if an employer changes a group health plan so that dental care becomes covered under the plan, an employee on FMLA leave must be given the same opportunity as other employees to receive (or obtain) the dental care coverage. Any other plan changes (*e.g.*, in coverage, premiums, deductibles, *etc.*) which apply to all employees of the workforce would also apply to an employee on FMLA leave.

(d) Notice of any opportunity to change plans or benefits must also be given to an employee on FMLA leave. If the group health plan permits an employee to change from single to family coverage upon the birth of a child or otherwise add new family members, such a change in benefits must be made available while an employee is on FMLA leave. If the employee requests the changed coverage it must be provided by the employer.

(e) An employee may choose not to retain group health plan coverage during FMLA leave. However, when an employee returns from leave, the employee is entitled to be reinstated on the same terms as prior to taking the leave, including family or dependent coverages, without any qualifying period, physical examination, exclusion of pre- existing conditions, etc. *See* §825.212(c).

(f) Except as required by the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) and for ''key'' employees (as discussed below), an employer's obligation to maintain health benefits during leave (and to restore the employee to the same or equivalent employment) under FMLA ceases if and when the employment relationship would have terminated if the employee had not taken FMLA leave (e.g., if the employee's position is eliminated as part of a nondiscriminatory reduction in force and the employee would not have been transferred to another position); an employee informs the employer of his or her intent not to return from leave (including before starting the leave if the employer is so informed before the leave starts); or the employee fails to return from leave or continues on leave after exhausting his or her FMLA leave entitlement in the 12-month period.

(g) If a ''key employee'' (see §825.218) does not return from leave when notified by the employer that substantial or grievous economic injury will result from his or her reinstatement, the employee's entitlement to group health plan benefits continues unless and until the employee advises the employer that the employee does not desire restoration to employment at the end of the leave period, or FMLA leave entitlement is exhausted, or reinstatement is actually denied.

(h) An employee's entitlement to benefits other than group health benefits during a period of FMLA leave (e.g., holiday pay) is to be determined by the employer's established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as appropriate).

[60 FR 2237, Jan. 6, 1995; 60 FR 16383, Mar. 30, 1995]

§825.210 How may employees on FMLA leave pay their share of group health benefit premiums?

(a) Group health plan benefits must be maintained on the same basis as coverage would have been provided if the employee had been continuously employed during the FMLA leave period. Therefore, any share of group health plan premiums which had been paid by the employee prior to FMLA leave must continue to be paid by the employee during the FMLA leave period. If premiums are raised or lowered, the employee would be required to pay the new premium rates. Maintenance of health insurance policies which are not a part of the employer's group health plan, as described in §825.209(a)(1), are the sole responsibility of the employee. The employee and

the insurer should make necessary arrangements for payment of premiums during periods of unpaid FMLA leave.

(b) If the FMLA leave is substituted paid leave, the employee's share of premiums must be paid by the method normally used during any paid leave, presumably as a payroll deduction.

(c) If FMLA leave is unpaid, the employer has a number of options for obtaining payment from the employee. The employer may require that payment be made to the employer or to the insurance carrier, but no additional charge may be added to the employee's premium payment for administrative expenses. The employer may require employees to pay their share of premium payments in any of the following ways:

(1) Payment would be due at the same time as it would be made if by payroll deduction;

(2) Payment would be due on the same schedule as payments are made under COBRA;

(3) Payment would be prepaid pursuant to a cafeteria plan at the employee's option;

(4) The employer's existing rules for payment by employees on ''leave without pay'' would be followed, provided that such rules do not require prepayment (*i.e.,* prior to the commencement of the leave) of the premiums that will become due during a period of unpaid FMLA leave or payment of higher premiums than if the employee had continued to work instead of taking leave; or,

(5) Another system voluntarily agreed to between the employer and the employee, which may include prepayment of premiums (*e.g.,* through increased payroll deductions when the need for the FMLA leave is foreseeable).

(d) The employer must provide the employee with advance written notice of the terms and conditions under which these payments must be made. (*See* §825.301.)

(e) An employer may not require more of an employee using FMLA leave than the employer requires of other employees on ''leave without pay.''

(f) An employee who is receiving payments as a result of a workers' compensation injury must make arrangements with the employer for payment of group health plan benefits when simultaneously taking unpaid FMLA leave. *See* paragraph (c) of this section and §825.207(d)(2).

[60 FR 2237, Jan. 6, 1995; 60 FR 16383, Mar. 30, 1995]

§825.211 What special health benefits maintenance rules apply to multi-employer health plans?

(a) A multi-employer health plan is a plan to which more than one employer is required to contribute, and which is maintained pursuant to one or more collective bargaining agreements between employee organization(s) and the employers.

(b) An employer under a multi-employer plan must continue to make contributions on behalf of an employee using FMLA leave as though the employee had been continuously employed, unless the plan contains an explicit FMLA provision for maintaining coverage such as through pooled contributions by all employers party to the plan.

(c) During the duration of an employee's FMLA leave, coverage by the group health plan, and benefits provided pursuant to the plan, must be maintained at the level of coverage and benefits which were applicable to the employee at the time FMLA leave commenced.

(d) An employee using FMLA leave cannot be required to use ''banked'' hours or pay a greater premium than the employee would have been required to pay if the employee had been continuously employed.

(e) As provided in §825.209(f) of this part, group health plan coverage must be maintained for an employee on FMLA leave until:

(1) the employee's FMLA leave entitlement is exhausted;

(2) the employer can show that the employee would have been laid off and the employment relationship terminated; or,

(3) the employee provides unequivocal notice of intent not to return to work.

§825.212 What are the consequences of an employee's failure to make timely health plan premium payments?

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

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

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

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

(c) If coverage lapses because an employee has not made required premium payments, upon the employee's return from FMLA leave the employer must still restore the employee to coverage/benefits equivalent to those the employee would have had if leave had not been taken and the premium payment(s) had not been missed, including family or dependent coverage. See §825.215(d)(1)–(5). In such case, an employee may not be required to meet any qualification requirements imposed by the plan, including any new preexisting condition waiting period, to wait for an open season, or to pass a medical examination to obtain reinstatement of coverage.

§825.213 May an employer recover costs it incurred for maintaining "group health plan" or other non-health benefits coverage during FMLA leave?

(a) In addition to the circumstances discussed in §825.212(b), an employer may recover its share of health plan premiums during a period of unpaid FMLA leave from an employee if the employee fails to return to work after the employee's FMLA leave entitlement has been exhausted or expires, unless the reason the employee does not return is due to:

(1) The continuation, recurrence, or onset of a serious health condition of the employee or the employee's family member which would otherwise entitle the employee to leave under FMLA; or

(2) Other circumstances beyond the employee's control. Examples of ''other circumstances beyond the employee's control'' are necessarily broad. They include such situations as where a parent chooses to stay home with a newborn child who has a serious health condition; an employee's spouse is unexpectedly transferred to a job location more than 75 miles from the employee's worksite; a relative or individual other than an immediate family member has a serious health condition and the employee is needed to provide care; the employee is laid off while on leave; or, the employee is a ''key employee'' who decides not to return to work upon being notified of the employer's intention to deny restoration because of substantial and grievous economic injury to the employer's operations and is not reinstated by the employer. Other circumstances beyond the employee's control would not include a situation where an employee desires to remain with a parent in a distant city even though the parent no longer requires the employee's care, or a parent chooses not to return to work to stay home with a well, newborn child.

(3) When an employee fails to return to work because of the continuation, recurrence, or onset of a serious health condition, thereby precluding the employer from recovering its (share of) health benefit premium payments made on the employee's behalf during a period of unpaid FMLA leave, the employer may require medical certification of the employee's or the family member's serious health condition. Such certification is not required unless requested by the employer. The employee is required to provide medical certification in a timely manner which, for purposes of this section, is within 30 days from the date of the employer's request. For purposes of medical certification, the employee may use the optional DOL form developed for this purpose (see §825.306(a) and Appendix B of this part). If the employer requests medical certification and the employee does not provide such certification in a timely manner (within 30 days), or the reason for not returning to work does not meet the test of other circumstances beyond the employee's control, the employer may recover 100% of the health benefit premiums it paid during the period of unpaid FMLA leave.

(b) Under some circumstances an employer may elect to maintain other benefits, *e.g.*, life insurance, disability insurance, *etc.*, by paying the employee's (share of) premiums during periods of unpaid FMLA leave. For example, to ensure the employer can meet its responsibilities to provide equivalent benefits to the employee upon return from unpaid FMLA leave, it may be necessary that premiums be paid continuously to avoid a lapse of coverage. If the employer elects to maintain such benefits during the leave, at the conclusion of leave, the employer is entitled to recover only the costs incurred for paying the employee's share of any premiums whether or not the employee returns to work.

(c) An employee who returns to work for at least 30 calendar days is considered to have ''returned'' to work. An employee who transfers directly from taking FMLA leave to retirement, or who retires during the first 30 days after the employee returns to work, is deemed to have returned to work.

(d) When an employee elects or an employer requires paid leave to be substituted for FMLA leave, the employer may not recover its (share of) health insurance or other non-health benefit premiums for any period of FMLA leave covered by paid leave. Because paid leave provided under a plan covering temporary disabilities (including workers' compensation) is not unpaid, recovery of health insurance premiums does not apply to such paid leave.

(e) The amount that self-insured employers may recover is limited to only the employer's share of allowable ''premiums'' as would be calculated under COBRA, excluding the 2 percent fee for administrative costs.

(f) When an employee fails to return to work, any health and non-health benefit premiums which this section of the regulations permits an employer to recover are a debt owed by the non-returning employee to the employer. The existence of this debt caused by the employee's failure to return to work does not alter the employer's responsibilities for health benefit coverage and, under a self-insurance plan, payment of claims incurred during the period of FMLA leave. To the extent recovery is allowed, the employer may recover the costs through deduction from any sums due to the employee (*e.g.*, unpaid wages, vacation pay, profit sharing, *etc.*), provided such deductions do not otherwise violate applicable Federal or State wage payment or other laws. Alternatively, the employer may initiate legal action against the employee to recover such costs.

§ 825.214 What are an employee's rights on returning to work from FMLA leave?

(a) On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence. *See* also §825.106(e) for the obligations of joint employers.

(b) If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA. However, the employer's obligations may be governed by the Americans with Disabilities Act (ADA). *See* §825.702.

[60 FR 2237, Jan. 6, 1995; 60 FR 16383, Mar. 30, 1995]

§825.215 What is an equivalent position?

(a) An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

(b) If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, fly a minimum number of hours, *etc.,* as a result of the leave, the employee shall be given a reasonable opportunity to fulfill those conditions upon return to work.

(c) *Equivalent Pay.* (1) An employee is entitled to any unconditional pay increases which may have occurred during the FMLA leave period, such as cost of living increases. Pay increases conditioned upon seniority, length of service, or work performed would not have to be granted unless it is the employer's policy or practice to do so with respect to other employees on ''leave without pay.'' In such case, any pay increase would be granted based on the employee's seniority, length of service, work performed, etc., excluding the period of unpaid FMLA leave. An employee is entitled to be restored to a position with the same or equivalent pay premiums, such as a shift differential. If an employee departed from a position averaging ten hours of overtime (and corresponding overtime pay) each week, an employee is ordinarily entitled to such a position on return from FMLA leave.

(2) Many employers pay bonuses in different forms to employees for job-related performance such as for perfect attendance, safety (absence of injuries or accidents on the job) and exceeding production goals. Bonuses for perfect attendance and safety do not require performance by the employee but rather contemplate the absence of occurrences. To the extent an employee who takes FMLA leave had met all the requirements for either or both of these bonuses before FMLA leave began, the employee is entitled to continue this entitlement upon return from FMLA leave, that is, the employee may not be disqualified for the bonus(es) for the taking of FMLA leave. *See* §825.220 (b) and (c). A monthly production bonus, on the other hand does require performance by the employee. If the employee is on FMLA leave during any part of the period for which the bonus is computed, the employee is entitled to the same consideration for the bonus as other employees on paid or unpaid leave (as appropriate). *See* paragraph (d)(2) of this section.

(d) *Equivalent Benefits.* ''Benefits'' include all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer through an employee benefit plan as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(3).

(1) At the end of an employee's FMLA leave, benefits must be resumed in the same manner and at the same levels as provided when the leave began, and subject to any changes in benefit levels that may have taken place during the period of FMLA leave affecting the entire workforce, unless otherwise elected by the employee. Upon return from FMLA leave, an employee cannot be required to requalify for any benefits the employee enjoyed before FMLA leave began (including family or dependent coverages). For example, if an employee was covered by a life insurance policy before taking leave but is not covered or coverage lapses during the period of unpaid

FMLA leave, the employee cannot be required to meet any qualifications, such as taking a physical examination, in order to requalify for life insurance upon return from leave. Accordingly, some employers may find it necessary to modify life insurance and other benefits programs in order to restore employees to equivalent benefits upon return from FMLA leave, make arrangements for continued payment of costs to maintain such benefits during unpaid FMLA leave, or pay these costs subject to recovery from the employee on return from leave. *See* §825.213(b).

(2) An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. Benefits accrued at the time leave began, however, (*e.g.*, paid vacation, sick or personal leave to the extent not substituted for FMLA leave) must be available to an employee upon return from leave.

(3) If, while on unpaid FMLA leave, an employee desires to continue life insurance, disability insurance, or other types of benefits for which he or she typically pays, the employer is required to follow established policies or practices for continuing such benefits for other instances of leave without pay. If the employer has no established policy, the employee and the employer are encouraged to agree upon arrangements before FMLA leave begins.

(4) With respect to pension and other retirement plans, any period of unpaid FMLA leave shall not be treated as or counted toward a break in service for purposes of vesting and eligibility to participate. Also, if the plan requires an employee to be employed on a specific date in order to be credited with a year of service for vesting, contributions or participation purposes, an employee on unpaid FMLA leave on that date shall be deemed to have been employed on that date. However, unpaid FMLA leave periods need not be treated as credited service for purposes of benefit accrual, vesting and eligibility to participate.

(5) Employees on unpaid FMLA leave are to be treated as if they continued to work for purposes of changes to benefit plans. They are entitled to changes in benefits plans, except those which may be dependent upon seniority or accrual during the leave period, immediately upon return from leave or to the same extent they would have qualified if no leave had been taken. For example if the benefit plan is predicated on a pre-established number of hours worked each year and the employee does not have sufficient hours as a result of taking unpaid FMLA leave, the benefit is lost. (In this regard, §825.209 addresses health benefits.)

(e) *Equivalent Terms and Conditions of Employment.* An equivalent position must have substantially similar duties, conditions, responsibilities, privileges and status as the employee's original position.

(1) The employee must be reinstated to the same or a geographically proximate worksite (*i.e.*, one that does not involve a significant increase in commuting time or distance) from where the employee had previously been employed. If the employee's original worksite has been closed, the employee is entitled to the same rights as if the employee had not been on leave when the worksite closed. For example, if an employer transfers all employees from a closed worksite to a new worksite in a different city, the employee on leave is also entitled to transfer under the same conditions as if he or she had continued to be employed.

(2) The employee is ordinarily entitled to return to the same shift or the same or an equivalent work schedule.

(3) The employee must have the same or an equivalent opportunity for bonuses, profit-sharing, and other similar discretionary and non-discretionary payments.

(4) FMLA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, or position which better suits the employee's personal needs on return from leave, or to offer a promotion to a better position. However, an employee cannot be induced by the employer to accept a different position against the employee's wishes.

(f) The requirement that an employee be restored to the same or equivalent job with the same or equivalent pay, benefits, and terms and conditions of employment does not extend to de minimis or intangible, unmeasurable

aspects of the job. However, restoration to a job slated for lay-off when the employee's original position is not would not meet the requirements of an equivalent position.

§825.216 Are there any limitations on an employer's obligation to reinstate an employee?

(a) An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. For example:

(1) If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employer's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee cease at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise. An employer would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration.

(2) If a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon restoration. However, if a position on, for example, a night shift has been filled by another employee, the employee is entitled to return to the same shift on which employed before taking FMLA leave.

(b) If an employee was hired for a specific term or only to perform work on a discrete project, the employer has no obligation to restore the employee if the employment term or project is over and the employer would not otherwise have continued to employ the employee. On the other hand, if an employee was hired to perform work on a contract, and after that contract period the contract was awarded to another contractor, the successor contractor may be required to restore the employee if it is a successor employer. See §825.107.

(c) In addition to the circumstances explained above, an employer may deny job restoration to salaried eligible employees (''key employees,'' as defined in paragraph (c) of §825.217) if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer; or may delay restoration to an employee who fails to provide a fitness for duty certificate to return to work under the conditions described in §825.310.

(d) If the employee has been on a workers' compensation absence during which FMLA leave has been taken concurrently, and after 12 weeks of FMLA leave the employee is unable to return to work, the employee no longer has the protections of FMLA and must look to the workers' compensation statute or ADA for any relief or protections.

§825.217 What is a "key employee"?

(a) A ''key employee'' is a salaried FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed by the employer within 75 miles of the employee's worksite.

(b) The term ''salaried'' means ''paid on a salary basis,'' as defined in 29 CFR 541.118. This is the Department of Labor regulation defining employees who may qualify as exempt from the minimum wage and overtime requirements of the FLSA as executive, administrative, and professional employees.

(c) A ''key employee'' must be ''among the highest paid 10 percent'' of all the employees—both salaried and non-salaried, eligible and ineligible—who are employed by the employer within 75 miles of the worksite.

(1) In determining which employees are among the highest paid 10 percent, year-to-date earnings are divided by weeks worked by the employee (including weeks in which paid leave was taken). Earnings include wages, premium pay, incentive pay, and non-discretionary and discretionary bonuses. Earnings do not include incentives whose value is determined at some future date, *e.g.*, stock options, or benefits or perquisites.

(2) The determination of whether a salaried employee is among the highest paid 10 percent shall be made at the time the employee gives notice of the need for leave. No more than 10 percent of the employer's employees within 75 miles of the worksite may be ''key employees.''

§ 825.218 What does "substantial and grievous economic injury" mean?

(a) In order to deny restoration to a key employee, an employer must determine that the restoration of the employee to employment will cause ''substantial and grievous economic injury'' to the operations of the employer, not whether the absence of the employee will cause such substantial and grievous injury.

(b) An employer may take into account its ability to replace on a temporary basis (or temporarily do without) the employee on FMLA leave. If permanent replacement is unavoidable, the cost of then reinstating the employee can be considered in evaluating whether substantial and grievous economic injury will occur from restoration; in other words, the effect on the operations of the company of reinstating the employee in an equivalent position.

(c) A precise test cannot be set for the level of hardship or injury to the employer which must be sustained. If the reinstatement of a ''key employee'' threatens the economic viability of the firm, that would constitute ''substantial and grievous economic injury.'' A lesser injury which causes substantial, long-term economic injury would also be sufficient. Minor inconveniences and costs that the employer would experience in the normal course of doing business would certainly not constitute ''substantial and grievous economic injury.''

(d) FMLA's ''substantial and grievous economic injury'' standard is different from and more stringent than the ''undue hardship'' test under the ADA (see, also § 825.702).

§ 825.219 What are the rights of a key employee?

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

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

(c) If an employee on leave does not return to work in response to the employer's notification of intent to deny restoration, the employee continues to be entitled to maintenance of health benefits and the employer may not recover its cost of health benefit premiums. A key employee's rights under FMLA continue unless and until the employee either gives notice that he or she no longer wishes to return to work, or the employer actually denies reinstatement at the conclusion of the leave period.

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

§825.220 How are employees protected who request leave or otherwise assert FMLA rights?

(a) The FMLA prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights. More specifically, the law contains the following employee protections:

(1) An employer is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act.

(2) An employer is prohibited from discharging or in any other way discriminating against any person (whether or not an employee) for opposing or complaining about any unlawful practice under the Act.

(3) All persons (whether or not employers) are prohibited from discharging or in any other way discriminating against any person (whether or not an employee) because that person has—

(i) Filed any charge, or has instituted (or caused to be instituted) any proceeding under or related to this Act;

(ii) Given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under this Act;

(iii) Testified, or is about to testify, in any inquiry or proceeding relating to a right under this Act.

(b) Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act. ''Interfering with'' the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employer to avoid responsibilities under FMLA, for example:

(1) transferring employees from one worksite to another for the purpose of reducing worksites, or to keep worksites, below the 50-employee threshold for employee eligibility under the Act;

(2) changing the essential functions of the job in order to preclude the taking of leave;

(3) reducing hours available to work in order to avoid employee eligibility.

(c) An employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under ''no fault'' attendance policies.

(d) Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA. For example, employees (or their collective bargaining representatives) cannot ''trade off'' the right to take FMLA leave against some other benefit offered by the employer. This does not prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a ''light duty'' assignment

while recovering from a serious health condition (*see* § 825.702(d)). In such a circumstance the employee's right to restoration to the same or an equivalent position is available until 12 weeks have passed within the 12-month period, including all FMLA leave taken and the period of ''light duty.''

(e) Individuals, and not merely employees, are protected from retaliation for opposing (*e.g.*, file a complaint about) any practice which is unlawful under the Act. They are similarly protected if they oppose any practice which they reasonably believe to be a violation of the Act or regulations.

Subpart C—How do Employees Learn of Their FMLA Rights and Obligations, and What Can an Employer Require of an Employee?

§ 825.300 What posting requirements does the Act place on employers?

(a) Every employer covered by the FMLA is required to post and keep posted on its premises, in conspicuous places where employees are employed, whether or not it has any ''eligible'' employees, a notice explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act with the Wage and Hour Division. The notice must be posted prominently where it can be readily seen by employees and applicants for employment. Employers may duplicate the text of the notice contained in Appendix C of this part, or copies of the required notice may be obtained from local offices of the Wage and Hour Division. The poster and the text must be large enough to be easily read and contain fully legible text.

(b) An employer that willfully violates the posting requirement may be assessed a civil money penalty by the Wage and Hour Division not to exceed $100 for each separate offense. Furthermore, an employer that fails to post the required notice cannot take any adverse action against an employee, including denying FMLA leave, for failing to furnish the employer with advance notice of a need to take FMLA leave.

(c) Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer shall be responsible for providing the notice in a language in which the employees are literate.

§ 825.301 What other notices to employees are required of employers under the FMLA?

(a)(1) If an FMLA-covered employer has any eligible employees and has any written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook, information concerning FMLA entitlements and employee obligations under the FMLA must be included in the handbook or other document. For example, if an employer provides an employee handbook to all employees that describes the employer's policies regarding leave, wages, attendance, and similar matters, the handbook must incorporate information on FMLA rights and responsibilities and the employer's policies regarding the FMLA. Informational publications describing the Act's provisions are available from local offices of the Wage and Hour Division and may be incorporated in such employer handbooks or written policies.

(2) If such an employer does not have written policies, manuals, or handbooks describing employee benefits and leave provisions, the employer shall provide written guidance to an employee concerning all the employee's rights and obligations under the FMLA. This notice shall be provided to employees each time notice is given pursuant to paragraph (b), and in accordance with the provisions of that paragraph. Employers may duplicate and provide the employee a copy of the FMLA Fact Sheet available from the nearest office of the Wage and Hour Division to provide such guidance.

(b)(1) The employer shall also provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. The written notice must be provided to the employee in a language in which the employee is literate (see § 825.300(c)). Such

specific notice must include, as appropriate:

(i) that the leave will be counted against the employee's annual FMLA leave entitlement (see §825.208);

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

(iii) the employee's right to substitute paid leave and whether the employer will require the substitution of paid leave, and the conditions related to any substitution;

(iv) any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments (see §825.210), and the possible consequences of failure to make such payments on a timely basis (i.e., the circumstances under which coverage may lapse);

(v) any requirement for the employee to present a fitness-for-duty certificate to be restored to employment (see §825.310);

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

(vii) the employee's right to restoration to the same or an equivalent job upon return from leave (see §§825.214 and 825.604); and,

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

(2) The specific notice may include other information—*e.g.*, whether the employer will require periodic reports of the employee's status and intent to return to work, but is not required to do so. A prototype notice is contained in Appendix D of this part, or may be obtained from local offices of the Department of Labor's Wage and Hour Division, which employers may adapt for their use to meet these specific notice requirements.

(c) Except as provided in this subparagraph, the written notice required by paragraph (b) (and by subparagraph (a)(2) where applicable) must be provided to the employee no less often than the first time in each six-month period that an employee gives notice of the need for FMLA leave (if FMLA leave is taken during the six-month period). The notice shall be given within a reasonable time after notice of the need for leave is given by the employee—within one or two business days if feasible. If leave has already begun, the notice should be mailed to the employee's address of record.

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

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

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

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

(e) Employers furnishing FMLA-required notices to sensory impaired individuals must also comply with all applicable requirements under Federal or State law.

(f) If an employer fails to provide notice in accordance with the provisions of this section, the employer may not take action against an employee for failure to comply with any provision required to be set forth in the notice.

[60 FR 2237, Jan. 6, 1995; 60 FR 16383, Mar. 30, 1995]

§ 825.302 What notice does an employee have to give an employer when the need for FMLA leave is foreseeable?

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

(b) ''As soon as practicable'' means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. For foreseeable leave where it is not possible to give as much as 30 days notice, ''as soon as practicable'' ordinarily would mean at least verbal notification to the employer within one or two business days of when the need for leave becomes known to the employee.

(c) An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed for an expected birth or adoption, for example. The employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. In the case of medical conditions, the employer may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave (see § 825.305).

(d) An employer may also require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave. For example, an employer may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave. However, failure to follow such internal employer procedures will not permit an employer to disallow or delay an employee's taking FMLA leave if the employee gives timely verbal or other notice.

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

to attempt to make such arrangements, subject to the approval of the health care provider.

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

(g) An employer may waive employees' FMLA notice requirements. In addition, an employer may not require compliance with stricter FMLA notice requirements where the provisions of a collective bargaining agreement, State law, or applicable leave plan allow less advance notice to the employer. For example, if an employee (or employer) elects to substitute paid vacation leave for unpaid FMLA leave (*see* §825.207), and the employer's paid vacation leave plan imposes no prior notification requirements for taking such vacation leave, no advance notice may be required for the FMLA leave taken in these circumstances. On the other hand, FMLA notice requirements would apply to a period of unpaid FMLA leave, unless the employer imposes lesser notice requirements on employees taking leave without pay.

§825.303 What are the requirements for an employee to furnish notice to an employer where the need for FMLA leave is not foreseeable?

(a) When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. It is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible. In the case of a medical emergency requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved.

(b) The employee should provide notice to the employer either in person or by telephone, telegraph, facsimile (''fax'') machine or other electronic means. Notice may be given by the employee's spokesperson (*e.g.,* spouse, adult family member or other responsible party) if the employee is unable to do so personally. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. The employer will be expected to obtain any additional required information through informal means. The employee or spokesperson will be expected to provide more information when it can readily be accomplished as a practical matter, taking into consideration the exigencies of the situation.

§825.304 What recourse do employers have if employees fail to provide the required notice?

(a) An employer may waive employees' FMLA notice obligations or the employer's own internal rules on leave notice requirements.

(b) If an employee fails to give 30 days notice for foreseeable leave with no reasonable excuse for the delay, the employer may delay the taking of FMLA leave until at least 30 days after the date the employee provides notice to the employer of the need for FMLA leave.

(c) In all cases, in order for the onset of an employee's FMLA leave to be delayed due to lack of required notice, it must be clear that the employee had actual notice of the FMLA notice requirements. This condition would be satisfied by the employer's proper posting of the required notice at the worksite where the employee is employed. Furthermore, the need for leave and the approximate date leave would be taken must have been clearly foreseeable to the employee 30 days in advance of the leave. For example, knowledge that an employee would receive a telephone call about the availability of a child for adoption at some unknown point in the future would not be sufficient.

§ 825.305 When must an employee provide medical certification to support FMLA leave?

(a) An employer may require that an employee's leave to care for the employee's seriously-ill spouse, son, daughter, or parent, or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's ill family member. An employer must give notice of a requirement for medical certification each time a certification is required; such notice must be written notice whenever required by §825.301. An employer's oral request to an employee to furnish any subsequent medical certification is sufficient.

(b) When the leave is foreseeable and at least 30 days notice has been provided, the employee should provide the medical certification before the leave begins. When this is not possible, the employee must provide the requested certification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(c) In most cases, the employer should request that an employee furnish certification from a health care provider at the time the employee gives notice of the need for leave or within two business days thereafter, or, in the case of unforeseen leave, within two business days after the leave commences. The employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration.

(d) At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. The employer shall advise an employee whenever the employer finds a certification incomplete, and provide the employee a reasonable opportunity to cure any such deficiency.

(e) If the employer's sick or medical leave plan imposes medical certification requirements that are less stringent than the certification requirements of these regulations, and the employee or employer elects to substitute paid sick, vacation, personal or family leave for unpaid FMLA leave where authorized (*see* §825.207), only the employer's less stringent sick leave certification requirements may be imposed.

§ 825.306 How much information may be required in medical certifications of a serious health condition?

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

(b) Form WH–380, as revised, or another form containing the same basic information, may be used by the employer; however, no additional information may be required. In all instances the information on the form must relate only to the serious health condition for which the current need for leave exists. The form identifies the health care provider and type of medical practice (including pertinent specialization, if any), makes maximum use of checklist entries for ease in completing the form, and contains required entries for:

(1) A certification as to which part of the definition of ''serious health condition'' (see §825.114), if any, applies to the patient's condition, and the medical facts which support the certification, including a brief statement as to how the medical facts meet the criteria of the definition.

(2)(i) The approximate date the serious health condition commenced, and its probable duration, including the probable duration of the patient's present incapacity (defined to mean inability to work, attend school or perform other regular daily activities due

to the serious health condition, treatment therefor, or recovery therefrom) if different.

(ii) Whether it will be necessary for the employee to take leave intermittently or to work on a reduced leave schedule basis (*i.e.*, part-time) as a result of the serious health condition (see §825.117 and §825.203), and if so, the probable duration of such schedule.

(iii) If the condition is pregnancy or a chronic condition within the meaning of §825.114(a)(2)(iii), whether the patient is presently incapacitated and the likely duration and frequency of episodes of incapacity.

(3)(i)(A) If additional treatments will be required for the condition, an estimate of the probable number of such treatments.

(B) If the patient's incapacity will be intermittent, or will require a reduced leave schedule, an estimate of the probable number and interval between such treatments, actual or estimated dates of treatment if known, and period required for recovery if any.

(ii) If any of the treatments referred to in subparagraph (i) will be provided by another provider of health services (e.g., physical therapist), the nature of the treatments.

(iii) If a regimen of continuing treatment by the patient is required under the supervision of the health care provider, a general description of the regimen (see §825.114(b)).

(4) If medical leave is required for the employee's absence from work because of the employee's own condition (including absences due to pregnancy or a chronic condition), whether the employee:

(i) Is unable to perform work of any kind;

(ii) Is unable to perform any one or more of the essential functions of the employee's position, including a statement of the essential functions the employee is unable to perform (see §825.115), based on either information provided on a statement from the employer of the essential functions of the position or, if not provided, discussion with the employee about the employee's job functions; or

(iii) Must be absent from work for treatment.

(5)(i) If leave is required to care for a family member of the employee with a serious health condition, whether the patient requires assistance for basic medical or personal needs or safety, or for transportation; or if not, whether the employee's presence to provide psychological comfort would be beneficial to the patient or assist in the patient's recovery. The employee is required to indicate on the form the care he or she will provide and an estimate of the time period.

(ii) If the employee's family member will need care only intermittently or on a reduced leave schedule basis (*i.e.*, part-time), the probable duration of the need.

(c) If the employer's sick or medical leave plan requires less information to be furnished in medical certifications than the certification requirements of these regulations, and the employee or employer elects to substitute paid sick, vacation, personal or family leave for unpaid FMLA leave where authorized (*see* §825.207), only the employer's lesser sick leave certification requirements may be imposed.

§825.307 What may an employer do if it questions the adequacy of a medical certification?

(a) If an employee submits a complete certification signed by the health care provider, the employer may not request additional information from the employee's health care provider. However, a health care provider representing the employer may contact the employee's health care provider, with the employee's permission, for purposes of *clarification* and authenticity of the medical certification.

(1) If an employee is on FMLA leave running concurrently with a workers' compensation absence, and the provisions of the workers' compensation statute permit the employer or the employer's representative to have direct contact with the employee's workers' compensation health care provider, the employer may follow the workers' compensation provisions.

(2) An employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employer's expense. Pending receipt of the second

(or third) medical opinion, the employee is provisionally entitled to the benefits of the Act, including maintenance of group health benefits. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave and may be treated as paid or unpaid leave under the employer's established leave policies. The employer is permitted to designate the health care provider to furnish the second opinion, but the selected health care provider may not be employed on a regular basis by the employer. See also paragraphs (e) and (f) of this section.

(b) The employer may not regularly contract with or otherwise regularly utilize the services of the health care provider furnishing the second opinion unless the employer is located in an area where access to health care is extremely limited (*e.g.*, a rural area where no more than one or two doctors practice in the relevant specialty in the vicinity).

(c) If the opinions of the employee's and the employer's designated health care providers differ, the employer may require the employee to obtain certification from a third health care provider, again at the employer's expense. This third opinion shall be final and binding. The third health care provider must be designated or approved jointly by the employer and the employee. The employer and the employee must each act in good faith to attempt to reach agreement on whom to select for the third opinion provider. If the employer does not attempt in good faith to reach agreement, the employer will be bound by the first certification. If the employee does not attempt in good faith to reach agreement, the employee will be bound by the second certification. For example, an employee who refuses to agree to see a doctor in the specialty in question may be failing to act in good faith. On the other hand, an employer that refuses to agree to any doctor on a list of specialists in the appropriate field provided by the employee and whom the employee has not previously consulted may be failing to act in good faith.

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

(e) If the employer requires the employee to obtain either a second or third opinion the employer must reimburse an employee or family member for any reasonable ''out of pocket'' travel expenses incurred to obtain the second and third medical opinions. The employer may not require the employee or family member to travel outside normal commuting distance for purposes of obtaining the second or third medical opinions except in very unusual circumstances.

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

[60 FR 2237, Jan. 6, 1995; 60 FR 16383, Mar. 30, 1995]

§ 825.308 Under what circumstances may an employer request subsequent recertifications of medical conditions?

(a) For pregnancy, chronic, or permanent/long-term conditions under continuing supervision of a health care provider (as defined in § 825.114(a)(2)(ii), (iii) or (iv)), an employer may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless:

(1) Circumstances described by the previous certification have changed significantly (*e.g.*, the duration or frequency of absences, the severity of the condition, complications); or

(2) The employer receives information that casts doubt upon the employee's stated reason for the absence.

(b)(1) If the minimum duration of the period of incapacity specified on a certification furnished by the health care provider is more than 30 days, the employer may not request recertification until that minimum duration has passed unless one of the conditions set

forth in paragraph (c)(1), (2) or (3) of this section is met.

(2) For FMLA leave taken intermittently or on a reduced leave schedule basis, the employer may not request recertification in less than the minimum period specified on the certification as necessary for such leave (including treatment) unless one of the conditions set forth in paragraph (c)(1), (2) or (3) of this section is met.

(c) For circumstances not covered by paragraphs (a) or (b) of this section, an employer may request recertification at any reasonable interval, but not more often than every 30 days, unless:

(1) The employee requests an extension of leave;

(2) Circumstances described by the previous certification have changed significantly (*e.g.*, the duration of the illness, the nature of the illness, complications); or

(3) The employer receives information that casts doubt upon the continuing validity of the certification.

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

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

§825.309 What notice may an employer require regarding an employee's intent to return to work?

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

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

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

§825.310 Under what circumstances may an employer require that an employee submit a medical certification that the employee is able (or unable) to return to work (i.e., a "fitness-for-duty" report)?

(a) As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employer may have a uniformly-applied policy or practice that requires all similarly-situated employees (*i.e.*, same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work.

(b) If State or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied. Similarly, requirements under the Americans with Disabilities Act (ADA) that any return-to-work physical be job-related and consistent with business necessity apply. For example, an attorney could not be required to submit to a medical examination or inquiry just because her leg had been amputated. The essential functions of an attorney's job do not require use of both

legs; therefore such an inquiry would not be job related. An employer may require a warehouse laborer, whose back impairment affects the ability to lift, to be examined by an orthopedist, but may not require this employee to submit to an HIV test where the test is not related to either the essential functions of his/her job or to his/her impairment.

(c) An employer may seek fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification itself need only be a simple statement of an employee's ability to return to work. A health care provider employed by the employer may contact the employee's health care provider with the employee's permission, for purposes of clarification of the employee's fitness to return to work. No additional information may be acquired, and clarification may be requested only for the serious health condition for which FMLA leave was taken. The employer may not delay the employee's return to work while contact with the health care provider is being made.

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

(e) The notice that employers are required to give to each employee giving notice of the need for FMLA leave regarding their FMLA rights and obligations (see §825.301) shall advise the employee if the employer will require fitness-for-duty certification to return to work. If the employer has a handbook explaining employment policies and benefits, the handbook should explain the employer's general policy regarding any requirement for fitness-for-duty certification to return to work. Specific notice shall also be given to any employee from whom fitness-for-duty certification will be required either at the time notice of the need for leave is given or immediately after leave commences and the employer is advised of the medical circumstances requiring the leave, unless the employee's condition changes from one that did not previously require certification pursuant to the employer's practice or policy. No second or third fitness-for-duty certification may be required.

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

(g) An employer is not entitled to certification of fitness to return to duty when the employee takes intermittent leave as described in §825.203.

(h) When an employee is unable to return to work after FMLA leave because of the continuation, recurrence, or onset of the employee's or family member's serious health condition, thereby preventing the employer from recovering its share of health benefit premium payments made on the employee's behalf during a period of unpaid FMLA leave, the employer may require medical certification of the employee's or the family member's serious health condition. (See §825.213(a)(3).) The cost of the certification shall be borne by the employee and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification.

[60 FR 2237, Jan. 6, 1995; 60 FR 16383, Mar. 30, 1995]

§825.311 What happens if an employee fails to satisfy the medical certification and/or recertification requirements?

(a) In the case of foreseeable leave, an employer may delay the taking of FMLA leave to an employee who fails to provide timely certification after being requested by the employer to furnish such certification (i.e., within 15 calendar days, if practicable), until the required certification is provided.

(b) When the need for leave is not foreseeable, or in the case of recertification, an employee must provide certification (or recertification) within the time frame requested by the employer (which must allow at least 15 days after the employer's request) *or* as soon as reasonably possible under the particular facts and circumstances. In the case of a medical emergency, it may not be practicable for an employee to provide the required certification within 15 calendar days. If an employee fails to provide a medical certification

within a reasonable time under the pertinent circumstances, the employer may delay the employee's continuation of FMLA leave. If the employee never produces the certification, the leave is not FMLA leave.

(c) When requested by the employer pursuant to a uniformly applied policy for similarly-situated employees, the employee must provide medical certification at the time the employee seeks reinstatement at the end of FMLA leave taken for the employee's serious health condition, that the employee is fit for duty and able to return to work (see §825.310(a)) if the employer has provided the required notice (see §825.301(c); the employer may delay restoration until the certification is provided. In this situation, unless the employee provides either a fitness-for-duty certification or a new medical certification for a serious health condition at the time FMLA leave is concluded, the employee may be terminated. See also §825.213(a)(3).

§825.312 Under what circumstances may a covered employer refuse to provide FMLA leave or reinstatement to eligible employees?

(a) If an employee fails to give timely advance notice when the need for FMLA leave is foreseeable, the employer may delay the taking of FMLA leave until 30 days after the date the employee provides notice to the employer of the need for FMLA leave. (See §825.302.)

(b) If an employee fails to provide in a timely manner a requested medical certification to substantiate the need for FMLA leave due to a serious health condition, an employer may delay continuation of FMLA leave until an employee submits the certificate. (See §§825.305 and 825.311.) If the employee never produces the certification, the leave is not FMLA leave.

(c) If an employee fails to provide a requested fitness-for-duty certification to return to work, an employer may delay restoration until the employee submits the certificate. (See §§825.310 and 825.311.)

(d) An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. Thus, an employee's rights to continued leave, maintenance of health benefits, and restoration cease under FMLA if and when the employment relationship terminates (*e.g.,* layoff), unless that relationship continues, for example, by the employee remaining on *paid* FMLA leave. If the employee is recalled or otherwise re-employed, an eligible employee is immediately entitled to further FMLA leave for an FMLA-qualifying reason. An employer must be able to show, when an employee requests restoration, that the employee would not otherwise have been employed if leave had not been taken in order to deny restoration to employment. (See §825.216.)

(e) An employer may require an employee on FMLA leave to report periodically on the employee's status and intention to return to work. (See §825.309.) If an employee unequivocally advises the employer either before or during the taking of leave that the employee does not intend to return to work, and the employment relationship is terminated, the employee's entitlement to continued leave, maintenance of health benefits, and restoration ceases unless the employment relationship continues, for example, by the employee remaining on *paid* leave. An employee may not be required to take more leave than necessary to address the circumstances for which leave was taken. If the employee is able to return to work earlier than anticipated, the employee shall provide the employer two business days notice where feasible; the employer is required to restore the employee once such notice is given, or where such prior notice was not feasible.

(f) An employer may deny restoration to employment, but not the taking of FMLA leave and the maintenance of health benefits, to an eligible employee only under the terms of the ''key employee'' exemption. Denial of reinstatement must be necessary to prevent ''substantial and grievous economic injury'' to the employer's operations. The employer must notify the employee of the employee's status as a ''key employee'' and of the employer's intent to deny reinstatement on that basis when the employer makes these

determinations. If leave has started, the employee must be given a reasonable opportunity to return to work after being so notified. (See § 825.219.)

(g) An employee who fraudulently obtains FMLA leave from an employer is not protected by FMLA's job restoration or maintenance of health benefits provisions.

(h) If the employer has a uniformly-applied policy governing outside or supplemental employment, such a policy may continue to apply to an employee while on FMLA leave. An employer which does not have such a policy may not deny benefits to which an employee is entitled under FMLA on this basis unless the FMLA leave was fraudulently obtained as in paragraph (g) of this section.

[60 FR 2237, Jan. 6, 1995; 60 FR 16383, Mar. 30, 1995]

Subpart D—What Enforcement Mechanisms Does FMLA Provide?

§ 825.400 What can employees do who believe that their rights under FMLA have been violated?

(a) The employee has the choice of:

(1) Filing, or having another person file on his or her behalf, a complaint with the Secretary of Labor, or

(2) Filing a private lawsuit pursuant to section 107 of FMLA.

(b) If the employee files a private lawsuit, it must be filed within two years after the last action which the employee contends was in violation of the Act, or three years if the violation was willful.

(c) If an employer has violated one or more provisions of FMLA, and if justified by the facts of a particular case, an employee may receive one or more of the following: wages, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or, where no such tangible loss has occurred, such as when FMLA leave was unlawfully denied, any actual monetary loss sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages for the employee. In addition, the employee may be entitled to interest on such sum, calculated at the prevailing rate. An amount equalling the preceding sums may also be awarded as liquidated damages unless such amount is reduced by the court because the violation was in good faith and the employer had reasonable grounds for believing the employer had not violated the Act. When appropriate, the employee may also obtain appropriate equitable relief, such as employment, reinstatement and promotion. When the employer is found in violation, the employee may recover a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action from the employer in addition to any judgment awarded by the court.

§ 825.401 Where may an employee file a complaint of FMLA violations with the Federal government?

(a) A complaint may be filed in person, by mail or by telephone, with the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor. A complaint may be filed at any local office of the Wage and Hour Division; the address and telephone number of local offices may be found in telephone directories.

(b) A complaint filed with the Secretary of Labor should be filed within a reasonable time of when the employee discovers that his or her FMLA rights have been violated. In no event may a complaint be filed more than two years after the action which is alleged to be a violation of FMLA occurred, or three years in the case of a willful violation.

(c) No particular form of complaint is required, except that a complaint must be reduced to writing and should include a full statement of the acts and/or omissions, with pertinent dates, which are believed to constitute the violation.

§ 825.402 How is an employer notified of a violation of the posting requirement?

Section 825.300 describes the requirements for covered employers to post a notice for employees that explains the Act's provisions. If a representative of the Department of Labor determines that an employer has committed a willful violation of this posting requirement, and that the imposition of a civil money penalty for such violation is appropriate, the representative

may issue and serve a notice of penalty on such employer in person or by certified mail. Where service by certified mail is not accepted, notice shall be deemed received on the date of attempted delivery. Where service is not accepted, the notice may be served by regular mail.

§825.403 How may an employer appeal the assessment of a penalty for willful violation of the posting requirement?

(a) An employer may obtain a review of the assessment of penalty from the Wage and Hour Regional Administrator for the region in which the alleged violation(s) occurred. If the employer does not seek such a review or fails to do so in a timely manner, the notice of the penalty constitutes the final ruling of the Secretary of Labor.

(b) To obtain review, an employer may file a petition with the Wage and Hour Regional Administrator for the region in which the alleged violations occurred. No particular form of petition for review is required, except that the petition must be in writing, should contain the legal and factual bases for the petition, and must be mailed to the Regional Administrator within 15 days of receipt of the notice of penalty. The employer may request an oral hearing which may be conducted by telephone.

(c) The decision of the Regional Administrator constitutes the final order of the Secretary.

§825.404 What are the consequences of an employer not paying the penalty assessment after a final order is issued?

The Regional Administrator may seek to recover the unpaid penalty pursuant to the Debt Collection Act (DCA), 31 U.S.C. 3711 *et seq.*, and, in addition to seeking recovery of the unpaid final order, may seek interest and penalties as provided under the DCA. The final order may also be referred to the Solicitor of Labor for collection. The Secretary may file suit in any court of competent jurisdiction to recover the monies due as a result of the unpaid final order, interest, and penalties.

Subpart E—What Records Must Be Kept to Comply With the FMLA?

§825.500 What records must an employer keep to comply with the FMLA?

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

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

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

(1) Basic payroll and identifying employee data, including name, address, and occupation; rate or basis of pay and terms of compensation; daily and

weekly hours worked per pay period; additions to or deductions from wages; and total compensation paid.

(2) Dates FMLA leave is taken by FMLA eligible employees (*e.g.,* available from time records, requests for leave, etc., if so designated). Leave must be designated in records as FMLA leave; leave so designated may not include leave required under State law or an employer plan which is not also covered by FMLA.

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

(4) Copies of employee notices of leave furnished to the employer under FMLA, if in writing, and copies of all general and specific written notices given to employees as required under FMLA and these regulations (see §825.301(b)). Copies may be maintained in employee personnel files.

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

(6) Premium payments of employee benefits.

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

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

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

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

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

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

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

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

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

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

(Approved by the Office of Management and Budget under control number 1215–0181)

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Subpart F—What Special Rules Apply to Employees of Schools?

§825.600 To whom do the special rules apply?

(a) Certain special rules apply to employees of ''local educational agencies,'' including public school boards and elementary and secondary schools under their jurisdiction, and private elementary and secondary schools. The special rules do not apply to other kinds of educational institutions, such as colleges and universities, trade schools, and preschools.

(b) Educational institutions are covered by FMLA (and these special rules) and the Act's 50-employee coverage test does not apply. The usual requirements for employees to be ''eligible'' do apply, however, including employment at a worksite where at least 50 employees are employed within 75 miles. For example, employees of a rural school would not be eligible for FMLA leave if the school has fewer than 50 employees and there are no other schools under the jurisdiction of the same employer (usually, a school board) within 75 miles.

(c) The special rules affect the taking of intermittent leave or leave on a reduced leave schedule, or leave near the end of an academic term (semester), by instructional employees. ''Instructional employees'' are those whose principal function is to teach and instruct students in a class, a small group, or an individual setting. This term includes not only teachers, but also athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. It does not include, and the special rules do not apply to, teacher assistants or aides who do not have as their principal job actual teaching or instructing, nor does it include auxiliary personnel such as counselors, psychologists, or curriculum specialists. It also does not include cafeteria workers, maintenance workers, or bus drivers.

(d) Special rules which apply to restoration to an equivalent position apply to all employees of local educational agencies.

§825.601 What limitations apply to the taking of intermittent leave or leave on a reduced leave schedule?

(a) Leave taken for a period that ends with the school year and begins the next semester is leave taken consecutively rather than intermittently. The period during the summer vacation when the employee would not have been required to report for duty is not counted against the employee's FMLA leave entitlement. An instructional employee who is on FMLA leave at the end of the school year must be provided with any benefits over the summer vacation that employees would normally receive if they had been working at the end of the school year.

(1) If an eligible instructional employee needs intermittent leave or leave on a reduced leave schedule to care for a family member, or for the employee's own serious health condition, which is foreseeable based on planned medical treatment, and the employee would be on leave for more than 20 percent of the total number of working days over the period the leave would extend, the employer may require the employee to choose either to:

(i) Take leave for a period or periods of a particular duration, not greater than the duration of the planned treatment; or

(ii) Transfer temporarily to an available alternative position for which the employee is qualified, which has equivalent pay and benefits and which better accommodates recurring periods of leave than does the employee's regular position.

(2) These rules apply only to a leave involving more than 20 percent of the working days during the period over which the leave extends. For example, if an instructional employee who normally works five days each week needs to take two days of FMLA leave per week over a period of several weeks, the special rules would apply. Employees taking leave which constitutes 20 percent or less of the working days during the leave period would not be subject to transfer to an alternative position. ''Periods of a particular duration'' means a block, or blocks, of time beginning no earlier than the first day for which leave is needed and ending no later than the last day on which leave is needed, and may include one uninterrupted period of leave.

(b) If an instructional employee does not give required notice of foreseeable FMLA leave (see §825.302) to be taken intermittently or on a reduced leave schedule, the employer may require the employee to take leave of a particular duration, or to transfer temporarily to an alternative position. Alternatively, the employer may require the employee to delay the taking of leave until the notice provision is met. *See* §825.207(h).

§ 825.602 What limitations apply to the taking of leave near the end of an academic term?

(a) There are also different rules for instructional employees who begin leave more than five weeks before the end of a term, less than five weeks before the end of a term, and less than three weeks before the end of a term. Regular rules apply except in circumstances when:

(1) An instructional employee begins leave more than five weeks before the end of a term. The employer may require the employee to continue taking leave until the end of the term if—

(i) The leave will last at least three weeks, and

(ii) The employee would return to work during the three-week period before the end of the term.

(2) The employee begins leave for a purpose other than the employee's own serious health condition *during* the five-week period before the end of a term. The employer may require the employee to continue taking leave until the end of the term if—

(i) The leave will last more than two weeks, and

(ii) The employee would return to work during the two-week period before the end of the term.

(3) The employee begins leave for a purpose other than the employee's own serious health condition during the three-week period before the end of a term, and the leave will last more than five working days. The employer may require the employee to continue taking leave until the end of the term.

(b) For purposes of these provisions, ''academic term'' means the school semester, which typically ends near the end of the calendar year and the end of spring each school year. In no case may a school have more than two academic terms or semesters each year for purposes of FMLA. An example of leave falling within these provisions would be where an employee plans two weeks of leave to care for a family member which will begin three weeks before the end of the term. In that situation, the employer could require the employee to stay out on leave until the end of the term.

§ 825.603 Is all leave taken during "periods of a particular duration" counted against the FMLA leave entitlement?

(a) If an employee chooses to take leave for ''periods of a particular duration'' in the case of intermittent or reduced schedule leave, the entire period of leave taken will count as FMLA leave.

(b) In the case of an employee who is required to take leave until the end of an academic term, only the period of leave until the employee is ready and able to return to work shall be charged against the employee's FMLA leave entitlement. The employer has the option not to require the employee to stay on leave until the end of the school term. Therefore, any additional leave required by the employer to the end of the school term is not counted as FMLA leave; however, the employer shall be required to maintain the employee's group health insurance and restore the employee to the same or equivalent job including other benefits at the conclusion of the leave.

§ 825.604 What special rules apply to restoration to "an equivalent position?"

The determination of how an employee is to be restored to ''an equivalent position'' upon return from FMLA leave will be made on the basis of ''established school board policies and practices, private school policies and practices, and collective bargaining agreements.'' The ''established policies'' and collective bargaining agreements used as a basis for restoration must be in writing, must be made known to the employee prior to the taking of FMLA leave, and must clearly explain the employee's restoration rights upon return from leave. Any established policy which is used as the basis for restoration of an employee to ''an equivalent position'' must provide substantially the same protections as provided in the Act for reinstated employees. See § 825.215. In other words, the policy or collective bargaining agreement must provide for restoration to an ''equivalent position'' with equivalent employment benefits, pay, and other terms and conditions of employment. For example, an employee may

not be restored to a position requiring additional licensure or certification.

Subpart G—How Do Other Laws, Employer Practices, and Collective Bargaining Agreements Affect Employee Rights Under FMLA?

§825.700 What if an employer provides more generous benefits than required by FMLA?

(a) An employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA. Conversely, the rights established by the Act may not be diminished by any employment benefit program or plan. For example, a provision of a CBA which provides for reinstatement to a position that is not equivalent because of seniority (*e.g.*, provides lesser pay) is superseded by FMLA. If an employer provides greater unpaid family leave rights than are afforded by FMLA, the employer is not required to extend additional rights afforded by FMLA, such as maintenance of health benefits (other than through COBRA), to the additional leave period not covered by FMLA. If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement.

(b) Nothing in this Act prevents an employer from amending existing leave and employee benefit programs, provided they comply with FMLA. However, nothing in the Act is intended to discourage employers from adopting or retaining more generous leave policies.

(c)(1) The Act does not apply to employees under a collective bargaining agreement (CBA) in effect on August 5, 1993, until February 5, 1994, or the date the agreement terminates (*i.e.*, its expiration date), whichever is earlier. Thus, if the CBA contains family or medical leave benefits, whether greater or less than those under the Act, such benefits are not disturbed until the Act's provisions begin to apply to employees under that agreement. A CBA which provides no family or medical leave rights also continues in effect. For CBAs subject to the Railway Labor Act and other CBAs which do not have an expiration date for the general terms, but which may be reopened at specified times, *e.g.*, to amend wages and benefits, the first time the agreement is amended after August 5, 1993, shall be considered the termination date of the CBA, and the effective date for FMLA.

(2) As discussed in §825.102(b), the period prior to the Act's delayed effective date must be considered in determining employer coverage and employee eligibility for FMLA leave.

§825.701 Do State laws providing family and medical leave still apply?

(a) Nothing in FMLA supersedes any provision of State or local law that provides greater family or medical leave rights than those provided by FMLA. The Department of Labor will not, however, enforce State family or medical leave laws, and States may not enforce the FMLA. Employees are not required to designate whether the leave they are taking is FMLA leave or leave under State law, and an employer must comply with the appropriate (applicable) provisions of both. An employer covered by one law and not the other has to comply only with the law under which it is covered. Similarly, an employee eligible under only one law must receive benefits in accordance with that law. If leave qualifies for FMLA leave and leave under State law, the leave used counts against the employee's entitlement under both laws. Examples of the interaction between FMLA and State laws include:

(1) If State law provides 16 weeks of leave entitlement over two years, an employee would be entitled to take 16 weeks one year under State law and 12 weeks the next year under FMLA. Health benefits maintenance under FMLA would be applicable only to the first 12 weeks of leave entitlement each year. If the employee took 12 weeks the first year, the employee would be entitled to a maximum of 12 weeks the second year under FMLA (not 16 weeks). An employee would not be entitled to 28 weeks in one year.

(2) If State law provides half-pay for employees temporarily disabled because of pregnancy for six weeks, the

employee would be entitled to an additional six weeks of unpaid FMLA leave (or accrued paid leave).

(3) A shorter notice period under State law must be allowed by the employer unless an employer has already provided, or the employee is requesting, more leave than required under State law.

(4) If State law provides for only one medical certification, no additional certifications may be required by the employer unless the employer has already provided, or the employee is requesting, more leave than required under State law.

(5) If State law provides six weeks of leave, which may include leave to care for a seriously-ill grandparent or a ''spouse equivalent,'' and leave was used for that purpose, the employee is still entitled to 12 weeks of FMLA leave, as the leave used was provided for a purpose not covered by FMLA. If FMLA leave is used first for a purpose also provided under State law, and State leave has thereby been exhausted, the employer would not be required to provide additional leave to care for the grandparent or ''spouse equivalent.''

(6) If State law prohibits mandatory leave beyond the actual period of pregnancy disability, an instructional employee of an educational agency subject to special FMLA rules may not be required to remain on leave until the end of the academic term, as permitted by FMLA under certain circumstances. (See Subpart F of this part.)

§ 825.702 How does FMLA affect Federal and State anti-discrimination laws?

(a) Nothing in FMLA modifies or affects any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability (e.g., Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act). FMLA's legislative history explains that FMLA is ''not intended to modify or affect the Rehabilitation Act of 1973, as amended, the regulations concerning employment which have been promulgated pursuant to that statute, or the Americans with Disabilities Act of 1990, or the regulations issued under that act. Thus, the leave provisions of the [FMLA] are wholly distinct from the reasonable accommodation obligations of employers covered under the [ADA], employers who receive Federal financial assistance, employers who contract with the Federal government, or the Federal government itself. The purpose of the FMLA is to make leave available to eligible employees and employers within its coverage, and not to limit already existing rights and protection.'' S. Rep. No. 3, 103d Cong., 1st Sess. 38 (1993). An employer must therefore provide leave under whichever statutory provision provides the greater rights to employees. When an employer violates both FMLA and a discrimination law, an employee may be able to recover under either or both statutes (double relief may not be awarded for the same loss; when remedies coincide a claimant may be allowed to utilize whichever avenue of relief is desired (*Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 445 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978))).

(b) If an employee is a qualified individual with a disability within the meaning of the Americans with Disabilities Act (ADA), the employer must make reasonable accommodations, *etc.*, barring undue hardship, in accordance with the ADA. At the same time, the employer must afford an employee his or her FMLA rights. ADA's ''disability'' and FMLA's ''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.

(c)(1) A reasonable accommodation under the ADA might be accomplished

by providing an individual with a disability with a part-time job with no health benefits, assuming the employer did not ordinarily provide health insurance for part-time employees. However, FMLA would permit an employee to work a reduced leave schedule until the equivalent of 12 workweeks of leave were used, with group health benefits maintained during this period. FMLA permits an employer to temporarily transfer an employee who is taking leave intermittently or on a reduced leave schedule to an alternative position, whereas the ADA allows an accommodation of reassignment to an equivalent, vacant position only if the employee cannot perform the essential functions of the employee's present position and an accommodation is not possible in the employee's present position, or an accommodation in the employee's present position would cause an undue hardship. The examples in the following paragraphs of this section demonstrate how the two laws would interact with respect to a qualified individual with a disability.

(2) A qualified individual with a disability who is also an ''eligible employee'' entitled to FMLA leave requests 10 weeks of medical leave as a reasonable accommodation, which the employer grants because it is not an undue hardship. The employer advises the employee that the 10 weeks of leave is also being designated as FMLA leave and will count towards the employee's FMLA leave entitlement. This designation does not prevent the parties from also treating the leave as a reasonable accommodation and reinstating the employee into the *same* job, as required by the ADA, rather than an equivalent position under FMLA, if that is the greater right available to the employee. At the same time, the employee would be entitled under FMLA to have the employer maintain group health plan coverage during the leave, as that requirement provides the greater right to the employee.

(3) If the same employee needed to work part-time (a reduced leave schedule) after returning to his or her same job, the employee would still be entitled under FMLA to have group health plan coverage maintained for the remainder of the two-week equivalent of FMLA leave entitlement, notwithstanding an employer policy that part-time employees do not receive health insurance. This employee would be entitled under the ADA to reasonable accommodations to enable the employee to perform the essential functions of the part-time position. In addition, because the employee is working a part-time schedule as a reasonable accommodation, the employee would be shielded from FMLA's provision for temporary assignment to a different alternative position. Once the employee has exhausted his or her remaining FMLA leave entitlement while working the reduced (part-time) schedule, if the employee is a qualified individual with a disability, and if the employee is unable to return to the same full-time position at that time, the employee might continue to work part-time as a reasonable accommodation, barring undue hardship; the employee would then be entitled to only those employment benefits ordinarily provided by the employer to part-time employees.

(4) At the end of the FMLA leave entitlement, an employer is required under FMLA to reinstate the employee in the same or an equivalent position, with equivalent pay and benefits, to that which the employee held when leave commenced. The employer's FMLA obligations would be satisfied if the employer offered the employee an equivalent full-time 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.

(d)(1) If FMLA entitles an employee to leave, an employer may not, in lieu of FMLA leave entitlement, *require* an employee to take a job with a reasonable accommodation. However, ADA may require that an employer offer an employee the opportunity to take such a position. An employer may not change the essential functions of the job in order to deny FMLA leave. See §825.220(b).

(2) An employee may be on a workers' compensation absence due to an on-the-job injury or illness which also qualifies as a serious health condition under FMLA. The workers' compensation absence and FMLA leave may run concurrently (subject to proper notice and designation by the employer). At some point the health care provider providing medical care pursuant to the workers' compensation injury may certify the employee is able to return to work in a ''light duty'' position. If the employer offers such a position, the employee is permitted but not required to accept the position (*see* § 825.220(d)). As a result, the employee may no longer qualify for payments from the workers' compensation benefit plan, but the employee is entitled to continue on unpaid FMLA leave either until the employee is able to return to the same or equivalent job the employee left or until the 12-week FMLA leave entitlement is exhausted. See § 825.207(d)(2). If the employee returning from the workers' compensation injury is a qualified individual with a disability, he or she will have rights under the ADA.

(e) If an employer requires certifications of an employee's fitness for duty to return to work, as permitted by FMLA under a uniform policy, it must comply with the ADA requirement that a fitness for duty physical be job-related and consistent with business necessity.

(f) Under Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, an employer should provide the same benefits for women who are pregnant as the employer provides to other employees with short-term disabilities. Because Title VII does not require employees to be employed for a certain period of time to be protected, an employee employed for less than 12 months by the employer (and, therefore, not an ''eligible'' employee under FMLA) may *not* be denied maternity leave if the employer normally provides short-term disability benefits to employees with the same tenure who are experiencing other short-term disabilities.

(g) For further information on Federal antidiscrimination laws, including Title VII and the ADA, individuals are encouraged to contact the nearest office of the U.S. Equal Employment Opportunity Commission.

[60 FR 2237, Jan. 6, 1995; 60 FR 16383, Mar. 30, 1995]

Subpart H—Definitions

§ 825.800 Definitions.

For purposes of this part:

Act or FMLA means the Family and Medical Leave Act of 1993, Public Law 103–3 (February 5, 1993), 107 Stat. 6 (29 U.S.C. 2601 *et seq.*)

ADA means the Americans With Disabilities Act (42 USC 12101 *et seq.*)

Administrator means the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, and includes any official of the Wage and Hour Division authorized to perform any of the functions of the Administrator under this part.

COBRA means the continuation coverage requirements of Title X of the Consolidated Omnibus Budget Reconciliation Act of 1986, As Amended (Pub.L. 99–272, title X, section 10002; 100 Stat 227; 29 U.S.C. 1161–1168).

Commerce and industry or activity affecting commerce mean any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include ''commerce'' and any ''industry affecting commerce'' as defined in sections 501(1) and 501(3) of the Labor Management Relations Act of 1947, 29 U.S.C. 142(1) and (3).

Continuing treatment means: A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(1) A period of *incapacity* (*i.e.*, inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(i) 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

(ii) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

(2) Any period of incapacity due to pregnancy, or for prenatal care.

(3) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(i) 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;

(ii) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(iii) May cause episodic rather than a continuing period of incapacity (*e.g.*, asthma, diabetes, epilepsy, *etc.*).

(4) 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, a severe stroke, or the terminal stages of a disease.

(5) Any period of absence to receive multiple treatments (including any period of recovery therefrom) 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 that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, *etc.*), severe arthritis (physical therapy), kidney disease (dialysis).

Eligible employee means:

(1) An employee who has been employed for a total of at least 12 months by the employer on the date on which any FMLA leave is to commence; and

(2) Who, on the date on which any FMLA leave is to commence, has been employed for at least 1,250 hours of service with such employer during the previous 12-month period; and

(3) Who is employed in any State of the United States, the District of Columbia or any Territories or possession of the United States.

(4) Excludes any Federal officer or employee covered under subchapter V of chapter 63 of title 5, United States Code; and

(5) Excludes any employee of the U.S. Senate or the U.S. House of Representatives covered under title V of the FMLA; and

(6) Excludes any employee who is employed at a worksite at which the employer employs fewer than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is also fewer than 50.

(7) Excludes any employee employed in any country other than the United States or any Territory or possession of the United States.

Employ means to suffer or permit to work.

Employee has the meaning given the same term as defined in section 3(e) of the Fair Labor Standards Act, 29 U.S.C. 203(e), as follows:

(1) The term ''employee'' means any individual employed by an employer;

(2) In the case of an individual employed by a public agency, ''employee'' means—

(i) Any individual employed by the Government of the United States—

(A) As a civilian in the military departments (as defined in section 102 of Title 5, United States Code),

(B) In any executive agency (as defined in section 105 of Title 5, United States Code), excluding any Federal officer or employee covered under subchapter V of chapter 63 of Title 5, United States Code,

(C) In any unit of the legislative or judicial branch of the Government which has positions in the competitive service, excluding any employee of the U.S. Senate or U.S. House of Representatives who is covered under Title V of FMLA,

(D) In a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or

(ii) Any individual employed by the United States Postal Service or the Postal Rate Commission; and

(iii) Any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

(A) Who is not subject to the civil service laws of the State, political subdivision, or agency which employs the employee; and

(B) Who—

(*1*) Holds a public elective office of that State, political subdivision, or agency,

(*2*) Is selected by the holder of such an office to be a member of his personal staff,

(*3*) Is appointed by such an officeholder to serve on a policymaking level,

(*4*) Is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of the office of such officeholder, or

(*5*) Is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

Employee employed in an instructional capacity. See Teacher.

Employer means any person engaged in commerce or in an industry or activity 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, and includes—

(1) Any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer;

(2) Any successor in interest of an employer; and

(3) Any public agency.

Employment benefits means all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer or through an ''employee benefit plan'' as defined in section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(3). The term does not include non-employment related obligations paid by employees through voluntary deductions such as supplemental insurance coverage. (See § 825.209(a)).

FLSA means the Fair Labor Standards Act (29 U.S.C. 201 et seq.).

Group health plan means any plan of, or contributed to by, an employer (including a self-insured plan) to provide health care (directly or otherwise) to the employer's employees, former employees, or the families of such employees or former employees. For purposes of FMLA the term ''group health plan'' shall not include 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; and,

(5) the premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

Health care provider means:

(1) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery by the State in which the doctor practices; or

(2) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing

within the scope of their practice as defined under State law; and

(3) Nurse practitioners, nurse-midwives and clinical social workers who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law; and

(4) Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts.

(5) Any health care provider from whom an employer or a group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits.

(6) A health care provider as defined above who practices in a country other than the United States, who is licensed to practice in accordance with the laws and regulations of that country.

Incapable of self-care means that the individual requires active assistance or supervision to provide daily self-care in several of the ''activities of daily living'' (ADLs) or ''instrumental activities of daily living'' (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

Instructional employee: See *Teacher.*

Intermittent leave means leave taken in separate periods of time due to a single illness or injury, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy.

Mental disability: See *Physical* or mental disability.

Parent means the biological parent of an employee or an individual who stands or stood in loco parentis to an employee when the employee was a child.

Person means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons, and includes a public agency for purposes of this part.

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

Public agency means the government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State, or any interstate governmental agency. Under section 101(5)(B) of the Act, a public agency is considered to be a ''person'' engaged in commerce or in an industry or activity affecting commerce within the meaning of the Act.

Reduced leave schedule means a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee.

Secretary means the Secretary of Labor or authorized representative.

Serious health condition entitling an employee to FMLA leave means:

(1) an illness, injury, impairment, or physical or mental condition that involves:

(i) *Inpatient care* (*i.e.*, an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of *incapacity* (for purposes of this section, defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom), or any subsequent treatment in connection with such inpatient care; or

(ii) *Continuing treatment* by a health care provider. A serious health condition involving continuing treatment by a health care provider includes:

(A) A period of *incapacity* (*i.e.*, inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom) of

more than three consecutive calendar days, including any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(*1*) 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

(*2*) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

(B) Any period of incapacity due to pregnancy, or for prenatal care.

(C) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(*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 (*e.g.*, 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, a severe stroke, or the terminal stages of a disease.

(E) Any period of absence to receive multiple treatments (including any period of recovery therefrom) 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 that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, *etc.*), severe arthritis (physical therapy), kidney disease (dialysis).

(2) Treatment for purposes of paragraph (1) of this definition includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. Under paragraph (1)(ii)(A)(*2*) of this definition, a regimen of continuing treatment includes, for example, a course of prescription medication (*e.g.*, an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (*e.g.*, oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(3) Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not ''serious health conditions'' unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach minor, ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness resulting from stress or allergies may be serious health conditions, but only if all the conditions of this section are met.

(4) Substance abuse may be a serious health condition if the conditions of this section are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the

substance, rather than for treatment, does not qualify for FMLA leave.

(5) Absences attributable to incapacity under paragraphs (1)(ii) (B) or (C) of this definition qualify for FMLA leave even though the employee or the immediate family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

Son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is under 18 years of age or 18 years of age or older and incapable of self-care because of a mental or physical disability.

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

State means any State of the United States or the District of Columbia or any Territory or possession of the United States.

Teacher (or employee employed in an instructional capacity, or instructional employee) means an employee employed principally in an instructional capacity by an educational agency or school whose principal function is to teach and instruct students in a class, a small group, or an individual setting, and includes athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. The term does not include teacher assistants or aides who do not have as their principal function actual teaching or instructing, nor auxiliary personnel such as counselors, psychologists, curriculum specialists, cafeteria workers, maintenance workers, bus drivers, or other primarily noninstructional employees.

[60 FR 2237, Jan. 6, 1995; 60 FR 16383, Mar. 30, 1995]

APPENDIX A TO PART 825—INDEX

The citations listed in this Appendix are to sections in 29 CFR Part 825.

[60 FR 2237, Jan. 6, 1995; 60 FR 16383, Mar. 30, 1995]

APPENDIX B TO PART 825—CERTIFICATION OF PHYSICIAN OR PRACTITIONER (OPTIONAL FORM WH–380)

Certification of Health Care Provider
(Family and Medical Leave Act of 1993)

1. Employee's Name:

2. Patient's Name (if different from employee):

3. The attached sheet describes what is meant by a **"serious health condition"** under the Family and Medical Leave Act. Does the patient's condition[1] qualify under any of the categories described? If so, please check the applicable category.

(1)___ (2)___ (3)___ (4)___ (5)___ (6)___ , or None of the above _____

4. Describe the **medical facts** which support your certification, including a brief statement as to how the medical facts meet the criteria of one of these categories:

5.a. State the approximate **date** the condition commenced, and the probable **duration** of the condition (and also the probable duration of the patient's present **incapacity**[2] if different):

b. Will it be necessary for the employee to take work only **intermittently or to work on a less than full** schedule as a result of the condition (including for treatment described in Item 6 below)? _____

If yes, give the probable duration:

c. If the condition is a **chronic condition** (condition #4) or **pregnancy**, state whether the patient is presently incapacitated[2] and the likely duration and frequency of **episodes of incapacity**[2]:

6.a. If additional **treatments** will be required for the condition, provide an estimate of the probable number of such treatments:

If the patient will be absent from work or other daily activities because of **treatment** on an **intermittent** or **part-time** basis, also provide an estimate of the probable number and interval between such treatments, actual or estimated dates of treatment if known, and period required for recovery if any:

b. If any of these treatments will be provided by **another provider of health services** (e.g., physical therapist), please state the nature of the treatments:

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[1] Here and elsewhere on this form, the information sought relates only to the condition for which the employee is taking FMLA leave.

[2] "Incapacity," for purposes of FMLA, is defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom.

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c. If a **regimen of continuing treatment** by the patient is required under your supervision, provide a general description of such regimen (e.g., prescription drugs, physical therapy requiring special equipment):

7.a. If medical leave is required for the employee's **absence from work** because of the **employee's own condition** (including absences due to pregnancy or a chronic condition), is the employee **unable to perform** work of any kind? _____

b. If able to perform some work, is the employee **unable to perform any one or more of the essential functions of the employee's job** (the employee or the employer should supply you with information about the essential job functions)? _____ If yes, please list the essential functions the employee is unable to perform:

c. If neither a. nor b. applies, is it necessary for the employee to be **absent from work for treatment**?

_____

8.a. If leave is required to **care for a family member** of the employee with a serious health condition, **does** the patient **require assistance** for basic medical or personal needs or safety, or for transportation?_____

b. If no, would the employee's presence to provide **psychological comfort** be beneficial to the patient or assist in the patient's recovery?_____

c. If the patient will need care only **intermittently** or on a part-time basis, please indicate the probable **duration** of this need:

_____ _____

(Signature of Health Care Provider) (Type of Practice)

_____ _____

(Address) (Telephone number)

To be completed by the employee needing family leave to care for a family member:

State the care you will provide and an estimate of the period during which care will be provided, including a schedule if leave is to be taken intermittently or if it will be necessary for you to work less than a full schedule:

_____ _____

(Employee signature) (date)

A "**Serious Health Condition**" means an illness, injury, impairment, or physical or mental condition that involves one of the following:

1. Hospital Care

Inpatient care (*i.e.*, an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity[2] or subsequent treatment in connection with or consequent to such inpatient care.

2. Absence Plus Treatment

(a) A period of incapacity[2] of **more than three consecutive calendar days** (including any subsequent treatment or period of incapacity[2] relating to the same condition), that also involves:

(1) **Treatment**[3] **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*

(2) **Treatment** by a health care provider on **at least one occasion** which results in a **regimen of continuing treatment**[4] under the supervision of the health care provider.

3. Pregnancy

Any period of incapacity due to **pregnancy**, or for **prenatal care**.

4. Chronic Conditions Requiring Treatments

A **chronic condition** which:

(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[2] (e.g., asthma, diabetes, epilepsy, etc.).

5. Permanent/Long-term Conditions Requiring Supervision

A period of **incapacity**[2] 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**

---

[3] Treatment includes examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations.

[4] A regimen of continuing treatment includes, for example, a course of prescription medication (*e.g.*, an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition. A regimen of treatment does not include the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider.

receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

6. Multiple Treatments (Non-Chronic Conditions)

Any period of absence to receive **multiple treatments** (including any period of recovery therefrom) 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 that **would likely result in a period of incapacity[2] of more than three consecutive calendar days in the absence of medical intervention or treatment,** such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis).

APPENDIX C TO PART 825—NOTICE TO EMPLOYEES OF RIGHTS UNDER FMLA (WH PUBLICATION 1420)

Your Rights
Under The
Family and Medical Leave Act of 1993

FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to "eligible" employees for certain family and medical reasons. Employees are eligible if they have worked for a covered employer for at least one year, and for 1,250 hours over the previous 12 months, and if there are at least 50 employees within 75 miles.

Reasons For Taking Leave:

Unpaid leave must be granted for *any* of the following reasons:

- to care for the employee's child after birth, or placement for adoption or foster care;
- to care for the employee's spouse, son or daughter, or parent, who has a serious health condition; or
- for a serious health condition that makes the employee unable to perform the employee's job.

At the employee's or employer's option, certain kinds of *paid* leave may be substituted for unpaid leave.

Advance Notice and Medical Certification:

The employee may be required to provide advance leave notice and medical certification. Taking of leave may be denied if requirements are not met.

- The employee ordinarily must provide 30 days advance notice when the leave is "foreseeable."
- An employer may require medical certification to support a request for leave because of a serious health condition, and may require second or third opinions (at the employer's expense) and a fitness for duty report to return to work.

Job Benefits and Protection:

- For the duration of FMLA leave, the employer must maintain the employee's health coverage under any "group health plan."
- Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.
- The use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

Unlawful Acts By Employers:

FMLA makes it unlawful for any employer to:

- interfere with, restrain, or deny the exercise of any right provided under FMLA;
- discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.

Enforcement:

- The U.S. Department of Labor is authorized to investigate and resolve complaints of violations.
- An eligible employee may bring a civil action against an employer for violations.

FMLA does not affect any Federal or State law prohibiting discrimination, or supersede any State or local law or collective bargaining agreement which provides greater family or medical leave rights.

For Additional Information:

Contact the nearest office of the Wage and Hour Division, listed in most telephone directories under U.S. Government, Department of Labor.

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

WH Publication 1420
June 1993

APPENDIX D TO PART 825—PROTOTYPE NOTICE: EMPLOYER RESPONSE TO EMPLOYEE REQUEST FOR FAMILY AND MEDICAL LEAVE (FORM WH–381)

Employer Response to Employee
Request for Family or Medical Leave
(Optional use form - see 29 CFR §825.301(c))

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

(Family and Medical Leave Act of 1993)

(Date)

TO : _____
(*Employee's name*)

FROM: _____
(*Name of appropriate employer representative*)

SUBJECT: Request for Family/Medical Leave

On _____ (*date*), you notified us of your need to take family/medical leave due to:

□ the birth of your child, or the placement of a child with you for adoption or foster care; or

□ a serious health condition that makes you unable to perform the essential functions of your job; or

□ a serious health condition affecting your □ spouse, □ child, □ parent, for which you are needed to provide care.

You notified us that you need this leave beginning on _____ (*date*) and that you expect leave to continue until on or about _____ (*date*).

Except as explained below, you have a right under the FMLA for up to 12 weeks of unpaid leave in a 12-month period for the reasons listed above. Also, your health benefits must be maintained during any period of unpaid leave under the same conditions as if you continued to work, and you must be reinstated to the same or an equivalent job with the same pay, benefits, and terms and conditions of employment on your return from leave. If you do not return to work following FMLA leave for a reason other than: (1) the continuation, recurrence, or onset of a serious health condition which would entitle you to FMLA leave; or (2) other circumstances beyond your control, you may be required to reimburse us for our share of health insurance premiums paid on your behalf during your FMLA leave.

This is to inform you that: (*check appropriate boxes; explain where indicated*)

1. You are □ eligible □ not eligible for leave under the FMLA.

2. The requested leave □ will □ will not be counted against your annual FMLA leave entitlement.

3. You □ will □ will not be required to furnish medical certification of a serious health condition. If required, you must furnish certification by _____ (*insert date*) (must be at least 15 days after you are notified of this requirement) or we may delay the commencement of your leave until the certification is submitted.

Form WH-381
December 1994

4. You may elect to substitute accrued paid leave for unpaid FMLA leave. We ☐ will ☐ will not require that you substitute accrued paid leave for unpaid FMLA leave. If paid leave will be used the following conditions will apply: (*Explain*)

5(a). If you normally pay a portion of the premiums for your health insurance, these payments will continue during the period of FMLA leave. Arrangements for payment have been discussed with you and it is agreed that you will make premium payments as follows: (*Set forth dates, e.g., the 10th of each month, or pay periods, etc. that specifically cover the agreement with the employee.*)

(b). You have a minimum 30-day (*or, indicate longer period, if applicable*) grace period in which to make premium payments. If payment is not made timely, your group health insurance may be cancelled, provided we notify you in writing at least 15 days before the date that your health coverage will lapse, or, at our option, we may pay your share of the premiums during FMLA leave, and recover these payments from you upon your return to work. We ☐ will ☐ will not pay your share of health insurance premiums while you are on leave.

(c). We ☐ will ☐ will not do the same with other benefits (e.g., life insurance, disability insurance, etc.) while you are on FMLA leave. If we do pay your premiums for other benefits, when you return from leave you ☐ will ☐ will not be expected to reimburse us for the payments made on your behalf.

6. You ☐ will ☐ will not be required to present a fitness-for-duty certificate prior to being restored to employment. If such certification is required but not received, your return to work may be delayed until the certification is provided.

7(a). You ☐ are ☐ are not a "key employee" as described in §825.218 of the FMLA regulations. If you are a "key employee," restoration to employment may be denied following FMLA leave on the grounds that such restoration will cause substantial and grievous economic injury to us.

(b). We ☐ have ☐ have not determined that restoring you to employment at the conclusion of FMLA leave will cause substantial and grievous economic harm to us. (*Explain (a) and/or (b) below. See §825.219 of the FMLA regulations.*)

8. While on leave, you ☐ will ☐ will not be required to furnish us with periodic reports every ___ *(indicate interval of periodic reports, as appropriate for the particular leave situation)* of your status and intent to return to work *(see §825.309 of the FMLA regulations).* If the circumstances of your leave change and you are able to return to work earlier than the date indicated on the reverse side of this form, you ☐ will ☐ will not be required to notify us at least two work days prior to the date you intend to report for work.

9. You ☐ will ☐ will not be required to furnish recertification relating to a serious health condition. (*Explain below, if necessary, including the interval between certifications as prescribed in §825.308 of the FMLA regulations.*)

APPENDIX E TO PART 825—IRS NOTICE DISCUSSING RELATIONSHIP BETWEEN FMLA AND COBRA

Internal Revenue Bulletin No. 1994-51 (December 19, 1994), pp. 10-11.

Part III. Administrative, Procedural, and Miscellaneous

Effect of the Family and Medical Leave Act on COBRA Continuation Coverage

Notice 94-103

The Family and Medical Leave Act of 1993 ("FMLA"), P.L. 103-3, imposes certain requirements on employers regarding coverage, including family coverage, under group health plans for employees taking FMLA leave. Many employers have raised questions about how the requirements under FMLA affect their obligation to provide COBRA continuation coverage in accordance with the requirements of section 4980B of the Internal Revenue Code. This notice addresses a number of the principal questions that have been raised.

The requirements pertaining to FMLA leave, including the employer's obligation to maintain coverage under a group health plan during FMLA leave, are established under FMLA, not under the Internal Revenue Code. The U.S. Department of Labor has published rules interpreting the requirements of FMLA in part 825 of title 29 of the Code of Federal Regulations. The determination of when FMLA leave ends is relevant to the guidance provided in this notice. Although this notice makes several references to the first day or the last day of FMLA leave, the notice does not purport to provide guidance on when FMLA leave begins or ends or on any other aspect of FMLA leave; instead, the notice provides guidance on the COBRA continuation coverage requirements that may arise once FMLA leave has ended (as determined under FMLA and the Labor Regulations thereunder). *See, e.g.*, 29 C.F.R. § 825.209(f) and (g).

Q-1: *In What Circumstances Does a COBRA Qualifying Event Occur If an Employee Does Not Return from FMLA Leave?*

A-1: The taking of leave under FMLA does not constitute a qualifying event under section 4980B of the Code. A qualifying event under section 4980B(f)(3)(B) occurs, however, if (1) an employee (or the spouse or a dependent child of the employee) is covered on the day before the first day of FMLA leave (or becomes covered during the FMLA leave) under a group health plan of the employee's employer, (2) the employee does not return to employment with the employer at the end of the FMLA leave, and (3) the employee (or the spouse or a dependent child of the employee) would, in the absence of COBRA continuation coverage, lose coverage under the group health plan (*i.e.*, cease to be covered under the same terms and conditions as in effect for similarly situated active employees and their spouses and dependent children) before the end of what would be the maximum coverage period. However, the satisfaction of the three conditions in the preceding sentence does not constitute a qualifying event if the employer eliminates, on or before the last day of the employee's FMLA leave, coverage under a group health plan for the class of employees (while continuing to employ that class of employees) to which the employee would have belonged if the employee had not taken FMLA leave.

Q-2: *When Does the COBRA Qualifying Event Occur, and How is the Maximum Coverage Period Measured?*

A qualifying event described in Q&A-1 occurs on the last day of FMLA leave. The maximum coverage period is measured from the date of the qualifying event (*i.e.*, the last day of FMLA leave). If, however, coverage under the group health plan is lost at a later date and the plan provides for the extension of the required periods, as permitted under section 4980B(f)(8) of the Code, then the maximum coverage period is measured from the date when coverage is lost.

Example 1: Employee *A* is covered under the group health plan of Employer *X* on January 31, 1995. *A* takes FMLA leave beginning February 1, 1995. *A*'s last day of FMLA leave is 12 weeks later, on April 25, 1995, and *A* does not return to work with *X* at the end of the FMLA leave. If *A* does not elect COBRA continuation coverage, *A* will lose coverage under the group health plan of *X* on April 26, 1995.

A experiences a qualifying event on April 25, 1995, and the maximum coverage period (generally 18 months) is measured from that date. (This is the case even if, for part or all of the FMLA leave, *A* fails to pay the employee portion of premiums for coverage under the group health plan of *X* and is not covered under *X*'s plan. *See* Q&A-3 below.)

Example 2: Employee *B* and *B*'s spouse are covered under the group health plan of Employer *Y* on August 15, 1995. *B* takes FMLA leave beginning August 16, 1995. *B* informs *Y* less than 7 weeks later, on September 28, 1995, that *B* will not be returning to work. Under the FMLA regulations published by the Department of Labor in part 825 of title 29 of the Code of Federal Regulations, *B*'s last day of FMLA leave is September 28, 1995. *B* does not return to work with *Y* at the end of the FMLA leave. If *B* and *B*'s spouse do not elect COBRA continuation coverage, they will lose coverage under the group health plan of *Y* on September 29, 1995.

B and B's spouse experience a qualifying event on September 28, 1995, and the maximum coverage period (generally 18 months) is measured from that date. (This is the case even if, for part or all of the FMLA leave, *B* fails to pay the employee portion of premiums for coverage under the group health plan of *Y* and *B* or *B*'s spouse is not covered under *Y*'s plan. *See* Q&A-3 below.)

Q-3: *Can a COBRA Qualifying Event Occur If an Employee Failed to Pay the Employee Portion of Premiums for Coverage Under a Group Health Plan During FMLA Leave or Declined Coverage Under a Group Health Plan During FMLA Leave?*

A-3: Yes. Any lapse of coverage under a group health plan during FMLA leave is irrelevant in determining whether a set of circumstances constitutes a qualifying event under Q&A-1 of this notice or when such a qualifying event occurs under Q&A-2.

Q-4: *Are the Foregoing Rules Affected by a Requirement of State or Local Law to Provide a Longer Period of Coverage Than That Required Under FMLA?*

A-4: No. Any State or local law that requires coverage under a group health plan to be maintained during a leave of absence for a period longer than that required under FMLA (for example, for 16 weeks of leave rather

than for the 12 weeks required under FMLA) is disregarded for purposes of determining when a qualifying event occurs under section 4980B of the Code.

Q-5: *May COBRA Continuation Coverage Be Conditioned Upon Reimbursement of the Premiums Paid by the Employer for Coverage Under a Group Health Plan During FMLA Leave?*

A-5: No. The U.S. Department of Labor has published rules describing the circumstances in which an employer may recover premiums it pays to maintain coverage, including family coverage, under a group health plan during FMLA leave from an employee who fails to return from leave. *See* 29 CFR § 825.213. Even if recovery of premiums is permitted under those rules, the right to COBRA continuation coverage cannot be conditioned upon the employee's reimbursement of the employer for premiums the employer paid to maintain coverage under a group health plan during FMLA leave.

Q-6: *How Is the COBRA Notice Period for Employers Satisfied?*

A-6: In the case of an employee (or the spouse or a dependent child of an employee) who experiences a qualifying event described in Q&A-1 of this notice, the usual notice rules of section 4980B(f)(6) of the Code apply. Thus, the employer must notify the plan administrator of the qualifying event within 30 days (or, in the case of a group health plan which is a multiemployer plan, such longer period of time as may be provided in the terms of the plan) of the last day of FMLA leave. If, however, coverage under the group health plan is lost after the last day of FMLA leave and the plan provides for the extension of the required periods, as permitted under section 4980B(f)(8), then the applicable notice period of section 4980B(f)(6)(B) commences on the date coverage is lost.

Q-7: *What is the Effect of This Notice?*

A-7: Before the effective date of final regulations under section 4980B of the Code, employers and group health plans must operate in good faith compliance with a reasonable interpretation of the statutory requirements for COBRA continuation coverage. Whether there has been good faith compliance with a reasonable interpretation will be determined based on all the facts and circumstances of each case; however, the Service will consider compliance with the terms of this notice to constitute good faith compliance with a reasonable interpretation of the COBRA continuation coverage requirements of section 4980B of the Code as they apply to FMLA leave situations, but only to the extent that this notice addresses the COBRA continuation coverage requirements in such situations.

DRAFTING INFORMATION

The principal author of this notice is Russ Weinheimer of the Office of the Associate Chief Counsel (Employee Benefits and Exempt Organizations). For further information regarding this notice, contact Mr. Weinheimer at (202) 622-4695 (not a toll-free number).

5 Employee Benefits

510 Leave

511 General

511.1 Administration Policy

The U.S. Postal Service policy is to administer the leave program on an equitable basis for all employees, considering (a) the needs of the Postal Service and (b) the welfare of the individual employee.

511.2 Responsibilities

511.21 Postal Officials

Postal officials:

a. Administer the leave program.

b. Inform employees of their leave balance.

c. Approve or disapprove requests for leave.

d. Record leave in accordance with Handbook F-21, *Time and Attendance*, or Handbook F-22, *PSDS Time and Attendance*.

e. Control unscheduled absences (see 511.4).

511.22 Eagan Accounting Service Center

The Eagan Accounting Service Center (ASC):

a. Maintains official leave records.

b. Provides leave data to installation *when employees are being separated.*

511.23 Postal Employees

Postal employees:

a. Request leave by completing Form 3971, *Request for or Notification of Absence*.

b. Obtain approval of Form 3971 before taking leave — except in cases of emergencies.

c. Avoid unnecessary forfeiture of annual leave.

511.3 Eligibility

511.31 Covered

Covered by the leave program are:

a. Full-time career employees.

b. Part-time regular career employees.

c. Part-time flexible career employees.

d. To the extent provided in the USPS-NRLCA National Agreement, temporary employees assigned to rural carrier duties.

Note: Transitional employees are not covered by the leave program, but do earn leave as specified in their union's national agreement.

511.32 Not Covered

Not covered by the leave program are:

a. Postmaster relief/leave replacements, noncareer officers in charge, and other temporary employees except as described in 511.31d above.

b. Casual employees.

c. Individuals who work on a fee or contract basis, such as job cleaners.

511.4 Unscheduled Absence

511.41 Definition

Unscheduled absences are any absences from work that are not requested and approved in advance.

511.42 Management Responsibilities

To control unscheduled absences, postal officials:

a. Inform employees of leave regulations.

b. Discuss attendance records with individual employees when warranted.

c. Maintain and review Forms 3972, *Absence Analysis*, and Forms 3971.

511.43 Employee Responsibilities

Employees are expected to maintain their assigned schedule and must make every effort to avoid unscheduled absences. In addition, employees must provide acceptable evidence for absences when required.

512 Annual Leave

512.1 General

512.11 Purpose

Annual leave is provided to employees for rest, for recreation, and for personal and emergency purposes.

512.12 Definitions

The following definitions apply for the purposes of subchapter 510:

a. *Leave year* — the year beginning with the first day of the first complete pay period in a calendar year and ending on the day before the first day of the first complete pay period in the following calendar year.

b. *Accumulated leave* — the total unused leave that remains to the credit of the employee at the beginning of any leave year.

c. *Current leave* — leave that an employee earns by biweekly pay periods during the current leave year.

d. *Accrued leave* — leave that is earned but is unused by an employee during any period during the current leave year.

512.2 Determining Annual Leave Category

512.21 General Policy

Both active military and civilian service, as outlined in 512.22 and 512.23, are used in computing the years of service that determine an employee's annual leave category. Leave credit is not allowed for both civilian and military service that cover the same period of time. Other service not counted is listed in 512.24.

512.22 Federal Civilian Service Counted

512.221 Service in the Postal Service

The following prior service in the Postal Service is used in computing the years of service that determine the annual leave category:

a. Service performed while a career employee of the U.S. Postal Service or Post Office Department.

b. Time on the rolls during which an employee served as a substitute rural carrier (not just the dates on which actual service was performed) if the time is creditable for the federal retirement program applicable to the employee.

c. If performed before January 1, 1977, time on the rolls as a casual or temporary employee, or time actually worked as a postmaster relief/leave replacement in an office other than fourth-class.

d. For postmaster relief/replacement in a fourth-class office, time actually worked after July 21, 1947, and before January 1, 1977.

512.222 Service in Other Federal Government Organizations, the District of Columbia, or Gallaudet University

The following service in the federal government, the District of Columbia, or Gallaudet University, regardless of breaks in service, is used in computing the years of service that determine the annual leave category:

a. Career, career conditional, and excepted appointment service (without a "not to exceed" (NTE) date).

b. Seasonal, on-call, or intermittent employment, even though it may be an "indefinite career appointment," credited on a "when actually

employed" (WAE) basis. For such appointments, no credit for leave is given for leave without pay (LWOP) periods.

c. Time-limited or temporary appointment service performed prior to January 1, 1977.

d. VISTA service prior to October 1, 1973.

e. District of Columbia (D.C.) government service only if (a) the person was employed there prior to October 1, 1987, or, if service in an appointment by the D.C. government to St. Elizabeth's Hospital, on October 1, 1977, and (b) the service is creditable for Civil Service Retirement System (CSRS) purposes.

512.23 Military Service Counted

512.231 Service of an Employee Not Eligible for Military Retirement Annuity

The following military service is used in computing the years of service that determine the annual leave category:

a. Periods of active service terminated by honorable discharge or transfer to inactive reserves under honorable conditions. Active service may be in the Army, Air Force, Navy, Marine Corps, and/or Coast Guard and their respective academies.

b. Service performed by employees who are members of the National Guard Service or Air National Guard Service only during periods of active duty with the U.S. Army or U.S. Air Force.

c. Service performed by Naval Reserve Officers Training Corps students during periods of active duty or training duty as members of the Naval or Marine Corps Reserve.

Note: Veterans Affairs (VA) disability payments for service-connected injuries or illnesses are not retirement annuities. If a VA disability payment is received and the employee is not eligible for a military retirement annuity, 512.231 applies. If the employee is eligible for a military retirement annuity, 512.232 applies.

512.232 Service of an Employee Eligible for Military Retirement Annuity

The following military service is used in computing the years of service that determine the annual leave category:

a. *Full Credit.* Full leave accrual credit for all of active military service is granted if a military retiree meets one of the following three conditions:

(1) Retirement was based on disability resulting from injury or disease received in the line of duty as a direct result of armed conflict.

(2) Retirement was based on disability caused by an instrumentality of war and incurred in the line of duty during a period of war defined in 38 *United States Code* (U.S.C.) 101 and 301.

(3) On November 30, 1964, the employee was employed in a civilian office to which the Annual and Sick Leave Act of 1951 applied

and continues to be employed in a civilian capacity without a break in civilian service of more than 30 days.

Notes:

(a) A military retiree who as a military reservist or member of the National Guard was called from civilian employment to active military duty before November 30, 1964, and after that date was restored to a civilian position (under 5 U.S.C. 3551) does not meet this condition.

(b) Section 3551 provides only for restoration; therefore, the employee is not considered as having been on military furlough or leave of absence from a civilian position or as having been employed on November 30, 1964, in a civilian position to which section 6303(a), the former *Annual and Sick Leave Act*, applied.

b. *Partial Credit.* Military retirees who do not qualify for full leave accrual credit can qualify for partial credit based on the following:

(1) Service for determining an employee's leave category is restricted to the actual length of time in active service in the armed forces during any war or in any nonwartime campaign or expedition for which a campaign badge was authorized.

(2) Service in a nonwartime campaign or expedition does *not* entitle the military retiree to credit for the duration of the campaign or expedition but only for the period of service in the campaign or expedition.

Note: Exhibit 512.232a provides data about wars and campaigns and expeditions for which campaign badges were authorized.

c. *Verification.* Military service should be verified:

(1) *Disability Retirements.* Request verification from the records center of the appropriate military branch.

(2) *Wartime Service.* Verify from discharge certificates (e.g., DD Form 214).

(3) *Military Records Center.* Addresses and other data necessary to verify service are included in Exhibit 512.232b.

(4) *Campaign or Expeditionary Service.* Verify by sending a completed Standard Form (SF) 813, *Verification of a Military Retiree's Service in Nonwartime Campaigns or Expeditions*, to the appropriate military records center. (See Exhibit 512.232c for an illustration of SF 813.) This form is not stocked in the material distribution center; it is to be reproduced locally.

Exhibit 512.232a (p. 1)

Wars, Campaigns, and Expeditions of the Armed Forces Since 1937

a. Wars [1]

War	Inclusive Dates	Organizations Participating (indicated by "X" below)				
		Army	Navy	Air Force [2]	Marine Corps	Coast Guard
World War I	Apr. 6, 1917 to July 2, 1921 [3]	X	X	—	X	X
World War II	Dec. 7, 1941 to Apr. 28, 1952 [4]	X	X	X	X	X

b. Nonwar Campaigns and Expeditions Since 1937 for Which a Campaign or Expeditionary Medal Has Been Awarded.

Campaign or Expedition	Inclusive Dates	Organizations Participating (indicated by "X" below)				
		Army	Navy	Air Force [2]	Marine Corps	Coast Guard
China Service	July 7, 1937 to Sept. 7, 1939	—	X	—	X	—
American Defense Service	Sept. 8, 1939 to Dec. 7, 1941	X	X	—	X	X
Navy Occupation of Trieste	May 8, 1945 to Oct. 25, 1954	—	X	—	—	X
Army Occupation of Germany (exclusive of Berlin)	May 9, 1945 to May 5, 1955	X	X	X	—	X
Army Occupation of Berlin	May 9, 1945 to Oct. 2, 1990	X	X	X	X	X
Army Occupation of Austria	May 9, 1945 to July 27, 1955	X	—	X	—	—
Navy Occupation of Austria	May 9, 1945 to Oct. 25, 1955	—	X	—	X	—
Units of the Sixth Fleet (Navy)	May 9, 1945 to Oct. 25, 1955	—	X	—	—	—
China Service Medal (Extended)	Sept. 2, 1945 to Apr. 1, 1957	—	X	—	X	X
Army Occupation of Japan	Sept. 3, 1945 to Apr. 27, 1952	X	X	X	X	X
Korean Service	June 27, 1950 to July 27, 1954	X	X	X	X	X
Vietnam Service Medal (VSM)	July 4, 1965 to Mar. 28, 1973	X	X	X	X	X
Southwest Asia Service Medal (Operations Desert Shield and Desert Storm)	Aug. 2, 1990 to Nov. 30, 1995	X	X	X	X	X
Armed Forces Expeditionary Medal (AFEM) for these operations:						
Lebanon	July 1, 1958 to Nov. 1, 1958 and June 1, 1983 to Dec. 1, 1987	X	X	X	X	X
Vietnam (including Thailand)	July 1, 1958 to July 3, 1965	X	X	X	X	X
Quemoy and Matsu Islands	Aug. 23, 1958 to June 1, 1963	X	X	X	X	X
Taiwan Straits	Aug. 23, 1958 to Jan. 1, 1959	X	X	X	X	X
Cuba	Oct. 24, 1962 to June 1, 1963	X	X	X	X	X
Congo	July 14, 1960 to Sept. 1, 1962 and Nov. 23 to 27, 1964	X	X	X	X	X
Laos	Apr. 19, 1961 to Oct. 7, 1962	X	X	X	X	X
Berlin	Aug. 14, 1961 to June 1, 1963	X	X	X	X	X
Thailand	May 16, 1962 to Aug. 10, 1962	X	X	X	X	X
Dominican Republic	Apr. 28, 1965 to Sept. 21, 1966	X	X	X	X	X

Exhibit 512.232a (p. 2)
Wars, Campaigns, and Expeditions of the Armed Forces Since 1937

Campaign or Expedition	Inclusive Dates	Organizations Participating (indicated by "X" below)				
		Army	Navy	Air Force [2]	Marine Corps	Coast Guard
Korea	Oct. 1, 1966 to June 30, 1974	X	X	X	X	X
Cambodia	Mar. 29, 1973 to Aug. 15, 1973	X	X	X	X	X
Cambodia Evacuation (Operation Eagle Pull)	Apr. 11, 1975 to Apr. 13, 1975	X	X	X	X	X
Vietnam Evacuation (Operation Frequent Wind)	Apr. 29, 1975 to Apr. 30, 1975	X	X	X	X	X
Mayaguez Operation	May 15, 1975	X	X	X	X	X
Indian Ocean/Iran	Nov. 21, 1979 to Oct. 20, 1981	X	X	X	X	X
El Salvador	Jan. 1, 1981 to Feb. 1, 1992	X	X	X	X	X
Grenada (Operation Urgent Fury)	Oct. 23, 1983 to Nov. 21, 1983	X	X	X	X	X
Operations in the Libyan Area (Operation Eldorado Canyon)	Apr. 12 thru Apr. 17, 1986	X	X	X	X	X
Persian Gulf Operation (Operation Earnest Watch)	July 24, 1987 to Aug. 1, 1990	X	X	X	X	X
(Operation Vigilant Sentinel)	Dec. 1, 1995 to Feb. 15, 1997	X	X	X	X	X
(Operation Southern Watch) [5]	Dec. 1, 1995 to	X	X	X	X	X
Panama (Operation Just Cause)	Dec. 20, 1989 to Jan. 31, 1990	X	X	X	X	X
Somalia (Operation Restore Hope)	Dec. 5, 1992 to Mar. 31, 1995	X	X	X	X	X
Haiti (Operation Uphold Democracy)	Sept. 16, 1994 to Mar. 31, 1995	X	X	X	X	X
Bosnia (Operation Joint Endeavor)	Nov. 20, 1995 to Dec. 20, 1996	X	X	X	X	X
(Operation Joint Guard)	Dec. 20, 1996 to	X	X	X	X	X
Persian Gulf Intercept Operation [5]	Dec. 1, 1995 to	X	X	X	X	X
Iraq (Operation Northern Watch) [5]	Jan. 1, 1997 to	X	X	X	X	X
Kosovo [5]	Mar. 24, 1999 to	X	X	X	X	X
Navy Expeditionary Medal and Marine Corps Expeditionary Medal for these operations:						
Cuba	Jan. 3, 1961 to Oct. 23, 1962	—	X	—	X	—
Iranian/Yemen/Indian Ocean	Dec. 8, 1978 to June 6, 1979	—	X	—	X	—
Indian Ocean/Iran	Nov. 21, 1979 to Oct. 20, 1981	—	X	—	X	—
Panama	Apr. 1, 1980 to Dec. 19, 1986 and Feb. 1, 1990 to June 13, 1990	—	X	—	X	—
Lebanon	Aug. 20, 1982 to May 31, 1983	—	X	—	X	—
Libyan Area	Jan. 20, 1986 to June 27, 1986	—	X	—	X	—
Persian Gulf	Feb. 1, 1987 to July 23, 1987	—	X	—	X	—

Exhibit 512.232a (p. 3)

Wars, Campaigns, and Expeditions of the Armed Forces Since 1937

Campaign or Expedition	Inclusive Dates	Organizations Participating (indicated by "X" below)				
		Army	Navy	Air Force [2]	Marine Corps	Coast Guard
Liberia (Operation Sharp Edge)	Aug. 5, 1990 to Feb. 21, 1991	—	X	—	X	—
Rwanda (Operation Distant Runner)	Apr. 7, 1994 to Apr. 18, 1994	—	X	—	X	—

1 "Wars" include only those armed conflicts for which a declaration of war was issued by Congress. The Title 38, U.S.C., definition of "war," which is used in determining benefits administered by the Department of Veterans Affairs, includes the Vietnam Era and other armed conflicts. That Title 38 definition is *not* applicable for purposes of granting partial leave credit to military retirees.

2 The United States Air Force became a separate branch of the Armed Forces of the United States on September 18, 1947.

3 July 2, 1921 is the date of a Joint Resolution of the U.S. Congress that terminated the war with Germany and Austria-Hungar

4 The effective date of the Treaty of Peace with Japan that officially terminated World War II.

5 On-going campaign or operation through August 2000.

Exhibit 512.232b (p. 1)

Standard Form 180, Requests Pertaining to Military Records

REQUEST PERTAINING TO MILITARY RECORDS

Please read instructions on the reverse. If more space is needed, use plain paper.

PRIVACY ACT OF 1974 COMPLIANCE INFORMATION. The following information is provided in accordance with 5 U.S.C. 552a(e)(3) and applies to this form. Authority for collection of the information is 44 U.S.C. 2907, 3101, and 3103, and E.O. 9397 of November 22, 1943. Disclosure of the information is voluntary. The principal purpose of the information is to assist the facility servicing the records in locating and verifying the correctness of the requested records or information to answer your inquiry. Routine uses of the information as established and published in accordance with 5 U.S.C.a(e)(4)(D) include the transfer of relevant information to appropriate Federal, State, local, or foreign agencies for use in civil, criminal, or regulatory investigations or prosecution. In addition, this form will be filed with the appropriate military records and may be transferred along with the record to another agency in accordance with the routine uses established by the agency which maintains the record. If the requested information is not provided, it may not be possible to service your inquiry.

SECTION I—INFORMATION NEEDED TO LOCATE RECORDS (Furnish as much as possible)

1. NAME USED DURING SERVICE *(Last, first, and middle)*	2. SOCIAL SECURITY NO.	3. DATE OF BIRTH	4. PLACE OF BIRTH

5. ACTIVE SERVICE, PAST AND PRESENT (For an effective records search, it is important that ALL service be shown below)

BRANCH OF SERVICE *(Also, show last organization, if known)*	DATES OF ACTIVE SERVICE		Check one		SERVICE NUMBER DURING THIS PERIOD
	DATE ENTERED	DATE RELEASED	OFFICER	ENLISTED	

6. RESERVE SERVICE, PAST OR PRESENT *If "none," check here* ▶ ☐

a. BRANCH OF SERVICE	b. DATES OF MEMBERSHIP		c. Check one		d. SERVICE NUMBER DURING THIS PERIOD
	FROM	TO	OFFICER	ENLISTED	
			☐	☐	

7. NATIONAL GUARD MEMBERSHIP *(Check one)*: ☐ a. ARMY ☐ b. AIR FORCE ☐ c. NONE

d. STATE	e. ORGANIZATION	f. DATES OF MEMBERSHIP		g. Check one		h. SERVICE NUMBER DURING THIS PERIOD
		FROM	TO	OFFICER	ENLISTED	
				☐	☐	

8. IS SERVICE PERSON DECEASED ☐ YES ☐ NO *If "yes," enter date of death.*

9. IS (WAS) INDIVIDUAL A MILITARY RETIREE OR FLEET RESERVIST ☐ YES ☐ NO

SECTION II—REQUEST

1. EXPLAIN WHAT INFORMATION OR DOCUMENTS YOU NEED; OR, CHECK ITEM 2; OR, COMPLETE ITEM 3 _____

2. IF YOU ONLY NEED A STATEMENT OF SERVICE *check here* ☐

3. *LOST SEPARATION DOCUMENT REPLACEMENT REQUEST* *(Complete a or b, and c.)*

☐ a. REPORT OF SEPARATION *(DD Form 214 or equivalent)*	YEAR ISSUED	*This contains information normally needed to determine eligibility for benefits. It may be furnished only to the veteran, the surviving next of kin, or to a representative with veteran's signed release (item 5 of this form).*
☐ b. DISCHARGE CERTIFICATE	YEAR ISSUED	*This shows only the date and character at discharge. It is of little value in determining eligibility for benefits. It may be issued only to veterans discharged honorably or under honorable conditions; or, if deceased, to the surviving spouse.*

c. EXPLAIN HOW SEPARATION DOCUMENT WAS LOST

4. EXPLAIN PURPOSE FOR WHICH INFORMATION OR DOCUMENTS ARE NEEDED

6. REQUESTER

a. IDENTIFICATION *(check appropriate box)*

☐ Same person identified in Section I ☐ Surviving spouse
☐ Next of kin (relationship) _____
☐ Other (specify)

b. SIGNATURE *(see instruction 3 on reverse side)* | DATE OF REQUEST

5. RELEASE AUTHORIZATION, IF REQUIRED *(Read instruction 3 on reverse side)*

I hereby authorize release of the requested information/documents to the person indicated at right (item 7).

VETERAN SIGN HERE ▶ _____

(If signed by other than veteran show relationship to veteran.)

7. *Please type or print clearly* — COMPLETE RETURN ADDRESS

Name, number and street, city, State and ZIP code _____

TELEPHONE NO. *(include area code)* ▶

180-106 NSN 7540-00-142-9360 STANDARD FORM 180 (Rev. 7-86) Prescribed by NARA (36 CFR 1228.162(a))

Exhibit 512.232b (p. 2)

Standard Form 180, Requests Pertaining to Military Records

INSTRUCTIONS

1. Information needed to locate records. Certain identifying information is necessary to determine the location of an individual's record of military service. Please give careful consideration to and answer each item on this form. If you do not have and cannot obtain the information for an item, show "NA," meaning the information is "not available." Include as much of the requested information as you can. This will help us to give you the best possible service.

2. Charges for service. A nominal fee is charged for certain types of service. In most instances service fees cannot be determined in advance. If your request involves a service fee you will be notified as soon as that determination is made.

3. Restrictions on release of information. Information from records of military personnel is released subject to restrictions imposed by the military departments consistent with the provisions of the Freedom of Information Act of 1967 (as amended in 1974) and the Privacy Act of 1974. A service person has access to almost any information contained in his own record. The next of kin, if the veteran is deceased, and Federal officers for official purposes, are authorized to receive information from a military service or medical record only as specified in the above cited Acts. Other requesters must have the release authorization, in item 5 of the form, signed by the veteran or, if deceased, by the next of kin. Employers and others needing proof of military service are expected to accept the information shown on documents issued by the Armed Forces at the time a service person is separated.

4. Location of military personnel records. The various categories of military personnel records are described in the chart below. For each category there is a code number which indicates the address at the bottom of the page to which this request should be sent. For each military service there is a note explaining approximately how long the records are held by the military service before they are transferred to the National Personnel Records Center, St. Louis. Please read these notes carefully and make sure you send your inquiry to the right address. Please note especially that the record is not sent to the National Personnel Records Center as long as the person retains any sort of reserve obligation, whether drilling or non-drilling.

(If the person has two or more periods of service within the same branch, send your request to the office having the record for the last period of service.)

5. Definitions for abbreviations used below:
NPRC—National Personnel Records Center PERS—Personnel Records
TDRL—Temporary Disability Retirement List MED—Medical Records

SERVICE	NOTE: (See paragraph 4 above.)	CATEGORY OF RECORDS — WHERE TO WRITE ADDRESS CODE		▼
AIR FORCE (USAF)	*Except for TDRL and general officers retired with pay, Air Force records are transferred to NPRC from Code 1, 90 days after separation and from Code 2, 150 days after separation.*	Active members (includes National Guard on active duty in the Air Force), TDRL, and general officers retired with pay.		1
		Reserve, retired reservist in nonpay status, current National Guard officers not on active duty in Air Force, and National Guard released from active duty in Air Force.		2
		Current National Guard enlisted not on active duty in Air Force.		13
		Discharged, deceased, and retired with pay.		14
COAST GUARD (USCG)	*Coast Guard officer and enlisted records are transferred to NPRC 7 months after separation.*	Active, reserve, and TDRL members.		3
		Discharged, deceased, and retired members *(see next item).*		14
		Officers separated before 1/1/29 and enlisted personnel separated before 1/1/15.		6
MARINE CORPS (USMC)	*Marine Corps records are transferred to NPRC between 6 and 9 months after separation.*	Active, TDRL, and Selected Marine Corps Reserve members.		4
		Individual Ready Reserve and Fleet Marine Corps Reserve members.		5
		Discharged, deceased, and retired members *(see next item).*		14
		Members separated before 1/1/1905.		6
ARMY (USA)	*Army records are transferred to NPRC as follows: Active Army and Individual Ready Reserve Control Groups: About 60 days after separation. U.S. Army Reserve Troop Unit personnel: About 120 to 180 days after separation.*	Reserve, living retired members, retired general officers, and active duty records of current National Guard members who performed service in the U.S. Army before 7/1/72.*		7
		Active officers (including National Guard on active duty in the U.S. Army).		8
		Active enlisted (including National Guard on active duty in the U.S. Army) and enlisted TDRL.		9
		Current National Guard officers not on active duty in the U.S. Army.		12
		Current National Guard enlisted not on active duty in the U.S. Army.		13
		Discharged and deceased members *(see next item).*		14
		Officers separated before 7/1/17 and enlisted separated before 11/1/12.		6
		Officers and warrant officers TDRL.		8
NAVY (USN)	*Navy records are transferred to NPRC 6 months after retirement or complete separation.*	Active members (including reservists on duty)—PERS and MED		10
		Discharged, deceased, retired (with and without pay) less than six months, TDRL, drilling and nondrilling reservists	PERS ONLY	10
			MED ONLY	11
		Discharged, deceased, retired (with and without pay) more than six months *(see next item)*—PERS & MED		14
		Officers separated before 1/1/03 and enlisted separated before 1/1/1886—PERS and MED		6

**Code 12 applies to active duty records of current National Guard officers who performed service in the U.S. Army after 6/30/72.*
Code 13 applies to active duty records of current National Guard enlisted members who performed service in the U.S. Army after 6/30/72.

ADDRESS LIST OF CUSTODIANS (BY CODE NUMBERS SHOWN ABOVE)—Where to write / send this form for each category of records

1	Air Force Manpower and Personnel Center Military Personnel Records Division Randolph AFB, TX 78150-6001	**5**	Marine Corps Reserve Support Center 10950 El Monte Overland Park, KS 66211-1408	**8**	USA MILPERCEN ATTN: DAPC-MSR 200 Stoval Street Alexandria, VA 22332-0400	**12**	Army National Guard Personnel Center Columbia Pike Office Building 5600 Columbia Pike Falls Church, VA 22041
2	Air Reserve Personnel Center Denver, CO 80280-5000	**6**	Military Archives Division National Archives and Records Administration Washington, DC 20408	**9**	Commander U.S. Army Enlisted Records and Evaluation Center Ft. Benjamin Harrison, IN 46249-5301	**13**	The Adjutant General *(of the appropriate State, DC, or Puerto Rico)*
3	Commandant U.S. Coast Guard Washington, DC 20593-0001	**7**	Commander U.S. Army Reserve Personnel Center ATTN: DARP-PAS 9700 Page Boulevard St. Louis, MO 63132-5200	**10**	Commander Naval Military Personnel Command ATTN: NMPC-036 Washington, DC 20370-5036	**14**	National Personnel Records Center (Military Personnel Records) 9700 Page Boulevard St. Louis, MO 63132
4	Commandant of the Marine Corps (Code MMRB-10) Headquarters, U.S. Marine Corps Washington, DC 20380-0001			**11**	Naval Reserve Personnel Center New Orleans, LA 70146-5000		

U.S Government Printing Office: 1986 480-498 (m) STANDARD FORM 180 BACK (Rev. 7-86)

Exhibit 512.232c (p. 1)

Standard Form 813, Verification of a Military Retiree's Service in Nonwartime Campaigns or Expeditions

SF 813 (8/94)
U.S. Office of Personnel Management
FPM Supplement 296-33

Verification of a Military Retiree's Service In Nonwartime Campaigns or Expeditions
(See Instruction on Reverse Before Completing Form)

Date of Request *(Month, Day, Year)*

To: *(Address A or B From Reverse Side)*

PRIVACY ACT STATEMENT
Solicitation of this information is authorized by sections 3502, "Retention Order, and 6303, "Leave Accrual," of title 5, United States Code, and solicitation of the Social Security Number (SSN) is authorized by Executive Order 9397, "Using Social Security Number as Identifier." This information, including the SSN, wil be used to verify periods of creditable service in all campaigns and expeditions claimed. Furnishing this information, including the SSN is voluntary, but failure to comply may make it difficult or impossible to verify periods of creditable service.

1. Name Used During Military Service	2. Service Number	3. Social Security Number

4. Branch of Service	5. Date of Military Retirement	6. Last Military Rank Held

7. Remarks

8. NONWARTIME CAMPAIGNS AND EXPEDITIONS Service from 12/7/41 through 4/28/52 is always creditable and need not be verified.	SERVICE CLAIMED						FOR RECORDS CENTER USE ONLY							
	From:			To:			If correct, check here	If not correct, give the dates (from and to) of the active duty the person performed in the period covered by the campaign badge or medal.						
	Mo.	Day	Yr.	Mo.	Day	Yr.		From:			To:			
								Mo.	Day	Yr.	Mo.	Day	Yr.	

9. Requesting Agency *(Name, Address and Zip Code)*

Items checked were verified by our records. Items which do not correspond with dates shown in records have been corrected.

Typed or Stamped Name and Title of Certifying Official

Signature | Date Signed

AUTHORIZED FOR LOCAL REPRODUCTION 813-101 Previously known as OPM Form 813

Exhibit 512.232c (p. 2)
Instructions for Completing Standard Form 813

Instructions for Completing SF 813

NOTE: DO NOT USE THIS FORM FOR PERSONS WHO ARE NOT MILITARY RETIREES

Use SF 813 only to request verification of a retiree's military service performed in a nonwartime campaign or expedition for which badge/medal was authorized, in order to credit such service for leave accrual rate and reduction-in-force purposes. Complete the address block and items 1 through 9 and submit the form in duplicate to the appropriate address listed below.

A. To verify campaign/expeditionary service for military retirees of the U.S. Air Force, U.S. Navy, U.S. Marine Corps, and U.S. Coast Guard, address the request to:

National Personnel Records Center
(Military Personnel Records)
9700 Page Boulevard
St. Louis, MO 63132-1547

B. To verify campaign/expeditionary service for military retirees of the U.S. Army, address the request to:

U.S. Army Reserve Components
Personnel and Administration Center
ATTN: DARP-VSE-VC
9700 Page Boulevard
St. Louis, MO 63132-5000

The records center will verify only claimed and unverified nonwartime campaign or expeditionary service. It is the retired member's responsibility to provide the names of any nonwartime campaign or expedition in which served. The records center will not verify service unless specific campaigns/expeditions and inclusive dates are listed. Service components (e.g., "USAF") or medal (e.g., "Vietnam Service Medal') are not sufficient.

If a follow-up check is necessary, reproduce a copy of the original request and clearly mark the top of the SF 813, *"Follow-up Request".*

512.24 Service Not Counted

Credit is not allowed for:

a. Service in a nonpay status in excess of 6 months in a calendar year unless the employee is in an LWOP status and is (1) receiving Office of Workers Compensation Programs (OWCP) benefits, (2) serving as a full-time officer or employee of an employee or management organization, or (3) on active military service while being carried on postal rolls in an LWOP status.

b. LWOP periods during indefinite career appointments that are seasonal, on-call, or intermittent employment.

c. VISTA service after October 1, 1973, Peace Corps, or similar volunteer service.

d. Tennessee Valley Authority service.

e. Time-limited or temporary service performed on or after January 1, 1977.

f. Service in Army and Air Force Exchange Services (AAFES), Navy and Coast Guard Exchanges, Army and Air Force Motion Picture Service, and other organizations under the jurisdiction of the armed forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of armed forces personnel.

512.3 Accrual and Crediting

512.31 Employee Categories

512.311 Full-Time Employees

The following provisions concern full-time employees:

a. *Accrual Chart.* Full-time career employees earn annual leave based on their number of creditable years of service:

Leave Category	Creditable Service	Maximum Leave Per Year
4	Less than 3 years	4 hours for each full biweekly pay period; i.e. 104 hours (13 days) per 26-period leave year.
6	3 years but less than 15 years	6 hours for each full biweekly pay period plus 4 hours in last full pay period in calendar year; i.e. 160 hours (20 days) per 26-period leave year.
8	15 years or more.	8 hours for each full biweekly pay period; i.e., 208 hours (26 days) per 26-period leave year.

b. *Credit at Beginning of Leave Year.* Full-time career employees are credited at the beginning of the leave year with the total number of annual leave hours that they will earn for that leave year.

c. *Changes in Employee's Accrual Rate.* Leave credit at the beginning of the leave year reflects any change in an employee's accrual rate for that year.

d. *Change From Part-Time to Full-Time.* An employee who changes from a part-time to a full-time employee after the start of a leave year is credited with the annual leave to be earned for the remainder of the leave year.

e. *Nonpay Status.* Leave credit for periods in which an employee is in a nonpay status is reduced during the leave year as follows:

(1) When an employee's absence in a nonpay status totals the equivalent of 1 pay period of regular service during the leave year (10 days or 80 hours), credit for leave is reduced by the amount of leave earned by the employee in a pay period.

Notes:

(a) For rural carriers who are required to work 6 days a week, the equivalent of 1 pay period is 12 days or 96 hours.

(b) For J route carriers, the equivalent of 1 pay period is 11 days or 88 hours.

(2) When an employee has one or more periods of LWOP during the leave year, all hours in a nonpay status (during periods in which the employee earned annual leave) are totaled to reduce leave credits.

512.312 Part-Time Employees

The following provisions concern part-time employees:

a. *Accrual and Crediting Chart.* Part-time career employees other than rural carriers earn annual leave based on the number of hours in which they are in pay status (see Exhibit 512.312).

b. *Biweekly Crediting.* Leave accrues and is credited in whole hours at the end of each biweekly pay period. All hours in pay status that cannot be credited for leave purposes (512.312a) are dropped when:

(1) The leave year ends.

(2) The employee's status is changed from part-time to full-time.

(3) The employee is removed from the rolls for any cause.

c. *Exceptions.* The following are exceptions to the crediting rule in 512.312b.

(1) Part-time regular schedule employees including A-E postmasters are credited with annual leave on a pro rata basis, according to their authorized daily schedules. Employees other than A-E postmasters must wait until they have 1 year or more of career service to be credited at the beginning of the leave year with the annual leave that they will earn during the leave year. A-E postmasters are credited at the beginning of the leave year with

the annual leave that they earn during the leave year. Part-time regular employees are entitled to additional leave hours, based on their leave category, for each 20, 13, or 10 hours of work in excess of the schedule (see Exhibit 512.312).

(2) Substitute rural carriers and rural carrier associates (RCAs) earn leave for time serving (a) a vacant route or (b) a route from which the rural carrier is on extended leave in excess of 90 days. RCAs also earn leave based on the number of hours worked serving an auxiliary route for a period in excess of 90 days. The leave category for substitute rural carriers is based on creditable service, and for RCAs it is based on category 4. The first day of the pay period following 90 days, the substitute or RCA is credited with accrued annual leave for the first 90 days.

(3) Auxiliary rural carriers, including substitute rural carriers in dual appointments, are credited with annual leave for actual service performed in accordance with their appropriate leave category. If auxiliary rural carriers are otherwise employed (e.g., as clerks in the post office), such additional service is also used in the computation of leave credit; otherwise, they are credited as instructed in 512.312a.

Exhibit 512.312
Accrual and Crediting Chart for Part-Time Career Employees

Leave Category	Years of Creditable Service	Maximum Leave per Year	Rate of Accrual	Hours in Pay Status	Hours of Leave Earned per Period
4	Less than 3 years.	104 hours, or 13 days per 26-period leave year or 4 hours for each biweekly pay period.	1 hour for each unit of 20 hours pay in status.	20 40 60 80	1 2 3 4 (max.)
6	3 years but less than 15 years.	160 hours, or 20 days per 26-period leave year or 6 hours for each full biweekly pay period.[1]	1 hour for each unit of 13 hours in pay status.	13 26 39 52 65 78	1 2 3 4 5 6 (max.)[1]
8	15 years or more.	208 hours, or 26 days per 26-period leave year or 8 hours for each full biweekly pay period.	1 hour for each unit of 10 hours in pay status.	10 20 30 40 50 60 70 80	1 2 3 4 5 6 7 8 (max.)

[1] Except that the accrual for the last pay period of the calendar year may be 10 hours, provided the employee has the 130 creditable hours or more in a pay status in the leave year for leave purposes.

Recording Hours for Annual and Sick Leave

a. Units of hours in a pay status are converted into annual leave credits at the rate of 1 hour for each unit of 20, 13, or 10 hours in a pay status — up to a maximum of 4, 6, or 8 hours per biweekly pay period, depending on the employee's leave category.

b. Hours in a pay status in excess of these whole units are accumulated and carried forward as excess workhours. These excess (uncredited) workhours are added to hours in a pay status in the next period.

c. Whole units of creditable hours (20, 13, or 10) are then converted into leave hours at the unit rate — provided no more leave is credited to a part-time employee than could be earned in the same leave year by a full-time employee.

d. The maximum credit allowable for a particular leave category is calculated by multiplying the period number by the number of leave hours allowable per period.

512.313 Appointees

The following provisions concern appointees:

a. *Rate of Leave Accrual.* The rate of leave accrual for a new career employee (whether appointed, reinstated, or transferred) *is determined promptly as soon as related facts are verified*. It is based on creditable service, both civilian and military (see 512.2).

b. *Ninety-Day Qualifying Period.*

(1) *Requirement.* New employees are not credited with and may not take annual leave until they complete 90 days of continuous employment under one or more appointments without a break in service.

Exception: This requirement does not apply to (a) career (or career conditional) employees who have had a minimum of 90 days of continuous federal service prior to transferring, without a break in service, to a Postal Service career position (see 512.812 and 512.91) or (b) substitute rural carriers or RCAs who are in a leave-earning status and convert to a Postal Service career position without a break in service.

(2) *Break in Service.* A break in service of 1 or more workdays breaks the continuity of employment. Any further employment requires beginning a new 90-day period. (For substitute rural carriers and RCAs, see 512.552.)

(3) *Active Military Service.* Active military service for an employee *not entitled to mandatory restoration* is a break in civilian service. The employee begins a new 90-day qualifying period for leave purposes.

(4) *Full-Time Employees and A-E Postmasters.* After new employees complete the 90-day qualifying period, they are credited with annual leave to be earned during the remainder of the leave year plus the leave earned during the qualifying period.

(5) *Part-Time Employees Except A-E Postmasters.* After part-time employees complete the 90-day qualifying period, annual leave that they have accrued is credited to their accounts.

c. *Partial Pay Period.*

(1) Any employee whose appointment is made effective after the first Monday of a pay period does not receive leave credit for service performed during that pay period. Part-time employees appointed in this manner do not have their service hours brought forward for leave purposes for that pay period.

(2) An employee transferring from an agency having different pay periods may be given credit for the partial period.

512.32 Maximum Carryover

512.321 Maximum Carryover Amounts

The maximum carryover amount, i.e., the maximum amount of previously accumulated annual leave with which an employee may be credited at the beginning of a year, is as follows:

a. *Bargaining Unit Employees.* The maximum leave carryover for bargaining unit employees is 55 days (440 hours).

b. *Executive and Administrative Schedule (EAS) Employees.* The maximum carryover amount for EAS employees is 70 days (560 hours).

c. *Employees Affected by Public Law 102.* For employees who, on January 1, 1953 (prior to the passage of Public Law 102), (1) had more accumulated leave to their credit than the amounts provided above, and (2) who have maintained balances in excess of those amounts, the maximum carryover amount is the balances they have maintained.

512.322 Nonbargaining Unit to Bargaining Unit

When a nonbargaining unit employee is permanently assigned to a bargaining unit position, the employee's annual leave carryover ceiling is reduced to the carryover ceiling for that bargaining unit. The employee is permitted to use the excess annual leave over the bargaining unit ceiling during the leave year in which the permanent assignment is effective.

512.4 Authorizing Annual Leave

512.41 Requests for Annual Leave

512.411 General

Except for emergencies, annual leave for all employees except postmasters must be requested on Form 3971 and approved in advance by the appropriate supervisor. Leave requests from rural carriers must be approved in accordance with Article 10 of the USPS-NRLCA National Agreement.

512.412 Emergencies

An exception to the advance approval requirement is made for emergencies; however, in these situations, the employee must notify appropriate postal authorities of the emergency and the expected duration of the absence as soon as possible.

When sufficient information is provided to the supervisor to determine that the absence may be covered by the Family and Medical Leave Act (FMLA), the supervisor completes a Form 3971 and mails it to the employee's address of record along with a Publication 71, *Notice for Employees Requesting Leave for Conditions Covered by Family and Medical Leave Policies.*

When the supervisor is not provided enough information in advance of the absence to determine that the absence is covered by FMLA, the employee must submit Form 3971 and applicable medical or other certification upon returning to duty and explain the reason for the emergency to his or her supervisor.

Supervisors approve or disapprove the leave request. When the request is disapproved, the absence may be recorded as LWOP or absent without leave (AWOL) at the discretion of the supervisor as outlined in 512.422.

512.42 Form 3971 Request for or Notification of, Absence

512.421 Purpose

Request for annual leave is made in writing, in duplicate, on Form 3971, *Request for or Notification of Absence*.

512.422 Approval or Disapproval

The supervisor is responsible for approving or disapproving the request for annual leave by signing Form 3971, a copy of which is given to the employee. If a supervisor does not approve a request for leave, the Disapproved block on Form 3971 is checked and the reasons given in writing in the space provided. When a request is disapproved, the granting of any alternate type of leave, if any, must be noted along with the reasons for disapproval. AWOL determinations must be similarly noted.

512.423 Retention and Disposal Period

Forms 3971 are retained by the installation head for 2 years from the date the leave is taken or disapproved and are then destroyed. (Documents that become a part of a disciplinary file or administrative proceeding will be disposed of with that file.)

512.43 Insufficient Leave Balance

If the leave is approved and the employee has an insufficient leave balance, it is changed to LWOP when the employee's pay is processed.

512.5 Leave Charge Information

512.51 Full-Time Employees

512.511 Minimum Unit Charge

Minimum unit charges for full-time employees are as follows:

Employee Category	Minimum Unit Charge
a. All full-time nonexempt employees.	One-hundredth of an hour (0.01 hour).
b. Full-time exempt.	(See 519.7.)
c. Regular rural carriers.	1 day (8 hours).
d. Substitute rural carriers and RCAs when in a leave-earning status and serving:	
(1) Vacant routes.	1 day (8 hours).
(2) Routes from which rural carriers are on extended leave.	1 day (8 hours).
e. RCAs when in a leave-earning status and serving auxiliary routes.	1 hour.
f. Auxiliary rural carriers.	1 hour.
g. Triweekly rural carriers.	(See 512.54.)

512.512 **Holidays**

Leave cannot be charged for national legal holidays, days designated as holidays, or absences authorized by administrative order.

512.513 **Leave for Postmasters and Installation Heads**

These employees must (a) promptly report emergency or planned absences exceeding 5 working days to their postal managers and (b) maintain accurate records of their leave.

512.514 **Rural Carriers (Regular and Substitute)**

See 512.53 and 512.55.

512.52 Part-Time Employees

512.521 **Minimum Unit Charge**

Minimum unit charges for part-time employees are as follows:

Employee Category	Minimum Unit Charge
All part-time nonexempt employees.	One-hundredth of an hour (0.01 hour).
Part-time exempt employees.	(See 519.7.)

512.522 **Part-Time Regular**

A part-time regular employee who is granted annual leave and performs service on the same day is not allowed to take more leave hours than would total 8 hours when combined with workhours.

512.523 **Part-Time Flexible**

The following provisions concern part-time flexible employees:

a. A part-time flexible employee who has been credited with 40 hours or more of paid service (work, leave, or a combination of work and leave) in a service week is not granted paid annual or sick leave during the remainder of that service week. Absences in such cases are treated as nonduty time, not chargeable to paid leave of any kind. Supervisors should avoid granting leave resulting in the requirement for overtime pay.

b. Part-time flexible employees who request leave on days that they are scheduled to work, except legal holidays, may be granted leave provided they can be spared. The combination of leave and workhours charged to these employees cannot exceed 8 hours on any one day. The installation head may also consider a request for annual leave on any day a part-time flexible employee is not scheduled to work. The 40 hours paid service in a service week specified in 512.523a may not be exceeded.

512.524 A-E Postmasters

The following provisions concern A-E postmasters:

a. *Maximum Leave.* Annual leave may not exceed the scheduled service hours for the day on which the leave is taken.

b. *Saturday Absences.* A-E postmasters work a 6-day week. Absence on Saturday that occurs within or at the beginning or end of a period of annual leave or sick leave is not charged to such leave, nor is there loss of compensation provided either of the following is true:

(1) There are 5 or more days of annual or sick leave within the period.

(2) There are 4 or more days of annual or sick leave plus a holiday. If the holiday falls on a Saturday that is a scheduled workday, absence on the preceding Friday is not charged to leave. If the leave period is for less than 4 days, absence on Friday is charged to leave.

512.53 Regular Rural Carriers

512.531 General

Annual leave is earned by a regular rural carrier in accordance with 512.311 and the terms of the applicable collective bargaining agreement. It is taken in minimum units of 1 day (8 hours) provided a leave replacement is available.

512.532 Saturday Absences

Rules for approved absences of regular rural carriers, substitute rural carriers, or RCAs in a leave-earning status are subject to the specific conditions of the USPS-NRLCA National Agreement. Accordingly, the following apply:

a. Absence on Saturday that occurs within or at the beginning or end of a period of annual leave or sick leave is not charged to such leave, nor is there loss of compensation provided the appropriate leave balance on the Form 1223-A, *Earnings Statement,* reflects at least 6 days of leave and either of the following is true:

(1) There are more than 5 days of annual or sick leave within the period.

(2) There are more than 4 days of annual or sick leave plus a holiday. If the holiday falls on a Saturday that is a scheduled workday, absence on the preceding Friday is not charged to leave. If the leave period is 4 days or less, absence on Friday is charged to leave.

b. Interruption during the approved period of annual or sick leave by 1 day of court leave due to circumstances beyond the carrier's control does not disqualify the carrier for coverage as provided above.

c. Upon request, a rural carrier is granted annual leave or LWOP on Saturday, at the carrier's option, provided a replacement is available.

512.54 Triweekly Rural Carriers

512.541 Week's Absence

Carriers who are absent for a week on sick or annual leave are charged with 5 days' leave.

512.542 Absences Less Than a Week

Carriers who are absent for less than a week at a time are charged with 2 days' leave for each workday of absence.

512.543 Leave Carryover

The carrier may end the year with 1 day of unused annual leave. This day may be carried forward into another leave year provided the total carried forward does not exceed 55 days, except as provided in 512.321.

512.55 Leave Replacements for Rural Carriers

512.551 General

After a rural carrier or RCA has been assigned to and served in excess of 90 days in a vacant route or in a route from which a rural carrier is on extended leave, or after an RCA has been assigned to and served in excess of 90 days in an auxiliary route, he or she may take the accrued annual leave. Annual leave is granted in accordance with normal leave requirements and the terms of the applicable collective bargaining agreement. It is granted in minimum units of 1 day for regular routes or 1 hour for auxiliary routes provided a leave replacement is available.

512.552 Ninety-Day Qualifying Period

Substitute carriers and RCAs qualify for taking leave after being assigned as the primary leave replacement and serving in excess of 90 days in (a) a vacant route or (b) a route from which the rural carrier is on extended leave. RCAs also qualify for taking leave after being assigned to and serving an auxiliary route in excess of 90 days. A break in service of 1 or more workdays breaks continuity of employment, and the substitute carrier or RCA must begin a new 90-day qualifying period. Normally a break in service occurs only when the regular carrier returns or when the vacant route is filled by the appointment of a new regular rural carrier. A break in service does not mean absence from the route on a nonscheduled workday or absence in approved leave status, including LWOP. The first day of the pay period following 90 days of service, the substitute carrier or RCA is credited with annual leave accrued for the 90-day qualifying period. (In determining the employee's leave category, credit is also given for prior service as a substitute rural carrier or RCA.)

512.553 Lump Sum Payment

When regular rural carriers return to duty, substitute replacement carriers who earn leave are given lump sum payments for the annual leave to their credit if they have been in a leave-earning capacity. The lump sum payment is not made if the substitute replacement carrier is converted to a career position without a break in service and continues to earn leave.

512.56 Auxiliary Rural Carriers

Auxiliary rural carriers earn leave based on the number of hours worked and in accordance with the appropriate leave category. Leave is credited as earned. These carriers are granted leave in increments of 1 hour.

512.6 Vacation Planning and Special Programs

512.61 Bargaining Unit Employees Vacation Planning

For these employees, leave is subject to specific vacation planning provisions of applicable collective bargaining agreements. Note also:

a. For all regular employees, both full-time and part-time, vacation leave is granted when requested to the extent practicable.

b. For part-time flexible employees, vacation planning is limited to accumulated and accrued leave.

512.62 Nonbargaining Unit Employees Vacation Planning

Vacation leave is granted to these employees when their services can best be spared. Postmasters and other responsible officials must schedule leave so that (a) employees do not forfeit leave and (b) postal operations are not impaired.

512.63 Annual Leave Exchange

512.631 General

The annual leave exchange program provides eligible employees with the opportunity to receive cash in exchange for leave that they will earn during the next leave year. Accumulated leave and leave accrued during the current leave year cannot be exchanged under this program. The terms and conditions for exchanging leave vary for bargaining unit and nonbargaining unit employees and are explained in the instructions mailed to eligible employees before the open season November 15 through December 15 each year.

512.632 Bargaining Unit Annual Leave Exchange

Certain national collective bargaining agreements provide a leave exchange option for covered employees. Eligibility and the other terms and conditions for this option are set forth in the applicable collective bargaining agreements and information related to administering the program.

512.633 Nonbargaining Unit Annual Leave Exchange

Career employees permanently assigned to a nonbargaining unit position are provided the option at the end of the fiscal year to exchange for cash from 8 to 104 hours of the annual leave they will earn during the next year. To be eligible, employees must have an annual leave balance of 160 hours at the end of the leave year in which the election is made.

512.634 Processing Annual Leave Exchange Options

Open season for the annual leave exchange program runs from November 15 to December 15 each year. Eligible employees are notified of the election

before the open season. The exchange is effective the first full pay period of the new leave year.

Note: Postal employees may not exchange leave already earned that exceeds the Postal Service leave carryover limit due to Internal Revenue Service "constructive receipt" regulations.

512.64 Annual Leave Sharing

The annual leave-sharing program provides employees the opportunity to receive and use donated annual leave and to donate their annual leave to another employee under certain conditions. The program is limited to career nonbargaining unit and bargaining unit employees and to noncareer employees designated as transitional employees (TEs) under certain collective bargaining agreements. The terms and conditions for this program are set forth in applicable collective bargaining unit agreements and memorandums of understanding. Instructions for administration of the terms and conditions are found in Management Instruction EL-510-1999-4, *Annual Leave Sharing Program*.

512.7 Separation Adjustments

512.71 Terminal Leave Worksheet

If an employee is not transferring to another federal agency and is separating from the Postal Service, the Eagan ASC furnishes the separating installation with Form 2246, *Terminal Leave Worksheet*, for filing in the employee's official personnel folder. (For transfers to other federal agencies, see 512.8.)

512.72 Collection for Unearned Leave

512.721 Refund

Separating employees who are indebted for unearned annual leave or sick leave must refund the amount paid to them for such unearned leave. If employees do not make refunds, deductions are made from any funds that are due them.

512.722 Exception

Collection is not required in cases of death or in the case of separation due to a disability that prevents an employee from returning to duty or continuing in the Postal Service.

512.73 Payment for Accumulated Leave

A separating employee may receive a lump sum payment for accumulated annual leave subject to the following conditions:

a. *Before Qualifying Period.* Except for those employees identified under 512.812, an employee who separates before completing the 90-day qualifying period forfeits terminal leave payment for accumulated leave.

b. *On or After Qualifying Period.* An employee who completes the 90-day qualifying period, even if separated at the close of business on day 90, is entitled to terminal leave payment for leave accumulated.

c. *Before Last Friday of Pay Period.* An employee whose separation is effective before the last Friday of a pay period does not receive leave credit or terminal leave payment for the leave that would have accrued during that pay period.

d. *Bargaining Unit Employee.* A bargaining unit employee is not paid for annual leave in excess of the annual leave carryover maximum for his or her bargaining unit (see 512.32). Any part of the unused annual leave earned during the current leave year that is in excess of the lump sum limitation is granted prior to separation. In the case of death, a lump sum payment is made for:

(1) Accumulated annual leave.

(2) Unused annual (current) leave earned during the year of the death that the employee could have taken had the employee lived to the end of the leave year. No payment is made for unused leave that the employee would have been required to forfeit at the end of the leave year.

e. *Nonbargaining Unit Employee.* Nonbargaining unit employees are entitled to receive a lump sum leave payment for accumulated annual leave equal to their authorized maximum carryover plus any unused accrued annual leave that was earned in the year of separation.

f. *For Military Service.* Employees who separate to enter active U.S. military duty may choose to receive a lump sum leave payment or to have accrued annual leave held for credit until they return to Postal Service duty.

g. *Followed by Reemployment.* An employee who received a lump sum leave payment on separation from a postal position (or a federal position under the federal leave system) and who is reemployed or reinstated to a leave-earning status before the period covered by the payment expires must refund to the Postal Service in full the payment for the overlapping period. The employee may then be recredited (see 512.9) with leave.

h. *Lump Sum Payment.* Lump sum payment for annual leave at the time of retirement does not affect the amount or commencement date of annuity payments.

512.8 Transfers

512.81 Transfer Without a Break in Service

512.811 From the Postal Service to a Federal Agency

The Eagan ASC furnishes the agency gaining the employee with SF 1150, *Record of Leave Data*. (A copy of SF 1150 is *not* sent to the losing installation.) When necessary, the Postal Service collects for used but unearned leave (see 512.721). When the receiving agency is unable to transfer a leave balance in excess of its leave carryover limit, the employee receives a lump sum payment for earned annual leave that cannot be transferred. The lump sum is calculated by multiplying the person's postal hourly rate times the number of earned annual leave hours that cannot be transferred.

512.812 From a Federal Agency to the Postal Service

Leave credit must be transferred to the employee's leave account. However, leave that may be transferred is limited to the leave carryover limit applicable to the Postal Service position to be filled. The employee should not have to take LWOP because of delay in transferring leave:

a. If the SF 1150 does not reach the Eagan ASC before the employee has to take leave, the Eagan ASC may contact the losing agency to request the employee's leave balance.

b. If LWOP cannot be avoided, the record can be adjusted when the SF 1150 is received to show paid leave unless the employee requests that the LWOP remain unchanged.

512.82 Transfer With a Break in Service

An employee who moves from the Postal Service to another federal agency after a break in service is separated (see 512.7) and later reemployed (see 512.9). Any accumulated leave is not transferred, but is paid for in a lump sum.

512.9 Recrediting Annual Leave

512.91 Policy

Annual leave that may be recredited consists of leave earned under any of the leave systems merged under the Annual and Sick Leave Act of 1951. However, annual leave that is already forfeited cannot be recredited.

Annual leave is recredited under the act for:

a. Employees who are reemployed before the period covered by the lump sum payment expires.

b. Employees who transferred to a position that is not under an annual leave system and transferred back to the Postal Service without a break in Postal Service service of more than 52 continuous calendar weeks.

c. Employees who return to pay and duty status following a period of suspension or involuntary separation (i.e., cases of retroactive reversals of disciplinary action).

512.92 Procedures

512.921 Leave Earned in Prior Service in the Postal Service

See 512.73g.

512.922 Leave Earned at Another Agency

When an employee makes application for recredit of leave earned in another agency, the Postal Service contacts the other agency to determine if leave was forfeited at the time of separation. If not, the agency is asked to certify the leave account. The following applies:

a. If the agency cannot find the leave record, the Postal Service will accept a statement or other evidence of leave credits. The statement

should include an estimate of leave credit and reflect the factors forming the basis of the estimate.

b. If the leave record or statement justifies it, the amount of leave shown is recredited.

512.923 **Leave Buy-Back — OWCP**

The following provisions concern leave buy-back:

a. Under the provisions of the Injury Compensation Program (545.73b(6)), current employees may be permitted to buy back sick and annual leave they used while awaiting adjudication of their cases by OWCP. In traumatic injury cases, employees may be permitted to buy back only the leave that is used after the end of the 45-day continuation-of-pay period.

b. When the employee buys back annual leave for a previous year that exceeds the applicable maximum (see 512.32), the excessive leave is automatically forfeited. Employees are allowed to buy back only those hours that can be carried forward.

c. Some loss of leave may occur when the period of absence is changed to an LWOP status as a result of leave buy-back. For every 80 hours of paid leave bought back and changed to LWOP, both annual and sick leave are adjusted by the amount earned in 1 pay period. The employee must be informed of this so there will be no misunderstanding.

See Exhibit 514.4, item e, for further information.

513 Sick Leave

513.1 Purpose

Sick leave insures employees against loss of pay if they are incapacitated for the performance of duties because of illness, injury, pregnancy and confinement, and medical (including dental or optical) examination or treatment. A limited amount may also be used to provide for the medical needs of a family member. Nonbargaining unit employees, and bargaining unit employees if provided in their national agreements, are allowed to take up to 80 hours of their accrued sick leave per leave year to give care or otherwise attend to a family member (as defined in 515.2) with an illness, injury, or other condition that, if an employee had such a condition, would justify the use of sick leave. (See 515 for information about FMLA entitlement to be absent from work.)

513.2 Accrual and Crediting

513.21 Accrual Chart

Time accrued is as follows:

Employee Category	Time Accrued
a. Full-time employees.	4 hours for each full biweekly pay period — i.e., 13 days (104 hours) per 26-period leave year.
b. Part-time employees.	1 hour for each unit of 20 hours in pay status up to 104 hours (13 days) per 26-period leave year.

513.22 Crediting

513.221 General

Sick leave is credited at the end of each biweekly pay period in which it is earned. Sick leave (earned and unused) accumulates without limitation.

513.222 Part-Time Employees

Part-time employees are not credited with sick leave in excess of 13 days (104 hours) per 26-period leave year.

513.223 Leave Replacements for Rural Carriers

Substitute rural carriers or RCAs assigned to and serving (a) a vacant route or (b) a route from which the rural carrier is on extended leave, and RCAs assigned to and serving an auxiliary route are credited with sick leave starting with the first pay period following the 90-day qualifying period.

513.224 Auxiliary Rural Carriers

Auxiliary rural carriers are not credited with sick leave in excess of 104 hours per leave year. If they serve in another capacity (e.g., flexible employees) in the post office, that service is also used in computing sick leave credit (see 513.21).

513.225 Substitute Rural Carriers in Dual Appointment

Substitute rural carriers in dual appointments earn sick leave only when their service is performed in a position that is subject to the Civil Service Retirement Act. The leave can be used only while they are serving in a leave-earning position.

513.226 Leave Credit Adjustment for LWOP

See 514.24.

513.3 Authorizing Sick Leave

513.31 Policy

513.311 General

Sick leave cannot be granted until it is earned, except as provided in 513.5.

513.312 **Restriction**

An employee who is in sick leave status may *not* engage in any gainful employment unless prior approval has been granted by appropriate authority (see 660, Code of Ethics).

513.32 Conditions for Authorization

Conditions for authorization are as follows:*

Conditions	
a. Illness or injury.	If the employee is incapacitated for the performance of official duties.
b. Pregnancy and confinement.	If absence is required for physical examinations or periods of incapacitation.
c. Medical, dental, or optical examination or treatment.	If absence is necessary during the employee's regular scheduled tour.
d. For eligible employees (as indicated in 513.1), care for a family member (as defined in 515.2).	Up to 80 hours of accrued sick leave per leave year if the illness, injury, or other condition is one that, if an employee had such a condition, would justify the use of sick leave.
e. Contagious disease. A contagious disease is a disease ruled as requiring isolation, quarantine, or restriction of movement of the patient for a particular period by the health authorities having jurisdiction.	If the employee (1) must care for a family member afflicted with a contagious disease, (2) has been exposed to a contagious disease and would jeopardize the health of others, or (3) has evidence supplied by the local health authorities or a certificate signed by a physician certifying the need for the period of isolation or restriction.
f. Medical treatment for disabled veterans.	If the employee (1) presents a statement from a duly authorized medical authority that treatment is required, and (2) when possible, gives prior notice of the definite number of days and hours of absence. (Such information is needed for work scheduling purposes.)

* Sick leave, annual leave, or LWOP is granted as may be necessary for any of these conditions in accordance with normal leave policies and collective bargaining agreements. (See also 513.6 and 514.22.)

513.33 Requests for Sick Leave

513.331 **General**

Except for unexpected illness or injury situations, sick leave must be requested on Form 3971 and approved in advance by the appropriate supervisor.

513.332 Unexpected Illness or Injury

An exception to the advance approval requirement is made for unexpected illness or injuries; however, in these situations the employee must notify appropriate postal authorities of their illness or injury and expected duration of absence as soon as possible. When sufficient information is provided to the supervisor to determine that the absence is to be covered by FMLA, the supervisor completes Form 3971 and mails it to the employee's address of record along with a Publication 71.

When the supervisor is not provided enough information in advance to determine whether or not the absence is covered by FMLA, the employee must submit a request for sick leave on Form 3971 and applicable medical or other certification upon returning to duty and explain the reason for the emergency to his or her supervisor. Employees may be required to submit acceptable evidence of incapacity to work as outlined in the provisions of 513.36, Documentation Requirements, or noted on the reverse of Form 3971 or Publication 71, as applicable.

The supervisor approves or disapproves the leave request. When the request is disapproved, the absence may be recorded as annual leave or, if appropriate, as LWOP or AWOL, at the discretion of the supervisor as outlined in 513.342.

513.34 Form 3971, Request for or Notification of Absence

513.341 General

Request for sick leave is made in writing, in duplicate, on Form 3971, *Request for or Notification of Absence*. If the absence is to care for a family member, this fact is to be noted in the Remarks section.

513.342 Approval or Disapproval

The supervisor is responsible for approving or disapproving requests for sick leave by signing Form 3971, a copy of which is given to the employee. If a supervisor does not approve a request for leave as submitted, the Disapproved block on the Form 3971 is checked and the reason(s) given, in writing, in the space provided. When a request is disapproved, the granting of any alternate type of leave, if any, must be noted along with the reason for the disapproval. AWOL determinations must be similarly noted.

513.35 Postmaster Absences

There are special requirements for postmaster absences:

a. *Leave Replacement.* A postmaster whose absence requires the hiring of a leave replacement must notify the appropriate official.

b. *Absence Over 3 Days.* A postmaster who is absent in excess of 3 days must submit Form 3971 within 2 days of returning to duty or, for an extended illness, at the end of each accounting period.

513.36 Sick Leave Documentation Requirements

513.361 Three Days or Less

For periods of absence of 3 days or less, supervisors may accept the employee's statement explaining the absence. Medical documentation or

other acceptable evidence of incapacity for work or need to care for a family member is required only when the employee is on restricted sick leave (see 513.39) or when the supervisor deems documentation desirable for the protection of the interests of the Postal Service. Substantiation of the family relationship must be provided if requested.

513.362 **Over Three Days**

For absences in excess of 3 days, employees are required to submit medical documentation or other acceptable evidence of incapacity for work or of need to care for a family member and, if requested, substantiation of the family relationship.

513.363 **Extended Periods**

Employees who are on sick leave for extended periods are required to submit at appropriate intervals, *but not more frequently than once every 30 days*, satisfactory evidence of continued incapacity for work or need to care for a family member unless some responsible supervisor has knowledge of the employee's continuing situation.

513.364 **Medical Documentation or Other Acceptable Evidence**

When employees are required to submit medical documentation, such documentation should be furnished by the employee's attending physician or other attending practitioner who is performing within the scope of his or her practice. The documentation should provide an explanation of the nature of the employee's illness or injury sufficient to indicate to management that the employee was (or will be) unable to perform his or her normal duties for the period of absence. Normally, medical statements such as "under my care" or "received treatment" are not acceptable evidence of incapacitation to perform duties.

Supervisors may accept substantiation other than medical documentation if they believe it supports approval of the sick leave request.

513.365 **Failure to Furnish Required Documentation**

If acceptable substantiation of incapacitation is not furnished, the absence may be charged to annual leave, LWOP, or AWOL.

513.37 Return to Duty

An employee returning from an FMLA-covered absence because of his or her own incapacitation must provide documentation from his or her health care provider that he or she is able to perform the functions of the position with or without limitation. Limitations described are accommodated when practical. Bargaining unit employees must also comply with requirements in 865.

513.38 Performance Ability Questioned

When the reason for an employee's sick leave is of such a nature as to raise justifiable doubt concerning the employee's ability to satisfactorily and/or safely perform duties, a *fitness-for-duty medical examination* is requested through appropriate authority. A complete report of the facts, medical and otherwise, should support the request.

513.39 Restricted Sick Leave

513.391 Reasons for Restriction

Supervisors or installation heads who have evidence indicating that an employee is abusing sick leave privileges may place the employee on the restricted sick leave list. In addition, employees may be placed on the restricted sick leave list after their sick leave use has been reviewed on an individual basis and the following actions have been taken:

a. Establishment of an absence file.

b. Review of the absence file by the immediate supervisor and higher levels of management.

c. Review of the absences during the past quarter of LWOP and sick leave used by employees. (No minimum sick leave balance is established below which the employee's sick leave record is automatically considered unsatisfactory.)

d. Supervisor's discussion of absence record with the employee.

e. Review of the subsequent quarterly absences. If the absence logs indicate no improvement, the supervisor is to discuss the matter with the employee to include advice that if there is no improvement during the next quarter, the employee will be placed on restricted sick leave.

513.392 Notice and Listing

Supervisors provide written notice to employees that their names have been added to the restricted sick leave listing. The notice also explains that, until further notice, the employees must support *all* requests for sick leave by medical documentation or other acceptable evidence (see 513.364).

513.393 Recision of Restriction

Supervisors review the employee's Form 3972, *Absence Analysis*, for each quarter. If there has been a substantial decrease in absences charged to sickness, the employee's name is removed from the restricted sick leave list and the employee is notified in writing of the removal.

513.4 Charging Sick Leave

513.41 Full-Time Employees

513.411 General

General provisions are as follows:

a. Sick leave is not charged for legal holidays or for nonworkdays established by Executive Order.

b. Sick leave may be charged on any scheduled workday of an employee's basic workweek.

513.412 **Minimum Unit Charge**

Minimum unit charges are as follows:

Employee Category	Minimum Unit Charge
a. All full-time nonexempt employees.	One-hundredth of an hour (0.01 hour).
b. Full-time exempt.	(See 519.6.)
c. Regular rural carriers.	1 day (8 hours).
d. Substitute rural carriers and RCAs when in a leave-earning status and serving:	
(1) Vacant routes.	1 day (8 hours).
(2) Routes from which rural carriers are on extended leave.	1 day (8 hours).
e. RCAs when in a leave-earning status and servicing auxiliary routes.	1 hour.
f. Auxiliary rural carriers.	1 hour.
g. Triweekly rural carriers.	(See 512.54.)

513.413 **Special Situations**

The following provisions concern special situations:

a. *A-E Postmasters.* A-E postmasters are charged sick leave the same as annual leave (see 512.524).

b. *Rural Carriers.* Rural carriers who are absent because of illness on Saturdays are charged sick leave based on the computations used for their annual leave charges (see 512.53).

c. *Replacement Rural Carriers.* Substitute rural carriers and RCAs in a leave earning status and serving (a) vacant routes and (b) routes from which rural carriers are on extended leave are charged sick leave in the same manner as rural carriers. RCAs in a leave earning status and serving auxiliary routes are charged sick leave in the same manner as auxiliary rural carriers.

d. *Triweekly Rural Carriers.* Triweekly rural carriers are charged sick leave the same as for annual leave (see 512.54).

513.42 Part-Time Employees

513.421 **General**

General provisions are as follows:

a. Absences due to illness are charged as sick leave on any day that an hourly rate employee is scheduled to work except national holidays.

b. Except as provided in 513.82, paid sick leave may not exceed the number of hours that the employee would have been scheduled to work, up to:

(1) A maximum of 8 hours in any one day.

(2) 40 hours in any one week.

(3) 80 hours in any one pay period. If a dispute arises as to the number of hours a part-time flexible employee would have been scheduled to work, the schedule is considered to have been equal to the average hours worked by other part-time flexible employees in the same work location on the day in question.

c. Limitations in 513.421b apply to paid sick leave only and not to a combination of sick leave and workhours. However, part-time flexible employees who have been credited with 40 hours or more of paid service (work, leave, or a combination of work and leave) in a service week are not granted sick leave during the remainder of that service week. Absences, in such cases, are treated as nonduty time that is not chargeable to paid leave of any kind. (Sick leave is not intended to be used to supplement earnings of employees.)

513.422 **Minimum Unit Charge**

Minimum unit charges are as follows:

Employee Category	Minimum Unit Charge
All part-time nonexempt employees.	One-hundredth of an hour (0.01 hour).
Part-time exempt employees.	(See 519.6.)

513.5 Advanced Sick Leave

513.51 Policy

513.511 **May Not Exceed Thirty Days**

Sick leave not to exceed 30 days (240 hours) may be advanced in cases of an employee's serious disability or illness if there is reason to believe the employee will return to duty. Sick leave may be advanced whether or not the employee has an annual leave or donated leave balance.

513.512 **Medical Document Required**

Every request for advanced sick leave must be supported by medical documentation of the illness.

513.52 Administration

513.521 **Installation Heads' Approval**

Officials in charge of installations are authorized to approve these advances without reference to higher authority.

513.522 **Forms Forwarded**

Form 1221, *Advanced Sick Leave Authorization*, is completed and forwarded to the Eagan ASC when advanced sick leave is authorized.

513.53 Additional Sick Leave

513.531 **Thirty-Day Maximum**

Additional sick leave may be advanced even though liquidation of a previous advance has not been completed provided the advance at no time exceeds

30 days. Any advanced sick leave authorized is in addition to the sick leave that has been earned by the employee at the time the advance is authorized.

513.532 Liquidating Advanced Sick Leave

The liquidation of advanced sick leave is not to be confused with the substitution of annual leave for sick leave to avoid forfeiture of the annual leave. Advanced sick leave may be liquidated in the following manner:

a. Charging the sick leave against the sick leave earned by the employee as it is earned upon return to duty.

b. Charging the sick leave against an equivalent amount of annual leave at the employee's request provided the annual leave charge is made prior to the time such leave is forfeited because of the leave carryover limit.

513.6 Leave Charge Adjustments

513.61 Insufficient Sick Leave

If sick leave is approved but the employee does not have sufficient sick leave to cover the absence, the difference is charged to annual leave or to LWOP at the employee's option.

513.62 Insufficient Sick and Annual Leave

If sick leave is approved for employees who have no annual or sick leave to their credit, the absence may be charged as LWOP unless sick leave is advanced as outlined in 513.5. LWOP so charged cannot thereafter be converted to sick or annual leave.

513.63 Disapproved Sick Leave

If sick leave is disapproved, but the absence is nevertheless warranted, the supervisor may approve, at the employee's option, a charge to annual leave or a charge to LWOP.

513.64 Absence Without Leave

An absence that is disapproved is charged as LWOP and may be administratively considered as AWOL.

513.65 Annual Leave Changed to Sick Leave

If an employee becomes ill while on annual leave and the employee has a sick leave balance, the absence may be charged to sick leave.

513.7 Transfer or Reemployment

513.71 Transfer

513.711 Crediting

Individuals who are transferring from a federal agency to the Postal Service are credited with their sick leave balance provided there is not a break in service in excess of 3 years.

513.712 Recrediting

The following provisions concern recrediting:

a. If a Postal Service employee transfers to a position under a different leave system to which only a part of the employee's sick leave can be transferred, the sick leave is recredited if the individual returns to the Postal Service provided there is not a break in service in excess of 3 years.

b. If a Postal Service employee transfers to a position to which sick leave cannot be transferred, the sick leave is recredited if the individual returns to the Postal Service provided there is not a break in service in excess of 3 years.

513.72 Reemployment

Sick leave may be recredited upon reemployment provided there is not a break in service in excess of 3 years.

513.73 Reemployment — OWCP

All individuals who were originally separated and who are subsequently reemployed from a continuous period on OWCP rolls have any previously unused sick leave recredited to their account, regardless of the length of time these employees were on OWCP and off postal rolls.

Exception: Sick leave may not be recredited if an employee applied and was approved for disability retirement regardless of whether the employee actually collected the annuity.

513.8 Retirements or Separations

513.81 General

No payment is made for accumulated sick leave when an employee retires or separates from Postal Service employment.

513.82 Retirement

513.821 Credit for Sick Leave

Provisions of the Civil Service Retirement Act provide for the granting of credit for unused sick leave in calculating retirement or survivor annuity at the time of the employee's retirement or death (see 562.4). Each 8 hours of sick leave represents 1 day of retirement credit. Unused sick leave days are converted to calendar time retirement credit, based on a 260-day workyear (260 days x 8 hours = 2,080 hours). There are no provisions for credit of sick leave upon retirement for employees under the Federal Employees Retirement System (FERS) program except for those employees who formerly were in the Civil Service Retirement System (CSRS) and transferred to FERS. Subchapter 580, Federal Employees' Retirement System (FERS), provides details for credit of sick leave upon retirement for FERS employees who formerly were under the CSRS coverage.

513.822 **Disability Retirement**

If the OPM has approved an application for disability retirement effective on expiration of accumulated and accrued leave, or if the employee is being otherwise separated for physical or mental disability resulting in inability to perform the work, sick leave is granted at the rate of 8 hours per day, 40 hours per week, or 80 hours per pay period until the employee's sick leave is exhausted. Payments may not be made, however, for any hours for which the employee received salary or leave payments from another federal agency.

513.83 Separation by Death

If an ill employee dies without returning to duty and without making application for sick leave, the postal official who is in charge of the installation grants sick leave for the period of illness or disability immediately prior to death. If the employee was in pay status on the day of death or immediately prior to death, the employee's beneficiary is entitled to receive compensation without charge to leave for the date of death. The latter applies whether or not employees have leave to their credit.

513.9 Collection for Unearned Sick Leave

Collection for used but unearned sick leave at the time of separation is made in the same manner as for unearned annual leave (see 512.72).

514 Leave Without Pay

514.1 Definitions

The following definitions apply for the purposes of 514:

a. LWOP is an authorized absence from duty in a nonpay status.

b. LWOP may be granted upon the employee's request and covers only those hours that the employee would normally work or for which the employee would normally be paid.

c. LWOP is different from AWOL (absent without leave), which is a nonpay status due to a determination that no kind of leave can be granted either because (1) the employee did not obtain advance authorization or (2) the employee's request for leave was denied.

514.2 Policy

514.21 Restriction

LWOP in excess of 2 years is not approved unless specifically provided for in postal policy or regulations.

514.22 Administrative Discretion

Each request for LWOP is examined closely, and a decision is made based on the needs of the employee, the needs of the Postal Service, and the cost to the Postal Service. The granting of LWOP is a matter of administrative

discretion and is not granted on the employee's demand except as provided in collective bargaining agreements or as follows:

a. A disabled veteran is entitled to LWOP, if necessary, for medical treatment.

b. A Reservist or a National Guardsman is entitled to LWOP, if necessary, to perform military training duties under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Public Law 103-353.

c. An employee who requests and is entitled to time off under 515, Absence for Family Care or Serious Health Condition of Employee, must be allowed up to a total of 12 workweeks of absence within a Postal Service leave year for one or more reasons listed in 515.41.

514.23 Condition

In granting approval for extended LWOP, the granting official should have reasonable expectation that the employee will return at the end of the approved period.

514.24 Leave Credit Adjustment

Employees who are on LWOP for a period, or periods, totaling 80 hours (normal number of workhours in 1 pay period) during a leave year have their leave credits reduced by the amount of leave earned in 1 pay period.

Exception: Employees who (1) are in leave category 6, (2) are not on LWOP for the entire year, and (3) whose accumulated LWOP reaches 80 hours in the last pay period in a leave year have their leave balance reduced by only 6 hours, even if they earn 10 hours during that pay period (see 512.3). Also, no adjustment is made to the leave computation date for periods of LWOP taken for active military service or while absent due to an illness or injury approved by OWCP.

514.25 Other Employment

LWOP is not granted for the purpose of enabling an employee to "try out" or to accept other employment.

514.3 Authority to Approve

514.31 Installation Head

Installation heads may approve requests for LWOP that are not in excess of 1 year.

514.32 District Managers

District managers may approve requests for LWOP that are not in excess of 2 years.

514.4 Acceptable Reasons and Instructions

See Exhibit 514.4 for acceptable reasons and instructions for LWOP.

Exhibit 514.4 (p. 1)
Acceptable Reasons and Instructions for LWOP

Acceptable Reasons for LWOP	Instructions
a. Personal reasons.	LWOP may be granted to cover the absence.
b. Employee has no leave to cover vacation during choice vacation period.	LWOP may be granted to cover the absence.
c. Full-time attendance at a college or university.	(1) Restricted to full-time employee. (2) An official transcript of courses taken must be submitted to the installation head.
d. Personal illness or injury (also see 515).	(1) LWOP may be granted after accumulated accrued sick and annual leave have been exhausted; except that during a pay period in which, due to personal injury or illness, no work is performed, an employee may utilize annual and/or sick leave in conjunction with LWOP, subject to approval of the leave in accordance with normal leave approval procedures. (2) A medical document from the attending physician or practitioner must be obtained before approval, the same as for sick leave. (3) Applications for LWOP to cover a period in excess of 30 days in any 1 year in cases of illness or injury are reviewed and acted upon by the installation head. (4) An employee normally will not be separated from the service because of absence due to personal illness or injury for a period of less than 1 year (also see 568). An employee may be separated if required to be absent for more than 1 year unless there is cause to expect recovery and return within a reasonable time after the end of 1 year in LWOP status. (5) The separation of an employee after 1 year of continued absence with or without pay does not prevent an eligible employee from filing an application for retirement (also see 568).
e. Injury in line of duty.	(1) Supervisors must advise employees of their right to file an application for FECA benefits as a result of illness or injury that is suffered in the line of duty. (See instructions on CA-1 and CA-2a for traumatic injuries and CA-2 for occupational illnesses and diseases.) (2) In traumatic injury cases, an employee is entitled to a maximum of 45 calendar days of continuation of pay (COP) without charge to leave if written notice of injury is filed within 30 days of injury. The period of COP begins at the start of the employee's first full tour of duty thereafter, or the first day following the disability, whichever occurs sooner. The period during which 45 days of COP may be claimed must begin within 90 days of the occurrence of the injury but may end after 90 days from the occurrence. If, after returning to work subsequent to an apparent recovery from a traumatic injury, an employee is again absent from work as a result of the original traumatic injury, the employee may use any remaining COP time left up to the 45-day limit. However, the remaining COP time must be used within 90 days of the date the employee first returns to work following the initial traumatic injury. (3) An employee may choose sick or annual leave in lieu of COP; however, this leave may be retroactively converted to COP provided a request is made within 1 year of the date the leave was used or the date of the claim approval, whichever is later. (4) Before being placed on LWOP, an employee may choose to use annual or sick leave until it is exhausted. Leave is earned during that part of a pay period in which the employee is in pay status. (5) On favorable adjudication of a claim by the Office of Workers' Compensation Programs (OWCP), LWOP may be substituted for a period of sick and/or annual leave so that the employee may accept disability compensation for the period of absence. (6) On favorable adjudication of a claim by OWCP, current employees may be permitted to buy back the leave that they used while awaiting adjudication (see 545.73b(6)). If the injury is a traumatic injury, only leave used after the end of the 45-day COP period may be bought back. OWCP does not restrict the amount of leave hours an employee may buy back. However, Postal Service regulations do not permit employees to carry-over into the next leave year more than the allowable maximum number of hours of annual leave (see 512.12). When an employee buys back annual leave in the previous year in an amount that exceeds the applicable maximum carry-over, such excess will be automatically forfeited. For every 80 hours of leave bought back and changed to LWOP, both annual and sick leave must be adjusted by the amount earned in a pay period.

Exhibit 514.4 (p. 2)
Acceptable Reasons and Instructions for LWOP

Acceptable Reasons for LWOP	Instructions
f. Family care (see 515).	An eligible employee may request and must be allowed up to a total of 12 workweeks of absence during a Postal Service leave year for one or more reasons listed in 515.41.
g. Military duty for scheduled drills or for periods of training.	An employee enlisted under the Reserve Forces Act of 1955 who has completed the initial period of active duty training of not less than 3 months or more than 6 months may be granted LWOP for scheduled drills or periods of training.
h. Military duty for any purpose, training or otherwise.	Eligible members of the National Guard or reserve components of the Armed Forces who are ordered to active duty for training or for any other purposes, for a specified period of time not to exceed 1 year, but in excess of the total time allowable under military leave and annual leave are granted LWOP.
i. Employee elected to devote full-time service as a national president to an organization of supervisory or other managerial personnel (see 416.3).	(1) LWOP normally does not exceed 2 consecutive years coinciding with the elected term of office. (2) The employee requests in writing, through the appropriate management structure, that the vice president of Labor Relations grant the employee LWOP during tenure of presidency for the purpose of serving as resident president of an employee organization in Washington, D.C., in a full-time capacity. (3) If LWOP is granted, the employee continues to be eligible for appropriate fringe benefits during that period. (4) The vice president of Labor Relations reserves the right to deny the request for LWOP if it is determined that the position must be filled on a permanent basis, unencumbered by an individual on prolonged leave.
j. Union business.	See applicable provisions of current collective bargaining agreement.
k. Postmaster elected as an organization officer, other than the president.	An employee holding a national office in one of the postmaster organizations must use annual leave or LWOP for absences to conduct business for the organization.

514.5 Forms Required

514.51 Form 3971

A request for LWOP is submitted by the employee on Form 3971, *Request for or Notification of Absence*. If the request for leave indicates that the LWOP will extend over 30 days, a written justification and statement of reason for the desired absence is required.

514.52 Form 50

Form 50, *Notification of Personnel Action*, is prepared when LWOP is in excess of 30 days (see Handbook EL-301, *Guidelines for Processing Personnel Actions*).

515 Absence for Family Care or Serious Health Condition of Employee

515.1 Purpose

Section 515 provides policies to comply with the Family and Medical Leave Act of 1993 (FMLA). Nothing in this section is intended to limit employees' rights or benefits available under other current policies (see 511, 512, 513, 514) or collective bargaining agreements. Likewise, nothing increases the amount of paid leave beyond what is provided for under current leave policies or in any collective bargaining agreement. The conditions for authorizing the use of annual leave, sick leave, or LWOP are modified only to the extent described in this section.

515.2 Definitions

The following definitions apply for the purposes of 515:

a. *Son or daughter* — biological, adopted, or foster child, stepchild, legal ward, or child who stands in the position of a son or daughter to the employee, who is under 18 years of age or who is 18 or older and incapable of self-care because of mental or physical disability.

b. *Parent* — biological parent or individual who stood in that position to the employee when the employee was a child.

c. *Spouse* — husband or wife.

d. *Serious health condition* — illness, injury, impairment, or physical or mental condition that involves any of the following:

(1) *Hospital care* — inpatient care (i.e., an overnight stay) in a hospital or residential medical care facility, including any period of incapacity or subsequent treatment in connection with or subsequent to such inpatient care.

(2) *Absence plus treatment* — a period of incapacity of more than 3 consecutive calendar days (including any subsequent treatment or period of incapacity relating to the same condition) that also involves either one of the following:

(a) Treatment two or more times by a health care provider.

(b) Treatment by a health care provider on at least one occasion that results in a regimen of continuing treatment under the supervision of the health care provider.

(3) *Pregnancy* — any period of incapacity due to pregnancy or for prenatal care.

(4) *Chronic condition requiring treatments* — a chronic condition that meets all of the three following conditions:

(a) 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.

(b) Continues over an extended period of time (including recurring episodes of a single underlying condition).

(c) May cause episodic, rather than a continuing period of, incapacity. Examples of such conditions include diabetes, asthma, and epilepsy.

(5) *Permanent or long-term condition requiring supervision* — a period of incapacity that 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 of such conditions include Alzheimer's, a severe stroke, and the terminal stages of a disease.

(6) *Condition requiring multiple treatments (nonchronic condition)* — any period of absence to receive multiple treatments (including any period of recovery therefrom) 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 that would likely result in a period of incapacity of more than 3 consecutive calendar days in the absence of medical intervention or treatment. Examples of such conditions include cancer (which may require chemotherapy, radiation, etc.), severe arthritis (which may require physical therapy), and kidney disease (which may require dialysis).

Note: Cosmetic treatments (such as most treatments for orthodontia or acne) are not "serious health conditions" unless complications occur. Restorative dental surgery after an accident or removal of cancerous growths is a serious health condition provided all the other conditions are met. Allergies, mental illness resulting from stress, and treatments for substance abuse are protected only if all the conditions are met. Routine preventative physical examinations are excluded. Also excluded as a regimen of continuing treatments are treatments that involve only over-the-counter medicine or activities such as bed rest that can be initiated without a visit to a health care provider.

e. *Health care provider* — doctor of medicine or osteopathy; Christian Science practitioner listed with the First Church of Christ, Scientist, in

Boston, MA; physician; or other attending practitioner who is performing within the scope of his or her practice.

515.3 Eligibility

For an absence to be covered by the FMLA, the employee must have been employed by the Postal Service for an accumulated total of 12 months and must have worked a minimum of 1,250 hours during the 12-month period before the date leave begins.

515.4 Leave Requirements

515.41 Conditions

Eligible employees *must* be allowed an total of up to 12 workweeks of leave within a Postal Service leave year for one or more of the following:

a. Because of the birth of a son or daughter of the employee and in order to care for such son or daughter. Entitlement to be absent for this condition expires 1 year after the birth.

b. Because of the placement of a son or daughter with the employee for adoption or foster care. Entitlement to be absent for this condition expires 1 year after the placement.

c. In order to care for the spouse, son, daughter, or parent of the employee if the spouse, son, daughter, or parent has a serious health condition.

d. Because of a serious health condition that makes the employee unable to perform the functions of the employee's position.

515.42 Leave Type

Absences that qualify as FMLA leave may be charged as annual leave, sick leave, continuation of pay, or leave without pay, or a combination of these. Leave is charged consistent with current leave policies and applicable collective bargaining agreements.

515.43 Authorized Hours

Eligible employees are entitled to 12 workweeks per leave year of FMLA-protected absences. This amount is twelve times the hours normally, or regularly, scheduled in the employee's workweek. Occasional or sporadic overtime hours are excluded. Thus:

a. Full-time employees who normally work 40 hours per week are entitled to up to 480 hours of FMLA-covered absences within a leave year.

b. Part-time employees who have regular weekly schedules are entitled to 12 times the number of hours normally scheduled in their workweek. For example, a part-time employee with a normal schedule of 30 hours a week is entitled to 360 hours (12 weeks times 30 hours).

c. Part-time employees who do not have normal weekly schedules are entitled to the total number of hours worked in the previous 12 weeks, not including occasional or sporadic overtime hours.

Absences in addition to the 12 workweeks of FMLA leave may be granted in accordance with other leave policies or collective bargaining agreements (see 511, 512, 513, 514).

515.5 Documentation

515.51 General

An employee must provide a supervisor a Form 3971, *Request for or Notification of Absence*, together with documentation supporting the request, at least 30 days before the absence if the need for the leave is foreseeable. If 30 days notice is not practicable, the employee must give notice as soon as practicable. Ordinarily the employee should give at least verbal notification within 1 or 2 business days of the time the need for leave becomes known. A copy of the completed Form 3971 is returned to the employee along with a copy of Publication 71, which details the specific expectations and obligations and the consequences of a failure to meet these obligations.

Additional documentation may be requested of the employee, and this must be provided within 15 days or as soon as practicable considering the particular facts and circumstances.

During an absence, the employee must keep his or her supervisor informed of intentions to return to work and of status changes that could affect his or her ability to return to work. Failure to provide documentation can result in the denial of FMLA protection.

515.52 New Son or Daughter

An employee requesting time off because of the birth of the employee's son or daughter and to care for the son or daughter, or because of the placement of a son or daughter with the employee for adoption or foster care, may be required to substantiate the relationship and provide the birth or placement date.

515.53 Care of Others for Medical Reasons

An employee requesting time off to care for a spouse, parent, son, or daughter who has a serious health condition may be required to substantiate the relationship and to provide documentation from the health care provider stating the date the serious health condition began, probable duration of the illness, appropriate medical facts, nature of the need to care for, and when the employee will be needed to provide such care or psychological support.

The medical certification provision that an employee is "needed to care for" a family member encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport him- or herself to the doctor, etc. The term also includes providing psychological comfort and reassurance that would be beneficial to a child, spouse, or parent with a serious health condition who is receiving inpatient or home care.

515.54 Additional Medical Opinions

A second medical opinion by a health care provider who is designated and paid for by the Postal Service may be required. A health care provider selected for the second opinion may not be employed by the Postal Service on a regular basis. In case of a difference between the original and second opinion, a third opinion by a health care provider may be required. The third health care provider is jointly designated or approved by management and the employee, and the third opinion is final. The Postal Service pays the health care provider for the third opinion. Recertifications of a medical condition, for which the employee bears the cost, may also be required. Such medical opinions are obtained off the clock.

515.55 Employee Incapacitation

An employee requesting time off that is covered by FMLA because of his or her own incapacitation must satisfy the documentation requirements for sick leave in 513.31 through 513.38 or for LWOP in 514.4. If medical opinions are required in addition to initial documentation, they are administered as described in 515.54.

515.56 Return to Work After Employee Incapacitation

To return to work from an FMLA-covered absence because of their own incapacitation, employees must provide certification from their health care provider that they are able to perform the essential functions of their positions with or without limitations. Limitations described are accommodated when practical. In addition, bargaining unit employees must comply with collective bargaining agreements, which include Postal Service policies in 865 (summarized in section VI of Publication 71), 513.37, and other handbooks and manuals.

515.6 Intermittent Leave or Reduced Schedule

515.61 New Son or Daughter

Absences requested because of the birth and subsequent care of the employee's newborn son or daughter or because of the placement of a son or daughter with the employee for adoption or foster care may be taken on an intermittent basis or reduced work schedule only if the request for such intermittent leave or schedule modification is approved by the supervisor. Eligibility for this leave expires 1 year after the birth or placement. Approval is based on employee need, Postal Service need, and costs to the Postal Service.

515.62 Care of Others for Medical Reasons or Employee Incapacitation

Absences requested to care for a spouse, son, daughter, or parent with a serious health condition or due to the employee's own health condition may be taken on an intermittent basis or by establishing a reduced work schedule when medically necessary.

515.63 Temporary Change in Duty Assignment

If an employee requests intermittent leave or a reduced work schedule, the Postal Service may assign the employee, with equivalent pay and benefits, temporarily to the duties of another position consistent with applicable collective bargaining agreements and regulations if such an assignment better accommodates the recurring periods of absence.

515.64 Fair Labor Standards Act Status

An employee exempt from the Fair Labor Standards Act (FLSA) normally may not take leave in less than 1-day increments. However, leave taken for an FMLA-covered reason on an intermittent basis or by temporarily establishing a reduced work schedule can be taken in less than 1-day increments without affecting the employee's FLSA-exempt status.

515.7 Return to Position

Employees whose absence is covered by the FMLA are normally entitled to return to the positions they held when the absence began, or to equivalent positions with equivalent pay, benefits, working conditions, and other terms of employment if they are able to perform the essential functions of the positions. Returning employees are not entitled to any right, benefit, or position to which they would not have been entitled had they not been absent, or to intangible, unmeasurable aspects of the job such as the perceived loss of potential for future promotional opportunities. If an employee was hired for a specific term or only to perform work on a discrete project, then there is no further reinstatement obligation under this section if the employment term or project is over and the employment would not have otherwise continued.

515.8 Benefits

All benefits accrue to employees during an FMLA absence pursuant to the applicable provision of the ELM.

515.9 Family Leave Poster

All postal facilities, including stations and branches, are required to conspicuously display WH Publication 1420, *Your Rights Under the Family and Medical Leave Act of 1993*. It must be posted, and remain posted, on bulletin boards where it can be seen readily by employees and applicants for employment.

516 Absences for Court-Related Service

516.1 General

516.11 Determining Nature of Court-Related Service

Installation heads ascertain the exact nature of court service and determine if the employee (a) is entitled to paid court leave, (b) must take annual leave or LWOP, or (c) is to serve in an official duty status. If a summons to witness

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

NOV 15 1993

Dear Mr. Burrus

This is in response to your request for an advisory opinion under the Family and Medical Leave Act of 1993 (FMLA) regarding mandatory "modified" or "light duty" job programs for temporarily disabled employees.

You ask if an employer can require a temporarily disabled "eligible employee," who seeks FMLA leave for a serious health condition that makes the employee unable to perform the employee's position, to accept an alternative position (with similar pay and benefits) that has been modified to eliminate the essential functions which the employee cannot perform. If so, you ask if the employer can deny the requested FMLA leave and require the employee's presence at work in the modified job.

The FMLA Regulations, 29 CFR Part 825, at § 825.702(d), provide that if FMLA entitles an employee to leave, an employer may not, in lieu of FMLA leave entitlement, <u>require</u> the employee to take a job with a reasonable accommodation. Thus, an employer could not require an employee to work in a restructured job instead of granting the employee's FMLA leave request in the example you posed in your inquiry.

FMLA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, or position which better suits the employee's personal needs on return from leave [see § 825.215(e)(4)], but the employee cannot be induced by the employer to accept a different position against the employee's wishes.

As noted in your letter, § 825.204 of the regulations addresses temporary transfers to alternative positions with equivalent pay and benefits for employees who request intermittent leave or leave on a reduced leave schedule for planned medical treatment, including for a period of recovery from a serious health condition.

Sincerely,

Maria Echaveste
Administrator

* * * * * * * * * * * * * *

Letter Ruling: May 12, 1995 (FMLA-61)

This is in response to your letter requesting an interpretation of the Family and Medical Leave Act of 1993 (FMLA) regarding substitution of an employee's accrued paid leave for unpaid FMLA leave. Specifically, one of your members has been told by his employer that he must substitute vacation leave that he would otherwise not yet be entitled to use for part of his FMLA leave. Under the employer's vacation leave plan, an employee who has worked 800 hours in the current vacation year earns paid vacation that may not be used until the next vacation year.

Section 102(d)(2) of FMLA (29 U.S.C. 2612(d)(2)) provides generally that an employee may elect, or an employer may require the employee, to substitute certain of the accrued paid vacation leave, personal leave, family leave, or sick or medical leave of the employee for the unpaid leave provided under the Act. The legislative history indicates that the purpose of this section was "to provide that specified paid leave which has accrued but has not yet been taken, may be substituted for the unpaid leave under this act in order to mitigate the financial impact of wage loss due to family and temporary medical leaves." (House Report 103-8, Feb. 2, 1993, p. 38.) The Department interprets these provisions to mean that the employee has both earned the leave and is able to use that leave during the FMLA leave period. Consequently, in the particular situation that you describe, the employer could not require the employee to substitute leave that is not yet available to the employee to use under the terms of the employer's leave plan.

The foregoing would neither prevent an employer from voluntarily advancing paid leave to an employee nor an employee from voluntarily accepting such leave during an FMLA absence. Section 403 of FMLA (29 U.S.C. 2653) specifically states that "[n]othing in this Act or any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act."

This above is intended as general guidance only and assumes that no other compliance questions are at issue. Please contact this office directly should the above not fully address your concerns.

/s/ Daniel F. Sweeney
Deputy Assistant
Administrator

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UNITED STATES POSTAL SERVICE

February 7, 1994

Mr. William Burrus
Executive Vice President
American Postal Workers Union,
AFL-CIO
1300 L Street, N.W.
Washington, DC 20005-4128

Dear Bill:

I was glad to see that the APWU published a user-friendly FMLA booklet to help employees understand their rights and obligations under this law. I think it's important that employees receive support and consideration when confronted with pressing family health obligations or serious illnesses.

With regard to the questions regarding FMLA which you and Corine Rodriguez discussed, our responses are:

Question: Do employees retain the no-layoff protection when FMLA interrupts the 20 pay periods worked per year during the six year period of continuous service?

Answer: Yes. However, since the maximum FMLA time off is 12 weeks or 6 pay periods per leave year, loss of the no-layoff protection would normally be for other reasons. The only time FMLA would interrupt the years required for protection is in cases where more than 12 weeks of FMLA during two different "leave" years result in more than 6 pay periods of absence during an individual employee's "anniversary" year. In these rare cases the no-layoff protection must manually be restored. This is accomplished by sending a memorandum to the Minneapolis Information Service Center.

Question: Does OWCP and Military Leave count towards the 1250 work hour criteria for eligibility for FMLA?

Answer: No. Whether an employee has worked the minimum 1250 hours of service is determined according to the principles

established under the Fair Labor Standards Act (FLSA) for determining compensable hours of work. OWCP and Military Leave do not qualify as work under these principles.

If we can answer any other questions, please contact Corine at (202) 268-3823.

Sincerely,

Sherry A. Cagnoli
Manager
Contract Administration (NALC/NRLCA)
Labor Relations

Letter Ruling: July 21, 1995 (FMLA-68)

This is in response to your letter asking two question regarding the application of the Family and Medical Leave Act of 1993 (FMLA).

The first question is whether an employer can count an absence for sickness or injury as an FMLA absence if the employee does not request that it be counted as such. So long as the employer is a covered employer, the employee is an eligible employee, and the reason for the absence meets one of the conditions described in the definitions of "serious health conditions" under the FMLA, the employer may designate (and so advise the employee) and count the absence against the employee's 12-week FMLA entitlement even if the employee has not requested that it be counted as such.

Your second question concerns a negotiated leave of absence policy that was in effect prior to FMLA. Under this policy, employees are not required to use up all of their accrued vacation, sick time, personal time, and any other compensated time before their leave begins. You indicate that, especially in maternity situations, employees may consider this leave preferable to FMLA leave. The FMLA Regulations, 29 CFR Part 825, provide that an employer must observe any employment benefit program or plan that provides greater family and medical leave rights to employees than the rights established by FMLA. (See Regulations 825.700.) There is not enough information in you letter to determine conclusively if the negotiated leave of absence policy provides a greater benefit. If in fact it does, the employer may not cite FMLA as a reason not to adhere to the employer's established policy.

As discussed in Regulations 825.207(h), an employee who complies with an employer's less stringent leave plan requirements may not be denied leave for an FMLA purpose on the grounds that the stricter requirements of FMLA have not been met.

The above answers are based on the limited information provided in your letter and assume that no other compliance issues exist. The application of FMLA in any particular situation will of course be affected by the facts in that situation.

If you have specific questions not addressed by the above, you may contact the office of the Wage and Hour Division responsible for enforcing FMLA in your area located at U.S. Courthouse and Federal Building, 15 Henry Street, Room 101K, Binghampton, New York 13901, telephone: (607) 773-2609.

/s/ Daniel F. Sweeney
Deputy Assistant
Administrator

UNITED STATES POSTAL SERVICE

February 22, 1996

Mr. William Burrus
Executive Vice President
American Postal Workers
Union, AFL-CIO
1300 L Street, NW
Washington, DC 20005-4128

Dear Bill:

This will serve to further respond to your correspondence dated January 23 and follow up to your telecon with Donna Gill on February 13 regarding the Sick Leave for Dependent Care MOU. There is no dispute that this provision allows employees to use up to 80 hours of earned sick leave to care for family members. There is no requirement that employees use sick leave to cover such absences. It is incumbent upon the employee to submit a request for sick leave when he/she wants to be paid sick leave to cover such absences. The parties do not require the employee to use sick leave under such circumstances.

I hope this satisfactorily addresses your concerns.

Sincerely,

Anthony J. Vegliante
Manager
Contract Administration APWU/NPMHU

UNITED STATES POSTAL SERVICE

February 22, 1996

Mr. William Burrus
American Postal Workers
Union, AFL-CIO
1300 L Street, NW
Washington, DC 20005-4128

Dear Mr. Burrus:

This is in response to your February 5 and February 9 correspondence concerning the Family and Medical Leave Act (FMLA) and clarification of the following issues:

1) Employees are not required to submit documentation for each absence related to a chronic condition if (a) the original documentation gives an estimate of the probable number of and the interval between episodes of incapacity, (b) the circumstances are unchanged, and (c) the supervisor does not have information that casts doubt upon the employee's stated reason for the absence. The parties at this level are not in dispute on this issue. We suggest that you refer any specific problems to the local offices for resolution.

2) Management should not disallow or delay an employee's taking FMLA leave, pending requests for sick or annual leave, if the employee gives timely verbal or other notice.

Under FMLA, if an employee does not choose to substitute paid leave for FMLA unpaid leave, management may require the employee to substitute accrued paid leave. This must be noted on the PS Form 3971 and a copy returned to the employee or the employee may be notified by a written notice. However, written notice does not have to be provided on each separate occasion as long as notice is provided to the employee no less often than the first time in each six-month period that an employee gives notice of the need for FMLA leave.

With respect to LWOP, management has the discretion to approve or disapprove LWOP and that decision is made based on the needs of the employee, the needs of the Postal Service, and the cost to the Postal Service. There is no requirement that the employee exhaust paid leave before the approval of LWOP nor can LWOP be denied in cases where an employee has exhausted all paid leave but is entitled to FMLA unpaid leave.

Should you have any further questions concerning these issues, you may call Corine Rodriguez at (202) 268-3823.

Sincerely,

Anthony J. Vegliante
Manager
Contract Administration (APWU/NPMHU)

UNITED STATES POSTAL SERVICE

September 12, 1996

Mr. William Burrus
Executive Vice President
American Postal Workers
Union, AFL-CIO
1300 L Street, NW
Washington, DC 20005-4128

Dear Bill:

This is in response to your July 30 correspondence concerning a system to address disputes arising out of the Family and Medical Leave Act and the Privacy Act. After our last discussion, we agreed to send you a written summary of our understanding regarding your concerns.

You indicated that there is a problem in the field with managers who insist on retention and review of records containing a prognosis or diagnosis. The National Medical Director for the Postal Service, Dr. David Reid, III, addressed the documentation requirements for approval of leave in a memorandum dated June 22, 1995. As noted by Dr. Reid, medical information received by an employee's supervisor that provides a diagnosis and a medical prognosis must be forwarded to the health unit or office of the contract medical provider and treated as a "restricted medical record" under Section 214.3 of Handbook EL-806. This application is consistent with the documentation requirements under the FMLA. Therefore, to address your concerns we can reissue the memorandum and review specific complaints on a case by case basis.

In response to your questions regarding those issues needing agreement or disagreement as to the basic principle, we submit the following as our understanding of our final discussion:

> Issue: Whether or not supervisors/postmasters/managers may maintain files containing medical records including prognosis or diagnosis.
>
> Answer: Management may maintain WH380, union FMLA forms, or other certifications from health care providers that do not contain restricted medical information. Documents containing diagnosis or prognosis must be returned to the employee, destroyed, or forwarded to the medical unit.

Should you have any further questions concerning these issues, you may call Corine Rodriguez at (202) 268-3823.

Sincerely,

Anthony J. Vegliante
Manager
Contract Administration (APWU/NPMHU)

UNITED STATES POSTAL SERVICE

December 12, 1995

Mr. William Burrus
Executive Vice President
American Postal Workers
Union, AFL-CIO
1300 L Street, NW
Washington, DC 20005-4128

Dear Bill:

This is in response to your November 22 correspondence regarding whether steward's duty time should be counted as time worked toward the 1,250 hours eligibility requirement for FMLA.

After additional research we agree with your interpretation that authorized steward time, during the course of a regular schedule, is credited towards the required 1,250 hours for FMLA eligibility.

If you have any questions concerning this matter, please contact Corine T. Rodriguez at (202) 268-3823.

Sincerely,

Anthony J. Vegliante
Manager
Contract Administration (APWU/NPMHU)

UNITED STATES
POSTAL SERVICE

January 5, 1996

Mr. William Burrus
Executive Vice President
American Postal Workers
Union, AFL-CIO
1300 L Street, NW
Washington, DC 20005-4128

Dear Bill:

This is in reference to your correspondence dated December 18 regarding sick leave for dependent care. Let me assure you that no one on my staff informed supervisors that sick leave for dependent care cannot be used for those absences covered by the Family and Medical Leave Act (FMLA). They were informed that there are absences covered by the sick leave for dependent care provisions that do not qualify as FMLA absences but when an absence is FMLA qualifying, there may be an overlap.

If you have any questions regarding this matter, please contact Donna Gill of my staff at 268-2373.

Sincerely,

Anthony J. Vegliante
Manager
Contract Administration, APWU/NPMHU

American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

William Burrus
Executive Vice President
(202) 842-4246

November 22, 1995

Dear Tony:

This is to formally address an issue that has recently been identified as an area of possible disagreement regarding time spent by Stewards under the national agreement and the Family and Medical Leave Act. I am informed by Pat Heath of your staff that other postal officials have interpreted the law as omitting Steward time as "time worked" under FLSA regulations.

The parties have agreed through Article 19 of the national agreement and Chapter 440 of the Employee and Labor Relations Manual (ELM) that "total pay received for steward's duty time, in accordance with the applicable collective-bargaining agreement" is defined within "all remuneration for employment received" and included as time worked under FLSA.

As you are aware, many locals have reached agreement with management to provide for full-time Stewards under the collective bargaining agreement and Stewards in other offices spend a considerable portion of their work day performing Steward duties. I must assume that this convoluted interpretation would apply similarly to facilitators under the Employee Involvement Programs, labor management meetings and other activities that are sanctioned by the collective bargaining agreements, but are not specifically addressed in the Fair Labor Standard Act.

While Ms Heath of your staff has not provided a definitive response to the inquiry, I am appalled that postal officials in responsible positions would offer such interpretations that go to the heart of the employer/employee relationship.

Page 2 - Vegliante

I request an official response to the inquiry of whether or not it is the USPS position that authorized Steward time, during the course of a regular schedule, is or is not credited towards the required 1250 hours for FMLA eligibility.

Thank you for your attention to this matter.

Sincerely,

William Burrus

William Burrus
Executive Vice President

Anthony J. Vegliante, Manager
Grievance & Arbitration Division
Labor Relations
475 L'Enfant Plaza, SW
Washington, DC 20260

WB:rb
opeiu#2
afl-cio

American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

April 4, 1995

William Burrus
Executive Vice President
(202) 842-4246

Dear Ms. Rodriquez:

I am in receipt of your March 29, 1995 response to my earlier letter of March 13 regarding the issuance of discipline for an absence under FMLA. Your response indicates that there was an obligation on the part of the employee to provide "documentation" regarding the pregnancy. If intended as written, this is contrary to DOL regulations as well as the agreement between USPS and APWU. It is established that "documentation" is not required for birth. The employee's certification represented by her physical appearance or a statement (verbal or written) of pregnancy is sufficient to qualify for FML. The parties have agreed in the "questions and answers" distributed to our respective representatives. If the employer has independent information casting doubts upon the employee's certification, the employer is free to require the employee to submit to a second medical evaluation. We have not established that an employee is required to present a medical statement from a physician to verify pregnancy. In fact, the DOL form provides that the employee "self certifies" the documentation for leave. The supervisor is responsible for designating the absence as qualifying under the FMLA upon notification of the medical condition involving pregnancy.

I trust that this is not an area of dispute between the parties, but merely sentence construction in your response. In the event there is a dispute between the parties I would appreciate the employer's position being reduced to writing and provided to my office at your earliest convenience.

Thank you for your attention to this matter.

Sincerely,

William Burrus

William Burrus
Executive Vice President

Corine T. Rodriquez
Labor Relations Specialist
475 L'Enfant Plaza, SW
Washington, DC 20260

UNITED STATES POSTAL SERVICE

March 29, 1995

Mr. William Burrus
Executive Vice President
American Postal Workers Union, AFL-CIO
1300 L Street, NW
Washington, DC 20005-4128

Dear Mr. Burrus:

This is in response to your March 13 correspondence regarding a letter of warning which included a Family Medical Leave Act (FMLA) qualifying incident as part of the disciplinary action.

The investigation indicates that the supervisor was informed of the pregnancy on the date the employee went into the hospital. He requested documentation which was never provided by the employee and he subsequently failed to designate the leave as FMLA qualifying.

However, it's my understanding that he will not use this period as a basis for discipline. Additionally, he will take steps to assure that employees are aware of their responsibility to disclose the cause of absence in order to gain the protection of the FMLA and he will furnish employees with written notice of their rights and obligations under the act, and any medical documentation which may be required.

If you have any questions or need any other information, please call me at (202) 268-3823. Thank you for your assistance in this matter.

Sincerely,

Corine T. Rodriguez

Corine T. Rodriguez
Labor Relations Specialist
Contract Administration (NALC/NRLCA)
Labor Relations

UNITED STATES POSTAL SERVICE

May 17, 1994

Mr. William Burrus
Executive Vice President
American Postal Workers Union,
AFL-CIO
1300 L Street, N.W.
Washington, DC 20005-4128

Dear Bill:

This is in response to your April 20 inquiry regarding the eligibility of postal employees to use leave donated under the Leave Sharing Program for absences authorized under the Family and Medical Leave Act.

Employees who suffer serious personal health conditions and who are eligible for coverage under the Family and Medical Leave Act may participate in the Leave Sharing Program (LSP). However, eligibility is not automatic in that the employee must qualify under the current provisions of the LSP. For example, donated leave would not be available to employees who may qualify for FMLA before they exhaust their earned/unused sick and annual leave balances and accumulate 80 hours or more of leave without pay due to the serious health condition. Also, an employee may be eligible for coverage under FMLA but may be excluded from the LSP because he/she is a noncareer employee.

This is certainly consistent with existing leave policies and with our viewpoint that employees need our support and consideration when confronted with serious illnesses. If you have any further questions, please contact Corine T. Rodriguez at (202) 268-3823.

Sincerely,

for Sherry A. Cagnoli
Manager
Contract Administration (NALC/NRLCA)
Labor Relations

American Postal Workers Union, AFL-CIO
1300 L Street, NW, Washington, DC 20005

William Burrus
Executive Vice President
(202) 842-4246

February 2, 1995

Dear Tony:

*In compliance with the Privacy Act the Postal Service has published in the Federal Register a listing of personnel who are authorized access to restricted medical information. Pursuant to Section 221.3 "Files Maintenance", "All correspondence and other records containing restricted medical information must be marked **RESTRICTED-MEDICAL** (rather than confidential) and filed in locked cabinets. Keys must be kept by medical personnel only. Only medical personnel may have access to these files."*

Due to the reduction of medical personnel in postal facilities there are few postal officials authorized to access restricted medical records. Postal supervisors and Compensation Specialist routinely access and demand for their use and evaluation restricted medical information, including "physician diagnosis and prognoses" and "employee medical history". Compensation Specialist and designated supervisors are not "medical personnel" as defined by the Privacy Act and USPS official designation and are not authorized to have access to the information contained in such restricted medical information. In addition, the published regulations require that such restricted medical information be maintained only in the "office of the contract physician" where on-site postal medical personnel are not available.

It is the position of the Union that supervisors, non-certified managers and specialist may not review or maintain medical information in any form that includes prognosis and/or diagnosis, and may not insist that such information be provided to them as a condition for approved absence from work. If such information is required as a condition for approval for absence from work, to modify job assignment or request a reduced schedule, the restricted medical information must be transmitted directly from the employee or physician to the postal official who is certified for access to restricted information.

This is to determine the USPS' interpretation of the right of supervisors, Compensation Specialist and other non-designated postal officials to receive, access, review and maintain restricted medical records and information of postal employees.

Please respond at your earliest opportunity that the union can evaluate its response as appropriate.

Sincerely,

William Burrus

William Burrus
Executive Vice President

Mr. Anthony Vegliante, Manager
Grievance and Arbitration Division
United States Postal Service
475 L'Enfant Plaza, SW
Washington, DC 20260

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UNITED STATES POSTAL SERVICE

Mr. William Burrus
Executive Vice President
American Postal Workers
Union, AFL-CIO
1300 L Street, N.W.
Washington, DC 20005-4128

Dear Bill:

This letter is in further response to your correspondence of February 7 concerning the nature of medical documentation needed by supervisors to approve leave.

The enclosed memorandum from Dr. David H. Reid, III, National Medical Director for the Postal Service, serves to distinguish between a diagnosis or medical prognosis, and medical facts, as they relate to Section 513.36 of the Employee and Labor Relations Manual (ELM). It is intended to clear up any confusion which may exist in the field.

As noted by Dr. Reid, medical information which contains a diagnosis and a medical prognosis constitutes a restricted medical record as defined in Section 214.3 of Handbook EL-806.

Dr. Reid observes that restricted medical records are not necessary to support a request for approved leave when required by Section 513.36 of the (ELM): "A health care provider can provide an explanation of medical facts sufficient to indicate that an employee is, or will be, incapacitated for duty without giving a specific diagnosis or medical prognosis."

It is additionally the Postal Service's position that this application is consistent with the documentation requirements attendant to a request for leave under the Family and Medical Leave Act (FMLA).

If you have any questions on the foregoing, please contact Charles Baker of my staff at (202) 268-3842.

Sincerely,

Anthony J. Vegliante
Manager
Contract Administration APWU/NPMHU

Enclosure

UNITED STATES POSTAL SERVICE

June 22, 1995

MANAGERS, HUMAN RESOURCES (ALL AREAS)
MANAGERS, HUMAN RESOURCES (ALL DISTRICTS)
SENIOR AREA MEDICAL DIRECTORS

SUBJECT: Documentation Requirements

It has recently come to my attention that there is some confusion in the field concerning the substance of medical information needed by a supervisor to approve leave pursuant to Section 513.36 of the Employee and Labor Relations Manual. The following restates the Postal Service's position.

When employees are required to submit medical documentation to support a request for approved leave, such documentation should be furnished by the employee's attending physician or other attending practitioner, with an explanation of the nature of the employee's illness or injury sufficient to indicate that the employee was or will be unable to perform his or her normal duties during the period of absence. Normally, statements such as "under my care" or "received treatment" are not acceptable evidence of incapacitation.

In order to return to duty when medical documentation is required, an employee must submit to the supervisor information from the appropriate medical source which includes:

1. Evidence of incapacitation for the period of absence.

2. Evidence of the ability to return to duty with or without limitations.

Medical information which includes a diagnosis and a medical prognosis is not necessary to approve leave. A health care provider can provide an explanation of medical facts sufficient to indicate that an employee is, or will be, incapacitated for duty without giving a specific diagnosis or medical prognosis. If medical documentation is received by an employee's supervisor that provides a diagnosis and a medical prognosis, it must be forwarded to the health unit or office of the contract medical provider and treated as a "restricted medical record" under Section 214.3 of Handbook EL-806.

In order to facilitate operational scheduling and planning, supervisors may request medical information relative to the duration of an absence, future absences, or an employee's future ability to perform the full duties of a position or duty assignment. Such information may be given to a supervisor by an employee or health care provider without divulging restricted medical information.

David H. Reid, III MD
National Medical Director
Office of Employee Health and Services

UNITED STATES POSTAL SERVICE

April 12, 1994

Mr. William Burrus
Executive Vice President
American Postal Workers Union,
AFL-CIO
1300 L Street, N.W.
Washington, DC 20005-4128

Dear Bill:

This is in response to your March 9 correspondence concerning the need for uniform responses to Family and Medical Leave Act (FMLA) questions. Enclosed for your review is Attachment 1, the responses we prepared for your questions as well as Attachment 2, additional questions and answers which have arisen since our last meeting.

The responses represent our best efforts to provide guidance and information to all our employees so that workplace relationships are not dissolved while workers attend to pressing family health obligations or their own serious illness. If you have any questions concerning our answers or if you would like to discuss them, please call Corine T. Rodriguez of my staff at (202) 268-3823.

I appreciate your help and cooperation in this matter.

Sincerely,

Sherry A. Cagnoli
Manager
Contract Administration (NALC/NRLCA)
Labor Relations

Enclosures

Attachment 1

1. What certification is required for employees requesting FMLA because of the birth or placement of a son or daughter and in order to care for such son or daughter after birth:

   The required information is:

   a) That the employee is the parent.

   b) Date of birth or placement of this son or daughter.

   Note: There are no specified optional forms which the supervisor must accept. Optional forms are acceptable only if they are completed with sufficient detail (as described in 825.306).

2. Is medical certification required for the birth or placement of a son or daughter?

   No medical certification is required for the placement or to care for a son or daughter who does not have a serious health condition.

   825.302(c)

   Medical certification is required if the mother is requesting time off because of the pregnancy.

   825.114

3. Can an employee use intermittent leave or work a reduced schedule for the birth or placement of a son or daughter or to care for a newborn son or daughter?

   Yes, but only with the agreement of the employer.

   825.203

4. Can an employee use intermittent leave or work a reduced schedule because of pregnancy or the serious health condition of a newborn child?

Yes, when medically necessary due to the mother's pregnancy or the newborn child's serious health condition. The employer may require a certification from the health care provider that such leave is medically necessary and the expected duration and schedule of such leave.

825.117

5. Is the employer's approval required for an employee to use intermittent leave or work a reduced schedule if the employee, spouse, child or parent has a serious health condition?

No, provided proper medical certification has been provided. (The employee must attempt to schedule their leave so as not to disrupt the employer's operation and may be assigned to an alternative position with equivalent pay and benefits that better accommodates the intermittent or reduced leave schedule.)

825.203 and 825.117

6. Are employees entitled to FMLA if their absence is required during procedures intended to induce pregnancy, i.e., in-vitro fertilization and other insemination procedures.

Yes, as certified by the attending physician.

825.114c and 825.114 (3)

7. Is treatment for substance abuse covered as a serious health condition?

Yes, if certified by the medical care provider as a serious health condition.

825.114

8. Is an employee required to provide medical documentation for each absence after a medical provider has certified that the employee is receiving continuing treatment?

   No, but the employer may request certification if there is reason to question the appropriateness of the leave or its duration. An employer may request recertification of medical conditions to support leave requests at any reasonable interval, but not more often than every 30 days, unless:

   a) The employee requests an extension of leave.

   b) Circumstances have changed significantly from the original request.

   c) The employer receives information that casts doubt upon the continuing validity of the certification.

   d) The absence is for a different condition or reason.

   825.305(b) and 825.308

9. Does the employee have the option of using LWOP in conjunction with annual or sick leave for FMLA?

   Yes, subject to the approval of the leave in accordance with normal leave approval procedures.

   825.208 and Article 10, section 6

10. Can an employee be disciplined or receive other administrative action for absences covered by the FMLA?

    No. However, if the absence exceeds more than 12 weeks as authorized by FMLA, an employee could be subject to disciplinary action or other administrative action.

    825.220(c)

11. What can an employer do if it questions the adequacy of a medical certification?

    If the certification includes the required information, the employer may require the employee to obtain a second medical opinion at the employer's expense. The second health care provider may not be employed on a regular basis by the employer.

    825.307 and 825.308

12. Is advance written notice required for employees' use of FMLA?

    Not in the case of unexpected emergencies. In such cases, the employee should provide notice by telephone, telegraph, FAX or other electronic means. Additional information must be provided when it can readily be accomplished as a practical matter.

    825.302 and 825.303

13. Can properly submitted FMLA requests be denied because of operational reasons?

    No. If the absence is otherwise justified under FMLA, the leave cannot be denied. (When the necessity for leave is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice as practicable. If the necessity for leave is based on planned medical treatment the employee shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer and shall provide the employer with not less than 30 days notice, as practicable.

    825.100, 825.112, 825.203 and PL 103-3 Section 102(e)

14. If an employee provides notice of the need for FMLA leave, what information must the employer provide to the employee?

    a) Whether or not the leave will be counted against the FMLA entitlement.

b) Any requirements for the employee to furnish medical certification and the consequences of failing to do so.

c) The employee's right to use annual, sick leave, or LWOP.

d) Any requirement for the employee to make health benefit payments and the arrangements for making such payments.

e) Any requirement for the employee to present a fitness-for-duty certificate to be restored to employment.

f) The employee's right to restoration to the same or an equivalent job upon return from leave.

g) The employee's potential liability for payment of health insurance premiums paid by the employer if the employee fails to return to work.

825.301 (c)

Attachment 2

FAMILY AND MEDICAL LEAVE (FMLA) QUESTIONS & ANSWERS

Q. Can an FLSA exempt employee now take leave in less than full day increments?

A. Only if the time off is due to reasons covered by FMLA. Charging an FLSA exempt employee a partial day of leave for any other reason is a violation of the Fair Labor Standards Act.

Q. How are the 12 weeks of FMLA tracked?

A. By the leave request forms (3971) maintained for two years. When a leave is requested for a condition covered by FMLA, the supervisor writes FMLA in the form's remarks section. In most cases it will be pretty obvious to the supervisor when an employee is getting close to 12 weeks. When questions arise, the supervisor may have to review the request forms submitted by the employee since the start of the leave year.

Q. Must the employee state the leave is FMLA?

A. No, leave requested for a covered condition is part of the 12 workweeks provided by the FMLA policy. When an employee requests leave for a covered condition, the supervisor should note "FMLA" in the request form's remarks section, and give the employee the required notice.

Q. I am having trouble getting a baby sitter on Saturdays and need to be off every other Saturday to care for my 5 month old baby. Can I take family leave every other Saturday for that purpose?

A. Leave requested to care for your child, other than for medical reasons, may be taken on an intermittent basis only with your supervisor's approval. (ELM 516.61.)

Q. When may a supervisor deny or delay leave requested for a condition covered by family leave?

A. When less than 30 days' notice, or as much notice as practical under the circumstances, is given. Another situation is when leave requested on an intermittent or

reduced schedule because of the birth and care of the newly born child, or because of the placement of a child with the employee. Such leave is approved based on the employee's need, Postal Service need, and costs to the Postal Service. (ELM 515.51 and 515.61.)

Q. Is FMLA in addition to sick and annual leave?

A. FMLA is in addition to annual or sick leave that is taken for reasons not covered by FMLA. FMLA does not provide for additional sick or annual leave. It merely provides up to 12 workweeks absence for covered conditions. During such absence either annual, sick or LWOP is taken by the employee depending on the reason for the absence, and the employee's leave balances.

Q. Can a step increase be deferred as a result of FMLA?

A. It can happen, but is not likely. There is a maximum of 12 weeks during a leave year for leave taken as FMLA. An employee must have 13 weeks of LWOP during the step increase wait period for a step increase to be deferred. I should mention that the Family and Medical Leave Act does not require accrual of any rights or benefits during a period of leave.

Q. Do employees retain the no-layoff protection when FMLA interrupts the 20 pay periods worked per year during the six year period of continuous service?

A. Yes. However, since the maximum FMLA time off is 12 weeks or 6 pay periods per leave year, loss of the no-layoff protection would normally be for other reasons. The only time FMLA would interrupt the years required for protection is in cases where more than 12 weeks of FMLA during two different "leave" years result in more than 6 pay periods of absence during an individual employee's "anniversary" year. In these rare cases the no-layoff protection must manually be restored. This is accomplished by sending a memorandum to the Minneapolis Information Service Center.

American Postal Workers Union, AFL-CIO
1300 L Street, NW, Washington, DC 20005

March 9, 1994

William Burrus
Executive Vice President
(202) 842-4246

Dear Ms. Cagnoli:

Since our last meeting on the Family and Medical Leave Act a number of questions have arisen that require uniform responses. It is important that the parties practice and the implementation of the law be consistent with the intent of Congress.

Following are the questions and the union's interpretation of the law:

1. What certification is required for employees requesting FMLA because of the birth or placement of a son or daughter and in order to care for such son or daughter after birth:

The required information is limited to:
Employee's Name
Name of employee's son or daughter
Date of birth or placement of this son or daughter
Employee's signature

(Optional Form WH-380)

2. Is medical certification required for the birth or placement of a son or daughter?

No, unless the employee is requesting intermittent leave or a reduced schedule

(Optional Form WH-380)

3. Can an employee use intermittent leave or work a reduced schedule for the birth of a son or daughter or to care for a newborn son or daughter?

Yes, but only with the agreement of the employer.

825.203

4. Can an employee use intermittent leave or work a reduced schedule because of pregnancy or the serious health condition of a newborn child?

Yes, provided the mother or the newborn child has a serious health condition

825.101

5. Is the employer's approval required for an employee to use intermittent leave or work a reduced schedule if the employee, spouse, child or parent have a serious health condition?

No, provided proper medical certification has been provided. (The employee must attempt to schedule their leave so as not to disrupt the employer's operation and may be assigned to an alternative position with equivalent pay and benefits that better accommodates the intermittent or reduced leave schedule)

825.203 825.117

6. Is an employee entitled to FML if their absence is required during procedures intended to induce pregnancy, ie in-vitro fertilization and other insemination procedures?

Yes, as certified by the attending physician
825.114 (c)

7. Is treatment for substance abuse covered as a serious health condition?

Yes, provided a stay in an in-patient treatment facility is required

825.114

8. Is an employee required to provide medical documentation for each absence after a medical physician has certified that the employee is receiving continuing treatment?

No, provided the medical certification includes an explanation of the continuing treatment under the supervision of the health care provider to resolve the health condition

825.114

9. Does the employee have the option of using LWOP in conjunction with annual or sick leave for FML?

Yes, provided the absence is covered by the provisions of FMLA

825.208 Article 10, Sec 6

10. Can an employee be disciplined or receive other administrative action for absences covered by the FMLA?

No

825.220

11. What can an employer do if it questions the adequacy of a medical certification?

If the certification includes the required information as contained on Form WH 380, the employer may only require the employee to obtain a second opinion at the employers expense.

11. Is advance written notice required for employees use of FML?

No, in the case of a medical emergency the employee should provide notice by telephone, telegraph, fax or other electronic means. Additional information must be provided when it can readily be accomplished as a practical matter.

825.302 825.303

13. Can properly submitted Family and Medical Leave request be denied because of operational reasons?

No. If the absence is otherwise justified under the FMLA, the leave cannot be denied

825.100 825.112

14. If an employee provides notice of the need for FMLA leave, what information must the employer provide to the employee?

A. Whether or not the leave will be counted against the FMLA entitlement

B. Any requirements for the employee to furnish medical certification and the consequences of failing to do so

C. The employee's right to substitute paid leave or LWOP

D. Any requirement for the employee to make health benefit payments and the arrangements for making such payments

E. Any requirement for the employee to present a fitness-for-duty certificate to be restored to employment

F. The employee's right to restoration to the same or an equivalent job upon return from leave

G. The employee's potential liability for payment of health insurance premiums paid by the employer if the employee fails to return to work

825.301 (c)

Thank you for your attention to this matter.

Sincerely,

William Burrus
Executive Vice President

Sherry Cagnoli, Manager
Labor Relations
475 L'Enfant Plaza, SW
Washington, DC 20260

WB:rb

LABOR RELATIONS

UNITED STATES
POSTAL SERVICE

'96 DEC 12 A10:00

GRIEVANCE & ARBITRATION
PROCESSING CENTER-3005

December 9, 1996

HOLLOWAY ADAIR

SUBJECT: Clarification of Family and Medical Leave Act (FMLA) Issues

This is in response to the questions you raised concerning the Postal Worker article written by Mr. Burrus regarding some basic FMLA principles.

First, please note that Mr. Burrus' article is part of a union publication and the union has every right to print their viewpoint in their publication. They are not obligated to include the Postal Service's viewpoint. Moreover, since almost all FMLA issues require additional and further information, to rely on the union's opinion concerning these issues would be erroneous. While we may agree on the basic premise of the law, we could disagree either on the application or the interpretation as it concerns postal policy. Therefore, the following explanations are provided in response to your specific concerns.

Item 1. There have been numerous instructions concerning retention and review of "restricted records." "Restricted records" should be forwarded to the medical unit, returned to the employee, or destroyed. While we disagree with the union's plan to request damages for the illegal retention of records, grievances where the Postal Service would be found guilty of violating its own rules concerning the retention or review of restricted records should not be pursued to arbitration or to the courts.

Item 2. On the issue of return to duty, there is confusion engendered by the multi-part 825.310, one section of which says "certification need only be a simple statement of an employee's ability to return to work," but continues on from there to explain that more is allowed. The "simple statement" is just a starting point. The restrictive information really applies to ***other*** (emphasis added) information an employer may try to obtain from the employee's health care provider, but it's clear that clarification can be requested for the serious health condition.

475 L'ENFANT PLAZA SW
WASHINGTON DC 20260-4100

It's important to note that this section is superseded by subsections (a) and (b). Specifically, subsection (b) clearly provides that where the terms of a collective bargaining agreement govern an employee's return to work, these provisions ***shall*** be applied (emphasis added).

Therefore, if an employee is out more than 21 days, is hospitalized, or has one of the other conditions listed in Handbook EL-311, Section 342, the employee must be notified that upon return to work he must provide acceptable medical evidence of his fitness or his return may be delayed. This medical evidence is submitted to a postal medical officer or to a contract physician for evaluation.

When the employee's serious health condition does not fall into any of the conditions set forth in the EL-311 and the Employee Labor Relations Manual (ELM), the supervisor should accept the "simple statement" that the employee is able to return to work. The key is that the employee cannot be delayed from returning to work when his health care provider certifies that he is "able to return" to work unless the employee has been notified that his absence requires medical evidence of his ability to return to work pursuant to EL-311, Section 342, and the ELM.

Item 3. Disciplinary action against any employee should not include any absences covered by FMLA (825.220.3b).

The APWU has been told that in any case where an absence has been certified and designated as a FMLA protected absence, and such absence has been inadvertently included in a disciplinary action, the Postal Service will strike out that absence and proceed with the disciplinary action if appropriate. The discipline may also be rescinded and reissued minus the FMLA absence(s). The Postal Service does not agree with the union's position that the inclusion of FMLA makes the discipline defective and that the action must be withdrawn.

Item 4. The employer is required to provide employees with a written notice of their rights and obligations. Notice to employees is satisfied with proper posting of the FMLA Poster 1420 at the work site and giving the employee a copy of a properly annotated PS 3971 with a Publication 71 each time the employee gives notice of the need for FMLA leave. The Publication 71 must be provided to the employee no less often than the first time in each six-month period that an employee takes FMLA leave.

While we understand the APWU's desire to use correspondence to prove their point, we don't concede that their interpretation represents any type of agreement beyond those points specifically dictated by the FMLA statute.

The Postal Service will continue to comply with the collective bargaining agreement and federal law.

Should you need additional information, please contact me at (202)268-3823.

Corine T. Rodriguez

Corine T. Rodriguez
Labor Relations Specialist

cc: Area Labor Relations Specialists

FAMILY AND MEDICAL

LEAVE ACT

(FMLA)

REFERENCE

MATERIAL

for

US Postal Service

Compensation and Benefits
Human Resources
(202) 268-4205
March, 1995

FOREWORD

This Family and Medical Leave Act (FMLA) reference material was compiled for the sole purpose of minimizing the need for Postal Service employees to regularly refer to the full document containing the final FMLA regulations. Its contents are based on the Department of Labor (DOL), Wage and Hour Division's final regulations issued as 29 CFR, Part 825, in the January 6, 1995 "Federal Register". Topics included in this material have the related sections of 29 CFR, Part 825, noted in parenthesis by the topic heading.

Only sections pertaining to the most common situations encountered are included, and some of the requirements are paraphrased for brevity. There is no intent to change any requirement from the full DOL regulations. For additional information concerning FMLA regulations or for clarification of information in this material, the DOL regulations must be referenced. In case of any conflict between this material and the DOL regulations, the DOL regulations are to be applied.

A listing of topics covered in the full DOL regulations is included as Appendix I in this material. Each Human Resource office in major Postal Service locations should maintain a current copy of the full DOL regulations on file.

Approval of the type of leave to be charged (i.e. annual, sick, or LWOP), cost and payment procedures for health insurance, and benefit coverage are the same for employees on FMLA leave as for employees not on FMLA leave and are absent on approved sick leave, annual leave or leave without pay.

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A.

ONE-PAGE SUMMARY OF FMLA PROCEDURES & RECORD KEEPING

(a) PS Poster 43, "Your Rights under the Family and Medical Leave Act of 1993", is to be permanently posted at each Postal Service facility where it can readily be seen by employees and employment applicants.

(b) Form PS 3971, "Request for or Notification of Absence", is submitted by the employee stating the reason for the leave.

(c) The Supervisor is responsible for determining if:

(i) The reason for the absence is a condition covered by the FMLA.

(ii) Additional documentation is required to know whether or not the FMLA applies.

(iii) Annual leave, sick leave , or leave without pay is to be charged under postal leave policies and applicable labor agreements.

(d) In approving the request, when the reason appears to be a FMLA covered condition, either "FMLA" or "FMLA pending additional documentation" is to be noted in the PS 3971 approval block. Also, any additional information or documentation required is to be written on, or attached to, the PS 3971.

(e) The employee's copy of the completed PS 3971 is returned to the employee with a copy of Publication 71, "Notice for Employees Requesting Leave for Conditions Covered by the Family and Medical Leave Act." Publication 71 need only be given once every six months for the same condition.

(f) Recertification of medical conditions may be requested at reasonable intervals, but no more often than 30 days or the minimum duration specified by the health care provider, unless:

(i) The employee requests an extension of the leave;

(ii) Circumstances described by the previous certification has changed; or

(iii) Information is received that casts doubt upon the continuing validity of the certification.

(g) PS 3971 and supporting documentation is maintained for three years. Detailed medical records are to be maintained in the medical unit.

B. FMLA LEAVE ELIGIBILITY (825.109, 825.110)

An employee is eligible for FMLA leave if he or she has:

(a) a total of 12 months career or other service with the Postal Service -- the 12 months do not have to be consecutive; and

(b) worked in the Postal Service for at least 1,250 hours during the 12 months immediately preceding the start of the leave -- the 1,250 hours must be actual work, and does not include time on any type leave.

(c) There are no exclusions in the Postal Service for "key employees"or employees in work sites with fewer than 50 employees within 75 miles.

C. FMLA COVERED CONDITIONS (825.112, 825.201, 825.208)

(a) Because of the birth of a son or daughter and to care for the son or daughter during the first year after birth.

(b) Because of the placement of a son or daughter with the employee for adoption or foster care.

(c) To care for the employee's spouse, parent, son or daughter who has a serious health condition.

(d) For the employee's own serious health condition, including pregnancy and prenatal care, that makes the employee unable to perform his or her job.

In all circumstances, it is the supervisor's responsibility to designate leave as FMLA qualifying, and give notice of the designation on the employee's copy of the PS 3971.

D. AMOUNT OF FMLA LEAVE (825.200, 825.202, 825.205)

Up to 12 workweeks (12 times the employee's normal scheduled hours per week, up to 40 hours) of absence must be granted per leave year[1] for one or more of the covered conditions. An employee could, possibly, take 12 weeks of leave at the end of the leave year and another 12 weeks at the beginning of the following year.

A husband and wife who are both employed by the Postal Service and eligible for FMLA leave may each take 12 workweeks of leave during a leave year. This is true even though the FMLA only requires that they be allowed a combined total of 12 workweeks in some circumstances.

E. ABSENCES QUALIFYING AS FMLA LEAVE (825.207, 825.208)

(a) In all cases the supervisor is responsible for designating whether or not an absence is FMLA qualifying and to give notice of the designation to the employee. Conditions noted in C, FMLA Covered Conditions, above qualify. However, for absences caused by a serious health condition, postal supervisors normally should not make the decision whether or not the condition meets the FMLA definition of serious health condition, but should have a current certification from a health care provider that the FMLA definition of serious

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1. Postal Service leave year starts with the first pay period that begins in a calendar year and ends with the start of the next leave year.

health condition is met. The optional DOL form WH-380, Certification of Serious Health Condition, found as Appendix II of this material, may be used to obtain current certification. See topic P on page 7 for certification information to be provided by the employee.

(b) If the supervisor has the requisite knowledge to determine leave is for an FMLA reason and fails to designate it as FMLA leave, the absence may not retroactively be designated as FMLA leave. The absence may be designated as FMLA leave only prospectively as of the date the employee is notified that it will be designated as FMLA leave. In such circumstances the employee is provided to the full protection of the Act for the entire period of the absence, but none of the absence preceding the employee's notice of the designation may be counted as part of the 12 workweeks of FMLA leave.

(c) Supervisors may not designate leave as FMLA leave after the employee has returned to work with two exceptions:

(i) If the employee was absent for an FMLA reason and the employer did not learn the reason for the absence until the employee's return (e.g., where the employee was absent for only a brief period), the employer may, upon the employee's return to work) designate the leave retroactively with appropriate notice to the employee.

(ii) If the supervisor knows the reason for the leave but has not been able to confirm that the leave qualifies under FMLA, or where the supervisor has requested medical certification which has not yet been received, or the parties are in the process of obtaining a second or third medical opinion, the supervisor should make a preliminary designation, and so notify the employee, at the time leave begins, or as soon as the reason for the leave becomes known. Upon receipt of the requisite information from the employee or of the medical certification which confirms the leave is for an FMLA reason, the preliminary designation becomes final. If the medical certifications fail to confirm that the reason for the absence was an FMLA reason, the supervisor must withdraw the designation (with written notice to the employee).

(d) If the supervisor did not know the leave was used for an FMLA reason and has not designated the leave as FMLA leave, but the employee desires that the leave be counted as FMLA leave, the employee must notify the employer within two business days of returning to work that the leave was for an FMLA reason. In the absence of such timely notification by the employee, the employee may not subsequently assert FMLA protections for the absence.

(e) Sick leave used for a medical condition which is not a serious health condition can not be counted as part of the 12 workweek FMLA entitlement. However, when employees take sick leave that turns into a serious health condition (e.g., bronchitis that turns into bronchial pneumonia) and then gives notice of the need for an extension of leave, the entire period of the serious health condition may be counted as FMLA leave.

(f) When an on-the-job injury results in a serious health condition, time off under C.O.P. and O.W.C.P. is counted as part of the 12 workweeks per leave year for FMLA.

(g) Once the employer learns that the leave is for an FMLA required reason, the employee must be promptly (within two business days absent extenuating circumstances) notified the leave is designated as FMLA leave. Oral notices that the leave is designated as FMLA leave shall be confirmed in writing no later than the greater of one week or the following payday.

(h) Discussions to resolve any disputes on whether paid leave qualifies as FMLA leave and the discussion must be documented.

F. TYPE OF LEAVE (825.207, 825.208) (ELM 514.22)

Annual leave or leave without pay may be requested for conditions (a), (b), or (c) in section C above. Annual leave, sick leave, or annual may be requested for condition (d). The supervisor may require the employee to substitute accrued annual or sick leave for LWOP. Postal leave policies and applicable labor agreements provide that this is an administrative decision based on the needs of the employee, the needs of the Postal Service, and the cost of the Postal Service.

Sick leave is available only for the employee's own health condition or for exposure to, or caring for, a family member with a contagious disease ruled as requiring quarantine, or restriction of movement of the patient for a particular period by the health authorities having jurisdiction.

G. FAMILY MEMBER DEFINITION (825.113)

(a) Spouse: Husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides.

(b) Parent: A biological parent or individual who has or had day-to-day responsibilities to care for and financially support the employee when the employee was a child.

(c) Son or Daughter: A biological, adopted, or foster child, stepchild, a legal ward, or a child for whom the employee has day-to-day responsibilities to care for an financially support, who is under age 18, or age 18 or older and incapable of self-care due to a mental or physical disability.

H. HEALTH CARE PROVIDER DEFINITION (825.118) (ELM 513.364)

Doctor of Medicine or other attending practitioner.

I. SERIOUS HEALTH CONDITION DEFINITION (825.114)

For purposes of FMLA, a serious health condition must be documented and involves either (a), (b), (c), (d), (e), or (f) as follows:

(a) An overnight, or longer, stay in a medical care facility, including any related periods of incapacity, recovery, and subsequent treatments in connection with or consequent to such inpatient care; or

(b) A period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom) of more than three consecutive calendar days, and including any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(i) 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

(ii) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

Examples of such regimen of continuing treatment includes, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regime of continuing treatment for purposes of FMLA leave.

(c) Any period of incapacity due to pregnancy, or for prenatal care.

(d) Any period of incapacity or treatment for incapacity due to a chronic condition which may not require a visit to the health care provider for each absence, but:

(i) 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;

(ii) Continues over an extended period of time (including recurring episodes of a single underlying condition; and

(iii) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

(e) 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, a severe stroke, or the terminal stages of a disease.

(f) Any period of absence to receive multiple treatments (including any period of recovery therefrom) 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 that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis).

Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not "serious health conditions" unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health condition provided all the other conditions of this regulation are met. Mental illness resulting from stress or allergies may be serious health conditions, but only if all the conditions of this section are met.

Substance abuse may be a serious health condition if the conditions of this section are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

J. NEEDED TO CARE FOR A FAMILY MEMBER WITH A SERIOUS HEALTH CONDITION (825.116)

The medical certification provision that an employee is "needed to care for" a family member

encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor, etc. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse, or parent with a serious health condition who is receiving inpatient or home care.

The term also includes situations where the employee may be needed to fill in for others who are caring for the family member, or to make arrangements for changes in care, such as transfer to a nursing home.

An employee's intermittent leave or a reduced leave schedule necessary to care for a family member includes not only a situation where the family member's condition itself is intermittent, but also where the employee is only needed intermittently -- such as where other care is normally available, or care responsibilities are shared with another member of the family or a third party.

K. LEAVE TAKEN ON INTERMITTENT OR REDUCED SCHEDULE BASIS (825.203, 825.204, 825.117, 825.306)

Leave may be taken intermittently or on a reduced work schedule when medically necessary as described in the health care provider's certification of the serious health condition. Also, the treatment regimen and other information described in the certification meets the requirement for the medical necessity of intermittent leave or a reduced work schedule. Employees needing intermittent FMLA leave or a reduced work schedule must attempt to schedule their absences so as to have the least disruption to the employer's operations. In addition, the employee may be assigned to an alternative position with equivalent pay and benefits that better accommodates the employee's intermittent or reduced work schedule.

After the birth or placement of a child, FMLA leave may be taken intermittently only if the supervisor agrees, except when the mother or child has a serious health condition.

L. FLSA EXEMPT EMPLOYEES (825.206)

An employee exempt from Fair Labor Standards Act (FLSA) normally may not take leave in less than one day increments. However, FMLA leave taken on an intermittent or reduced work schedule basis can be taken in less than one day increments without affecting the employee's FLSA exempt status.

M. NOTICES TO EMPLOYEES (825.300, 825.301)

WH Publication 1420 (formerly USPS Poster 43), "Your Rights under the FMLA of 1993" must be permanently posted at each postal facility in a prominent position where it can be readily seen by employees and applicants for employment. See Appendix IV.

For each leave request submitted in writing or orally, the employer must provide the following information within 2 days of determining that the absence qualifies as FMLA leave:

(a) whether or not the absence is designated as FMLA leave;

(b) any additional documentation the employee needs to furnish; and

(c) the type leave, i.e., annual leave, sick leave, or leave without pay to be charged.

If the employee is not at work, the information must be mailed to the employee's home address. The information should be provided on the employee's copy of form PS 3971, "Request for or Notification of Absence", with a copy of Publication 71, "Notice for Employees Requesting Leave for Conditions Covered by the Family and Medical Leave Act".

N. NOTICES EMPLOYEES PROVIDE FOR FORESEEABLE FMLA LEAVE (825.302)

An employee should request leave 30 days before FMLA leave is to begin if the leave is foreseeable. If 30 days is not practicable, the request should ordinarily be made within 2 days of when the need for leave becomes known to the employee.

The employee need not mention FMLA, but only state that leave is needed for an expected birth or adoption, for example. The supervisor should question the employee further if it is necessary to have more information to determine if the leave is being sought for a FMLA covered condition. Medical certification may be required to determine if the leave is because of a serious health condition.

When planning medical treatments or to care for others, the employee must consult with the supervisor and make a reasonable effort to schedule the leave so as not to unduly disrupt operations, subject to the approval of the health care provider.

O. NOTICES EMPLOYEES PROVIDE WHEN FMLA IS NOT FORESEEABLE (825.303)

When the approximate timing of the leave is not foreseeable, the employee should request leave as soon as practicable under the circumstances. The request is to be made no more than 1 or 2 working days after the need for leave becomes known, except in extraordinary circumstances.

The employee need not specify, or even mention FMLA, but only state that leave is needed. In such cases the supervisor is expected to obtain any additional required information through informal means. The employee or spokesperson will be expected to provide more information as soon as practical.

P. MEDICAL CERTIFICATION TO SUPPORT FMLA LEAVE (825.305, 825.306, 825 Appendix B, Form WH-380 and its Attachment)

Certification by the health care provider is required for leave requested to care for a seriously ill family member or because of the employee's own serious health condition. No less than 15 calendar days can be allowed for the employee to provide the certification. When the certification is found to be incomplete, the employee is to be advised and provided a reasonable opportunity to cure the deficiency.

No specific form is required for medical certification. Documentation from the employee's attending physician or other attending practitioner is acceptable in any format. However, the DOL optional form WH-380, Certification of Health Care Provider, found as Appendix II of this material, provides the required information. In any case the documentation should contain the following:

(a) The health care provider's name, address, phone number, and type of practice, and the patient's name.

(b) A certification that the patient's condition meets the FMLA definition of serious health condition, supporting medical facts, and a brief statement as to how the medical facts meet the definition's criteria.

(c) Approximate date the serious health condition commenced, its probable duration, and the probable duration of the patient's present incapacity, if different.

(d) Whether the employee will need to take leave intermittently or to work on a reduced schedule as a result of the serious health condition; and if so, the probable duration of such schedule, an estimate of the probable number and interval between episodes of incapacity, and period required for recovery, if any.

(e) For pregnancy or a chronic serious health condition: whether the patient is presently incapacitated and the likely duration and frequency of episodes of incapacity.

(f) For employee's own condition, including pregnancy or a chronic condition: whether the employee is unable to perform work of any kind; any parts of the employee's job he or she is unable to perform; and if the employee must be absent from work for treatment.

(g) If additional or continuing treatments are required: nature and regimen of the treatments, an estimate of the probable number, length of absence required by the treatments, and actual or estimated dates of the treatments if known.

(h) If leave is required to care for a family member with a serious health condition: whether the patient requires assistance for basic medical or personal needs or safety, or for transportation; or if not, whether the employee's presence to provide psychological comfort would be beneficial to the patient or assist in the patient's recovery; and probable duration of the need for care or an intermittent or reduced work schedule basis. The employee is required to indicate on the form the care he or she will provide and an estimate of the time period.

Q. ADEQUACY OF MEDICAL CERTIFICATION IS QUESTIONED (825.307)

When certification is submitted with the information noted above missing, the employee may be requested to provide the additional information. However, if an employee submits a complete certification signed by the health care provider, the supervisor may not request additional information from the employee's health care provider. A health care practitioner representing the Postal Service, though, may contact the employee's health care provider, with the employee's permission, for purposes of clarification and authenticity of the medical certification.

If an employee is on FMLA leave that is running concurrently with a workers' compensation absence, and the provisions of the workers' compensation statute permit the employer or the employer's representative to have direct contact with the employee's workers' compensation health care provider, the employer may follow the workers' compensation provisions.

A supervisor who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the Postal Service's expense. Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits and protection provided by the Act. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave and may be treated as leave under leave policies. The Postal Service is permitted to designate the health care provider to furnish the second opinion, but the selected health care provider may not be employed on a regular basis by the supervisor. The employer may not regularly contract with or otherwise regularly utilize the services of the health care provider furnishing the second opinion unless the employer is located in an area where access to health care is extremely limited.

If the opinions of the employee's and the employer's designated health care providers differ,

the supervisor may require the employee to obtain certification from a third health care provider, again at the Postal Service's expense. This third opinion shall be final and binding. The third health care provider must be designated or approved jointly by the supervisor and the employee. The supervisor and the employee must each act in good faith to attempt to reach agreement on whom to select for the third opinion provider. If the Postal Service does not attempt in good faith to reach agreement, the Postal Service will be bound by the first certification. If the employee does not attempt in good faith to reach agreement, the employee will be bound by the second certification. For example, an employee who refuses to agree to see a doctor in the specialty in question may be failing to act in good faith. On the other hand, an employer that refuses to agree to any doctor on a list of specialists in the appropriate field provided by the employee and whom the employee has not previously consulted may be failing to act in good faith.

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

If the employee is required to obtain either a second or third opinion the Postal Service will reimburse the employee or family member for any reasonable "out of pocket" travel expenses incurred to obtain the second and third medical opinions.

R. RECERTIFICATION OF MEDICAL CONDITIONS (825.308)

Requests for recertification may be made at any reasonable interval, but not more often than 30 days or until the minimum duration specified by the health care provider has passed unless:

(a) The employee requests an extension of leave;

(b) Circumstances described by the previous certification have changed significantly (e.g., the duration of the illness, the nature of the illness, complications); or

(c) The employer receives information that casts doubt upon the continuing validity of the certification.

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

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

S. EMPLOYEE FAILS TO SATISFY CERTIFICATION REQUIREMENTS (825.311)

In the case of foreseeable leave, an employer may delay the taking of FMLA leave to an employee who fails to provide timely certification after being requested by the supervisor to furnish such certification (i.e., within 15 calendar days, if practicable), until the required certification is provided. When the need for leave is not foreseeable, or in the case of recertification, an employee must provide certification (or recertification) within the time frame requested by the supervisor (which must allow at least 15 days after the supervisor's request) or as soon as reasonably possible under the particular facts and circumstances. In the case of a medical emergency, it may not be practicable for an employee to provide the required certification within 15 calendar days. If an employee fails to provide a medical certification within a reasonable time under the pertinent circumstances, the employer may delay the

employee's continuation of FMLA leave. If the employee never produces the certification, the leave is not FMLA leave.

T. CIRCUMSTANCES ALLOWING DELAY OR REFUSAL OF FMLA LEAVE OR REINSTATEMENT (825.312)

(a) If an employee fails to give timely advance notice when the need for FMLA leave is foreseeable, the employer may delay the taking of FMLA leave until 30 days after the date the employee provides notice to the supervisor of the need for FMLA leave.

(b) If an employee fails to provide in a timely manner a requested medical certification to substantiate the need for FMLA leave due to a serious health condition, continuation of FMLA leave may be delayed until an employee submits the certificate. If the employee never produces the certification, the leave is not FMLA leave.

(c) If an employee fails to provide a requested fitness-for-duty certification to return to work, an employer may delay restoration until the employee submits the certificate.

(d) An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period.

(e) If an employee unequivocally advises the employer either before or during the taking of leave that the employee does not intend to return to work, and the employment relationship is terminated, the employee's entitlement to continued leave and restoration ceases unless the employment relationship continues, for example, by the employee remaining on paid leave.

(f) An employee may not be required to take more leave than necessary to address the circumstances for which leave was taken. If the employee is able to return to work earlier than anticipated, the employee shall provide the employer two business days notice where feasible; the employer is required to restore the employee once such notice is given, or where such prior notice was not feasible.

(g) An employee who fraudulently obtains FMLA leave from an employer is not protected by FMLA.

Supervisor's Guide

to the

Family and Medical Leave Act

and

Sick Leave for Dependent Care

Payroll Accounting
Headquarters
December 1996

Table of Contents

1. Family and Medical Leave Act (FMLA)

The Act

The Family and Medical Leave Act is a federal law which entitles eligible employees to take up to 12 workweeks of absence each year, without loss of job or benefits, for the following reasons:

1) The birth of a child and to care for that child

2) The placement of a child with the employee for adoption or foster care

3) To care for a spouse or immediate family member with a serious health condition

4) The employee's own serious health condition

Employee Protections

For an eligible employee who provides the proper certification, the FMLA provides certain basic protections:

- Employees must be allowed to retain their existing health insurance coverage under any group plan with the employee continuing to pay his/her share of the cost.

- Employees may not suffer any loss of benefits accrued before the leave began.

- Employees must be allowed to return to their same or equivalent positions at the expiration of the FMLA protected absence.

- Employees who utilize the FMLA entitlement are protected from any disciplinary action resulting solely from the absence.

Basically, the FMLA provides for up to 12 weeks of absence for a certified situation. Whether the employee receives pay or not during the absence is left to the employers normal policies. In the postal service, these include annual leave, sick leave, leave without pay, continuation of pay, and Office of Workers' Compensation Programs policies, as well as any applicable labor agreements. The substitution of paid leave for unpaid leave does not increase the total of 12 weeks maximum.

The 12 week entitlement is based on a full time schedule - 40 hours per week. Thus, full time employees are entitled to a maximum of 480 hours of FMLA protected leave per leave year. Part time and casual employees are eligible for a prorated number of hours based on their normal schedule or the number of hours worked, excluding overtime, in the past 12 workweeks, respectively.

A husband and wife who are both employed by the postal service and eligible for FMLA protected leave may each be eligible for 12 workweeks of absence during a leave year.

Definitions

Eligible Employee - To be eligible for FMLA absence, an employee (career or noncareer) must have:

a) worked for the Postal Service for at least one year prior to the leave request (this time need not be consecutive).

b) worked a total of 1,250 hours (including overtime) during the prior 26 pay periods.

Family Member -

Spouse - Husband or wife as defined or recognized under state law for purposes of marriage in the state in which the employee resides.

Parent - A biological parent or individual who has or had day to day responsibilities to care for and financially support the employee when the employee was a child.

Son or Daughter - A biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee has day to day responsibilities to care for and financially support, who is under the age of 18, or age 18 or older but incapable of self-care due to a mental or physical disability.

Serious Health Condition -

1) Illness, injury, impairment, or physical or mental condition that involves a period of incapacity or treatment in connection with an overnight stay in a hospital, hospice, or residential medical care facility.

2) Continuing treatment by a health care provider (HCP), including one or more of the following:

A. A period of incapacity of more that three consecutive calendar days that also involves either:

1) treatment two or more times by a health care provider or a provider of health care services under the orders of or referral by a health care provider; or

2) treatment by a health care provider on at least one occasion that results in a regimen of continuing treatment under the supervision of the health care provider. Examples of this type of regimen includes a course of prescription medication or therapy requiring special equipment such as a dialysis machine or oxygen tank.

B. Any period of incapacity due to pregnancy or for prenatal care;

C. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition which may not require a visit to the health care provider for each absence but:

1) requires periodic visits for treatment by a health care provider or by a nurse or physicians assistant under the direct supervision of the health care provider and

2) continues over an extended period of time and

3) may cause episodic rather than continuing incapacity (e,g., asthma, epilepsy, diabetes).

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 not necessarily the active treatment by a health care provider. Examples of this would be a severe stroke, Alzheimer's disease or the terminal stages of a disease.

E. Any period of absence to receive multiple treatments by a health care provider or provider of health care services under orders from or referral by a health care provider either for:

1) restorative surgery after accident/injury or

2) condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment.

2. Sick Leave for Dependent Care

The national agreements negotiated between the USPS and some of it's unions have resulted in a new leave type authorized for the use of sick leave. Effective Pay Period 25-96 employees in Rate Schedule Codes (RSCs) A, B, C, E, F, J, K, M, N, P, Q, R, S and U may now use up to 80 hours of earned sick leave per leave year to give care or otherwise attend to a family member with an illness, injury, or other condition, which, if the employee had that condition, would justify the use of sick leave by the employee. This leave type is referred to as Sick Leave Dependent Care (SLDC).

Employees who desire to use their earned sick leave for the purposes indicated above must complete a PS Form 3971 and provide the following, as required:

1) A statement that the sick leave is requested to care for a spouse, son or daughter, or parent,

2) An explanation of the medical facts and/or documentation relating to the leave request,

3) A statement as to the reason that the employee needs to care for or attend to the qualifying person.

The normal postal service leave policies relating to documentation requirements and right to privacy apply to the use and approval of SLDC.

While leave used for Sick Leave Dependent Care can be a unique situation, it may also qualify for FMLA protection.

When the supervisor receives a Form 3971 requesting SLDC, he/she should make a determination whether the FMLA applies to the situation. Supervisors have an obligation to advise the employee of his/her FMLA rights if the situation is due to a "serious health condition".

FMLA protection depends on the employee's eligibility and the reason for the absence. Sick leave for dependent care, just as when an employee himself/herself is sick, may or may not be covered by the FMLA. The determining factor is the existence of a "serious health condition" as defined under the FMLA. Sick leave used for dependent care which meets FMLA criteria is charged against both remaining FMLA and SLDC balances.

Leave used by an employee for SLDC which is also protected by the FMLA cannot be used as the basis for discipline or to penalize the employee in any way. Non-FMLA SLDC however, is governed by the same provisions applicable to an employee's own use of sick leave, i.e., it is not protected from the disciplinary policies in cases of abuse.

3. Employee Responsibilities

To be entitled to use FMLA protected leave, the employee must:

1) Give Advance Notice - Whenever the need for FMLA protected leave is foreseeable, the employee must provide at least 30 days advance notice that the leave will be needed. When the need id not foreseeable, the employee must provide notice as soon as practicable.

2) Provide Documentation * - The employee must provide the documentation required by the supervisor to determine whether the absence is FMLA protected. Except in unusual cases the employee will have 15 days from the time the documentation is requested to submit it. The employee may also be required to provide recertification of the existence of a serious health condition every 30 days, or more often if the situation changes substantially.

3) Maintain Scheduling Flexibility - If the employee is requesting FMLA protected leave on a reduced schedule or intermittent basis, he/she must be willing to work with the supervisor to develop a schedule that will best accommodate the needs of the employee with the least impact on the operational needs of the postal service.

Additionally, the employee may be assigned to an alternate position that will enable the postal service to continue with business as usual until the employee is able to return to his/her regular position.

4) Provide Estimated Date of Return - Regardless of which type of leave is taken the employee must provide the supervisor with the date the employee expects to return to work on a regular schedule.

* Medical Certification Required to Support FMLA Leave

Certification by the health care provider is required for leave requested due to an employee's serious health condition or to care for a qualifying family member with a serious health condition. No less than 15 calendar days can be allowed for the employee to provide the certification. When the certification is found to be incomplete, the employee is to be advised and provided a reasonable opportunity to correct the deficiency. Failure to provide the necessary certification will result in FMLA protection being denied and the leave is therefore subject to disciplinary action.

No specific form is required for medical certification. Documentation from the employee's attending physician or other attending practitioner is acceptable in any format. The Department of Labor optional form WH-380, *Certification of Health Care Provider*, contains the necessary information. In any case the documentation requirements noted in Publication 71 should be provided.

4. Supervisor Responsibilities

General

The supervisor is the main point of contact when an employee submits a leave request. It is the supervisor's responsibility to determine if the absence is covered by the FMLA, if the employee meets the FMLA eligibility criteria, to request additional documentation as necessary, and to charge the employee's leave to annual leave, sick leave, or LWOP in accordance with Postal Service leave policy and applicable labor agreements.

Determining whether a particular absence is protected by the FMLA is a methodical process and must be done consistently in each case. The supervisor, in conjunction with the medical unit if necessary, will determine if the requested absence is for "family and medical leave act reasons".

Upon receipt of PS Form 3971, the supervisor must make a preliminary determination as to whether the absence requested might be an FMLA covered absence. If the supervisor feels that FMLA coverage is possible, he/she must provide Publication 71 to the employee, along with a copy of Form 3971, conditionally approved under FMLA pending additional documentation. The employee, having received Publication 71, must provide satisfactory documentation for the absence to be FMLA protected. An employee's failure to submit the documentation within 15 calendar days may result in loss of FMLA protection from discipline based on the absence. When proper documentation has been received, and the PS Form 3971 has been finally approved as an FMLA absence, the supervisor must provide a signed copy of the Form 3971 to the employee.

In cases where there is not a clear determination of FMLA protection, the employee may be required to provide a second medical opinion, obtained off the clock at USPS expense. If that second opinion is contrary to the first, the employee may request a third, controlling opinion, also obtained off the clock at USPS expense.

If a "serious health condition" has been properly certified and that condition could cause unforeseeable, intermittent absences, the supervisor should be prepared to ask, upon receipt of a Form 3971 or phone call from the employee, whether the absence is related to the documented serious health condition. If it is, the supervisor should mark the Form 3971 as approved, FMLA. Thus, this absence may not be used as the basis for discipline.

In cases where the supervisor has no legitimate reason to know that an employee's request for leave might be FMLA protected, the employee must request FMLA designation of the leave within two days of returning from the absence, or he/she may not later request FMLA protection for that absence.

On Line Inquiry - Family Leave Display

A new on-line screen has been developed to provide managers and supervisors access to the information required to determine an employee's eligibility for FMLA protected leave and to track the amount of FMLA protected leave and SLDC taken. This screen can be viewed by using the LAN 3270 access available at each location. Employees who currently have access to the On-Line Query (OLQ) application in Distributed Data Entry / Distributed Reporting (DDE/DR) will automatically be provided access to the Family Leave Display screen.

Supervisors who do not have current access to OLQ must complete a Form 1357 requesting access to the DDE/DR system, using access group "K" and user type 'D", and forward it through normal channels. When a Logon ID has been assigned the supervisor can research the leave balances of any employee under their jurisdiction.

The information contained on the Family Leave Display screen is covered by postal service Privacy Act policies. When finished researching an employee's FMLA eligibility status, the supervisor should sign off the system to avoid leaving an employee's name and SSN displayed on an unattended PC.

The following pages provide an overview of how to access the Family Leave Display.

To access the Family Leave Display screen, the supervisor must first utilize the LAN 3270 access method to get to the USPS TCP/IP Network screen.

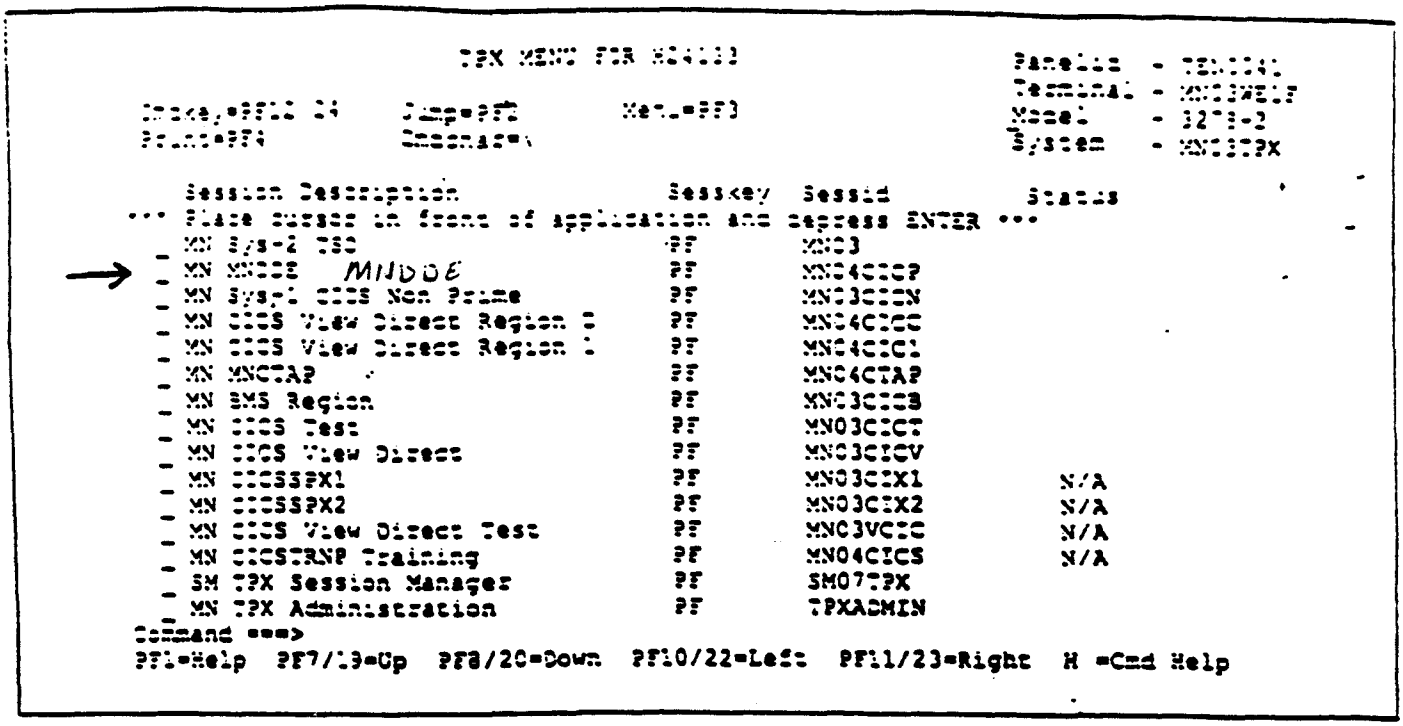
```
===> Welcome to the United States Postal Service TCP/IP Routed Network <====
                  Terminal IP Addr: ==>> 56.64.0.168    <<==

 *-------------------------------------------------------------------------*
 * Misuse Of A  USPS ADP Computer System May Result In Disciplinary Action And *
 * Criminal Prosecution. Any Detected Misuse Of An ADP System Will Be Reported *
 *               To The Inspection Service For Investigation.              *
 *-------------------------------------------------------------------------*
 *                        F O R    A S S I S T A N C E                     *
 *                                 C A L L                                 *
 *                        INFORMATION SYSTEMS SUPPORT                      *
 *                             >> COMMERCIAL <<                            *
 *                              1-800-USPSHELP                             *
 *                              1-800-877-7435                             *
 *-------------------------------------------------------------------------*

        A.. MNTPX - Minneapolis, MN          B. SMTPX - San Mateo, CA

 Enter Request: A
```

==> Enter: A and press the Enter key

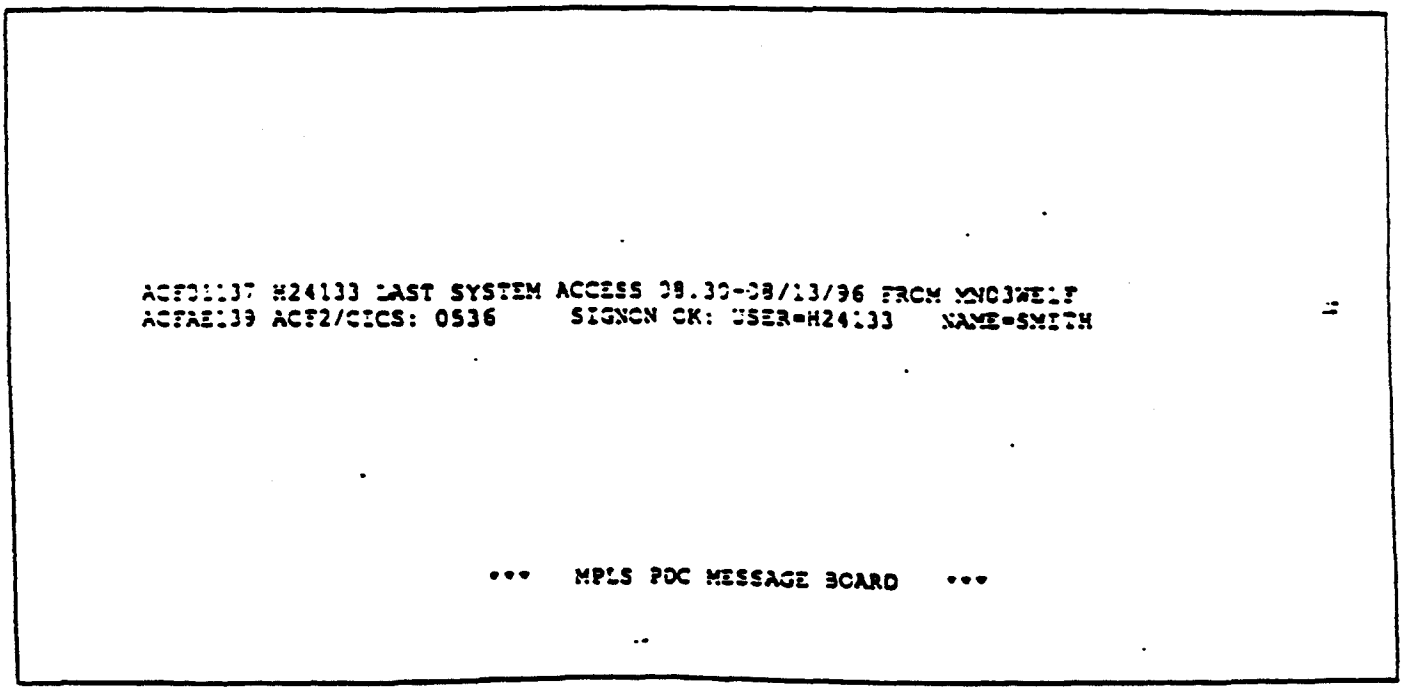
The following screen will be displayed:

```
                    Information Service Center
                      Minneapolis, Minnesota

Logon ID:                                                    08:29:18
Password:                                                    08/13/96
New Password:                                                MN03WE1F
Account:                                                     3278-2
Transfer:                                                    SMRTUSPS

WELCOME TO MINNEAPOLIS INFORMATION SERVICE CENTER.  SHOULD YOU ENCOUNTER ANY
PROBLEMS, PLEASE CALL:  1-800-877-7435 OPTION 1 -- OR -- 612-725-1222

   PF1=Help     PF3=Logoff
```

==> Enter: Your logon ID and Password and press the Enter key



==> Move the cursor to MNDDE and press the Enter key



==> Enter: D385 and press the Enter key

A blank Family Leave Display screen will be displayed:

```
USPS RESTRICTED INFORMATION

                              FAMILY LEAVE DISPLAY

SSN _ _ _-_ _-_ _ _ _     FINANCE NUMBER _ _ - _ _ _ _     DESIG __     EMPL STATUS _

NAME _____                                          EFFECTIVE PP YR ____

ENTERED ON DUTY DATE ____                           RATE SCHEDULE CODE ____

WORK HOURS PRIOR 26 PP ____                         AL PERIODS WORKED CNT ____

CURRENT AL BALANCE ____                             CURRENT SL BALANCE ____

CURRENT FMLA BALANCE ____                           CURRENT SLDC BALANCE ____


SSN ___-__-____          OPTION      I

AAD385 0001-010 ENTER SSN TO START PROCESSING
```

To verify information for a specific employee, ⟹ ENTER: The SSN for the desired employee and press the Enter key

The following screen will be displayed:

```
USPS RESTRICTED INFORMATION

                              FAMILY LEAVE DISPLAY

SSN 123-45-6789          FINANCE NUMBER 12-3456   DESIG  11    EMPL STATUS    A

NAME                  I M EMPLOYEE                              EFFECTIVE PP YR 25-96

ENTERED ON DUTY DATE       790505                 RATE SCHEDULE CODE       E

WORK HOURS PRIOR 26 PP     1850.00                AL PERIODS WORKED CNT    7

CURRENT AL BALANCE          240.00                  CURRENT SL BALANCE  520.00

CURRENT FMLA BALANCE        480.00                 CURRENT SLDC BALANCE  80.00


SSN ___-__-____          OPTION      I

AAD385 0025-10 REQUESTED RECORD DISPLAYED
               ENTER NEXT SSN OR 'E' TO EXIT
```

This is an inquiry only screen which will display the information indicated. The supervisor can verify the employee's current annual and sick leave balances as well as see how many hours of FMLA protected leave and Sick Leave for Dependent Care remain for use this leave year.

NOTE THAT THE CURRENT FMLA BALANCE ABOVE IS BASED ON FULL TIME EMPLOYEE STATUS, WITH A MAXIMUM OF 480 HOURS. IF THE EMPLOYEE REQUESTING LEAVE IS NOT A FULL TIME EMPLOYEE YOU WILL NEED TO CALCULATE THE APPROPRIATE NUMBER OF HOURS REMAINING.

5. Timekeeper Responsibilities

Manual Offices

Nine new leave type codes, referred to as non crossfoot (non x-ft) hours codes have been established to track FMLA leave. These codes must be used in conjunction with the existing hours codes for various types of leave.

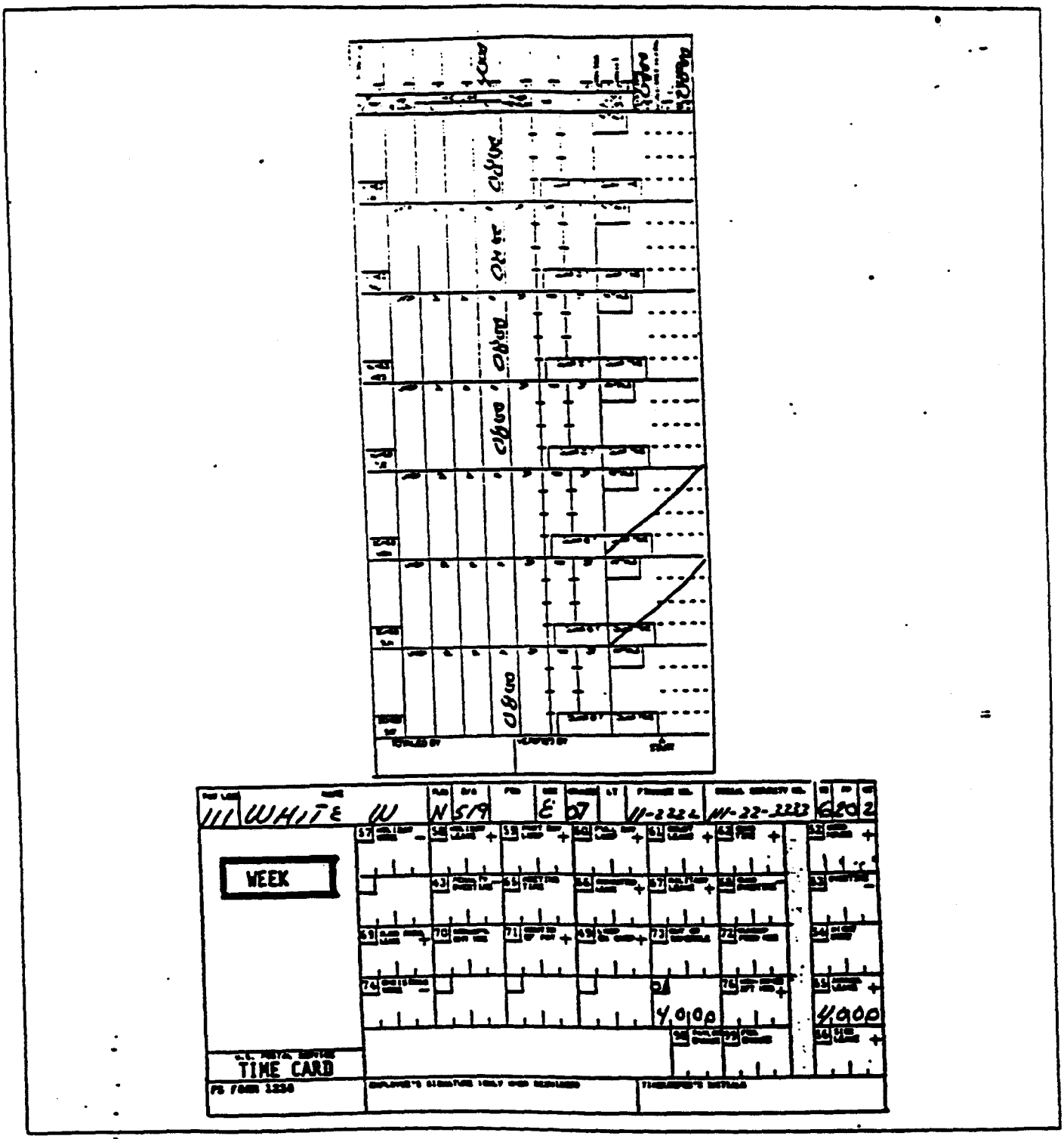
DESCRIPTION	HOURS CODE	NON X-FT HOURS CODE
FMLA Annual Leave	55	01
FMLA Sick Leave	56	02
FMLA Continuation of Pay	71	03
FMLA IOD/OWCP	49	04
FMLA LWOP Part Day	59	05
FMLA LWOP Full Day	60	06
FMLA SLDC	56	07
NON FMLA SLDC	56	08
Replacement Carrier Unavailable (Rural only)	76	09

Timekeepers in manual (time card) offices, must include not only the hours code (55, 56, 71 etc.), but also the appropriate FMLA non crossfoot hours code (01 through 09) on the front of the time card. Both codes are also required for CTAPS and PC-CTAPS processing.

All employees (including FLSA Exempt) may take less than a whole day of FMLA protected leave (01-06). Exempt employees, however, can not take less than a whole day of leave for SLDC (08) but may take less than a whole day if it also qualifies under FMLA (07).

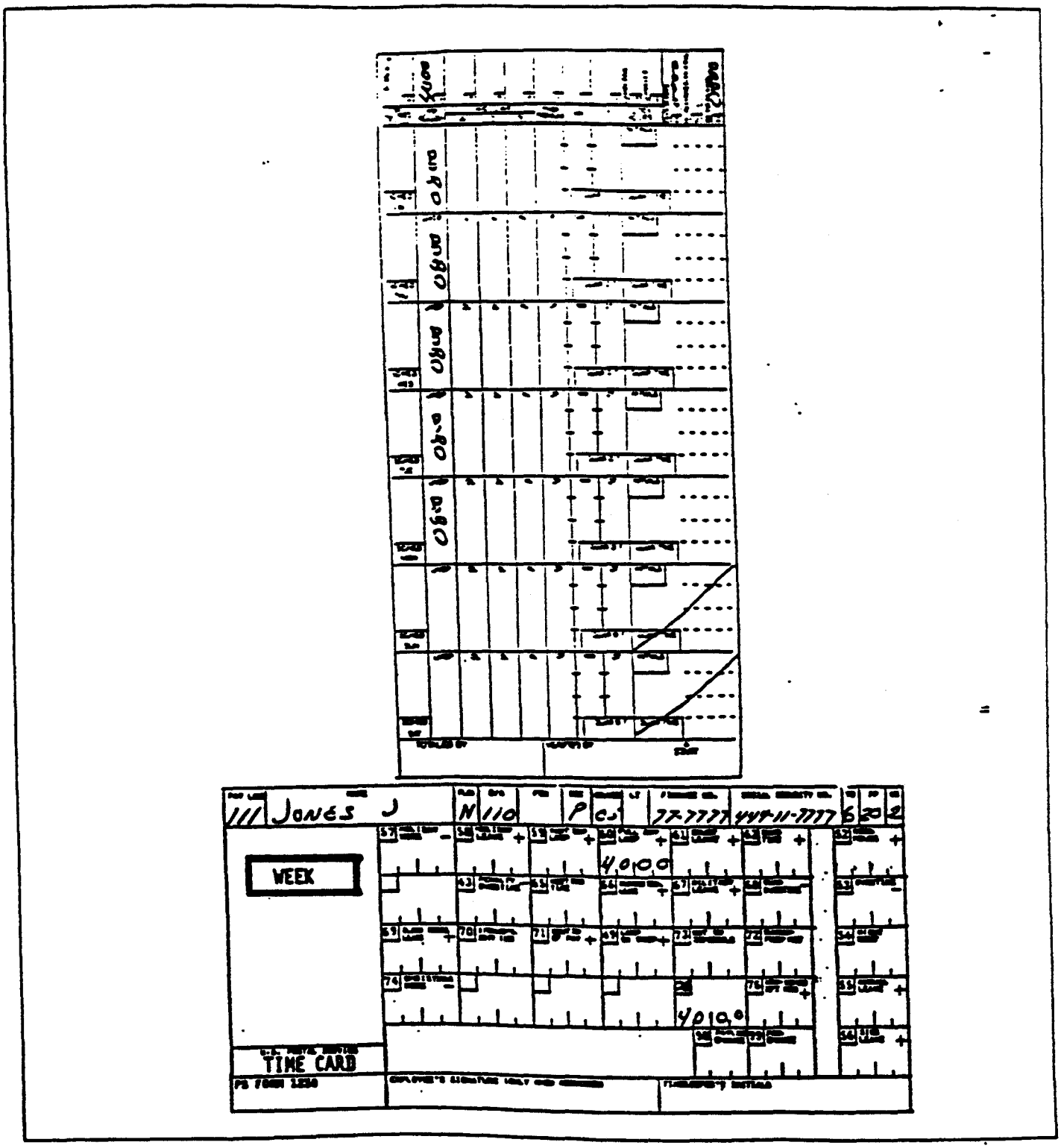
Example 1

Mr. White requests 40 hours annual leave to take his daughter to an out of state cancer clinic for treatment. The Form 1230 time card reflects 40 hours of annual leave (code 55) and 40 hours of FMLA annual leave (code 01).



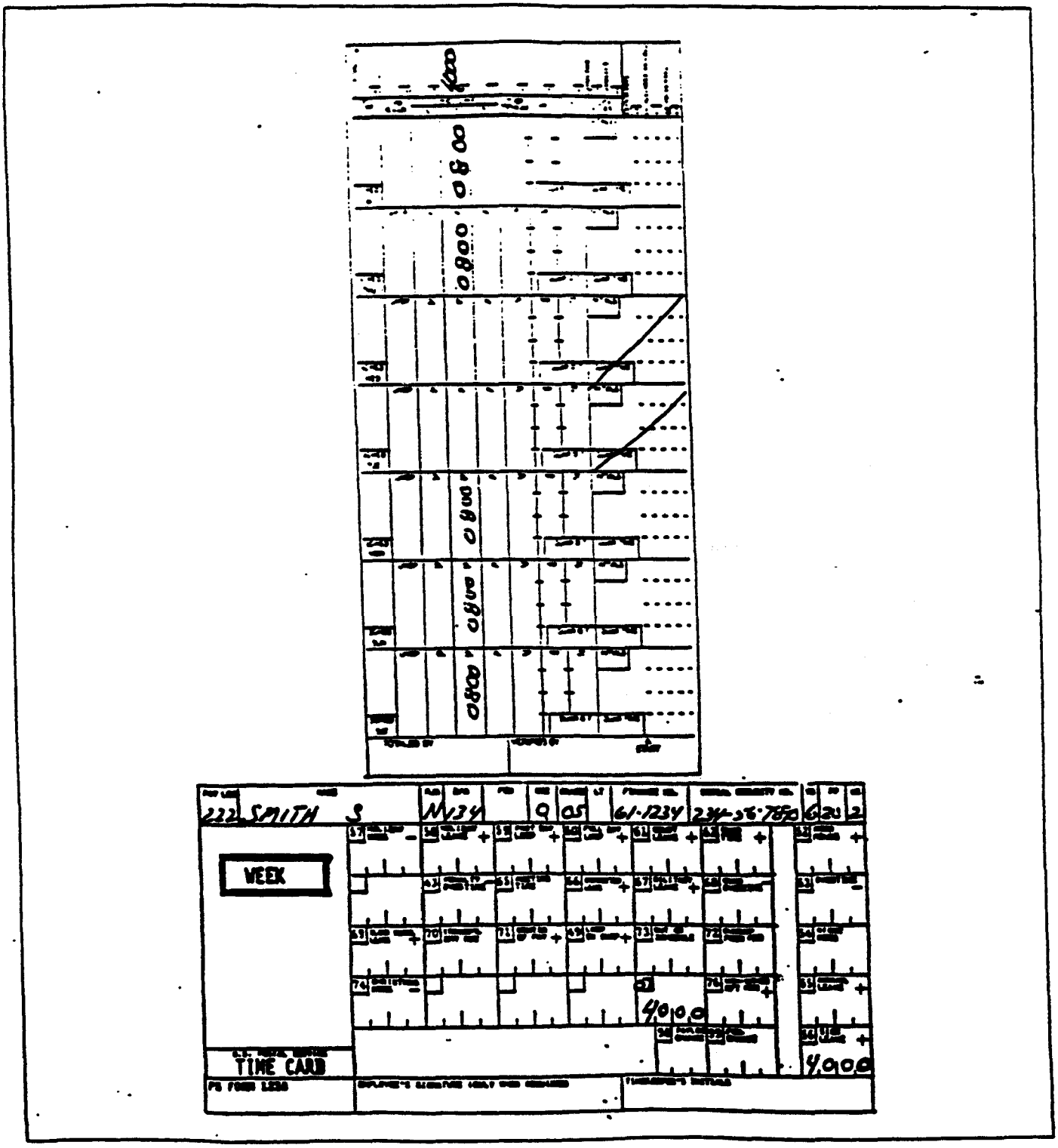
Example 2

Mr. Jones, who has a zero annual and sick leave balance, requests 40 hours of leave without pay to care for his wife who is recuperating from brain surgery. The Form 1230 time card reflects 40 hours leave without pay (code 60) and 40 hours FMLA leave without pay (code 06).



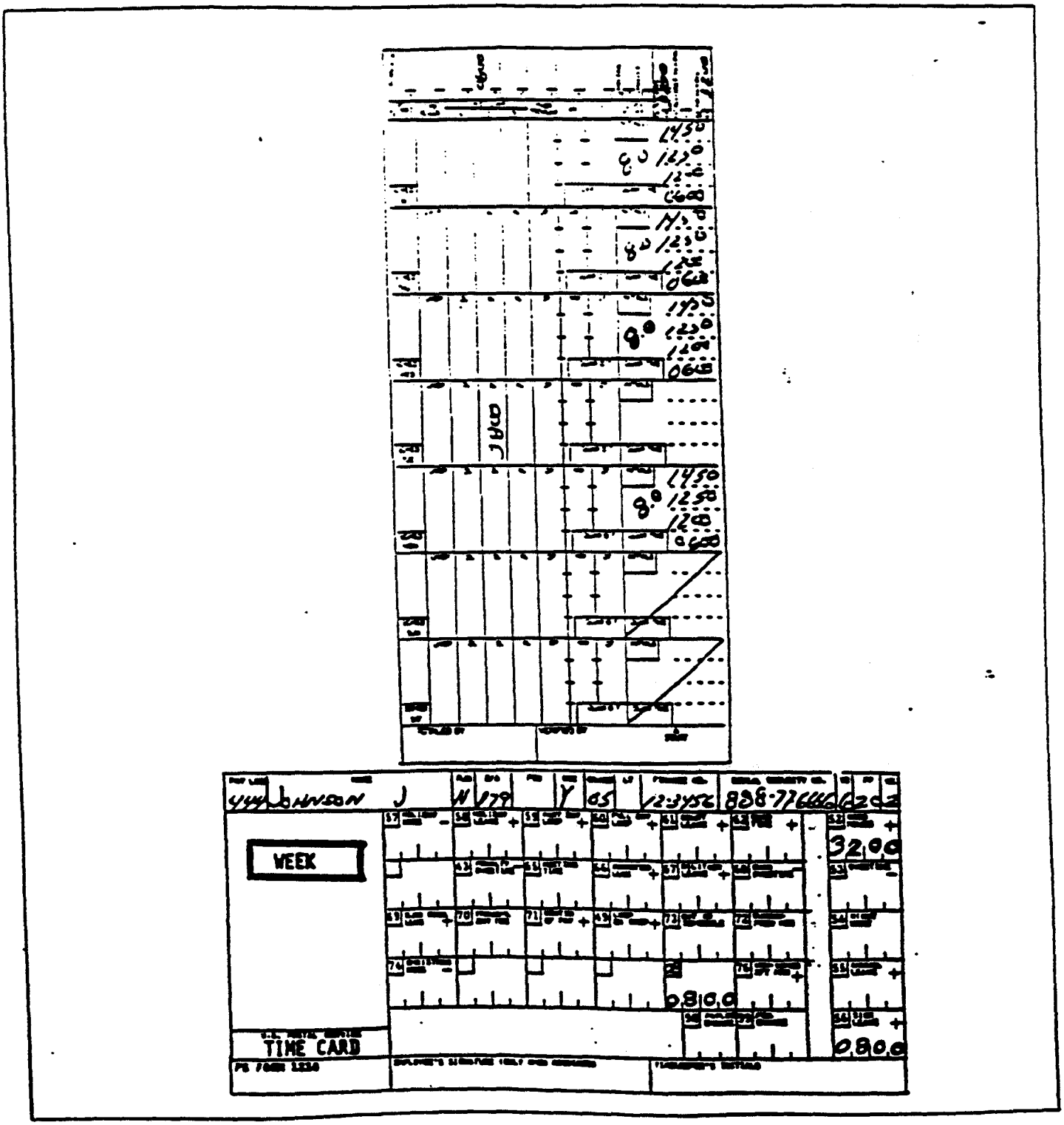
Example 3

Mrs. Smith requests 40 hours of sick leave to care for her child who has muscular dystrophy. Since this leave is to care for her ill child, the Form 1230 time card reflects 40 hours sick leave (code 56) and 40 hours FMLA sick leave dependent care (code 07).



Example 4

Mr. Johnson requested 8 hours of sick leave to transport his son to an outpatient procedure and aftercare. Since the procedure is for his son and does not meet the criteria of a "serious health condition" the Form 1230 time card reflects 8 hours sick leave (code 56) and 8 hours non FMLA sick leave dependent care (code 08).



PSDS Offices

Eight new non crossfoot hours codes have been established to track FMLA/SLDC leave:

DESCRIPTION	X-FT HOURS CODE	NON X-FT HOURS CODE
FMLA Annual Leave	55	32
FMLA Sick Leave	56	33
FMLA Continuation of Pay	71	34
FMLA IOD/OWCP	49	35
FMLA LWOP Part Day	59	36
FMLA LWOP Full Day	60	37
FMLA SLDC	56	38
NON FMLA SLDC	56	39

Timekeepers in PSDS offices must use TR 2 code to enter the leave in whole hours and TR 6 code to enter adjustments after the fact. The system will automatically adjust the necessary hours *except for the new Exempt Code Y employees.* Those hours must be 6 coded if less than whole hours or reduced after the fact to ensure proper amounts are charged.

All employees (including FLSA Exempt) may take less than a whole day of FMLA protected leave (32-38). Exempt employees, however, can not take less than a whole day of leave for SLDC (39) but may take less than a whole day if it also qualifies under FMLA (38).

If hours code 38 is used, the FMLA and SLDC leave balances will be reduced accordingly. For example, if an employee has an FMLA balance of 296 hours and SLDC balance of 72 hours, the entry of hours code 38 of eight hours will reduce these balances to 288 for FMLA and 64 for SLDC.

The T&A reports will reflect both types of hours codes (32-39) entered into the system. The time certification report will reflect the leave transactions listed above as well as the leave charges to the corresponding hours codes. It will automatically convert the codes to the appropriate leave transaction (55, 56, 71, etc.) and information transaction (32-39)

Example 1

POSTAL SOURCE DATA SYSTEM

ON-LINE INQUIRY

```
WBPDC              TIME AND ATTENDANCE ONLINE INQUIRY SYSTEM      PAGE 01 OF 01
PL 050                        FULL TIME EMPLOYEES              AS OF DPP 05 PP 19
******************  LOC    35     O/A 069 SRF 10
* FMLA021-NAPS   *  SSN 500010021 LEV 18 SCH 7   SDO-WK1 05-06
******************                          FLSA Y   SDO-WK2 12-13
 REC  SN DPP X-FT    WRK+  SUN   HOL    SL+   HL+  FDC+  SDL+
 BASE    01  8.00    2.50                3.00        1.00  1.50

 BASE    02  8.00    2.50  2.50          3.00        1.00  1.50

 BASE    03  8.00    2.50        2.50          8.00

 BASE    04  8.00    2.50                3.00        1.00  1.50

 TOTAL      32.00   10.00  2.50  2.50    9.00  8.00  3.00  4.50


(W)ORK/LEAVE SUM    (F)ORWARD PAGE    (P)REV FUNCTION    (C)OLLECTION FILE INQ
(M)ENU              (B)ACKWARD PAGE   (N)EXT EMPLOYEE    (6)CD HRS ADJUSTMENT
RESPONSE =>
                 ** END OF DATA **
```

The on-line inquiry will only reflect the new hours codes which are what the timekeeper needs to adjust in the system. Whenever the employee is still on-line use hours codes 32-39.

Example 2

FMLA
POSTAL SOURCE DATA SYSTEM

TIME CERTIFICATION REPORT

```
                                    LOC 69 D/A 067 SDO-WK1 06-07 FLSA-EXEMPT
*FMLA001          * SSN 500010001 LEV 19 SCH  E  SDO-WK2 08-09 ND 000 SP 2

D/A S LV CO-TYP X-FT   WK+52 AL+55 HL+58 IO+49 FAL32 F0035  LOC
067 E 19 BASE 0 40.00  16.00  8.00  8.00  8.00  6.00  8.00
090      TSFR           8.00                                50

                                    LOC 69 D/A 067 SDO-WK1 06-07 FLSA-EXEMPT
*FMLA002          * SSN 500010002 LEV 19 SCH  E  SDO-WK2 08-09 ND 000 SP 2

D/A S LV CO-TYP X-FT   WK+52 SL+56 HL+58 FW+60 FSL33 FLP36  LOC
067 E 19 BASE 0 40.00  14.00 10.00  8.00  8.00  6.00  8.00
090      TSFR           6.00                                50

                                    LOC 69 D/A 067 SDO-WK1 06-07 FLSA-EXEMPT
*FMLA003          * SSN 500010003 LEV 19 SCH  E  SDO-WK2 08-09 ND 000 SP 2

D/A S LV CO-TYP X-FT   WK+52 CP+71 SP*72 FCP34  LOC
067 E 19 BASE 0 40.00  32.00  8.00  7.00  4.00
090      TSFR          24.00                      50

                                    LOC 69 D/A 067 SDO-WK1 06-07 FLSA-EXEMPT
*FMLA004          * SSN 500010004 LEV 19 SCH  E  SDO-WK2 08-09 ND 000 SP 2

D/A S LV CO-TYP X-FT   WK+52 IO+49 SP*72 F0035  LOC
067 E 19 BASE 0 40.00  32.00  8.00  6.00  4.00
090      TSFR          24.00                      50

                                    LOC 69 D/A 067 SDO-WK1 06-07 FLSA-EXEMPT
*FMLA005          * SSN 500010005 LEV 19 SCH  E  SDO-WK2 08-09 ND 000 SP 2

D/A S LV CO-TYP X-FT   WK+52 FW+59 SP*72 FLP36  LOC
067 E 19 BASE 0 40.00  32.00  8.00  6.00  8.00
090      TSFR          24.00                      50
```

The Time Certification Report has been modified to display the new hours codes and abbreviations for FMLA and SLDC and will reflect exactly what the employee should be paid based on the weekly totals. The employee's FMLA hours and the appropriate leave charged will be reflected. Since FMLA in the system is strictly for reporting management information, it will not have a crossfoot indicator of + or -, nor will it have a value for crossfooting on the on the time card record. If the information on this report is incorrect a payroll adjustment must be submitted to the accounting office. Note that the hours codes and FMLA codes used on the PS Form 2240 are not the same as those used in the PSD System. For example, AL is charged as 55 on the PS Form 2240 but 01 in PSDS.

The hours codes for for FMLA/SLDC will be reflected as well as the leave hours codes. Those fields do not have to be equal in all cases. For example, if the employee takes regular annual leave as well as FMLA annual leave, it will reflect the total annual leave the employee requested. COP and IOD/OWCP will always be equal until the employee has exceeded the FMLA/SLDC balance .

Example 3

POSTAL SOURCE DATA SYSTEM

MICROFICHE

```
                                                                  CLOCK RINGS AND HOURS HISTORY                    FRAME     22
* 001-11-1016 *  FINANCE NUMBER 35-0060  PP-YR 13-96              REPORT NO. AAVG11CB  PO 000  0000000000000000
                                                                  RETENTION YEARS      DISPOSE ON
                 P/L   LOC  LV-ST  W1 W2  SPC FL ROUTE  H/D   BPP BPP                 INPUT  TR
 -EMPLOYEE NAME- D/A   SCH     SPC SDO  CODES SA     DWN  S/P VOC ROT EPP SRF OPR-LU    DAY-TIME CD   ACTION      MESSAGE

 TEST16          005 134 21 1 05  0 0 12 12       N                    00 000-00

 ----------DAILY AND WEEKLY HOURS SUMMARY---------- (NOTE: AN ASTERISK TO THE RIGHT OF LEAVE HOURS INDICATES AN UNSCHEDULED ABSENCE

R SE D/A S  LV  CD-TYP  W OPP   X-FT   WK-52 OT-53 AL-55 SL-56 FW-59 FW-60 PD-61 AD-66 FAL32 FSL33 LSL+  TRN+  FW-FB FW-PD
1                       01             8.75  8.00                      .75
1                       03   8.00                                                          8.00*
1                       04   8.00                                                          8.00*
1                       05   8.00                                  5.00*                            1.00
1                       06   8.00                                                          8.00*
1                       10   8.00                                                  8.00*
1                       11   8.00                                                          8.00*
1                       12   8.00                                                          8.00*
1                       14   8.00                2.00  6.00
     134 0  05  BASE 0  1    40.00  8.75  8.00                3.00 32.00  .75  5.00          2.00  6.00
     134 0  05  BASE 0  2    40.00                2.00  6.00       32.00                     2.00  6.00

* 001-11-1017 *  FINANCE NUMBER 35-0060  PP-YR 13-96
                 P/L   LOC  LV-ST  W1 W2  SPC FL ROUTE  H/D   BPP BPP                 INPUT  TR
 -EMPLOYEE NAME- D/A   SCH     SPC SDO  CODES SA     DWN  S/P VOC ROT EPP SRF OPR-LU    DAY-TIME CD   ACTION      MESSAGE

 TEST17       CA 005 120 14 5 04  0 1 67 12  N  N                    00 000-00

 ----------DAILY AND WEEKLY HOURS SUMMARY---------- (NOTE: AN ASTERISK TO THE RIGHT OF LEAVE HOURS INDICATES AN UNSCHEDULED ABSENCE

R SE D/A S  LV  CD-TYP  W OPP   X-FT   WK-52 OT-53 HD-54 10-69 FW-58 FW-60 CP-71 FCP3A F0035 FW-FB FW-PD LDC
1                       01   8.00   8.00        8.00
1                       02   8.00   8.00
1                       04    .50                                                   .50
2 01     3  11          04   7.50   7.50
1                       10   8.00  10.00  2.00
1                       11   8.00  10.00  2.00
```

The microfiche has also been modified to reflect FMLA and SLDC data, and will reflect the same information as the time certification report. FMLA AL is displayed as FAL32 and FMLA SL is displayed as FSL33. These hours do not add or subtract from the normal crossfoot of a time card record. Incorrect information on the microfiche must be corrected through the payroll adjustment system. Note that the hours codes for FMLA on the PS Form 2240 are not the same as those used in the PSD System.

Example 4

POSTAL SOURCE DATA SYSTEM

EMPLOYEE ACTIVITY REPORT

```
REPORT NBR=15 TC=1 PID=4     (LINE 1 PID=4 SKIP=  MARK= )    (LINE 2 PID=4 SKIP=1 MARK= )    (LINE 3 PID=4 SKIP=0 MARK= )

PO COLUMBIA PADC              PL 050          EMPLOYEE ACTIVITY REPORT              09/06/96     DPP 07 PP 19

                              LDC 35 D/A 069 SDO-WK1 05-06 FLSA-EXEMPT OPRLD-WK1  000-10 SRF-WK1 10
OFMLA020-RAPS    * SSN 500010020 LEV 18 SCH  7  SDO-WK2 12-13  RAPS-VAR  OPRLD-WK2  000-10 SRF-WK2 10

RECORD SM DPP X-FT   WORK+ SUR  WOP+  FLF  OPN  D/A  LDC
BASE 1    01  8.00   8.50       3.50 3.50
TSFR 3 01 01         8.50                      090   50

BASE 1    02  8.00   8.50 4.50 3.50 3.50
TSFR 3 01 02         8.50                      090   50

BASE 1    03  8.00   8.50       3.50 3.50
TSFR 3 01 03         8.50                      090   50

BASE 1    04  8.00   8.50       3.50 3.50
TSFR 3 01 04         8.50                      090   50

BASE 1    07  8.00   8.50       3.50 3.50
TSFR 3 01 07         8.50                450   090   50
                  BT 1200  ET 1650
          07   RESPONSE TO TR 82 DETAIL INQUIRY BY REQUESTOR 500-01-0010
          07   INV OP 450 USED - DEFAULT TO LDC 50/53 - ADJ TSFR/LOAN RECORD
```

The EAR has been modified to reflect the new hours codes for FMLA and SLDC. The report above shows an 82 transaction entered reflecting 3.50 hours of FMLA-LWOP for an employee on day of pay period (DPP) 07. The data technician entered the hours code 36 - FMLA LWOP Part Day using leave transaction code 2. When this transaction is entered the system will automatically create two transactions. One transaction will charge hours to FMLA LWOP and the other will create a LWOP (code 23) to charge against the employee's leave balance. On the report the hours will be reflected under both the column headings WOP+ and FLF. To correct an error in the amount of leave charged in this example a 6 code adjustment to hours code 36 must be entered.

ETC Offices

Eight new non crossfoot hours codes have been established in the ETC system to track FMLA and SLDC leave:

DESCRIPTION	HOURS CODE	NON X-FT HOURS CODE
FMLA Annual Leave	55	01
FMLA Sick Leave	56	02
FMLA Continuation of Pay	71	03
FMLA IOD/OWCP	49	04
FMLA LWOP Part Day	59	05
FMLA LWOP Full Day	60	06
FMLA SLDC	56	07
NON FMLA SLDC	56	08

In the ETC system, only the FMLA/SLDC hours code needs to be keyed in at the EBR or in the Transaction Editor. At the end of the week, when the Final Time Certification is run, the system will automatically generate the appropriate leave code For example, if an employee has eight hours of code 02, the system will generate eight hours of both code 02 and eight hours of code 56. When the file merges with PCCTAPS both codes will be displayed.

Rural Carriers

FMLA

Rural carriers (Designation 71, 72, or 74) are always charged leave in 8 hour increments. The Form 1314, in the Days Assigned Carrier Absent block, should reflect the number of days the rural carrier was absent, and the Form 1314-F should reflect only the actual hours charged to FMLA protected leave. FMLA hours cannot exceed the total number of leave hours charge.

SLDC

Rural carriers may take up to 80 hours of earned sick leave for SLDC approved purposes. The Form 1314, in the Days Assigned Carrier Absent block, should reflect the number of days the rural carrier was absent, and the Form 1314-F should reflect only the actual hours charged to SLDC in the NON-FMLA SL Dependent Care block. In the event that the sick leave used for SLDC is determined to be covered by FMLA protection, the hours used should be entered in the FMLA SL Dependent Care block only.

Replacement rural carriers

Replacement carriers (Designation 77 and 79) must meet the eligibility requirements. Replacement carriers in a leave earning status who have accrued sick leave may take SLDC in hourly increments. The number of hours taken for FMLA SLDC or NON-FMLA SLDC must be recorded. If a replacement carrier is scheduled but unavailable, or just unavailable, due to FMLA reasons, that time must be recorded on Form 1314-F in the Replacement Carrier Unavailable block. The Form 1314-F should be completed using route type and number A996 and submitted with the other certificates at the end of the pay period for processing.

Example 1

Ms. Smith on route K001 had to leave the route when her daughter became ill at school. She requested Sick Leave Dependent Care for the day. Even though she worked the route for a short period of time, 8 hours Sick Leave is recorded on Form 1314, and 8 hours SLDC is recorded on Form 1314-F.

Name of Assigned Carrier	Finance Number	Social Security Number	Des./Act.	Route No.	Evaluated Hours	Year	PP
Smith G	01-2345 E	123-45-6789	71-01	K001	B	96	20

Day	Actual		Sick Leave			
1	36.42	K	S			
2	41.98	K				

Des./Act.	Name of Relief Carrier	SSN	Week 1 Actual Hrs./Min.		Week 2 Actual Hrs./Min.	
73-0	Riley R	345-67-8910	1292	2	0908	1

This certifies that the above carrier rendered service in compliance with Postal regulations. Postmaster's Signature: Willie Smith — Date: 9/27/96 — Carrier's Initials: GS

REGULAR RURAL CARRIER TIME CERTIFICATE

Name of Assigned Carrier	Finance Number	Social Security Number	Des.	Route No.	Year	PP
Smith G	01-2345	123-45-6789	71-0	K001	96	20

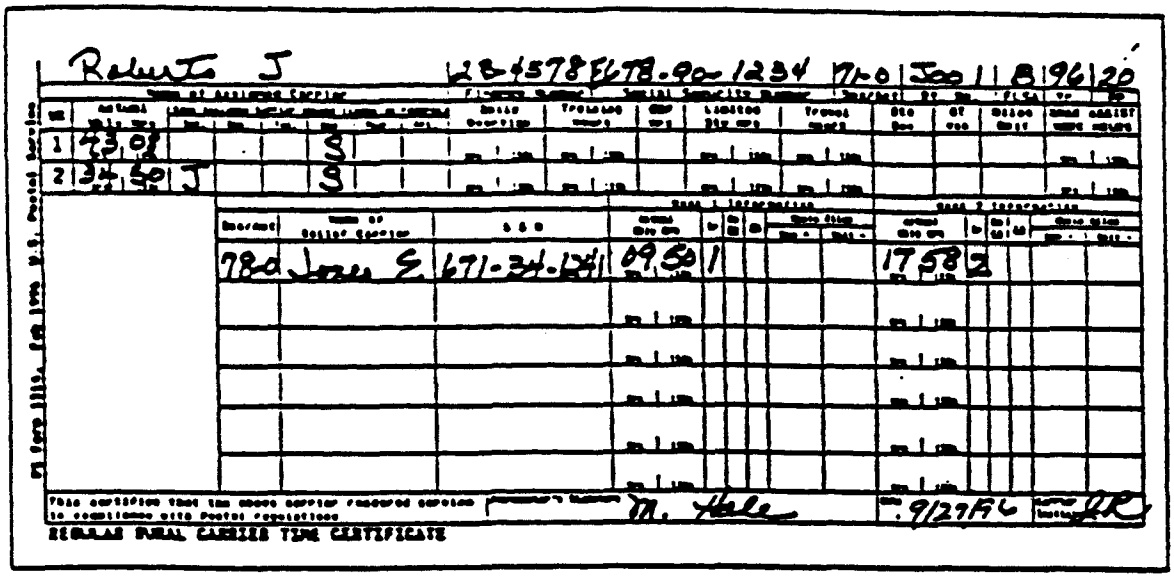
	Week 1 (Hours / 100s)	Week 2 (Hours / 100s)		Week 1 (Hours / 100s)	Week 2 (Hours / 100s)
FMLA AL Hours			FMLA SL Hours		
FMLA LWOP Hours			FMLA SL Dependent Care		
Non-FMLA SL Dependent Care	08 00		FMLA Replacement Carrier Unavailable		
FMLA COP Hours			FMLA IOD/OWCP Hours		

Postmaster's Signature: Willie Smith — Date: 09/27/96 — Carrier's Initials: GS

PS Form 1314-F, August 1996 — Rural Carrier FMLA Certificate

Example 2

Mr. Roberts must go for physical therapy for a serious health condition every Wednesday. Form 1314 will indicate Sick Leave for the entire day but only the hours actually required for the physical therapy are recorded as FMLA SL.



Roberts J | 234578 | 678-90-1234 | 71 | J001 | 96 | 20

REGULAR RURAL CARRIER TIME CERTIFICATE

Roberts J	234578	678-90-1234	71	J001	96	20
Name of Assigned Carrier	Finance Number	Social Security Number	Des.	Route No.	Year	PP

	Week 1 Hours	Week 1 100s	Week 2 Hours	Week 2 100s		Week 1 Hours	Week 1 100s	Week 2 Hours	Week 2 100s
FMLA AL Hours					FMLA SL Hours	04	00	03	50
FMLA LWOP Hours					FMLA SL Dependent Care				
Non-FMLA SL Dependent Care					FMLA Replacement Carrier Unavailable				
FMLA COP Hours					FMLA IOD/OWCP Hours				

Postmaster's Signature: M. Hale | Date: 09/27/96 | Carrier Initials: JR

PS Form 1314-F, August 1986 — Rural Carrier FMLA Certificate

Example 3

Mr Kane must take his wife for chemotherapy on Friday, week 2. Mr. Kane will be charged 8 hours of SL on Form 1314 because he elected to take SLDC. Since Mrs Kane's illness falls under FMLA the 4 hours spent in chemotherapy plus the hours spent in transporting her will be entered under FMLA SLDC.

Kane P	52-1234	P	789-01-2345	71-0	H004	B	96	20

1	26.58									
2	39.92					S				

73-0	O'Neill R	345-62-1220		08.92

This certifies that the above carrier rendered services in compliance with Postal regulations

Date 9/27/96 — Carrier Initials PK

REGULAR RURAL CARRIER TIME CERTIFICATE

Kane P	52-1234	789-01-2345	710	H004	96	20
Name of Assigned Carrier	Finance Number	Social Security Number	Des.	Route No.	Year	PP

	Week 1	Week 2		Week 1	Week 2
FMLA AL Hours	Hours | 100s	Hours | 100s	FMLA SL Hours	Hours | 100s	Hours | 100s
FMLA LWOP Hours	Hours | 100s	Hours | 100s	FMLA SL Dependent Care	Hours | 100s	0500 Hours | 100s
Non-FMLA SL Dependent Care	Hours | 100s	Hours | 100s	FMLA Replacement Carrier Unavailable	Hours | 100s	Hours | 100s
FMLA COP Hours	Hours | 100s	Hours | 100s	FMLA IOD/OWCP Hours	Hours | 100s	Hours | 100s

Postmaster's Signature	Date 9/27/96	Carrier's Initials PK

PS Form 1314-F, August 1996 — Rural Carrier FMLA Certificate

Example 4

Ms. Jones is a replacement carrier. She is scheduled to work every Saturday on route K001. Her husband is undergoing treatment for cancer and she is unavailable to work for the next four weeks. Form 1314-F in completed to indicate that she was unavailable due to an FMLA situation. Record the evaluated hours of the route under the FMLA replacement carrier unavailable.

Jane S	24-982	589-40-1245	780	A996	96	20
Name of Assigned Carrier	Finance Number	Social Security Number	Des	Route No.	Year	PP

	Week 1	Week 2		Week 1	Week 2
FMLA AL Hours	Hours 100s	Hours 100s	FMLA SL Hours	Hours 100s	Hours 100s
FMLA LWOP Hours	Hours 100s	Hours 100s	FMLA SL Dependent Care	Hours 100s	Hours 100s
Non-FMLA SL Dependent Care	Hours 100s	Hours 100s	FMLA Replacement Carrier Unavailable	Hours 100s	06,00 Hours 100s
FMLA COP Hours	Hours 100s	Hours 100s	FMLA 100/OWCP Hours	Hours 100s	Hours 100s
Postmaster's Signature Mike Smith			Date 9/27/96	Carrier's Initials DJ	

PS Form 1314-F, August 1986 Rural Carrier FMLA Certificate

6. Adjustments

Adjustment requests, PS Form 2240s, need to include the FMLA/SLDC leave type (01 through 09) when applicable.

The leave type codes used for FMLA and SLDC are non-crossfoot codes which do not affect the 40 hour crossfoot.

When processing Form 2240 adjustment requests, the FMLA/SLDC leave type codes may be entered independently of the hours codes. For example, if an employee was charged a combination of annual leave and sick leave in a week, and it is subsequently determined that one or the other should be covered by FMLA protection, FMLA Annual Leave (leave type 01) can be added to the hours history using the Form 2240 without also changing any existing annual leave or sick leave hours codes (55 & 56 respectively).

Note: Adjustments processed will subsequently appear on the employee's earning statement, reflecting the total number of hours adjusted. For example, if an adjustment is made to change 8.00 hours annual leave to 8.00 hours FMLA sick leave the earning statement will show 16.00 hours adjusted (8.00 leave hours + 8.00 FMLA hours type).

Example 1

The following Form 2240 shows an adjustment required to change 40 hours FMLA annual leave to 40 hours FMLA sick leave.

U.S. Postal Service

Pay, Leave, or Other Hours Adjustment Request

Date: 10/10/96

Salary Advance Adjustment Information

Amount of Advance: $

Employee's Name		Level	Finance No.	Social Security No.	Yr	PP	Wk
CLAUS, SANTA	E	21	10 1111	555443333	6	20	2

Card Type: 0

Field	Hours
55 Annual Leave	00.00
56 Sick Leave	40.00
(FMLA)	40.00

Card Type Must Be Entered at Right and Must Match the Original Record Paid.

Remarks: EMPLOYEE WAS CHARGED 40 HOURS FMLA ANNUAL LEAVE. CHANGE TO 40 HOURS FMLA SICK LEAVE.

Employee's Signature and Date: S. Claus 10/10/96

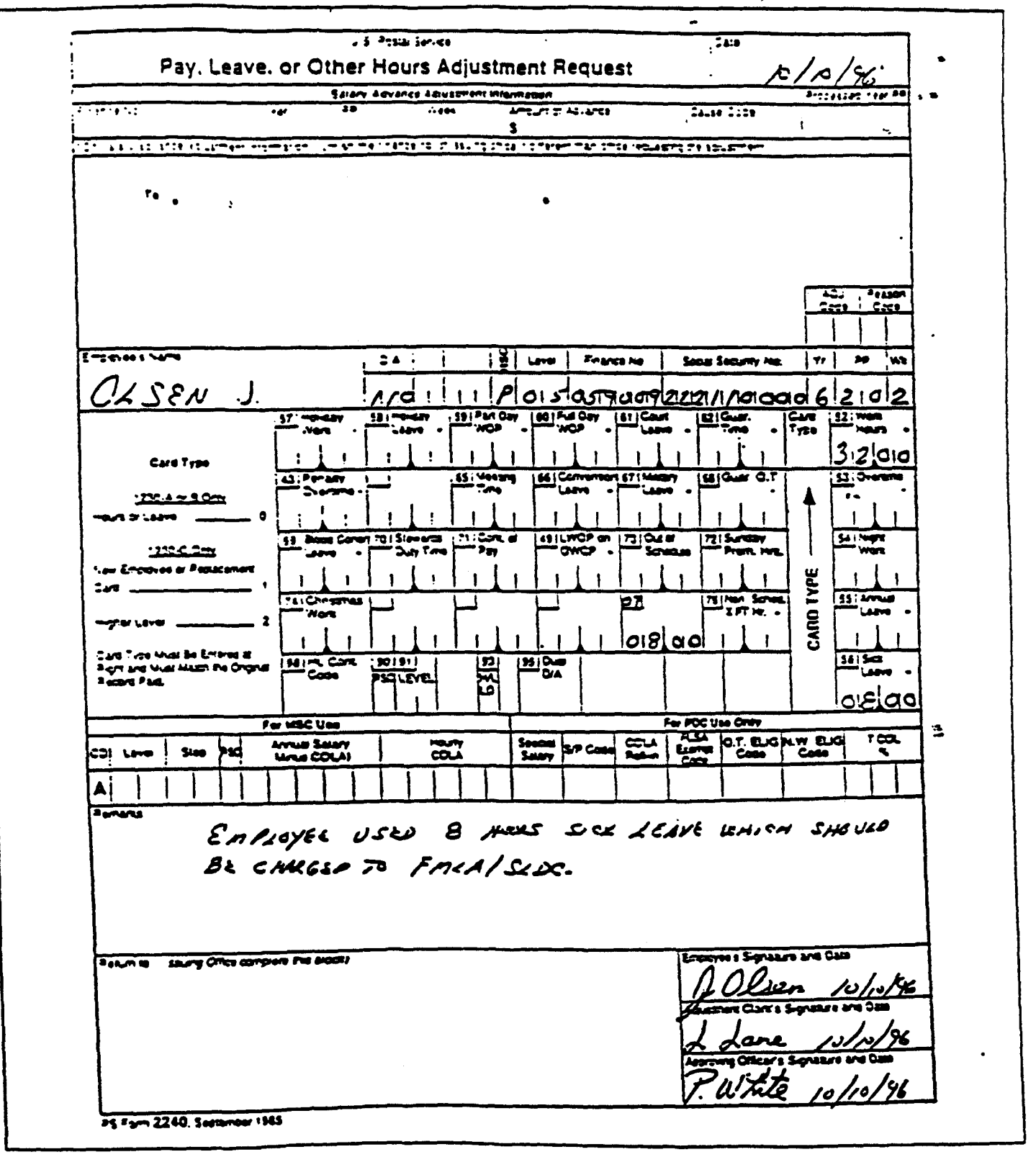
Adjustment Clerk's Signature and Date: E Bunny 10/10/96

Approving Officer's Signature and Date: P Boss 10/10/96

PS Form 2240 September 1985

Example 2

The following Form 2240 shows an adjustment required to change 8 hours sick leave to 8 hours FMLA sick leave dependent care.



Pay, Leave, or Other Hours Adjustment Request

10/10/96

Employee's Name: OLSEN J.

CARD TYPE

For HRSC Use

For POC Use Only

Remarks: EMPLOYEE USED 8 HOURS SICK LEAVE WHICH SHOULD BE CHARGED TO FMLA/SLDC.

Employee's Signature and Date: J Olsen 10/10/96

Approving Official's Signature and Date: P White 10/10/96

PS Form 2240, September 1985

7. FAQ (Frequently Asked Questions)

Q. Is family leave in addition to annual leave or sick leave?

A. No, the FMLA does not provide additional annual leave or sick leave. FMLA merely provides up to 12 weeks of absence for reasons and/or conditions covered by the act. This absence may be paid annual leave or sick leave, if available based on the existing postal leave policies and the employee's existing leave balances. The total number of annual leave or sick leave hours available to employees is the same as under existing postal policies.

Q. Does an employee have to use all of their annual leave or sick leave before taking LWOP for FMLA approved absences?

A. No, employees may request FMLA LWOP without exhausting their annual leave or sick leave balances. However, approval of LWOP is made in accordance with existing postal leave policies.

Q. How does an employee request FMLA absence?

A. FMLA absence is requested by completing and submitting PS Form 3971, *Request for or Notification of Absence*, with the supporting documentation required. The employee should indicate their preference for annual leave, sick leave, or LWOP as appropriate to the situation. As usual, in emergency situations, a telephone call should be made and will suffice until the necessary paperwork can be completed. FMLA does not change existing USPS leave policies concerning the types of leave an employee may be granted. Therefore, whether an employee uses annual leave, sick leave or LWOP for an FMLA covered absence depends on the reason for the absence and normal USPS leave policies.

Q. Can an employee take more than 12 weeks of leave during the year?

A. Yes, FMLA requires that an eligible employee must be granted up to 12 weeks for FMLA covered absence. However, current postal leave policies remain unchanged.

Q. How will an employee know if the requested leave is chargeable against the 12 week entitlement under the FMLA?

A. FMLA covered absences will be indicated as "Approved, FMLA" by the appropriate supervisor on the PS Form 3971.

Q. Is there a defined time period in which employees are eligible for the 12 workweek FMLA coverage?

A. Under the terms of the FMLA employers may determine the 12 month period according to several measurements. The postal service has elected to utilize the existing postal leave year (PP 02 through PP 01) structure

Q. Must a supervisor approve an employee's request for leave on a reduced schedule to care for a sick parent?

A. Yes, if the employee meets the eligibility requirements, the proper documentation has been received and the parent's condition meets the definition of "serious health condition", and the reduced schedule is necessary to properly care for the parent's medical condition.

Q. What are the Fair Labor Standards Act (FLSA) implications of FMLA?

A. There is an exception to the FLSA that allows hourly amounts to be deducted from an employee's pay without affecting the employee's FLSA exempt status when that employee takes reduced schedule or intermittent FMLA protected leave.

Q. Whose responsibility is it to determine whether an absence is covered by FMLA?

A. It is the supervisor's responsibility to determine if the absence is covered by the FMLA, if the employee meets the FMLA eligibility criteria, to request additional documentation as necessary, and to charge the employee's leave to annual leave, sick leave, or LWOP in accordance with Postal Service leave policy and applicable labor agreements.

Q. Are conditions such as chronic asthma or diabetes, where an employee takes a day or two of sick leave whenever the condition flares up, eligible for FMLA protection?

A. Yes, as long as appropriate supporting documentation is provided. Under the second qualifying condition for inclusion as a serious health condition, a chronic condition which may cause episodic rather than continuing incapacity.

Q. As a supervisor, can I disallow a request for FMLA protected leave based on the operational needs of the postal service, such as at Christmas?

A. Not as long as all eligibility criteria are met and a certified FMLA protected situations exists. Nationally, the FMLA has been given priority over the operational requirements of employers, including the postal service.

Q. Where can I get more information/guidance concerning FMLA?

A. For general information refer to Postal Bulletins 21847, 8-5-93 pages 3-11 and 21927, 8-29-96 pages 89-94. For specific information or clarification of questions regarding FMLA policies contact your area human resources office. Questions regarding FMLA timekeeping requirements should be directed to your area finance office.

8. Reference

PS Form 3971

UNITED STATES POSTAL SERVICE

Request for or Notification of Absence

Employee's Name (Last, First, M.I.) | Social Security No. | Date Submitted | No. of Hours Requested | Schedule | Use Schedule | PP | Year

Location (For Rail Leave, Show City, State, and ZIP Code) | L.S. Day | Pay Loc. # | D.A. Code | From Date | Hour | Day | Int. | Hours

Type of Call or Request | Scheduled Reporting Time | Employee Can Be Reached At (If needed) ☐ No Call | Thru Date | Hour

Type of Absence
- ☐ Annual
- ☐ Carrier 701 Rule
- ☐ LWOP (See Reverse)
- ☐ Sick (See Reverse)
- ☐ Late ☐ COP
- ☐ Other: _____

Documentation (For Official Use Only)
- ☐ For COP Leave (CA-7 on File)
- ☐ For Advanced Sick Leave (1221 on File)
- ☐ For Military Leave (Orders Reviewed)
- ☐ For Court Leave (Summons Reviewed)
- ☐ For Higher Level (1723 on File)
- ☐ Safety Training Testing, Counseling (Memo on File)

Revised Schedule for (Date) | Approved in Advance ☐ Yes ☐ No

Begin Work | Lunch-Out | Lunch-In | End Work | Total Hours

Remarks (Do Not Enter Medical Information)

I understand that the annual leave authorized in excess of amount available to me during the leave year will be changed to LWOP.

Employee's Signature and Date | Signature of Person Recording Absence and Date | Signature of Supervisor and Date Needed

Official Action on Application (Return copy of signed request to employee)

- ☐ Approved, not FMLA
- ☐ Approved, FMLA
- ☐ Pending Documentation Noted on Reverse.
- ☐ Disapproved (Give Reason)

Signature of Supervisor and Date

Warning: The furnishing of false information on this form may result in a fine of not more than $10,000 or imprisonment of not more than 5 years, or both. (18 U.S.C. 1001)

☐ Continued on Reverse

PS Form 3971, June 1995

During This Absence, I Was Incapacitated for Duty by:
- ☐ Sickness
- ☐ On the Job Injury
- ☐ Off the Job Injury
- ☐ Pregnancy and Confinement
- ☐ Caring for or Exposed to a Contagious Disease
- ☐ Undergoing Medical, Dental, or Special Examination or Treatment

Additional Documentation Required

Privacy Act: The collection of this information is authorized by 39 USC 401, 1001, 1003, 1005; 5 USC 8339; and Public Law 103-3. This information will be used to grant or deny your request for official leave from Postal Service duty. It may be disclosed under the routine uses given in Privacy Act system notices USPS 050.020 and USPS 120.070 (see appendix of Administrative Support Manual or, if you wish to obtain a copy of these notices contact your personnel office). Completion of this form is voluntary. If this information is not provided, official leave may not be granted.

Leave Types (Information Only)

Leave Type	Time Card Code	PS/DS Code
LWOP - Lieu of Sick Leave	53/60	20
LWOP - Preferred	53/60	21
LWOP - Personal Reasons	53/60	22
LWOP - Part Day	58	23
LWOP - Full Day	60	23
LWOP - AWOL	53/60	24
LWOP - 100-CWCP	49	25
LWOP - Maternity	53/60	26
LWOP - Suspension	53/60	27
LWOP - Union Official	64	28
LWOP - Suspension Pending Termination	53/60	29
Continuation of Pay - USPS	71	03
Court Duty	63	04
Military Leave	67	05
Postmaster's Organization	69	06
Blood Donor Leave	63	09
Other Paid Leave	66	10
Conversion Leave	68	12
Acts of God	78	13
Veteran's Funeral	79	14
Recession	80	15
Civil Defense	77	16
Civil Disorder	81	17
Voting Leave	65	18

Schedule	Use Schedule	PP	Year	Day	Int.	Hours
				Sat 01		
				Sun 02		
				Mon 03		
				Tue 04		
				Wed 05		
				Thur 06		
				Fri 07		
				Sat 08		
				Sun 09		
				Mon 10		
				Tue 11		
				Wed 12		
				Thur 13		
				Fri 14		

PS Form 3971, June 1995 (Reverse)

UNITED STATES POSTAL SERVICE

Notice for Employees Requesting Leave for Conditions Covered by the Family and Medical Leave Act

I. Qualifying Conditions

The Family and Medical Leave Act (FMLA) provides that employees meeting the eligibility requirements must be allowed to take time off for up to 12 workweeks in a leave year for the following conditions:

1. Because of the birth of a son or daughter (including prenatal care), or to care for such son or daughter. Entitlement for this condition expires 1 year after the birth.
2. Because of the placement of a son or daughter with you for acceptance or foster care. Entitlement for this condition expires 1 year after the placement.
3. In order to care for your spouse, son, daughter, or parent who has a serious health condition. Also, in order to care for those who have a serious health condition and who stand in the position of a son or daughter to you or who stood in the position of a parent to you when you were a child.
4. Because of a serious health condition that makes you unable to perform the functions of your position.

II. Eligibility

To be covered by FMLA, you must have been employed by the Postal Service for a total of at least 1 year *and* must have worked a minimum of 1,250 hours during the 12-month period before the date your absence begins.

III. Type of Leave or Pay

The time off counted toward the 12 workweeks allowed for the qualifying conditions can be any one or combination of the following:

- Time off you take as annual leave, sick leave, and/or LWOP in accordance with current leave policies.
- In the case of job-related injuries or illnesses, time off during which you are receiving continuation of pay (COP) and/or time during which you are placed on the Office of Workers' Compensation Program (OWCP) payroll.

Note that sick leave is available only for your own health condition except for the situations specifically designated in postal policy or collective bargaining agreements.

IV. Documentation

Supporting documentation is required for your leave request to receive final approval. Documentation requirements may be waived in specific cases by your supervisor.

- For qualifying condition (1) or (2), you must provide the birth or placement date.
- For conditions (3) or (4), you must provide documentation from the health care provider stating:
  a. The health care provider's name, address, phone number, and type of practice, and the patient's name.
  b. A certification that the patient's condition meets the FMLA definition of serious health condition, supporting medical facts, and a brief statement as to how the medical facts meet the definition's criteria.
  c. The approximate date the serious health condition commenced, its probable duration, and the probable duration of the patient's present incapacity, if different.
  d. Whether you will need to take leave intermittently or to work on a reduced schedule as a result of the serious health condition; and if so, the probable duration of such schedule, an estimate of the probable number of and the interval between episodes of incapacity, and the period required for recovery, if any.

continued

e. For pregnancy or a chronic serious health condition: whether the patient is presently incapacitated and the likely duration and frequency of episodes of incapacity.

f. If additional or continuing treatments are required: the nature and regimen of the treatments, an estimate of the probable number of treatments, the length of absence required by the treatments, and actual or estimated dates of the treatments, if known.

g. For your own serious health condition, including pregnancy or a chronic condition: whether you are unable to perform work of any kind, any parts of your job you are unable to perform, and if you must be absent from work for treatments.

h. To care for a family member with a serious health condition: whether the patient requires assistance for basic medical or personal needs or safety, or for transportation; or if not, whether your presence to provide psychological comfort would be beneficial to the patient or assist in the patient's recovery; and the probable duration of the need for care or an intermittent or reduced work schedule basis. You must indicate on the form the care you will provide and an estimate of the time period.

- If the serious health care condition is a result of a job-related injury or illness, the documentation requirements are provided separately.
- If the time off requested is to care for someone other than a biological parent or child, appropriate explanation of the relationship may be required.

Supporting information that is not provided at the time the leave is requested must be provided within 15 days, unless this is not practical under the circumstances. If the Postal Service questions the adequacy of a medical certification, a second or third opinion may be required. These are obtained off the clock. However, the Postal Service will pay for these opinions, plus reasonable "out of pocket" travel expenses incurred to obtain the opinions.

During your absence, you must keep your supervisor informed of your intentions to return to work and status changes that affect your ability to return. Failure to provide information can result in the denial of family and medical leave under these policies.

V. Benefits

Health Insurance — To continue your health insurance during your absence, you must continue to pay the "employee portion" of the premiums. This continues to be withheld from your salary while you are in a pay status. If the salary for a pay period does not cover the full employee portion, you are required to make the payment. If this occurs, you will be advised of the procedures for payment.

Life Insurance — Your basic life insurance is free and continues. If you are in an LWOP status for more than a year, this coverage is discontinued; in this case, you have the option to convert to an individual policy. If you have optional life insurance coverage, it continues. Your premium payments continue to be withheld from your pay check. If you are in a nonpay status, your optional insurance coverage continues without cost for up to 12 months. Thereafter you can convert this coverage to an individual policy.

Flexible Spending Accounts (FSAs) — If you participate in the FSA program, see your employee brochure for the terms and conditions of continuing coverage during leave without pay.

VI. Return to Duty

At the end of your leave, you will be returned to the same position you held when the absence began (or a position equivalent to it), provided you are able to perform the functions of the position and would have held that position at the time you returned if you had not taken the time off.

If the absence is due to your own health condition and exceeds 21 calendar days, you must submit evidence of your ability to return to work before you will be allowed to return.

PS Form 1357

Original PS 1357 Located at: | Logon ID Assigned

U S Postal Service

Request for Computer Access

(Instructions for completing form on reverse side)

Section A: User Identification

1 Requester's Name | 2 Social Security No. | 3 SA Code | 4 Finance No.

5 Requester's Job Title | 6 Employment Status (Check one) ☐ Career ☐ Casual ☐ Contractor ☐ Foreign ☐ Temporary ☐ Nonpostal

7 USPS Organization/Department | 8 USPS or Company Mailing Address (Include ZIP+4)

9 PEN Telephone No | Commercial Telephone No.

10 MSC Code and Name

11 User Responsibility Agreement Statement

[illegible]

Signature | Date

12 Manager Responsibility Agreement Statement

[illegible]

Manager's Name (Please print) | Social Security No. | Signature | Date | PEN/Commercial Phone No.

Section B: Computer Access Requested

13a. Directed Support Required

☐ Logon ID (Circle one): New Change Delete | ☐ Facility Where Access is Required: ____________

☐ DOE/CR: Access Code: ________ User Type: ________ | ☐ List Existing Logon IDs & Facilities: ____________

☐ MS Office
☐ F3/FB
☐ OnTime

ccMail
☐ ccMail
☐ ccMail Mobile

☐ Envelope Mgr
☐ OAG
☐ Library Services

☐ 3270 Access
☐ SmarTerm
☐ TCP/IP

☐ EIS
☐ NewsEdge
☐ CPIS

☐ Other

13b. Resource Name (Additional room is available on the reverse side)	13c. Sensitive or Proprietary	13d. Access Level Required (See Instructions)

Section C: Computer Access Approvals

14. Contractor Information (Must be completed by the Contracting Officer's Representative (COR))

a. Does the Contract Contain Provisions for (Circle Yes or No):

1. Screening? Yes No
2. Security of Information? Yes No
3. Privacy of Information? Yes No
4. Contractor Screening by the Inspection Service? Yes No

b. Contract Number: ____________

c. Contract Expiration Date: ____________

d. USPS Organization/Department: ____________

15. USPS COR's Name (Please Print) | Signature | Date | PEN/Commercial Phone No.

16. Functional System Coordinator's Name (Please Print) | Signature | Date | PEN/Commercial Phone No.

17. Logon ID Administrator's Name (Please Print) | Signature | Date | PEN/Commercial Phone No.

Instructions for Completing PS Form 1357

Note: Please print all entries except for signatures. Incomplete information may cause delays in implementation or return of this form.

Section A: User Identification

1 Print your full name.
2 Enter your Social Security Number.
3 Enter your Budget Authorization Code.
4 Enter your Finance Number.
5 Enter your office job title.
6 Enter your employment status.
7 Specify your work organization, e.g. DRMD, Phoenix Division; Centra Region, Finance; Systems and Programming, San Mateo P&DC.
8 Enter your USPS or company mailing address (include ZIP+4).
9 Enter your PEN and commercial phone numbers.
10 Enter your MSC Code and MSC Name if applicable.
11 Read and understand the User Responsibility Agreement Statement * and Privacy Act Statement (printed below) before signing and dating this document.
12 Your manager must read and understand the Manager Responsibility Agreement Statement * prior to affixing his/her name, Social Security Number, signature, date, and phone number.

Section B: Computer Access Requested

13a. Please check, enter, and describe the support that you will require. Specify any system exemptions or other special software required in support of your request. Include all data access (CICS transaction IDs, IDMS access, etc.) requirements or any special security required of the system or data. Include any support services (data entry, etc.) needed. Estimate the number of service hours required per week in support of your request. Specify access required to the DOE/OR system and require DOE/OR Functional System Coordinator to supply the access code and user type.

13b. Enter the name of the data element(s) or resources to which access is sought.

13c. Specify if data elements or files within applications are sensitive or proprietary.

13d. Specify the appropriate access level to applications and files.

READ access allows a user to read and copy, but not to change a filename or its contents.

WRITE access allows a user to change the contents of or delete a file or create files within a directory, and may permit renaming and processing files.

EXECUTE access allows a user to execute or use a program file, but generally not to see or change it.

ALLOCATE access allows a user to delete, rename, existing, unlinking, or archive a file.

Section C: Computer Access Approvals

14a-d. The Contracting Officer's Representative (COR) will complete the block – reference the Administrative Support Manual (ASM); Procurement Manual (PM); and Handbook AS-805, ADP Security. If the contractor has not been contracted, the contractor must complete and attach PS Forms 2028 and 2181 with this request.

15. The COR will complete Block 14 before entering his/her name, signature, date and phone number.

16 To approve grants of access, the Functional System Coordinator enters his/her name, signature, date, and phone number.

17 Computer Systems Security Officer (CSSO) or the person (Logon ID Administrator) responsible for assigning a logon ID is a user enters his/her name, signature, phone number, and date. The Logon ID Administrator must also indicate in the upper left hand corner of Form 1357 where the original of this Form 1357 will be kept and in the upper right hand corner the Logon ID assigned.

* Additional responsibilities can be found in Handbook AS-805, ADP Security, and Administrative Support Manual (ASM).

Privacy Act Statement

The collection of this information is authorized by 39 U.S.C. 401 and Public Law 100-235, Computer Security Act of 1987. This information will be used to assign computer logon IDs by which access to data and/or files on computer systems is limited to authorized persons through the use of computer security access control products. As a routine use, this information may be disclosed to a congressional office at your request; to OMB for review of privacy and legislation; to a labor organization as required by the NLRA where pertinent, in a legal proceeding to which the USPS is a party; to an authorized law enforcement agency for investigative or prosecutorial purposes; to a government agency where relevant to a hiring, contracting, or licensing decision by the requesting agency; to a government agency in order to elicit information relevant to a hiring, contracting, or licensing decision by the USPS; to an expert or consultant under contract with the USPS to fulfill an agency function; to the Federal Records Center for storage; to the Equal Employment Opportunity Commission for investigating a formal EEO complaint filed against the USPS under 29 CFR 1613; and to the Merit Systems Protection Board or Office of Special Counsel for proceedings involving possible prohibited personnel practices. Completion of this form is voluntary; however, if the information is not provided, you may not be granted a computer logon ID.

13b. Resource Name (Continued from front)	13c. Sensitive or Proprietary	13d. Access Level Required (See instructions)

PS Form 1357, January 1991 (Reverse)

Postal Bulletins

Postal Bulletin 21847, 8-5-93, pp 3 - 10 provides general information and ELM revisions concerning the Family and Medical Leave Act.

Postal Bulletin 21927, 8-29-96, pp 89 - 94 provides specific information regarding the implementation of FMLA for rural carriers.

FAMILY AND MEDICAL LEAVE

The Postal Service along with all private, state, and local government employees, and most federal and congressional employees have been required by law, since August 1993, to comply with the Family and Medical Leave Act (FMLA). Non-compliance can result in penalties imposed by the Department of Labor. Although several training classes have been conducted, supervisors seem to be unclear in certain areas. The following Supervisors' quick reference for leave under FMLA should be kept by the phone where call-ins are taken.

When an employee requests leave, either in advance or in an emergency, the **SUPERVISOR IS RESPONSIBLE for determining, through discussion with the employee. Or the person calling for that employee, whether it is an absence which falls under one of the covered conditions of the Family and Medical Leave Act (FMLA).** The employee is NOT required to mention FMLA. **BE SURE TO DOCUMENT ALL DISCUSSIONS.**

If, after initial discussion with the employee, you determine the absence MAY meet one of the conditions which may include COP and OWCP, determine whether the employee is eligible.

1. ELIGIBILITY To be eligible under the law, the employee must meet two criteria:

A. He/She must have one year (cumulative) of service with the Postal Service. This does not have to be continuous or recent. AND

B. He/she must have a minimum of 1250 work hours in the 12-month period immediately preceding the beginning date of the leave in question. **This includes workhours only, including overtime hours, but not including leave of any type (AL, SL, LWOP, Holiday pay, court leave, military leave, etc.).**

2. QUALIFYING MEDICAL CONDITION

SERIOUS MEDICAL CONDITION means an illness, injury impairment, or physical or mental condition that involves either:

A. Any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical-care facility and any period of incapacity or subsequent treatment in connection with such inpatient care; or,

B. Continuing treatment by a health care provider which includes any period of incapacity (i.e., inability to work, attend school or perform other regular daily activities) due to: (1) A health condition (including treatment therefore or recovery therefrom) lasting more than three consecutive days, and any subsequent treatment or period of incapacity relating to the same condition. (2) Pregnancy or prenatal care a visit to the health care provider is not necessary for each absence or (3) A chronic serious health condition, which continues over an extended period of time and requires periodic visits to a health-care provider, and may involve occasional episodes of incapacity (e.g. asthma, diabetes). A visit to a health care provider is not necessary for each absence: or (4) A permanent or long-term condition for which treatment may not be effective (e.g. Alzheimer's, a severe stroke, terminal cancer). Only supervision by a health care provider is required, rather than active treatment; or (5) Any absence to receive multiple treatments for restorative surgery or for a condition which would likely result in a period of incapacity of more than three days if not treated (e.g., chemotherapy or radiation treatments for cancer).

3. HEALTH CARE PROVIDER means doctors of medicine or osteopathy, podiatrists, dentists, clinical psychologist, optometrists and chiropractors, nurse practitioners, nurse midwives, clinical social workers, Christian Science practitioners authorized to practice medicine or surgery or performing within the scopes of their practice as defined by state law.

4. NOTICE AND DOCUMENTATION If NOT eligible, you must inform the employee within two days that he/she is not eligible. If the employee IS eligible, provide him/her with Publication 71, if he/she has not been provided with one within the last six (6) months, and

SICK LEAVE FOR DEPENDENT CARE (Cont'd)

Under the MOU for dependent care, it is not necessary that sick leave be used for a serious health condition, as required to be eligible under the FMLA, nor does the 1 year, 1250 hours requirement apply, if the absence does not meet the criteria for the FMLA.

The MOU do not diminish the employee's obligation to maintain regular attendance. Irregularities in attendance which result in unscheduled absences can be the basis for corrective action, including discipline. However, absences which qualify under the FMLA cannot be considered in any determination to take disciplinary action.

FMLA QUESTIONS

QUESTION: An employee wishes to take leave under FMLA to care for a sick child who meets the FMLA requirements. The employee has exhausted all her annual leave and now wish to requested donations under the leave sharing program. Is she entitled?

RESPONSE: A career employee cannot use the leave sharing program for the reasons stated, because to be eligible: (1) a career employee must be incapacitated for available postal duties due to a serious personal health condition and (2) must be known or expected to miss a least 80 hours or more from work than his or her own annual leave and/or sick leave. The key word is "personal." If she had previously received donated AL for her own personal illness and part of it was still unused, she could use that remaining leave, but she is ineligible to request donated leave for her child.

QUESTION: An employee who is a foster parent took eight weeks of FMLA to be home with the child this summer and is now planning to take the other four weeks during December. The regulations say she can take the leave anytime within the year. Can we stop her?

RESPONSE: Take a look at ELM 515.61, which states that FMLA leave can be taken on an intermittent basis....only if the request for such intermittent leave is approved. Approval is based on employee's need, Postal Service's need, and costs to the Postal Service.

QUESTION: An employee received a suspension for attendance. The employee has a serious medical condition. The supervisor was not aware of the condition because many of her absences were under three days. The employee never asked for FMLA leave. Now that she has the suspension she argues that her absences should have been covered on the FMLA.

RESPONSE: (FMLA) Reference Material for U.S. Postal Service, from Compensation and Benefits Human Resources, Section E, ABSENCES QUALIFYING AS FMLA subsection (d) states, "If the supervisor did not know the leave was used for a FMLA reason and had not designated the leave as FMLA leave, but the employee desired that the leave be counted as FMLA leave, the employee must notify the employer within two (2) business days of returning to work that the leave was for an FMLA reason. In the absence of such timely notification by the employee, the employee may not subsequently assert FMLA protection for the absence."

QUESTION: An employee's mother-in-law is ill with a serious medical condition. Can that employee request FMLA leave to care for her?

RESPONSE: The employee is not entitled to use FMLA for an in law. The person must qualify under the pretext of "loco parentis," responsible for the day to day care and financial responsibility of him when he/she was a child. On the other hand of the employee's spouse is an employee they may be eligible for FMLA leave to care for that parent.

CERTIFICATION BY EMPLOYEE'S HEALTH CARE PROVIDER FOR EMPLOYEE'S SERIOUS ILLNESS—FMLA

This form is to be completed by employee's Health Care Provider when employee is requesting FMLA and medical documentation is required pursuant to 512.41, 513.36 and 515.5 of the ELM. Form PS 3971 must be completed by employee.

Employee's name _____

Description of serious health condition *(On the back of this form is the description of a "serious health condition" under FMLA. Does the patient's condition qualify under any of the categories described? If so, please check the applicable category.)*

(1) _____ (2) _____ (3) _____ (4) _____ (5) _____ (6) _____ None of the above _____

Without giving a specific diagnosis or prognosis, briefly note how the medical facts meet the criteria of the category checked above. _____

_____

_____

Date condition commenced: _____

Probable duration of condition: _____

Probable duration of the present incapacity (if different): _____

Will the employee be required to be off from work intermittently or work on a reduced schedule as a result of this condition and /or treatments? _____ **Note the probable time and duration.** _____

If the condition is chronic (#4) or pregnancy (#3), note if the employee is presently incapacitated and the likely duration and frequency of episodes of incapacity.

_____

If additional or continuing treatments are required for the condition, provide the nature and regimen of the treatments, an estimate of the probable number of treatments, the length of absence required by the treatments, and the actual or estimated dates of the treatments, if known.

_____

_____

Is the employee able to perform the functions of employee's position? _____ **If no, describe the physical restrictions placed on the employee, including the duration of such restrictions.**

_____

_____

Health Care Provider's Signature _____ **Date** _____

Address _____

FMLA DESCRIPTION OF SERIOUS HEALTH CONDITION[1]

A "Serious Health Condition" means an illness, injury, impairment, or physical or mental condition that involves one of the following:

1. **Hospital Care**
   Inpatient care (i.e. an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity or subsequent treatment[2] in connection with or consequent to such inpatient care.

2. **Absence Plus Treatment**
   A period of incapacity of *more than three consecutive calendar days* (including any subsequent treatment or period of incapacity relating to the same condition), that also involves:
   (a) *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
   (b) *Treatment* by a health care provider on *at least one occasion* which results in a *regimen* of continuing *treatment*[3] under the supervision of the health care provider.

3. **Pregnancy**
   Any period of incapacity due to *pregnancy*, or for *prenatal care*.

4. **Chronic Conditions Requiring Treatments**
   A *chronic condition* which;
   (a) 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;
   (b) Continues over an *extended period of time* (including recurring episodes of a *single underlying* condition); and
   (c) May cause *episodic* rather than a continuing period of incapacity[4] (e.g., *asthma, diabetes, epilepsy*).

5. **Permanent/Long-term Conditions Requiring Supervision**
   A period of incapacity[4] 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, a severe stroke, or the terminal stages of a disease.

6. **Multiple Treatments (Non-Chronic Conditions)**
   Any period of *absence to receive multiple treatments* (including *any* period of recovery therefrom) 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 that *would likely result in a period of incapacity[4] of more than three consecutive calendar days in the absence of medical intervention or treatment*, such as cancer (chemotherapy, radiation, etc.) severe arthritis (physical therapy), kidney disease (dialysis).

---

[1] Here and elsewhere on this form, the information sought relates only to the condition for which the employee is taking FMLA leave.

[2] *Treatment* includes examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations.

[3] A *regimen of continuing treatment* includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition. A regimen of treatment does not include the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider.

[4] "Incapacity," for purposes of FMLA, is defined to mean inability to work, attend school or perform other regular daily activities [illegible] health condition, treatment therefor, or recovery therefrom.

APWU FORM 4A

NOTICE OF NEED FOR INTERMITTENT LEAVE OR FOR A REDUCED WORK SCHEDULE—FMLA

The Employer must approve absences needed for intermittent leave or a reduced work schedule to care for a sick immediate family member or for an employee's own serious health condition that has been properly certified by a health care provider when required pursuant to 513.36 and 515.5 of ELM. Intermittent or reduced schedule for birth or placement of a child may be scheduled only if the Employer agrees.

If the need is for a seriously ill family member: *Attach Medical Documentation APWU Form 3, when required pursuant to Section 513.36 and 515.5 of the ELM.* **If the need is for the employee's own serious health condition:** *Attach Medical Documentation APWU Form 3.*

Name _____

Relationship to employee _____

Required reduced or intermittent schedule, including duration: _____

_____

_____

_____

_____

_____

The employee must provide a completed Form PS 3971 for each pay period noting type of leave requested.

Employee's Signature _____ **Date** _____

DESIRED OR NEEDED ABSENCES FOR BIRTH OR PLACEMENT OF SON OR DAUGHTER UNDER FMLA

Note: Entitlement to Family and Medical Leave because of (1) birth, (2) placement for adoption or (3) placement for foster care; of a son or daughter expires 12 months after the birth, placement or adoption. Employees may use up to 12 weeks each postal leave year as long as the leave is continuous and the absence is within the first year of the birth, placement or adoption.

Absences due to care for a new son or daughter or the placement of a son or daughter is not a serious medical condition and do not require certification by a health care provider but may require documentation. Intermittent leave or a reduced schedule for this purpose requires approval by the employer. FMLA leave for birth, placement or adoption, must be continuous unless intermittent or reduced schedule approved by employer.*

Employee's name _____

Date of birth, placement or foster care of this son or daughter* _____

Schedule desired or needed *(employee is entitled up to 12 weeks)*

From: _____ To: _____

The employee must provide a completed Form PS 3971 for each pay period noting type of leave requested.

** Documentation may be required of the father if unmarried or not living with spouse, or of employee for adoption, placement under foster care, or to care for someone other than a biological parent or child.*

Employee's Signature _____ Date _____

National Postal Mail Handlers Union

William H. Quinn
National President

Mark A. Gardner
Secretary-Treasurer

Hardy Williams
Vice President
Central Region

Samuel C. D'Ambrosio
Vice President
Eastern Region

John F. Hegarty
Vice President
Northeastern Region

James C. Terrell
Vice President
Southern Region

Lou Kuchenriter
Vice President
Western Region

Memo

To: Mail Handler Representatives

From: Contract Administration Department

Subject: FMLA — Questions and Answers

Date: June 24, 1998

Our sister union, the APWU, and the U.S. Postal Service jointly developed the following questions and answers. Rather than reinvent the wheel, and after discussion with the USPS, we have included them in this manual. The parties agreed that referral to these questions and answers should eliminate disputes concerning basic FMLA issues. We have reproduced the questions and answers exactly although we have deleted any reference to transitional employees.

The answers to these FMLA questions are based on the Department of Labor (DOL), Wage and Hour Division's final regulations. Only questions pertaining to the most common situations are included and some of the requirements are paraphrased for brevity. There is no intent to change any requirements from the full DOL regulations or to change any Postal Service policy. For Postal Service policy, see subsection 510 of the Employee and Labor Relations Manual (ELM).

In addition, also attached are "Postal Service Responses to Frequently Asked Questions," dated July 26, 1994. The Postal Service takes the position that the 1998 Questions and Answers supersede the 1994 Questions and Answers, but we included them for your use as reference materials.

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Section 1
Who is Covered

1. Q. What is the Family and Medical Leave Act of 1993?

A. In general, the act entitles eligible employees to be absent for up to 12 workweeks per year for the birth or adoption of a child; to care for a spouse, son, daughter, or parent with a serious health condition; or when unable to work because of a serious health condition without loss of their job or health benefits. The FMLA does not provide more annual or sick leave than that which is already provided to Postal Service employees.

Source: 29 CFR 825.100

2. Q. Which employees are eligible?

A. Employees who have been employed by the Postal Service for at least one year and who have worked at least 1250 hours during the previous 12 months are eligible.

Source: 29 CFR 825.110, ELM 444.22

3. Q. Do COP, OWCP, military leave and court leave count toward eligibility requirements under FMLA?

A COP, OWCP, court leave, and short periods of military leave count toward the 12 month eligibility requirement. However, none of the times mentioned count toward the 1250 hours worked eligibility requirement.

Source: 29 CFR 825.100, ELM 444.22

4. Q. If both spouses work for the Postal Service, does the USPS let both take up to 12 workweeks each of protected absences under FMLA each leave year?

A. Yes.

Source: ELM 515.43

5. **Q. Can an employee who is separated or divorced take a protected absence under the FMLA to care for a spouse or ex-spouse with a serious health condition?**

A. For an employee to take such leave, the couple must be legally married.

Source: 29 CFR 835.113

Section 2
What is Covered

6. **Q. My mother-in-law who lives with me is ill and requires my care. Does management have to approve my leave as a covered condition?**

A. No, the FMLA only provides protected absences for covered conditions of a spouse, parent, son or daughter. Leave taken to care for anyone else would require approval under normal leave policies.

Source: 29 CFR 825.112

7. **Q. My knee problem was diagnosed during an appointment with a health care provider. He ordered three months of physical therapy treatments. Are the visits and the treatments protected by the FMLA?**

A. Yes, where properly documented as a serious health condition, the absence would qualify for FMLA protection since it involves a continuing treatment under the supervision of a health care provider. The health care provider is stating that lack of treatment would likely result in a period of

incapacity of more than three days Employees needing intermittent FMLA leave or leave on a reduced leave schedule must attempt to schedule their leave so as not to disrupt the employer's operations.

Source: 29 CFR 825.114 (a)(2)(v), 29 CFR 825.117

8. **Q. My wife's doctor said she needs almost total bed rest for the last two months of her pregnancy, and I need to stay home to care for our other children. Is this condition covered under the FMLA?**

A. FMLA does not cover babysitting for the other children. However, where properly documented that the husband is needed to care for her, the wife's serious health condition would entitle the husband to a FMLA protected absence.

Source: 29 CFR 825.116

9. **Q. If I use a midwife for both my prenatal care and the delivery of my child, would my pregnancy still be a condition covered under the FMLA?**

A. Yes, pregnancy is a covered condition under the FMLA. Midwives are considered health care providers if they are authorized to practice under State law and are performing within the scope of their practice as defined under State law.

Source: 29 CFR 825.118 (b)(2), 29 CFR 825.118 (c)

10. **Q. An employee had a baby and took 6 weeks of leave during a period when she was not eligible under the FMLA. Now she is eligible, and the baby is still less than a year old. Can she now take the 12 workweeks of protected absences under the FMLA?**

A. Yes, only the time taken when eligible under the FMLA counts toward the 12 workweeks.

Source: 29 CFR 825.112

11. Q. Is an employee entitled to 12 workweeks of protected absences under the FMLA for placement or care of an adopted or foster child?

A. Yes.

Source: 29 CFR 825.112,29 CFR 825 200, 29 CFR 825.201

12. Q. I took a week of protected leave under the FMLA to care for my baby who was born 2 months ago. Now I want to take the week of July 4th off to be with my baby. Since caring for my newborn is a condition covered under the FMLA, does my supervisor have to let me off for the week of July 4th?

A. Not necessarily. You are requesting time off for the birth and care of a child on an intermittent basis. Therefore, your request for the week of July 4th is subject to your supervisor's approval in accordance with current leave policies.

Source: 29 CFR 825.203

13. Q. Can an employee take protected leave under the FMLA to look for child care?

A. No. Of course, a supervisor can approve regular annual leave for such a purpose.

Source: 29 CFR 825.112

14. Q. An employee has a recurrent degenerative knee condition that qualifies as a serious health condition. The certification indicates his condition may "flare" up 1 to 2 days per month and render him incapacitated for duty. Consequently, the employee requests covered absences under the FMLA with little or no advance notice. Does this

meet the criteria or intent of the intermittent leave entitlement under the FMLA?

A. Intermittent absences due to a chronic condition which incapacitates an employee are covered by the FMLA.

Source: 29 CFR 825.114, 29 CFR 825.117, 29 CFR 825.703, 29 CFR 825.204

15. Q. Is treatment for substance abuse covered under the FMLA?

A. Yes, if certified by the health care provider as a serious health condition. Absence because of the employee's use of the substance, rather than for treatment, does not qualify as a covered condition under the FMLA.

Source: 29 CFR 825.114(d), 29 CFR 825.112 (g)

16. Q. Can the flu be considered a serious health condition under the FMLA?

A. Yes, if it complies with the definition of a serious health condition under the FMLA.

Source: 29 CFR 825.114 (c)

17. Q. If my child is sick, can I now take sick leave to care for him?

A. Yes, under the National Agreement-Memorandum of Understanding on Sick Leave for Dependent Care, employees may use up to 80 hours of their earned sick leave to care for a spouse, parent, son or daughter. Sick leave for Dependent Care is only protected under the FMLA when the illness qualifies as a serious health condition under the FMLA .

Source: National Agreement-Memorandum of Understanding, ELM 515.2

SECTION 3

HOW AN ABSENCE IS COVERED

18. Q. How do I apply for leave under FMLA?

A. Submit a form PS 3970 Request for or Notification of Absence, with the supporting documentation. Leave under the FMLA is not a separate category or type of leave. You may request annual leave, sick leave, or LWOP for your absence under the FMLA. just as in the past, in an emergency situation a phone call, telegram, etc. will suffice until it is possible for you to submit the necessary paperwork.

Source: 29 CFR 825.302, 29 CFR 825.303, ELM 510

19. Q. Do I have to mention the Family Medical Leave Act when I request time off for a covered condition?

A. No. However, and employee must explain the reasons for the absence and give enough information to allow the employee to determine that the leave qualifies for FMLA protection. If the employee fails to explain the reasons, the leave may not be protected under the FMLA.

Source: 29 CFR 825.208, 29 CFR 825.308, 29 CFR 825.303

20. Q. Do I have to use all of my annual leave balance before I can take LWOP for a condition covered under the FMLA?

A. no, you need not exhaust annual leave and/or sick leave before requesting leave without pay. The use of leave, paid or unpaid, is subject to management's approval consistent with the handbooks, manuals, the National Agreement and the FMLA.

Source: 29 CFR 285.207 ELM, NATIONAL AGREEMENT

21. Q. Can I take more than 12 workweeks of leave during a Postal leave year?

A. Twelve workweeks is the maximum amount of protected leave which must be granted for the covered conditions under the FMLA. After being off for 12 workweeks, you may request leave under current leave policies, but that time would not be protected under the FMLA Approval will be subject to the terms and conditions of current policies.

Source: 29 CFR 825.200, ELM 510

22. Q. Do the 12 workweeks of FMLA protected leave have to be continuous?

A. No, the leave may be taken intermittently or on a reduced schedule basis as long as taking it in that manner is medically necessary. When leave is taken because of the birth or placement of a child for adoption or foster care, and employee may take leave intermittently or on a reduced leave schedule only if the supervisor agrees.

Source: 29 CFR 825.203, 29 CFR 825.204

23. Q. How will I know if the requested leave counts as part of the 12 workweek entitlement under the Family and Medical Leave Act?

A. The supervisor should provide you a copy of the Form 3971. If the leave is approved as one of the covered conditions, the approving official will check the "Approved, FMLA" block on the Form 3971.

Source: 29 CFR 825.301, ELM 515

24. Q. If the employee does not request FMLA protection for an absence that meets the definition of a covered condition under the FMLA, must the supervisor designate the absence as FMLA protected leave?

A. Yes, if the employee provides sufficient information for the supervisor to be able to designate it as FMLA protected leave.

Source: 29 CFR 825.208

25. Q. If an employee is absent on sick leave and, while absent is diagnosed as having a serious health condition within two days of returning to work?

A. Yes, if the employee provides the supervisor with the necessary information about the serious health condition within two days of returning to work.

Source: 29 CFR 825.208 (d) & (e)

26. Q. Is the employer's approval required for an employee to use intermittent leave or work a reduced schedule if the employee, spouse, child, or parent has a serious health condition?

A. The absence must be allowed provided proper medial certification and notice is provided. However, in foreseeable cases, the employee must attempt to schedule the absences so as not to disrupt the employer's operation. The employee may be assigned to an alternative position with equivalent pay and benefits that better accommodates the intermittent or reduced leave schedule, in accordance with National Agreement.

Source: 29 CFR 825.203, 29 CFR 825 204

27. Q. If an employee requests leave for a condition covered under the FMLA, what information should the supervisor provide to the employee?

A. A supervisor should provide the following information:

- Whether the employee is eligible or when he will be eligible.
- Whether the leave will be designated as FMLA protected.
- A copy of PS form 3971 stating the type of leave and whether the approval is pending documentation.
- Publication 71 where applicable. Publication 71 included the consequences for not providing the requested documentation and what information must be provided for return to duty, if any.

Source: 29 CFR 825.301

28. Q. What certification is required for employment requesting leave protected under the FMLA because of the birth or placement of a son or daughter, and in order to care for such son or daughter after birth or placement?

A. That the employee is the parent and the date of birth or placement of this son or daughter. No medical certification is required.

Source: 29 CFR 825.113 (d)

29. Q. Is re-certification required for each absence when a health care provider has certified that the employee is received continuing treatment?

A. Re-certification is not required for the duration of treatment of period of incapacity specified by the health care provider, unless:

a.) the employee requests and extension of leave
b.) circumstances have changed significantly from the original request
c) the employer received information that casts doubt upon the continuing validity of the certification
d.) the absence is for a different condition or reason

Source: 29 CFR 825.308

30. Q. What can an employer do if he or she questions the adequacy of medical certification that includes all the required information?

A. The Postal Service may require the employee to obtain a second opinion at the employer's expense, but on the employees own time. The Postal Service may not contact the employee's heath care provider unless the employee consents.

Source: 29 CFR 826.307

31. Q. Is advance notice required for employee's use of protected leave under FMLA?

A. An employee must provide the Postal Service at least 30 days advance notice if the need for the leave is foreseeable. When the need for leave is not foreseeable, and employee should give notice to the Postal Service as soon as practicable by telephone, fac, or other electronic means.

Source: 29 CFR 825.302, 29 CFR 825.303

32. Q. Can a supervisor have a blanket policy that requires re-certification every 30 days for an all employees requesting FMLA protection for absences related to pregnancy, chronic conditions, and permanent/long-term conditions?

A. No. On a case by case basis, the supervisor may require re-certification of such conditions on a reasonable basis, but not more often than every 30 days and only in connection with an absence related to the condition. The supervisor may require re-certification in less than 30 days when:

-circumstance in the previous certification have changed.

-the supervisor receives information that lasts doubt upon the employee's stated reason for absence

Source: 29 CFR 825.308 (a)

SECTION 4
WORK RULES

33. Q. May an employee be removed, disciplined, or placed on restricted sick leave as a result of protected absences under the FMLA?

A. No.

Source: 29 CFR 825.220

34. Q. Some Local Memorandums of Understanding (LMOU's) allow for daily percentage off on leave, will that affect those who need protected leave under the FMLA?

A. No, leave percentages do not affect the rights of employees to be absent under the FMLA. LMOU language will determine whether FMLA absences count towards the percentages.

Source: AGREEMENT BETWEEN THE LOCAL PARTIES

35. Q. Can an employee file an EEO complaint related to FMLA?

A. Yes, but only on the grounds that the FMLA was applied in a discriminatory manner.

Source: 29 CFR 825.702

36. Q. Can a step increase be deferred as a result of LWOP used under the FMLA?

A. Yes, if an employee has used 13 weeks of LWOP during a step increase waiting period, then the step increase can be deferred. The Family and Medical Leave Act does not require accrual of any rights or benefits during the period of leave taken under the FMLA.

Source: 29 CFR 825.209 (h)

37. Q. My last chance agreement states that if I have more than 4 unscheduled absences within the next six months, I can be removed from the Postal Service. Will an absence protected under the FMLA count as an absence for the purposes of my last chance agreement?

A. No.

Source: 29 CFR 825.220

38. Q. While absences for conditions covered by the FMLA cannot be cited as a basis for discipline, can they be discussed in periodic absence reviews concerning the importance of regular attendance?

A. Yes

39. Q. Can the employee be separated after he or she has exhausted leave protected under the FMLA but is still unable to return to work?

A. Once leave protected under the FMLA has been exhausted, the employee's failure to return to work may be treated as any other failure to return to work.

Source: 29 CFR 825.309, 29 CFR 825.312

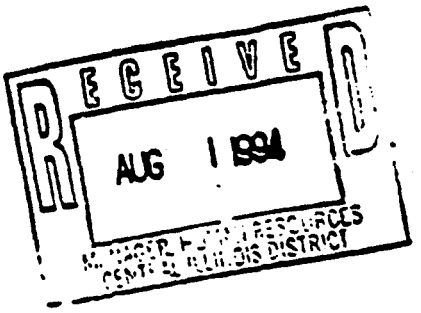
UNITED STATES POSTAL SERVICE

Washington, DC 20260

DATE: July 28, 1994

OUR REF: ER100:JLMoore:sk:4210

SUBJECT: Family and Medical Leave Policy



TO: Managers, Human Resources, Areas
Managers, Human Resources, Districts
Manager, Corporate Personnel Operations

The September 1993 issue of FOCUS provided questions and answers (Q's & A's) on the Family and Medical Leave Act. Since then, additional Q's & A's have been developed from a variety of sources, i.e., personnelists, unions, Labor Relations representatives, etc. In order to have a single source, we have combined them for your use and others in your organization who administer leave policies.

As additional information, the Department of Labor (DOL) is scheduled to release the "final regulations" in August. We do not anticipate radical changes from the interim regulations; however, there could be changes that will require some modifications to our policy. We will apprise you further as this information becomes available.

Dennis R. Weitzel
Manager, Compensation & Benefits
Employee Relations

Attachment

cc: Mr. Downes
Ms. Cagnoli
Ms. Intrater

FAMILY AND MEDICAL LEAVE (FML)
QUESTIONS & ANSWERS

I. GENERAL

1. Q. Is FML in addition to sick and annual leave?
   A. No. FML does not provide for additional sick or annual leave. It merely provides up to 12 workweeks absence for covered conditions. During such absence either annual, sick or LWOP is charged the employee depending on the reason for the absence, and the employee's leave balances.

2. Q. Local Memorandums of Understanding allow for daily percentages off, will that include those off on FMLA Leave?
   A. That must be decided based on the particular language as fashioned by the local representatives.

3. Q. How are the 12 weeks of FML tracked?
   A. By the leave request forms (PS 3971) which are maintained for two years. When leave is requested for a condition covered by FML the supervisor writes "FMLA" in the form's approval section. When questions arise, the supervisor may have to review the request forms submitted by the employee since the start of the leave year. In most instances the supervisor will be aware when an employee is getting close to 12 weeks.

4. Q. Can an employee file an EEO complaint related to FML?
   A. Yes, but only on the grounds that it was applied in a discriminatory manner.

II. ELIGIBILITY

5. Q. In order to be eligible for FMLA Leave, you have to have worked 1250 hours in the 12 months prior to the request. The Postal Service has chosen to implement FMLA by leave year. If you have requested the leave in March, does it have any impact if: (a) you are a career employee who has been on LWOP for an extended period such that you do not meet the criteria of 1250 hours within the past 12 months, and (b) you are a non-career employee who has met the criteria of 1250 hours within the past 12 months, but not within the current leave year?
   A. You must have worked 1250 hours in the past 12 month period prior to the date the leave commences. The employee described in (a) does not meet the 1250 hour criteria and, therefore, is not eligible for FML. The non-career employee described in (b) is

eligible for FMLA leave provided he or she has been employed by the Postal Service for a combined total of at least a year and worked 1250 hours in the past 12 month period prior to the date the leave commences. Neither the 1250 hours worked or the 12 months employment are related to the leave year.

6. Q. Is it true that COP, OWCP, military leave and court leave do not count toward the 12 month eligibility for FML?
   A. COP, OWCP, court leave, and short periods of military leave count toward the 12 month eligibility. However, none of the times mentioned count toward the 1250 hours worked eligibility requirement.

7. Q. Is an employee entitled to up to 12 workweeks of FML within a Postal Service leave year OR during any 12 month period?
   A. During a Postal Service leave year.

8. Q. Does the USPS let married partners take up to 12 weeks of FML each per year, even though the FMLA only mandates a combined total of 12 weeks between the two?
   A. Yes.

9. Q. If a husband and wife are separated or legally divorced, does it negate FML eligibility?
   A. To be eligible under FML to care for a spouse, the couple must be recognized as legally married. A couple who is separated and not divorced would be eligible. A couple who is divorced or is divorced but attempting reconciliation would not be eligible. Likewise, a couple who is living together, unless recognized under state statute as a common law marriage, would not be eligible for FML.

10. Q. An employee had a baby and took 6 weeks of leave during a period that she was not eligible for FML due to not working the required number of hours in the prior year. Now she is eligible for FML and the baby is still less than a year old, is she eligible for the full 12 weeks of FML?
    A. Yes, only the time taken when eligible for FML counts toward the 12 weeks.

11. Q. If the FML request is for placement of an older foster child who is capable of self care, is an employee entitled to FML beyond making arrangements for the actual placement?
    A. FML only covers absences required by the placement of a child with an employee for adoption or foster care. It does not provide time to care (except when medically required) for a child placed with the employee for adoption or foster care.

12. Q. The USPS implemented FML by leave year. An employee is entitled to 12 weeks per year and has up to a year from the date of birth of a child to apply for FML. Is it possible for the employee to take 12 weeks in September when the child is born and then another 12 weeks in March of the next year?
    A. Yes.

III. APPROVED/NOT APPROVED CONDITIONS

13. Q. I am having trouble getting a baby sitter on Saturdays and need to be off every other Saturday to care for my 5 month old baby. Can I take family leave every other Saturday for that purpose?
    A. Leave requested to care for your child, other than for medical reasons, may be taken on an intermittent basis only with your supervisor's approval.

14. Q. I took a week of leave when my baby was born 2 months ago. Now I want to take the week of July 4th off to be with my baby. Since this qualifies for FML, does my supervisor have to let me off?
    A. You are requesting time off for the birth and care of a child on an intermittent basis. Therefore, when the time is taken is subject to your supervisor's approval. The decision is based on your needs, the Postal Service needs, and costs to the Postal Service.

15. Q. Can an employee take family leave to look for child care?
    A. No. Of course, a supervisor can approve regular annual leave for such a purpose.

16. Q. Can the flu count as a serious illness?
    A. Yes, if it complies with the definition of serious illness in the ELM. (Section 515.2d, published in the Postal Bulletin, dated August 5, 1993). Supporting medical documentation may be requested.

17. Q. Is sick leave available under the FMLA for absences attributable to the care of children or elderly parents?
    A. No, only LWOP and annual leave can be used for such absences.

18. Q. If an employee is off with an illness for an extended period and does not request FML for the absence, is he then entitled to an additional 3 months under the FMLA?
    A. The supervisor would have placed FMLA in the approval block of the PS 3971 requesting leave for the extended illness whether the employee requested FMLA or not. If 12 weeks FML has been used within the leave year, the employee is not entitled to additional FML, but may be eligible for additional leave under normal leave regulations.

19. Q. An employee is diagnosed as having recurrent, degenerative arthritis which is supported by medical documentation and qualifies as a serious health condition. The documentation indicates his condition may "flare up" at any time and render him incapacitated for duty. The employee seeks to use this as a basis to call in and request FML with little or no notice. Does this meet the criteria or the intent of the intermittent leave entitlement under the FMLA?
    A. There is not a simple answer in this type of situation. The Department of Labor's interim final regulations state an employee has a covered condition if he or she is under the continuing supervision, but not necessarily being actively treated, due to a long-term, serious, chronic condition. This means such absences, even though intermittent, are covered by the FMLA. However, if management has information which casts doubt on whether or not the absence is actually due to the chronic condition, additional medical documentation can be required. Also, a second opinion can be required. Management must be reasonable about documentation requirements (more often than every 30 days for the same condition is not allowed). Both the employee and management must be open and reasonable concerning the situation. In cases of serious, long-term health conditions, management must accept that the FMLA changes how we treat legitimate absences such as flare-ups of chronic conditions. Finally, in cases where intermittent absences are legitimate, but keeps the employee from being able to meet the job requirements, the employee may have to be transferred to an equivalent position which can accommodate the intermittent absences.

20. Q. Are employees entitled to FML if their absence is required during procedures intended to induce pregnancy, i.e., in-vitro fertilization and other insemination procedures?
    A. Yes, as certified by the attending physician.

21. Q. Is treatment for substance abuse covered as a serious health condition?
    A. Yes, if certified by the medical care provider as a serious health condition or if inpatient care is required.

22. Q. Does "continuing treatment" include EAP and/or AA meetings?
    A. No, people in charge of EAP and AA meetings would not qualify as health care providers.

IV. APPROVAL

23. Q. Must the employee state the leave is FML?
    A. No, when an employee requests leave for a covered condition, the supervisor should note "FMLA" in the request form's approval block, and give the employee a copy of Publication 71.

24. Q. When may a supervisor deny or delay leave requested for a condition covered by family leave?
    A. Leave requests for <u>foreseeable</u> reasons may be denied or delayed unless 30 days notice and requested documentation is provided. Also, unless the leave is medically necessary, leave requested on an intermittent or reduced schedule basis may be denied or delayed when it is to care for a newly born child or because of the placement of a child with the employee.

25. Q. Must the employer designate as FMLA leave, leave taken which qualifies as FML, but was not requested or designated as such by the employee, i.e., an employee takes 4 days off for an operation or to care for a parent but does not request the leave under FMLA, is the employer REQUIRED to tell the employee he or she should take the leave as FMLA?
    A. Leave requested for a covered condition is part of the 12 weeks provided by the FMLA. When leave is requested for a covered condition, whether or not FML is specified by the employee, the supervisor should mark FMLA in the PS 3971 approval block and give the employee a copy of Publication 71. Of course, if the reason for the leave is not given by the employee and the supervisor does not ask, it would not be designated as FML.

26. Q. If an employee had simply applied for sick leave and then was diagnosed as having bronchitis and referred to another doctor, may the employee request to have the first one or two visits retroactively classified as FMLA leave?
    A. Leave cannot be retroactively designated as FMLA leave after the leave is concluded.

27. Q. May an employee simply seek to have leave taken as sick leave or annual leave in lieu of sick leave retroactively classified as FML when all the FML requirements are met by those absences?
    A. Leave cannot be retroactively designated as FMLA leave after the leave is concluded.

28. Q. What can be done about employees annotating all requests for leave "FMLA" on PS Form 3971?
    A. Whether or not the employee requests FML makes little difference. It is up to the supervisor to determine if the leave qualifies or not, and to so note on the PS 3971.

29. Q. Can an employee use intermittent leave or work a reduced schedule for the birth or placement of a son or daughter or to care for a newborn son or daughter?
    A. Yes, but the timing of intermittent, non-medically necessary leave is subject to the supervisor's approval. Approval is based on the employee's needs, Postal needs, and cost to the Postal Service.

30. Q. Can an employee use intermittent leave or work a reduced schedule because of pregnancy or the serious health condition of a newborn child?
    A. Yes, when medically necessary to care for the mother during her pregnancy or due to the newborn child's serious health condition. Certification may be required from the health care provider stating such leave is medically necessary and its expected duration and schedule.

31. Q. Is the employer's approval required for an employee to use intermittent leave or work a reduced schedule if the employee, spouse, child or parent has a serious health condition?
    A. Provided proper medical certification and notice is provided, the absence must be allowed. However, the employee must attempt to schedule the absences so as not to disrupt the employer's operation and may be assigned to an alternative position with equivalent pay and benefits that better accommodates the intermittent or reduced leave schedule.

32. Q. Does the employee have the option of using LWOP in conjunction with annual or sick leave for FMLA?
    A. The employee may request LWOP in conjunction with annual or sick, and such combinations may be approved. However, the type leave used is subject to approval in accordance with normal leave approval procedures. The FMLA only requires that a total of 12 weeks absence be approved. Except when sick or annual leave is no longer available for the absence, approval of LWOP is a matter of administrative discretion based on the needs of the employee and the needs and cost to the Postal Service.

33. Q. Can properly submitted FML requests be denied because of operational reasons?
    A. If the absence is otherwise justified under FMLA, the leave cannot be denied. The timing for taking intermittent leave to care for a newly born son or daughter (unless medically necessary) is subject to the supervisor's approval. (When the necessity for leave is foreseeable, the employee shall provide the employer with not less than 30 days' notice if practicable. If the necessity for leave is based on a planned medical treatment, the employee shall make a reasonable effort to schedule the treatment so as not to unduly disrupt the employer's operations.)

34. Q. If an employee requests leave for a condition covered by FML, what information must the supervisor provide to the employee?
    A. The approved PS 3971 with a notation of whether or not the leave will be considered FML (approval may state pending verification of information), any requirement for the employee to furnish additional certification, and a copy of Publication 71.

DOCUMENTATION

35. Q. What certification is required for employees requesting FML because of the birth or placement of a son or daughter and in order to care for such son or daughter after birth?
    A. That the employee is the parent, and the date of birth or placement of this son or daughter. No medical certification is required.

36. Q. Is medical documentation required for each absence after a medical physician has certified that the employee is receiving continuing treatment?

A. No, but recertification of medical conditions may be required to support leave requests at any reasonable interval, but not more often than every 30 days, unless:
a) the employee requests an extension of leave
b) circumstances have changed significantly from the original request
c) the employer receives information that casts doubt upon the continuing validity of the certification
d) the absence is for a different condition or reason

37. Q. What can an employer do if he or she questions the adequacy of a medical certification?
A. If the certification includes the required information, the employer may require the employee to obtain a second opinion at the employer's expense.

38. Q. Is advance written notice required for employees' use of FMLA?
A. Yes, except in the case of unexpected emergencies. In such cases, the employee should provide notice by telephone, telegraph, fax or other electronic means. Additional information must be provided as soon as practicable to do so.

39. Q. Is a 3971 sufficient advance notice or is additional documentation required?
A. A PS 3971, Request for or Notification of Absence, is sufficient for the advance notice provided it gives the appropriate information. Any additional required documentation must be provided before the request can be approved.

VI. MISCELLANEOUS

40. Q. Can an FLSA exempt employee now take leave in less than full day increments?
A. Only if the time off is due to reasons covered by FML. Charging an FLSA exempt employee a partial day of leave for any other reason is not allowed.

41. Q. Can a step increase be deferred as a result of FML?
A. It can happen, but is not likely. There is a maximum of 12 weeks during a leave year for leave taken as FML. An employee must have 13 weeks of LWOP during a step increase wait period for the step increase to be deferred. The Family and Medical Leave Act does not require accrual of any rights or benefits during the period of family leave.

42. Q. Do employees retain the no-layoff protection when FML interrupts the 20 pay periods worked per year during the six year period of continuous service?
    A. Yes. If no-layoff protection is lost, it would normally be for other reasons. The maximum FML time off is 12 weeks or 6 pay periods per leave year. The only time FML would interrupt the years required for protection is in cases where more than 12 weeks of FML during two different leave years result in more than 6 pay periods of absence during an individual employee's "anniversary" year. In these rare cases the no-layoff protection must be manually restored. This is accomplished by sending a memorandum to the Minneapolis Information Service Center.

43. Q. Is someone who has been progressively disciplined up to and including removal and who enters into a standard Last Chance Agreement and takes 2 weeks FML for contagious bronchitis exempt from implementing the terms and conditions of the Last Chance Agreement?
    A. This question is currently under review, and it appears the Last Chance Agreement will be revised to ensure compliance with FMLA requirement to not discipline an employee for absences covered by FML.

44. Q. Can an employee be disciplined or receive other administrative action for absences covered by FML?
    A. No. However, if the absence exceeds the 12 weeks authorized by the FMLA, an employee could be subject to disciplinary action or other administrative action.

45. Q. While absences for conditions covered by the FMLA cannot be cited as a basis for discipline, can they be discussed in periodic absence reviews concerning the importance of regular attendance?
    A. Yes.

46. Q. Can the employee be separated after he or she has exhausted family leave, but is still unable to return to work?
    A. Once family leave has been exhausted, the employee's failure to return to work should be treated as any other failure to return to work. Also, if requested documentation, including keeping the supervisor informed on an expected return to work date, is not provided within 15 days, family leave may be denied and steps toward separation may be taken. If appropriate documentation is later provided, the separation will have to be canceled.

47. Q. Do provisions of the FMLA which allow for reassignment due to a curtailed schedule apply to bargaining unit employees?
    A. Yes. Of course, the changes must be accomplished in accordance with applicable collective bargaining agreements.

48. Q. If a TE becomes a career employee and becomes eligible for FML during his or her probationary period and absents himself during a significant period of the probationary period due to FML, may the USPS extend the 90 day probationary period as appropriate to ensure a full 90 days of evaluation?
    A. There are no current provisions to extend the 90 day probationary period for new employees due to FML absences.

QUESTIONS AND ANSWERS (Q & A)

1. *Q. What is the Family and Medical Leave Act of 1993?*

   A. In general, the Act entitles qualified employees to be absent for up to 12 workweeks per year for the birth or adoption of a child; to care for a spouse, son, daughter, or parent with a serious health condition; or when unable to work because of a serious health condition without loss of their job or health benefits.

2. *Q. Which employees are qualified?*

   A. Employees who have been employed by the Postal Service for at least one year and who have worked at least 1250 hours during the previous 12 months are qualified.

3. *Q. How do I apply for family leave?*

   A. Submit a form PS 3971, Request for or Notification of Absence, with the supporting documentation. Family leave is not a separate type of leave, so you apply for annual or sick leave or LWOP as appropriate the same as you have applied for leave before. Just as in the past, in emergency situation a phone call, telegram, etc. will suffice until it is possible for you to submit the necessary paperwork.

4. *Q. Is family leave in addition to my annual or sick leave?*

   A. The Family and Medical Leave Act of 1993 does not provide more annual or sick leave than is already provided to Postal Service employees. However, it entitles you to up to 12 workweeks of absence if you meet the criteria of the Act. The approval of leave for other reasons, however, remains discretionary, consistent with collective bargaining agreements and policies.

5. *Q. Do I have to request family leave if I need time off for a covered condition?*

   A. No, however, if you request leave without specifying that it is for a covered condition, the leave may be denied, consistent with collective bargaining agreements and policies.

6. *Q. Do I have to use all of my annual leave balance before I can take LWOP for*

a condition covered by family leave?

A. *No, you need not exhaust annual leave and/or sick leave before requesting leave without pay.*

7. Q. *Can I still take more than 12 weeks leave during a year?*

A. *The 12 workweek limit is the maximum amount of leave which must be granted for the covered conditions. After being off for 12 weeks, you may request leave under current leave policies. Approval will be subject to the terms and conditions of these current policies.*

8. Q. *Does the 12 weeks leave have to be continuous?*

A. *No, the leave may be taken intermittently or on a reduced schedule basis as long as taking it in that manner is medically necessary or approved by local management.*

10. Q. *My mother-in-law who lives with me is ill and requires my care. Does management have to approve my leave?*

A. *No, the family leave policy only provides for care of a spouse, parent, son or daughter. Leave taken to care for anyone else would require approval under normal annual leave or LWOP policies.*

11. Q. *If my child is sick, can I now take sick leave to care for him?*

A. *Yes, pursuant to the terms of the 1994 National Agreement, employees may use up to 7 days of their earned sick leave to care for family members. Annual leave or LWOP may also be taken to care for your child.*

12. Q. *My knee problem was diagnosed during an appointment with a health care provider. He ordered three months of physical therapy treatments. Is that visit and the treatments covered by family leave?*

A. *Yes, that would qualify as a serious health condition since it involves a continuing treatment under the supervision of the health care provider which would likely result in a period of incapacity for more than three days if left untreated.*

13. Q. *How will I know if the requested leave is chargeable against the 12 week entitlement under the Family and Medical Leave Act?*

A. *When you indicate the request is for one of the conditions covered by the Family and Medical Leave Act, you will be provided a notice of expectations and employee obligations. If the leave is approved as one of the covered conditions, the approving official will note "FMLA" in the approved block of the form 3971.*

14. Q. *My wife's doctor said she needs almost total bed rest for the last two months of her pregnancy, and I need to stay home to care for our other children. Is this condition covered by family leave?*

A. *Yes, this leave is taken because of the birth of your son or daughter which is a covered condition. The leave can be before or after the birth, as long as it is because of the birth.*

15. Q. *I am a transitional employee for nine months. Am I eligible for family leave?*

A. *The FMLA is not limited to career employees. As long as you have been employed for an accumulated total of a year and have worked a total of 1250 hours during the previous 12 months, you are eligible for the entitlement under the Family and Medical Leave Act of 1993. This is true even though you may have had a break in service between appointments. The "accumulated" year can be the result of different types of appointments over several years.*

16. Q. *I qualify for time off under the Family and Medical Leave Act, but my transitional employee appointment term expires next week. How will that affect me?*

A. *The Family and Medical Leave Act does not change the terms of your appointment. However, if you otherwise would be reappointed, you will be reappointed and eligible to return to the same or equivalent position.*

17. Q. *If I have a midwife for my prenatal care and the delivery of my child, would my pregnancy still be a condition covered by family leave?*

A. *Yes, treatment by a medical doctor is not a requirement for family and medical leave coverage.*

18. Q. *During my absence, how often will I have to provide documentation relating to my health condition?*

A. *You must inform your supervisor as soon as possible anytime your intentions or status which would affect your returning to work changes from your last contact. Also, you may occasionally be requested to provide an update, but no more frequently than each 30 days.*

19. Q. *May an employee be removed, disciplined, or placed on restricted sick leave as a result of approved use of family leave?*

A. *No.*

20. Q. *Local Memorandums of Understanding allow for daily percentages off, will that include those off on FMLA Leave?*

A. *That must be decided based on the particular language as fashioned by the local representatives.*

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A. *By the leave request forms (PS 3971) which are maintained for two years. When leave is requested for a condition covered by FML the supervisor writes "FMLA" in the form's approval section. When questions arise, the supervisor may have to review the request forms submitted by the employee since the start of the leave year. In most instances the supervisor will be aware when an employee is getting close to 12 weeks.*

22. Q. *Can an employee file an EEO complaint related to FML?*

A. *Yes, but only on the grounds that it was applied in a discriminatory manner.*

23. Q. *In order to be eligible for FMLA Leave, you have to have worked 1250 hours in the 12 months prior to the request. The Postal Service has chosen to implement FMLA by leave year. If you have requested the leave in March, does it have any impact if: (a) you are a career employee who has been on LWOP for an extended period such that you do not meet the criteria of 1250 hours within the past 12 months, and (b) you are a non-career employee who has met the criteria of 1250 hours within the past 12 months, but not within the current leave year?*

A. *You must have worked 1250 hours in the past 12 month period prior to the date the leave commences. The employee described in (a) does not meet the 1250 hour criteria and, therefore, is not eligible for FML. The non-career employee described in (b) is eligible for FML leave provided he or she has been employed by the Postal Service for a combined total of at least a year and worked 1250 hours in the past 12 month period prior to the date the leave commences. Neither the 1250 hours worked or the 12 months employment are related to the leave year.*

24. Q. *Is it true that COP, OWCP, military leave and court leave do not count toward the 12 month eligibility for FML?*

A. *COP, OWCP, court leave, and short periods of military leave count toward the 12 month eligibility. However, none of the times mentioned count toward the 1250 hours worked eligibility requirement.*

25. Q. *Is an employee entitled to up to 12 workweeks of FML within a Postal Service leave year or during any 12 month period?*

A. *During a Postal Service leave year.*

26. Q. *Does the USPS let married partners take up to 12 weeks of FML, each per year, even though the FMLA only mandates a combined total of 12 weeks between the two?*

A. *Yes.*

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A. *To be eligible under FML to care for a spouse, the couple must be recognized as legally married. A couple who is separated and not recognized as legally married. A couple who is separated and not divorced would be eligible. A couple who is divorced but attempting reconciliation would not be eligible. Likewise, a couple who is living together, unless recognized under state statute as a common law marriage, would not be eligible for FML.*

28. Q. *An employee had a baby and took 6 weeks of leave during a period that she was not eligible for FML due to not working the required number of hours in the prior year. Now she is eligible for FML and the baby is still less than a year old, is she eligible for the full 12 weeks of FML?*

A. *Yes, only the time taken when eligible for FML counts toward the 12 weeks.*

29. Q. *If the FML request is for placement of an older foster child who is capable of self care, is an employee entitled to FML beyond making arrangements for the actual placement?*

A. *FML only covers absences required by the placement of a child with an employee for adoption or foster care. It does not provide time to care (except when medically required) for a child placed with the employee for adoption or foster care.*

30. Q. *The USPS implemented FML by leave year. An employee is entitled to 12 weeks*

per year and has up to a year from the date of birth of a child to apply for FML. Is it possible for the employee to take 12 weeks in September when the child is born and then another 12 weeks in March of the next year?

A. *Yes.*

31. Q. *I am having trouble getting a baby sitter on Saturdays and need to be off every other Saturday to care for my 5 month old baby. Can I take family leave every other Saturday for that purpose?*

A. *Leave requested to care for your child, other than for medical reasons, may be taken on an intermittent basis only with your supervisor's approval.*

32. Q. *I took a week of leave when my baby was born 2 months ago. Now I want to take the week of July 4th off to be with my baby. Since this qualifies for FML, does my supervisor have to let me off?*

A. *You are requesting time off for the birth and care of a child on an intermittent basis. Therefore, the time taken is subject to your supervisor's approval. The decision is based on your needs, the Postal Service needs, and costs to the Postal Service.*

33. Q. *Can an employee take family leave to look for child care?*

A. *No. Of course, a supervisor can approve regular annual leave for such a purpose.*

34. Q. *Can the flu count as a serious illness?*

A. *Yes, if it complies with the definition of serious illness. Supporting medical documentation may be requested.*

35. Q. *Is sick leave available under the FML for absences attributable to the care of children or elderly parents?*

A. *Yes, consistent with the leave provisions of the National Agreement.*

36. Q. *If an employee is off with an illness for an extended period and does not request FML for the absence, is he/she then entitled to an additional 3 months under the FMLA?*

A. *The supervisor would have placed FML in the approval block of the PS 3971 requesting leave for the extended illness whether the employee requested FML or not. If 12 weeks FML has been used within the leave year, the employee is*

not entitled to additional FML, but may be eligible for additional leave under normal leave regulations.

37. Q. *An employee is diagnosed as having recurrent, degenerative arthritis which is supported by medical documentation and qualifies as a serious health condition. The documentation indicates his condition may "flare up" at any time and render him incapacitated for duty. The employee seeks to use this as a basis to call in and request FML with little or no notice. Does this meet the criteria or the intent of the intermittent leave entitlement under the FMLA?*

A. *There is not a simple answer in this type of situation. The Department of Labor's final regulations state an employee has a covered condition if he/she is under the continuing supervision, but not necessarily being actively treated, due to a long-term, serious, chronic condition. This means such absences, even though intermittent, are covered by the FMLA. However, if management has information which casts doubt on whether or not the absence is actually due to the chronic condition, additional medical documentation can be required. Also, a second opinion can be required. Management must be reasonable about documentation requirements (more often than every 30 days for the same condition is not allowed). Both the employee and management must be open and reasonable concerning the situation. In cases of serious long-term health conditions, management must accept that the FMLA changes how we treat legitimate absences such as flare-ups of chronic conditions. Finally, in cases where intermittent absences are legitimate absences such as flare-ups of chronic conditions. Finally, in cases where intermittent absences are legitimate, but keeps the employee from being able to meet the job requirements, the employee may have to be transferred to an equivalent position which can accommodate the intermittent absences.*

38. Q. *Are employees entitled to FML if their absence is required during procedures intended to induce pregnancy, i.e., invito fertilization and other insemination procedures?*

A. *Yes, as certified by the attending physician.*

39. Q. *Is treatment for substance abuse covered as a serious health condition?*

A. *Yes, if certified by the medical care provider as a serious health condition or if inpatient care is required.*

40. Q. *Does "continuing treatment" include EAP and/or AA meetings?*

A. *No, people in charge of EAP and AA meetings would not qualify as health care providers.*

41. Q. *Must the employee state the leave is FML?*

A. *No, when an employee requests leave for a covered condition, the supervisor should note "FML" in the request form's approval block, and give the employee a copy of USPS Form 71.*

42. Q. *When may a supervisor deny or delay leave requested for a condition covered by family leave?*

A. *Leave requests for foreseeable reasons may be denied or delayed unless 30 days notice and requested documentation is provided. Also, unless the leave is medically necessary, leave requested on an intermittent or reduced schedule basis may be denied or delayed when it is to care for a newly born child or because of the placement of a child with the employee. Leave request that are properly documented and submitted timely may not be denied including intermittent or reduced schedule leave requested for a serious health condition.*

43. Q. *Must the employer designate as FML leave, leave taken which qualifies as FML, but was not requested or designated as such by the employee, i.e., an employee takes 4 days off for an operation or to care for a parent but does not request the leave under FML, is the employer required to tell the employee he/she should take the leave as FML?*

A. *Leave requested for a covered condition is part of the 12 weeks provided by the FMLA. When leave is requested for a covered condition, whether or not FML is specified by the employee, the supervisor should mark FML in the PS 3971 approval block and give the employee a copy of USPS Form 71. Of course, if the reason for the leave is not given by the employee and the supervisor does not ask, it would not be designated as FML.*

44. Q. *If an employee had simply applied for sick leave and then was diagnosed as having bronchitis and referred to another doctor, may the employee request to have the first one or two visits retroactively classified as FMLA leave?*

A. *Leave cannot be retroactively designated as FML leave after the leave is concluded.**

45. Q. *May an employee simply seek to have leave taken as sick leave or annual leave in lieu of sick leave retroactively classified as FML when all the FML requirements are met by those absences?*

A. *Leave cannot be retroactively designated as FML leave after the leave is concluded.**

**See Section 515.42*

46. Q. *What can be done about employees annotating all requests for leave "FML" on Ps Form 3971?*

A. *Whether or not the employee requests FML makes little difference. It is up to the supervisor to determine if the leave qualifies or not, and to so note on the PS 3971.*

47. Q. *Can an employee use intermittent leave or work a reduced schedule for the birth or placement of a son or daughter or to care for a newborn son or daughter?*

A. *Yes, but the timing of intermittent, non-medically necessary leave is subject to the supervisor's approval. Approval is based on the employee's needs, Postal Needs, and cost to the Postal Service.*

48. Q. *Can an employee use intermittent leave or work a reduced schedule because of pregnancy or the serious health condition of a newborn child?*

A. *Yes, when medically necessary to care for the mother during her pregnancy or due to the newborn child's serious health condition. Certification may be required from the health care provider stating such leave is medically necessary and its expected duration and schedule.*

49. Q. *Is the employer's approval required for an employee to use intermittent leave or work a reduced schedule if the employee, spouse, child or parent has a serious health condition?*

A. *Provided proper medical certification and notice is provided, the absence must be allowed. However, the employee must attempt to schedule the absences so as not to disrupt the employer's operation and may be assigned to an alternative position with equivalent pay and benefits that better accommodates the intermittent or reduced leave schedule.*

50. Q. *Can properly submitted FML requests be denied because of operational reasons?*

A. *If the absence is otherwise justified under FMLA, the leave cannot be denied. The timing for taking intermittent leave to care for a newly born son or daughter (unless medically necessary) is subject to the supervisor's approval. (When the necessity for leave is foreseeable, the employee shall provide the employer with not less than 30 days' notice if practicable. If the necessity for leave is based on a planned medical treatment, the employee shall make a reasonable effort to schedule the treatment so as not to unduly disrupt the employer's operations.)*

51. Q. *If an employee requests leave for a condition covered by FML, what information must the supervisor provide to the employee?*

A. *The approved PS 3971 with a notation of whether or not the leave will be considered FML (approval may state pending verification of information), any*

requirement for the employee to furnish additional certification, and a copy of Publication Form WH-381.

52. Q. *What certification is required for employees requesting FML because of the birth or placement of a son or daughter and in order to care for such son or daughter after birth?*

A. *That the employee is the parent, and the date of birth or placement of this son or daughter. No medical certification is required.*

53. Q. *Is medical documentation required for each absence after a medical physician has certified that the employee is receiving continuing treatment?*

A. *No, but recertification of medical conditions may be required to support leave requests at any reasonable interval, but not more often than every 30 days, unless:*
a) the employee requests an extension of leave
b) circumstances have changed significantly from the original request
c) the employer receives information that casts doubt upon the continuing validity of the certification
d) the absence is for a different condition or reason

54. Q. *What can an employer do if he or she questions the adequacy of a medical certification?*

A. *If the certification includes the required information, the employer may require the employee to obtain a second opinion at the employer's expense.*

55. Q. *Is advance written notice required for employees' use of FML?*

A. *Yes, except in the case of unexpected emergencies. In such cases, the employee should provide notice by telephone, telegraph, fax or other electronic means. Additional information must be provided as soon as practicable to do so.*

56. Q. *Is a 3971 sufficient advance notice or is additional documentation required?*

A. *A PS 3971, Request for or Notification of Absence is sufficient for the advance notice provided it gives the appropriate information. Any additional required documentation must be provided before the request can be approved.*

57. Q. *Can a step increase be deferred as a result of FML?*

A. *It can happen, but is not likely. There is a maximum of 12 weeks during a leave year for leave taken as FML. An employee must have 13 weeks of LWOP during a step increase wait period for the step increase to be deferred. The Family and Medical Leave Act does not require accrual of any rights or benefits during the period of family leave.*

58. Q. *Do employees retain the no-layoff protection when FML interrupts the 20 pay periods worked per year during the six year period of continuous service?*

A. *Yes. If no-layoff protection is lost, it would normally be for other reasons. The maximum FML time off is 12 weeks or 6 pay periods per leave year. The only time FML would interrupt the years required for protection is in cases where more than 12 weeks of FML during two different leave years result in more than 6 pay periods of absence during an individual employee's anniversary year. In these rare cases the no-layoff protection must be manually restored. This is accomplished by sending a memorandum to the Minneapolis Information Service Center.*

59. Q. *Is someone who has been progressively disciplined up to and including removal and who enters into a standard "Last Chance" Agreement and takes 2 weeks FML for contagious bronchitis exempt from implementing the terms and conditions of the Last Chance Agreement?*

A. *The Last Chance Agreement will be revised to ensure compliance with FMLA requirement to not discipline an employee for absences covered by FML.*

60. Q. *Can an employee be disciplined or receive other administrative action for absences covered by FML?*

A. *No. However, if the absence exceeds the 12 weeks authorized by the FMLA, an employee could be subject to disciplinary action or other administrative action subject to the just cause provisions of the contract.*

61. Q. *While absences for conditions covered by the FMLA cannot be cited as a basis for discipline, can they be discussed in periodic absence reviews concerning the importance or regular attendance?*

A. *Yes.*

62. Q. *Can the employee be separated after he or she has exhausted family leave, but is still unable to return to work?*

A. *Once family leave has been exhausted, the employee's failure to return to work should be treated as any other failure to return to work. Also, if requested documentation, including keeping the supervisor informed on an expected return to work date, is not provided within 15 days, family leave may be denied and steps toward separation may be taken. If appropriate documentation is later provided, the separation will have to be canceled.*

63. Q. *Do provisions of the FMLA which allow for reassignment due to a curtailed schedule apply to bargaining unit employees?*

A. *Yes, Of course, the changes must be accomplished in accordance with applicable collective bargaining agreements.*

64. Q. *If a TE becomes a career employee and becomes eligible for FML during his or her probationary period and absents themselves during a significant period of the probationary period due to FML, may the USPS extend the 90 day probationary period as appropriate to ensure a full 90 days of evaluation?*

A. *There are no current provisions to extend the 90 day probationary period for new employees due to FML absences.*

(b) Employees who fall under the provisions of Public Law 83-102 and who have maintained a carryover of more than 440 hours cannot increase their present ceiling.

(c) The parties agree that ELM 512.73d shall be changed to reflect that an employee covered by the NPMHU National Agreement is not paid for annual leave in excess of 55 days. In all other respects, the ELM provisions for payment of accumulated leave are not changed because of this Memorandum.

MEMORANDUM OF UNDERSTANDING
ANNUAL LEAVE EXCHANGE OPTION

The parties agree that mail handler career employees will be allowed to sell back a maximum of forty (40) hours of annual leave prior to the beginning of the leave year provided the following two criteria are met:

1) The employee must be at the maximum leave carry over ceiling at the start of the leave year, and

2) The employee must have used fewer than 75 sick leave hours in the leave year immediately preceding the year for which the leave is being exchanged.

This Memorandum of Understanding expires November 20, 200**4**.

MEMORANDUM OF UNDERSTANDING
LEAVE SHARING

The Postal Service will continue a Leave Sharing Program during the term of the **2000** National Agreement under which career postal employees are able to donate annual leave from their earned annual leave account to another career postal employee, within the same geographic area served by a postal district. In addition, career mail handlers may donate annual leave from their earned annual leave account to family members who hold a career position within the Postal Service regardless of geographical location. Family members shall include son or daughter, parent, and spouse as defined in ELM Section 515.2. Single donations must be of 8 or more whole hours and may not exceed half of the amount of annual leave earned each year based on the leave earnings category of the donor at the time of donation. Sick leave, unearned annual leave, and annual leave hours subject to forfeiture (leave in excess of the maximum carryover which the employee would not be permitted to use before the end of the leave year), may not be donated, and employees may not donate leave to their immediate supervisors. To be

eligible to receive donated leave, a career employee (a) must be incapacitated for available postal duties due to serious personal health conditions including pregnancy and (b) must be known or expected to miss at least 40 more hours from work than his or her own annual leave and/or sick leave balance(s), as applicable, will cover, and (c) must have his or her absence approved pursuant to standard attendance policies. Donated leave may be used to cover the 40 hours of LWOP required to be eligible for leave sharing.

For purposes other than pay and legally required payroll deductions, employees using donated leave will be subject to regulations applicable to employees in LWOP status and will not earn any type of leave while using donated leave.

Donated leave may be carried over from one leave year to the next without limitation. Donated leave not actually used remains in the recipient's account (i.e., is not restored to donors). Such residual donated leave at any time may be applied against negative leave balances caused by a medical exigency. At separation, any remaining donated leave balance will be paid in a lump sum.

MEMORANDUM OF UNDERSTANDING
LWOP IN LIEU OF SL/AL

It is hereby agreed by the U.S. Postal Service and the National Postal Mail Handlers Union that:

1. **As provided for in the Employee and Labor Relations Manual (ELM) Exhibit 514.4(d), an employee need not exhaust annual leave and/or sick leave before requesting leave without pay.**
2. **As specified in ELM 513.61, if sick leave is approved, but the employee does not have sufficient sick leave to cover the absence, the difference is charged to annual leave or to LWOP at the employee's option.**
3. **Employees may use LWOP in lieu of sick or annual leave when an employee requests and is entitled to time off under ELM 515, Absences for Family Care or Serious Health Problem of Employees (policies to comply with the Family and Medical Leave Act).**
4. **In accordance with Article 10, Section 6, when an employee's absence is approved in accordance with normal leave approval procedures, the employee may utilize annual and sick leave in conjunction with leave without pay. We further agree that this would include an employee who wishes to**

continue eligibility for health and life insurance benefits, and/or those protections for which the employee may be eligible under Article 6 of the National Agreement.

MEMORANDUM OF UNDERSTANDING

During the term of the **2000** National Agreement, sick leave may be used by an employee to give care or otherwise attend to a family member having an illness, injury or other condition which, if an employee had such condition, would justify the use of sick leave by the employee. Family members shall include son or daughter, parent and spouse as defined in ELM Section 515.2. Up to 80 hours of sick leave may be used for dependent care in any leave year. Approval of sick leave for dependent care will be subject to normal procedures for leave approval.

MEMORANDUM OF UNDERSTANDING
PART-TIME FLEXIBLE COURT LEAVE

1. Effective September 26, 1987, part-time flexible employees who have completed their probationary period shall be eligible for court leave as defined in Employee and Labor Relations Manual Part 516.1 and Part 516.31.
2. A part-time flexible employee will be eligible for court leave if the employee would otherwise have been in a work status or annual leave status. If there is a question concerning the status, the part-time flexible employee will be eligible if the employee was in work status or annual leave status on any day during the pay period immediately preceding the period of court leave.
3. If eligibility is established under paragraph 2, the specific amount of court leave for an eligible part-time flexible employee shall be determined on a daily basis as set forth below:
    a. If previously scheduled, the number of straight time hours the Employer scheduled the part-time flexible employee to work;
    b. If not previously scheduled, the number of hours the part-time flexible employee worked on the same service day during the service week immediately preceding the period of court leave;
    c. If not previously scheduled and if no work was performed on the same day in the service week immediately preceding the period of court leave, the guarantee as provided in Article 8, Section 8, of the National Agreement, provided

such circumstances, the employee shall not be eligible to re-bid the next posting of that assignment.

D) If at the end of one (1) year from the submission of the bid the employee has not been able to perform the duties of the bid-for position, the employee must relinquish the assignment, and shall not be eligible to re-bid the next posting of that assignment.

E) It is still incumbent upon the employee to follow procedures in Article 12.3.C to request notices to be sent to a specific location when absent. All other provisions relevant to the bidding process will also apply.

II. Higher Level Pay

Employees who bid to a higher level assignment pursuant to the procedures described in the preamble and Part I, Bidding, above, will not receive higher level pay until they are physically able to, and actually perform work in the bid-for higher level position.

MEMORANDUM OF UNDERSTANDING

BETWEEN THE UNITED STATES POSTAL SERVICE AND THE NATIONAL POSTAL MAIL HANDLERS UNION, AFL-CIO

RETURN TO DUTY

The parties affirm their understanding concerning the review of medical certificates submitted by employees who return to duty following extended absences due to illness.

We mutually agree to the following:

1. **To avoid undue delay in returning an employee to duty, the on-duty medical officer, contract physician, or nurse should review and make a decision based upon the presented medical information the same day it is submitted.**

   Normally, the employee will be returned to work on his/her next scheduled tour of duty or the date stated in the medical documentation, provided that adequate medical documentation is submitted within sufficient time for review and that a decision is made to return the employee to duty.

2. **The reasonableness of the Service in delaying an employee's return beyond his/her next scheduled tour of duty or the date stated in the medical documentation shall be a proper subject for the grievance procedure on a case-by-case basis.**

the first-in, first-out sequence has been agreed to by both advocates in accordance with the provisions articulated in Article 15.4.

- produce clear arbitration awards, ensuring both brevity and ease of understanding, by limiting the recitation of contract language to only citations that are relevant to the fact-circumstances of the case, without reproduction of unnecessary and lengthy quotes from the USPS-NPMHU National Agreement or other USPS handbooks or manuals.
- ensure fairness to the parties, especially the grievant, by issuing punctual awards as soon as possible following the close of the hearing record.

In keeping with our joint responsibility to ensure the effective use of arbitration, it is the position of the parties that canceled or lost arbitration hearing dates should be a rare occurrence. The parties are to be diligent in exerting their best efforts to ensure that hearing dates are effectively utilized to the maximum extent possible.

MEMORANDUM OF UNDERSTANDING
EXPEDITED ARBITRATION

The U.S. Postal Service and the National Postal Mail Handlers Union, a Division of the Laborers' International Union of North America, AFL CIO, agree to hear grievances concerning the following issues in the Expedited Arbitration forum.

1. Restricted Sick Leave;
2. Step Withholding;
3. Employee Requests for Leave;
4. AWOL;
5. Request for Medical Certification;
6. Supervisor performance of bargaining unit work in 1.6A offices;
7. Bypass of employee(s) on the Overtime Desired List;
8. Holiday scheduling;
9. Designation of successful bidder;
10. Movement outside of bid assignment area;
11. Higher level assignments;
12. Employee claims;

13. Any other grievance mutually agreed upon by the parties at Step 3.

This Agreement does not change either party's right to refer an expedited case to regular arbitration in accordance with the applicable procedures of Article 15, Section 4.C., of the National Agreement.

MEMORANDUM OF UNDERSTANDING

Re: Purge of Warning Letters

The parties agree that there will be a one-time purge of Official Disciplinary Letters of Warning from the personnel folders of all employees represented by the National Postal Mail Handlers Union. To qualify to be purged, a Letter of Warning must:

1. Have an issue date prior to the effective date of the **2000** National Agreement between the parties;
2. Have been in effect for 6 months or longer and not cited as an element of prior discipline in any subsequent disciplinary action; and
3. Not have been issued in lieu of a suspension or a removal action.

All grievances associated with discipline that is purged as a result of this Memorandum shall be withdrawn.

MEMORANDUM OF UNDERSTANDING
TASK FORCE ON DISCIPLINE

The parties agree to establish at the national level a "Task Force on Discipline." The Task Force shall have three (3) representatives of the Union and three (3) representatives of the USPS.

The purpose of the Task Force shall be to study the manner in which discipline is administered by the USPS, the manner in which disputes about discipline are handled by the parties, and to recommend changes and improvements which can be made in the discipline and dispute resolution systems.

The Task Force is authorized, at its discretion, to conduct tests of alternative discipline and dispute resolution systems in various facilities.

The Task Force shall convene periodically but at least quarterly, at such times and at such places as it deems appropriate during the term of the **2000** National Agreement. No action or recommendations may be taken by the Task Force except by an agreement of the parties.

Nothing herein shall preclude any of the parties from exercising the rights which they may otherwise have.

SUMMARY OF FMLA ARBITRATIONS

NPMHU ARBITRATIONS

USPS and National Postal Mail Handlers Union, Nos. C90M-1C-C96037038, C90M-1C-D96057025 (Sickles, December 24, 1996)

The FMLA requires an employee to timely advise the supervisor of medical or other qualifying conditions for FMLA leave, but does not require the employee to expressly request FMLA leave. It is the supervisor's obligation to determine whether the condition is covered by the Act and, if so, to note this on Form 3971, to provide the employee with written notification concerning his or her rights and responsibilities under the Act, and to notify the employee as to any required medical documentation (citing with approval the NALC Arbitration Award in Case No. H90N-4H-D94068273 (Lurie, November 27, 1994)). Where the grievant notified his supervisor of the reason for his absence -- to care for his wife who had been in a serious automobile accident -- and supervisor did not notify employee of FMLA rights or make FMLA notifications on the 3971 forms or submit the forms to the FMLA Administrator for an eligibility determination, removal based in part on these absences was set aside.

USPS and National Postal Mail Handlers Union, No. D90M-1D-D95006664 (Skelton, August 7, 1995)

In a case where the grievant's own medical condition and that of her son would probably have qualified for FMLA leave and the claim was raised only at Step 3, the grievance was denied. Prior to arbitration, the grievant did not notify management of the reasons for her absences or provide any documentation to management justifying her absences. "The FMLA is clear and unambiguous that FMLA leave cannot be granted retroactively. It can be granted prospectively or concomitantly with the FMLA qualifying condition."

USPS and National Postal Mail Handlers Union, No. H90M-1H-D94057914 (Skelton, May 30, 1995)

The grievant called in his absences for various illnesses; however, the arbitrator found that there was no indication to management that these absences resulted from a chronic condition requiring continual attention by medical authorities. None of the grievant's 3971 forms indicated that he sought approval for

FMLA absences. While noting merit in the Union's argument that the Postal Service was obliged at the time of the call-ins to designate the leave as FMLA or offer the grievant forms required to document such leave as qualified for FMLA, the arbitrator held that the employee first has an "obligation . . . to establish that he has a condition which qualifies for FMLA leave. This cannot be accomplished by merely telling a supervisor that he has migraine headaches, a peptic ulcer or chronic neck pain." Although some of the grievant's conditions might have qualified for FMLA leave, "'serious health conditions' must be documented and approved for FMLA prospectively and not retroactively. And certainly not after discipline has occurred."

USPS and National Postal Mail Handlers Union, No. D94M-1D-D97000459 (Sickles, December 3, 1997)

USPS and National Postal Mail Handlers Union, No. A90M-1A-D96059315 (Cannavo, November 10, 1997)

USPS and National Postal Mail Handlers Union, No. D94M-1D-D96085360 (Sickles, September 15, 1997)

USPS and National Postal Mail Handlers Union, No. D90M-4D-D95009806 (Sickles, April 7, 1995)

Although management's obligations under the FMLA are triggered when management personnel are made aware of an employee's *possible* coverage under the Act, an employee will not fall within the Act's protections where the employee makes no statements to management, nor makes any notations on pertinent Form 3971s, to raise a "red flag" to management that the absences were due to circumstances that may be covered under the Act.

USPS and National Postal Mail Handlers Union, No. D94M-1D-D97057013 (Sickles, August 11, 1997)

An employee's notice to his supervisor that his child had a high fever and other medical conditions requiring treatment by a doctor was sufficient to "raise a red flag" to the supervisor that the employee may be entitled to FMLA leave to care for a family member with a serious health condition. Such notice triggered an obligation on the part of the supervisor to take action to determine FMLA elegibility. Because the superviser failed to take any action, erroneously concluding that the FMLA was not applicable, the arbitrator did not consider these absences in making a disciplinary determination.

USPS and National Postal Mail Handlers Union, No. C94M-1C-D97013575 (Stoltenberg, September 26, 1997)

USPS and National Postal Mail Handlers Union, No. D90M-1D-D94009670 (Stoltenberg, January 21, 1997)

A supervisor's general knowledge about an employee's health problems is not sufficient to trigger management's obligation to consider whether the employee is eligible for FMLA leave. Where an employee does not specifically inform management of the medical reasons for his or her absences, such absences are not protected.

USPS and National Postal Mail Handlers Union, No. A90M-1A-D96042322 (O'Brien, September 26, 1997)

Where an employee was diagnosed as suffering from depression, his absences were not protected under the FMLA where the employee never told his manager that his unsceduled absences were due to his depression and the employee never requested FMLA leave. When the employee provided documentation of his medical condition in response to his Notice of Removal, the health care providers' medical documentation never indicated that the employee was incapacitated from working or that he needed to be given leave from employment for treatment of his depression.

USPS and National Postal Mail Handlers Union, No. A94M-1A-D97066268 (Liebowitz, December 19, 1997)

USPS and National Postal Mail Handlers Union, No. E94M-1E-D97034956 (Tamoush, August 29, 1997)

USPS and National Postal Mail Handlers Union, No. K90M-1K-D96072044 (Sickles, April 2, 1997)

Absences are not protected under the FMLA where the employee does not provide documentation to management to substantiate a claim that the absence was due to a medical or other qualifying condition.

USPS and National Postal Mail Handlers Union, Nos. H94M-1H-D97057805, H94M-1H-D97057806 (Holley, October 28, 1997)

The FMLA did not preclude removal based on absences that occurred after the employee had exhausted his leave entitlement (twelve weeks) under the Act.

USPS and National Postal Mail Handlers Union, No. A94M-1A-D97021018 (Talmadge, November 12, 1997)

USPS and National Postal Mail Handlers Union, No. J94M-1J-D96089837 (Walt, November 10, 1997)

USPS and National Postal Mail Handlers Union, No. I90-1I-D95022455 (Krider, June 21, 1995)

Where an FMLA claim is not raised during the grievance process prior to arbitration, it is beyond the arbitrator's authority to consider such claims.

USPS and National Postal Mail Handlers Union, No. A90M-1A-D96037391 (Liebowitz, November 14, 1997)

USPS and National Postal Mail Handlers Union, No. J90M-1J-D96053690 (Imes, August 31, 1997)

USPS and National Postal Mail Handlers Union, No. E94M-1J-D96085918 (Krider, April 27, 1997)

USPS and National Postal Mail Handlers Union, No. C90M-1C-D96062493 (Sickles, November 11, 1996)

An employee is not eligible for FMLA coverage where he or she has not met the Act's minimum hours worked requirement (1250 hours during the prior twelve months).

USPS and National Postal Mail Handlers Union, Nos. I94M-1I-D97059934/133300297, I94M-1I-D97059935/133302397, I94M-1I-D97059936/1333003897 (VanScyoc, March 7, 1998). This case arose under the Expedited Arbitration Panel and therefore may not be cited as a precedent.

At issue in this case was whether leave that had initially been approved as non-FMLA could be changed by the Postal Service to FMLA leave more than three months later. The Postal Service also raised the issue of whether FMLA claims are subject to the parties' grievance procedure.

The grievant, father to a baby born six weeks premature by Cesarean Section, notified his supervisor and requested extended leave to care for his dependent child. Copies of the Forms 3971 were provided to the grievant and were marked by his supervisor as "Approved, not FMLA." More than three months later, these forms were changed by the Manager of Distribution and Operations to "Approved, FMLA," although the grievant was never notified.

The grievant provided timely medical certification (Form WH-380) indicating, under the section related to care for a family member with a serious health condition, that the grievant was required to care for the for the premature baby, who suffered from several health conditions, because the mother was incapacitated due her surgery. When the grievant subsequently requested eight weeks of FMLA leave to bond with his child, the Postal Service denied his request on the grounds that he could not take two leaves for the same thing under the FMLA. The grievant took leave anyway and was notified that he would be subject to disciplinary suspensions based on his unapproved absences.

The arbitrator found it unnecessary to rule on the Postal Service's contention that the FMLA is not subject to the parties' grievance procedure. The arbitrator noted that the language of the FMLA has been translated into relevant provisions of the Employee and Labor Relations Manual ("ELM") and that the ELM is incorporated by reference into the National Agreement by Article 19. Section 515 of the ELM states that the section "provides policies to comply with the Family and Medical Leave Act of 1993," and much of the language of Section 515 mirrors the FMLA. The arbitrator also reasoned that even where the ELM provides no specific provisions with regard to a particular FMLA matter, because the stated purpose of these policies is to "comply" with the FMLA, "it is reasonable to look to the FMLA, and rules promulgated thereto, to develop a better understanding of the Parties' Agreement." Under FMLA regulations, if an employer has sufficient information to determine whether the leave is for an FMLA reason and fails to designate leave as FMLA when the employee gives notice or when the leave commences, the employer cannot do so retroactively and cannot count such leave against an employee's twelve-week annual FMLA leave entitlement. Thus, the Postal Service could not change the grievant's first approved leave from non-FMLA leave to FMLA leave three months after the leave had ended. The arbitrator held that because there was no reasonable basis for denying the grievant's subsequent FMLA leave request to bond with his child, disciplinary actions based on those absences were without cause.

USPS and American Postal Workers Union, No. G94T-4G-D96024286 (Baldovin, August 15, 1996)

At issue was whether documentation provided was sufficient to meet FMLA requirements. For an employee to qualify for FMLA leave for the employee's own illness, a "Health Care Provider" must certify that the employee's own serious health condition makes the employee unable to perform his job. The grievant submitted medical documentation from a Licensed Clinical Social Worker ("LCSW"), to whom he had been referred by the Postal Service's Employee Assistance Program, to justify his request for extended sick leave to recover from mental health problems. Although the Postal Service may elect not to grant sick leave to an employee without acceptable medical documentation from a physician, under the FMLA, documentation need not come from a doctor, and a LCSW is considered a "Health Care Provider" within the meaning of the Act (citing 29 CFR § 825.118). Thus, because the grievant's absence was protected leave under FMLA, discipline based on such a protected absence was improper.

USPS and American Postal Workers Union, No. D90C-4D-D94066660 (Dean, July 12, 1996)

The arbitrator rejected the union's argument that because the grievant frequently reported absent from work due to migraine headaches, that the Postal Service was put on notice of the grievant's medical problems and obligated to advise the grievant to possible eligibility for benefits under the FMLA. Accepting this argument would have the result that "every time an employee calls in sick, he would have to be notified that he may have FMLA rights." Citing with approval the approach of Arbitrator Skelton in two Postal Service arbitration awards (D90M-1D-D 95006664 and H90M-1H-D 94057914), the arbitrator stated that the Act cannot be applied retroactively to avoid discipline. "Although . . . the Employer bears certain monitoring responsibilities under the FMLA, the primary obligation to seek the benefits of the Act is squarely placed upon the employee."

The arbitrator also found that posting a Form 71, the form issued to employees who may be eligible for leave, rather than Form 1420, constituted substantial compliance with the Act's notice requirements.

USPS and American Postal Workers Union, No. J90C-1J-D95053025 (Benn, March 23, 1996)

With regard to unforeseeable absences, grievant was obligated to inform management of the reasons for his leave, but was not required to expressly assert that his absences were FMLA-protected. The arbitrator found support for his position in *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 760 (5th Cir. 1995), FMLA regulations at 29 C.F.R. § 825.303(b) ("the employee need not expressly assert rights under the FMLA or even mention the FMLA but may only state that leave is needed"), the Postal Services' FMLA Reference Materials, and Arbitrator Lurie's conclusion in H90N-4H-D 94068273 ("Under the FMLA, the Grievant was not required to request FMLA leave, but rather to timely advise her supervisor . . . of her medical condition.") It is the employer's responsibility to designate whether leave qualifies under FMLA, and if the employer does not have sufficient information to make the determination, the employer is expected to obtain additional required information.

The arbitrator found that the absence was not FMLA protected, however, because grievant's flu and side-effects from medication did not constitute a "serious health condition." Although the grievant was seen by a health care provider once during each absence period, the grievant's condition did not require inpatient care nor was grievant placed under a "regimen of continuing treatment" which requires "a course of prescription medicine."

USPS and American Postal Workers Union, No. F90C-4F-D95034653 (Irvine, March 9, 1996)

The grievant notified her supervisor of her child's serious health condition and provided proper documentation to support the child's illness, but supervisor was unaware of requirements for applying for FMLA leave. Under FMLA an employee is not obligated to request FMLA leave. It is a supervisor's obligation to determine whether a condition is covered by the FMLA and, if so, to note the fact on Form 3971, to provide written notice to the employee of her rights and obligations under the FMLA, and to advise her as to any medical documentation required. Because the employee advised her supervisor of her child's illness, but the supervisor did not note this on Form 3971 nor inform employees of her FMLA rights, the supervisor violated the FMLA and removal based on an FMLA protected absence is void.

USPS and American Postal Workers Union, No. H90C-1H-D95036450 (Plant, February 27, 1996)

Management claimed that FMLA issues are not arbitrable because the FMLA is not incorporated in any article of the National Agreement but is only covered in the Employee and Labor Relations Manual ("ELM"), which does not bestow any additional rights on employees. The union contended that violation of an employee's rights under the FMLA would violate the ELM and thus also violate Article 3 and 19 of the National Agreement (NOTE: these Articles are not set out in the opinion). The arbitrator held the parties signaled an intent to resolve FMLA issues within the grievance/arbitration process.

USPS and American Postal Workers Union, No. C90C-1C-D95043779 (Zobrak, December 22, 1995)

The arbitrator found that the Postal Service waived its right to argue that the grievant was not eligible for FMLA leave because he had not worked the minimum hours requirement (1250 hours over the preceeding 12 month period) when it granted the employee FMLA leave. The arbitrator held arbitration in abeyance until the Department of Labor resolved various FMLA issues in final ruling on the grievant's appeal to the Department that his FMLA rights had been denied.

USPS and American Postal Workers Union, No. G90C-1G-D94048580 (Gold, September 30, 1995)

The Union contended that because management knew the grievant was pregnant, and pregnancy is a covered condition under the FMLA, management had a responsibility to inform her about the FMLA. The arbitrator determined that the grievant did not make any request for long-term leave, either on a continuous, intermittent or reduced schedule basis, and there was no evidence that the grievant informed her supervisors that her absences were due to her pregnancy or other covered condition. "Under applicable procedures, the Grievant had an obligation to specify to her Supervisor that she needed [to take leave] for a covered condition. (She did not have to mention the FMLA.)" Management does not have a general obligation to take a proactive stance in informing employees of their rights under the FMLA. Only after an employee indicates that a request is for one of the conditions covered by the FMLA does the employer have an obligation to provide the employee notice of her rights and obligations under the FMLA. Should the Postal Service fail to request medical documentation of an employee's covered condition, this requirement is waived.

American Postal Workers Union and USPS, No. F90C-4F-D95024884 (Snow, August 10, 1995)

The gievant requested leave to accompany his wife to Chicago for medical consultations and procedures related to his wife donating ova to the grievant's sister, who was attempting to become pregnant through in vitro fertilization. The doctor had requested his presence and initially the supervisor seemed to think the request could probably be granted. The grievant was asked to provide medical documentation of his need to be in Chicago, which he did. At issue was whether FMLA extends to donors or spouses of donors to in-vitro fertilization procedures. The arbitrator concluded that a woman who was trying to get pregnant through in-vitro fertilization may be covered within the definition of "serious health condition" involving "continuing treatment by (or under the supervision of) a health care provider . . . for prenatal care." However, the arbitrator concluded that the term "prenatal care" did not cover donations of ova to permit another woman to become pregnant. Although voluntary treatments that are not medically necessary may be covered by the FMLA if inpatient hospital care is required, no evidence was submitted to indicate that hospitalization was necessary for the procedure.

USPS and American Postal Workers Union, No. G90C-1E-D94048580 (Gold, October 22, 1994)

The issue of whether the grievant was removed in retaliation for exercising rights under the FMLA and other statutes incorporated by reference into the National Agreement is arbitrable; however, the issue of whether the grievant was covered by the FMLA or whether her supervisor violated the National Agreement by failing to offer her the benefits of the Act is not arbitrable under the Agreement.

USPS and National Association of Letter Carriers, No. H90N-4H-D94068273 (Lurie, November 27, 1994)

The grievant notified her supervisor that she had displaced her hip joint and would be absent from work for a number of days. The grievant did not request leave under the FMLA, and her supervisor completed and signed a Form 3971 without making any notations or remarks. Upon returning from an absence of approximately two weeks, the grievant provided her supervisor with physicians' notes certifying that she had been unable to work during her absence due to degenerative joint disease and that her work schedule must be limited to four hours per day for the next ten days. The Postal Service subsequently removed the grievant for failure to be in regular attendance.

The arbitrator found the grievant's condition to be a "serious health condition" within the meaning of the Act, because it was a physical impairment which required her to miss more than three days of work and which involved continuing treatment by her doctor. Although the Postal Service argued that the absences were not protected because the grievant never expressly requested FMLA leave, the arbitrator held that an employee is not required to expressly request FMLA leave. An employee is required to timely inform her supervisor of the nature of her medical condition. Upon receipt of such information, the supervisor is obliged to determine whether the condition is a "serious health condition" covered by the Act and, if so, to note this fact on the employee's Form 3971, to provide the employee with written notification of her rights and responsibilities under the Act, and to notify the employee of any required medical documentation. The grievant's supervisor failed to fulfill her obligations under the Act.

The arbitrator concluded that because the grievant's absences were protected leave under the FMLA, use of such protected absences by the Postal Service as a basis for the grievant's removal violated the FMLA. The Postal Service's action also violated Article 19 of the National Agreement because the FMLA has been expressly endorsed by the Postal Service and incorporated into its handbooks and manuals.

SUMMARY OF POSTAL SERVICE FMLA CASES

Vargo-Adams v. United States Postal Service, 1998 U.S. Dist. LEXIS 1562, 4 Wage & Hour Cas. 2d (BNA) 663 (N.D.Ohio January 9, 1998)

An employee who suffered from migraine headaches claimed that she was wrongfully discharged for absences that should have been protected as intermittent leave under the FMLA. The employee provided the Postal Service with written notice from her physician that she suffered from migraines and claimed to have notified her supervisor at the time of subsequent absences that she could not work as a result of her migraine condition. The court found that the employee's actions could reasonably constitute sufficient notice to the Postal Service that her absences qualified under FMLA. The Postal Service argued that migraines do not constitute a "serious health condition" because the employee's absences were sporadic and did not last for more than three days, suggesting and that she did not need continuing medical treatment. Based on the employee's evidence that she visited her physician six times with regard to her condition, the court found that it would be reasonable to conclude that her migraines constituted a "serious health condition" under the Act.

Theole v. United States Postal Service, 1998 U.S. Dist. LEXIS 2876 (N.D.Ill. March 10, 1998)

Both parties agreed that the employee did not meet the FMLA's minimum hours worked requirement because he worked less than 1,250 hours during the twelve months prior to his leave request. The employee argued that he should still be covered by the Act on the following grounds: (1) that under the FMLA an employer must notify an employee that he or she is ineligible for leave within two days of the leave or the employee will be deemed eligible; (2) that the arbitrator found that the Postal Service failed to notify the employee that he was ineligible for FMLA leave until after he took the leave and that the court is thus collaterally estopped from making another determination; and (3) that he would have met the Act's 1250 hours worked requirement had he not been improperly suspended. The court dismissed all of the employee's arguments. First, the court held that the FMLA regulation requiring an employer to advise an employee of FMLA eligibility within two days, 29 C.F.R. § 825.110(d), did not exist at the time the employee requested leave, and this rule is not retroactive. Second, the court held that it was not collaterally estopped from determining the employee's FMLA eligibility because that issue was neither actually litigated nor

essential to the final judgement in the arbitration. Finally, the court found that it did not have jurisdiction to consider the employee's improper suspension claim, which was denied at the grievance stage and never appealed.

Sidaris v. Runyon, 967 F. Supp. 1260 (M.D.Ala. 1997)

An employee claimed that the Postal Service terminated her, in part, to prevent her from taking FMLA leave to care for a son with a serious health condition. The employee had requested her supervisor to provide her with FMLA information twice prior to her termination, but the supervisor had failed to do so. The court found that the employee satisfied a prima facie case of discrimination under the FMLA, which requires a showing (1) that she was protected under the FMLA, (2) that she suffered an adverse employment decision, and (3) that she was treated less favorably than an employee who had not requested leave or that the adverse employment decision resulted from her request for leave. Postal Service responded that the employee was terminated for several legitimate nondiscriminatory reasons: repeated on-the-job accidents, which posed a danger to herself and other employees, improper conduct, failure to timely report an on-the-job injury, and her inability to fulfill her job duties. The court found that the employee could not show that each of the proffered reasons for her termination was pretextual and the court, therefore, concluded that the employee failed to carry her burden of showing that the Postal Service discriminated against her to prevent her from exercising her FMLA rights.

2ND CASE of Focus printed in FULL format.

DEBORAH ALBERT, Plaintiff, v. MARVIN T. RUNYON, JR., POSTMASTER GENERAL OF THE UNITED STATES POSTAL SERVICE, Defendant.

Civil Action No. 98-10246-MEL

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

1998 U.S. Dist. LEXIS 7505

May 5, 1998, Decided

COUNSEL: [*1] For DEBORAH ALBERT, Plaintiff: Kenneth V. Kurnos, Kurnos, Capace & Margolin, LLP, Boston, MA.

For Marvin T. Runyon, Jr., Defendant: Michael J. Pineault, United States Attorney's Office, Boston, MA.

JUDGES: Morris E. Lasker, U.S.D.J.

OPINIONBY: Morris E. Lasker

OPINION:
LASKER, D.J.

This case raises unsettled questions about how the relatively new Family and Medical Leave Act fits into the already crowded intersection formed by the various laws regulating employment relationships -- in particular, to what extent, if any, the FMLA supersedes various statutory and regulatory provisions governing an employer's ability to condition an employee's return to work following medical leave on a fitness-for-duty examination.

I.

Deborah Albert has been employed by the United States Postal Service in various capacities for the past seventeen years. She held her most recent position, as District Manager in charge of the Boston area, until September 29, 1997, when she became temporarily disabled due to clinical depression and took a leave of absence. Albert claims she became depressed because she was subjected to gender-based discrimination and harassment by her male supervisor, the Vice President of [*2] the Northeast Area. While on leave, Albert filed a charge of discrimination with the EEOC.

On November 26, 1997, Mary Burrell, Manager of Human Resources in the Northeast Area, wrote Albert a letter indicating that Albert met the threshold eligibility requirements for the FMLA, and requesting that she submit certification from her health care provider so that the Postal Service could determine whether her absence should be designated FMLA leave. Burrell also asked that Albert provide updated medical evidence of her continued inability to work.

On December 1, 1997, Albert's treating psychologist, Dr. Carolyn Smith, certified Albert fit to return to work, "provided that the Postal Service makes the necessary changes that assure her of freedom from gender-based harassment and discrimination, and reverses any previously taken discriminatory action." Dr. Smith sent Burrell a letter describing Albert's treatment and diagnosis on December 11, 1997. She wrote that she did not fill out the FMLA form provided by the Postal Service because it did not seem appropriate in light of Albert's recovery, but indicated that she used the form for reference and intended her letter to address all the [*3] material issues surrounding Albert's leave.

On December 17, 1997, Burrell wrote to inform Albert that the letters from her treating psychologist were "inadequate to assess" her ability to work, and that Albert had therefore been scheduled for a fitness-for-duty examination, to include a psychiatric evaluation, with Dr. Lawrence Strasburger. An attorney for the Postal Service sent a similar letter to Albert's attorney, telling him that the Service needed additional information to evaluate not only whether Albert was fit to return to work, but also whether her medical condition qualified for protection under the FMLA. Albert was placed on paid administrative leave pending the results of the scheduled examination, and warned that refusal to undergo the examination could be cause for disciplinary action, including termination.

Albert's attorney objected to the proposed examination, claiming that the Postal Service had no right to condition the plaintiff's return to work on a fitness-for-duty examination. In a letter dated December 30, 1997, he claimed that the Postal Service had no reason to doubt Dr. Smith's certification, and offered to

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have Albert provide additional information to [*4] alleviate any outstanding concerns. He also represented that Albert would submit to the examination if accompanied by a psychiatrist of her choosing to lessen the risk that the examination would be psychologically damaging.

The exchange of letters between plaintiff's counsel and the representatives of the Postal Service continued for another five weeks. Postal Service counsel refused Albert's request that she be permitted to bring someone to the examination, and further explained the need for an examination by writing that Dr. Smith's letters were vague and conclusory in that they suggested limitations on Albert's activities without providing precise information about those limitations. Albert's attorney responded that Albert would be returning to work since she had complied with the relevant rules and procedures, but the Postal Services responded that Albert could not return without a report from the required fitness-for-duty examination. Albert's counsel also submitted a new certification of Albert's serious health condition from Dr. Smith -- this one on the FMLA form provided by the Postal Service. The Postal Service agreed to review the new form to determine whether Albert's leave [*5] should be designated as FMLA leave, but insisted that "routine policy" still required Albert to undergo an examination to assess her ability to perform the requirements of her position. The Service did review the second certification, but continues to maintain that Dr. Smith's submissions do not provide a sufficient basis for assessing whether Albert's condition qualified for FMLA leave.

Albert filed this suit pursuant to *29 U.S.C. § 2617*, which authorizes employees to file civil actions against their employers for violations of the FMLA. Albert asks to be restored to her job without having to undergo a psychiatric examination. She requests a permanent injunction preventing the defendants from conditioning her continued employment on submission to such an examination. She alleges that the Postal Service has violated the FMLA -- and has not even followed its own guidelines -- in requiring her to undergo examination, and she expresses concern that the real purpose of the proposed examination is not to determine her fitness for duty, but to gather information to build a defense to her EEOC claim and to provide a rationale for taking negative employment action against her in the future. [*6] Albert also complains that the contemplated scope of the proposed examination appears to go well beyond what could be relevant to the Postal Service's legitimate business concerns, and that the invasive nature of the examination could cause her substantial psychological harm. n1

n1 The Postal Service argues that neither the purpose nor the scope of the proposed examination can be considered here, since objections to these matters must be made under different statutes and must proceed through administrative channels before reaching federal court. However, Albert challenges the fitness-for-duty examination only on the grounds that it is impermissible under the FMLA, and not because of its allegedly retaliatory purpose or overbroad scope. These assertions are merely part of the background of her complaint.

Albert moved for a preliminary injunction, and the parties agreed that she would remain on paid administrative leave pending this decision. The relevant issues have been fully briefed and the case is therefore [*7] ripe for final judgment in lieu of preliminary relief. In accordance with the provisions of Fed. R. Civ. P. 65(a)(2), the parties were informed that the court intends to make a final disposition of the case. Each party has since requested that summary judgment be entered in its favor. Both parties agree that there is an adequate factual basis and there has been sufficient legal argument to determine whether the Postal Service's conduct comports with the requirements of the FMLA. However, the Service contends that even if Albert's arguments as to the effect of the FMLA are accepted, she may not be granted permanent relief at this time since she has not proven she is entitled to the protections of the FMLA. n2

n2 The Service requests that, if judgment is not now entered in its favor, a schedule be set to allow discovery as to Albert's ability to establish the foundational elements of an FMLA claim, in particular, whether she was eligible for FMLA leave, whether she suffered from a serious health condition entitling her to FMLA leave, and whether she provided substantiating documents in a timely manner. However, all relevant facts should be available to the Postal Service, and the Service has not explained what discovery it believes necessary for determining these issues. Accordingly, I am prepared to issue a final judgment, as detailed below, unless the Postal Service can show that discovery might support a good faith argument that Albert's leave is not covered by the FMLA. The Postal Service's own failure to decide whether Albert's leave qualifies as FMLA leave does not itself create a factual dispute as to her entitlement to the Act's protections.

[*8]

II.

Congress enacted the FMLA "to balance the demands of the workplace with the needs of families" by "entitling employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition." *29 U.S.C. § 2601*(b). Employees whose leave falls within the scope of the FMLA receive various protections, most notably, their leave may not be denied, their health benefits are maintained, and their jobs are protected. 29 C.F.R. § 825.100. The Act guarantees "eligible" employees of covered employers up to 12 workweeks of leave in any 12-month period for any of the above-mentioned reasons. *29 U.S.C. § 2612*(a)(1). Those who have been employed by their current employer for at least 12 months, and who have worked at least 1,250 hours within the preceding 12-month period, are eligible for the protections of the FMLA. *29 U.S.C. § 2611*(2)(A). The Act and its implementing regulations cover Postal Service employees. 29 C.F.R. § 825.109(b)(1).

An employee may take FMLA leave "because of a serious health condition that makes [her] unable to perform the functions of [her] position." *29 U.S.C. § [*9] 2612*(a)(1)(D). A "serious health condition" is defined as "an illness, injury, impairment, or physical or mental condition that involves . . . inpatient care . . . or continuing treatment by a health care provider." *29 U.S.C. § 2611*(11). The implementing regulations describe the various ways in which these definitions may be satisfied, and explain that "a serious health condition involving continuing treatment" includes a period of incapacity lasting more than three consecutive days and any subsequent related incapacity, coupled with at least two treatments by a health care provider. 29 C.F.R. § 825.114(a)(2)(i)(A).

An employee must notify her employer of the need for FMLA leave "as soon as practicable," but "need not expressly assert rights under the FMLA or even mention the FMLA." 29 C.F.R. §§ 825.302, 825.303. It is the employer's duty to determine whether leave is FMLA-qualifying, and the employer must base its decision "only on information received from the employee." 29 C.F.R. § 825.208(a). Leave taken under the FMLA may be either paid or unpaid, depending on the employee's eligibility for leave under the employer's general policies. 29 C.F.R. § 825.207. Where an employee [*10] uses accrued paid leave, the employer may not have sufficient information to determine whether the leave is covered by the FMLA. In such a situation, "the employer should inquire further of the employee . . . to ascertain whether the paid leave is potentially FMLA-qualifying." 29 C.F.R. § 825.208(a).

An employer may require employees seeking leave for medical reasons to provide certification of their serious health conditions from their health care providers. *29 U.S.C. § 2613*(a). Such certification "shall be sufficient" if it includes the date on which the condition commenced, its probable duration, "appropriate medical facts ... regarding the condition," and "a statement that the employee is unable to perform the functions of [her] position." *29 U.S.C. § 2613*(b). An employer may demand a second opinion if it "has reason to doubt the validity" of the provider's certification. *29 U.S.C. § 2613*(c).

The FMLA provides that an employee returning from FMLA leave "shall be entitled" to be restored to her former position or an equivalent position of employment. *29 U.S.C. § 2614*(a)(1). An employer may condition restoration on a uniform policy that requires each returning employee to [*11] obtain certification of her ability to resume work from her own health care provider. *29 U.S.C. § 2614*(a)(4).

The implementing regulations provide that this certification "need only be a simple statement of an employee's ability to return to work." 29 C.F.R. § 825.310(c). The regulations allow the employer, with the employee's permission, to have its own health care provider contact the employee's health care provider "for purposes of clarification of the employee's fitness to return to work." Id. The employer may not request additional information, and may request clarification "only for the serious health condition for which FMLA leave was taken." Id. Moreover, "the employer may not delay the employee's return to work while contact with the health care provider is being made." Id.

III.

Albert maintains that her leave of absence from September 29, 1997 through December 1, 1997 qualifies as FMLA leave, and that she is thus entitled to the Act's protections. She claims that the Postal Service's refusal to allow her to return to work until she submits to a fitness-for-duty examination violates her right under the FMLA, *29 U.S.C. § 2614*(a)(1), to be restored to her position [*12] of employment or an equivalent one. Albert argues that Dr. Smith's certification of her ability to work triggered her right to return to work under *29 U.S.C. § 2614*(a)(4). She complains that the Postal Service not only was mistaken in deeming Dr. Smith's certifications inadequate, but also responded improperly to this perceived inadequacy. Rather than requesting clarification, as contemplated by 29 C.F.R. § 825.310(c), the Postal Service demanded that Albert

submit to a psychiatric examination -- which, she asserts, is not permitted by the FMLA or its implementing regulations.

For purposes of argument, the Postal Service assumes, but does not concede, that Albert qualifies for the protections of the FMLA, but contends that its actions are permissible under the Act. The Postal Service offers several justifications for having ordered Albert to undergo a fitness-for-duty examination. First, the Service claims, as it did in its letters to Albert and her counsel, that the examination is needed because Dr. Smith's submissions did not satisfy the FMLA's standards for medical certifications. Next, the Service maintains that the FMLA does not supplant long-standing agency policy allowing [*13] it to require employees to undergo fitness-for-duty examinations at any time, and to place them on paid administrative leave pending receipt of examination results. The defendant further claims that the proposed examination is permissible under the standards expressed in the Americans with Disabilities Act and the Rehabilitation Act of 1973, and accordingly argues that it would not violate the FMLA since the statutes are to be read consistently with one another.

Albert responds that the Service's demand that she undergo a psychiatric examination prior to reinstatement does not conform even to its own regulations, since Part 864.4 of its Employee and Labor Relations Manual requires only "medical certification" from returning employees. She argues further that even if Postal Service regulations did permit a fitness-for-duty examination in the present circumstances, they could not supersede the provisions of the FMLA. Albert also denies that the ADA and the Rehabilitation Act are implicated here since she is not currently under any disability and is not making any claim under the ADA.

IV.

Dr. Smith certified that Albert could return to work as of December 1, 1997. The Postal Service [*14] deemed Dr. Smith's letters inadequate to allow it to assess whether Albert would be capable of performing all her duties. Although Albert authorized the Service to contact Dr. Smith with any questions, her employer ignored this offer and instead scheduled Albert for an independent fitness-for-duty examination. The Postal Service did not specify whether it found Dr. Smith's certification inadequate to satisfy the FMLA standards, or its own agency standards, or both, but this purported justification for requiring Albert to submit to a psychiatric examination is insufficient in any event.

A. FMLA Fitness-for-Duty Certification

The FMLA does not authorize an employer to make its own determination of whether an employee is fit to return from FMLA leave following recovery from a serious health condition. Rather, an employer must rely on the evaluation done by the employee's own clinician and return the employee to work without delay upon receipt of medical certification. This certification may be a "simple statement of any employee's ability to return to work," and need not contain the specific information about the employee's condition that the Postal Service criticizes Dr. Smith [*15] for not providing. 29 C.F.R. § 825.310(c). Dr. Smith's letter is sufficient to satisfy the FMLA fitness-for-duty standard.

Moreover, requiring Albert to undergo a psychological examination was not the proper way for the Postal Service to resolve any legitimate concerns it might have had about her abilities and possible restrictions on her activities. An employer with questions about the scope or adequacy of a medical certification may take advantage of the FMLA provision allowing it to contact the employee's clinician for clarification, but may not force an employee to submit to a further examination before allowing her to return to work. 29 C.F.R. § 825.310(c). In comments issued in conjunction with the final FMLA regulations, the Secretary of Labor explicitly declined to allow employers to seek a second opinion as to an employee's fitness for duty once the requisite certification has been received, noting the absence of any statutory authorization for such a procedure. *60 Fed. Reg. 2180, 2226* (Jan. 6, 1995)(Summary of Major Comments). n3 Accordingly, the Postal Service cannot justify its rejection of Dr. Smith's medical certification by claiming that it needed "specific information" [*16] about Albert's condition to evaluate her fitness to return to duty under the FMLA. If the Service believed that Dr. Smith's proviso against the alleged harassment of Albert indicated limitations on Albert's ability to work -- as well it might, in view of its likely disagreement with Albert's characterization of previous events as discriminatory -- it should have sought clarification from Dr. Smith. It did not.

n3 The Secretary wrote:

> Four commenters urged that the regulations provide for second and third medical opinions on fitness-for-duty certifications as in the case of the original medical certification.
>
> The statute expressly provides for second and third medical opinions regarding the original medical certification. No such provision is contained in the statute for the fitness-for-duty certification. The Department is unable to incorporate this suggestion

in the Final Rule.
60 F.R. 2180, 2226.

B. FMLA Certification of Serious Health Condition

Nor can the Postal Service justify ordering [*17] a fitness-for-duty examination by claiming it needs to obtain additional information so it can determine whether Albert's absence should be designated FMLA leave. The Service maintains that the letters provided by Dr. Smith are insufficient to allow it to determine whether Albert's leave is protected under the FMLA, and suggests that this provides a further reason for conducting a fitness-for-duty examination. n4 Albert complains that the Postal Service appears to be claiming that the fitness-for-duty examination is permissible as the second opinion of an employee's health condition that may be sought under the FMLA, and contends that neither the procedural nor the substantive requirements for requesting a second opinion are satisfied here.

n4 Although the Postal Service has assumed for the sake of argument that Albert is entitled to FMLA leave, and such an assumption implies that no examination is needed to determine whether her medical condition entitles her to the protection of the FMLA, this question must be addressed because the Service cites the need to make an FMLA determination as one of its reasons for requiring an examination. Of course, this analysis affects the Service's ability to argue that it needs discovery in order to address Albert's entitlement to FMLA leave.

[*18]

The Service's purported justification is without support because the FMLA allows an employer to demand a second opinion only if it has "reason to doubt the validity of the certification provided" by the employee's health care provider. *29 U.S.C. § 2613*(c)(1). An employer may, however, have its "health care provider . . . contact the employee's health care provider, with the employee's permission, for purposes of clarification." 29 C.F.R. § 825.307(a). An employer may also "inquire further" of an employee if it lacks "sufficient information about the reason for an employee's use of paid leave." 29 C.F.R. § 825.208(a). While the Postal Service deemed Dr. Smith's letters insufficient to allow it to "determine whether a designation of FMLA leave is appropriate," at no point prior to the onset of this litigation did it specify what information it felt Dr. Smith had omitted, or contact her or Albert to request clarification or information.

The FMLA limits the information an employer may request by providing that a certification "shall be sufficient" if it states

(1) the date on which the serious health condition commenced;
(2) the probable duration of the condition;
(3) the [*19] appropriate medical facts within the knowledge of the health care provider regarding the condition;
[and ...]
(4)(B) ... a statement that the employee is unable to perform the functions of the position of the employee.

29 U.S.C. § 2613(b). The implementing regulations include an "optional form" incorporating this information, and provide that an employer may not seek "additional information" beyond that included in the sample form. 29 C.F.R. § 825.306(b). Dr. Smith's letter of December 11, 1997 provided information on the commencement and duration of Albert's depression, and reported that Albert had been temporarily unable to work because of her condition. Dr. Smith also included her diagnosis of Albert's condition and a description of the progress of her symptoms. Even though the Service neither specified what additional information it needed, nor contacted Dr. Smith for clarification (pursuant to Albert's authorization), Dr. Smith submitted a second certification on February 3, 1998, this time on the form provided. Dr. Smith included a more detailed description of the medical facts relating to Albert's condition, and responded to each question to the extent she found [*20] it applicable to Albert's situation. The certifications indicate that Albert suffered from a mental condition that left her incapacitated for several months and has required ongoing treatment by Dr. Smith and other providers. This was sufficient information to establish that her leave was due to a serious health condition that made her unable to perform the functions of her position.

The Postal Service's criticisms of Dr. Smith's submissions may have stemmed from a misapprehension of its own role. At times, the Service writes as if it needs sufficient information to independently assess Albert's condition or to evaluate Dr. Smith's diagnosis. However, an employer is not entitled to require information beyond that allowed by *29 U.S.C. § 2613*, in order to make its own assessment. See 29 C.F.R. § 825.306(b) ("No additional information may be required."). Moreover, the limited information that the FMLA permits an employer to demand shows that the statute does not authorize an employer to make an independent assessment of the employee's medical condition. Instead, the employer should determine whether the provided information demonstrates that the diagnosed condition is a se-

duty examination only by bringing a complaint before the Merit Systems Protection Board under the Civil Service Reform Act. But at the same time, the Service reasons that its conduct was permissible because it conformed to agency regulations. The Postal Service cannot simultaneously rely on these regulations and expect to shield them from any substantive evaluation.

Nonetheless, because the FMLA precludes ordering a fitness-for-duty examination in this case regardless of its permissibility under Postal Service regulations, this question need not be resolved.

[*25]

The fact that the Postal Service could have ordered Albert to undergo a psychiatric examination absent her leave is not the determinative criterion. The proper determinative factor is whether an employer would have taken a given action absent an employee's FMLA leave. "An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment." 29 C.F.R. § 825.216(a). Just so, the Postal Service cannot order Albert to undergo a fitness-for-duty examination prior to her return from FMLA leave unless it can establish that it would have ordered such an examination if she had not taken leave. Cf. *Carrillo v. National Council of Churches of Christ in the U.S.A., 976 F. Supp. 254, 256 (S.D.N.Y. 1997)*(since it was undisputed that employee would have been fired absent medical leave, FMLA did not prevent termination).

In the case at hand, the Service has not shown or attempted to show that Albert would have been ordered to undergo a psychiatric examination had she not taken leave. Nowhere in the Service's extensive correspondence with Albert and her attorney did it claim its [*26] order had any basis unrelated to her FMLA leave. The Postal Service claimed an examination was necessary to determine if Albert was entitled to FMLA leave, and to evaluate whether she was fit to return from that leave. It is only once litigation began that the Postal Service suggested that Albert's "erratic behavior" prior to taking leave was a factor in its decision, and the record shows that the Service was not sufficiently concerned about this behavior to order a fitness-for-duty examination when it occurred.

The Service's "what's the difference?" reasoning vacillates between the claim that Albert could have been in the very same position had she never taken leave, and the suggestion that she could be in this position if she returns from leave and then is ordered to undergo a fitness-for-duty examination. The latter formulation suggests the possibility that employers in the Service's position might seek to avoid the impact of the FMLA by ordering employees to undergo examination immediately after reinstatement.

It is true that the FMLA does not prohibit an employer from requiring an employee who has returned to work to undergo a fitness-for-duty examination. However, the Postal [*27] Service must provide reasons for any such order, and may not circumvent the protections of the FMLA by basing an order on Albert's FMLA leave or the perceived inadequacy of Dr. Smith's submissions for agency purposes. The requirement that an employee be returned to duty without delay upon the employer's receipt of fitness-for-duty certification would be nullified if the fact that an employee had taken leave under the FMLA for a temporarily, but no longer, disabling condition could be a sufficient reason to question her ability to work. This is not to suggest that an employer can never order a newly returned employee to undergo examination, but only that where, as here, an employee presents a medical certification that is adequate under the FMLA, and the employer has no present reason to doubt the employee's fitness for duty, the employer cannot rely on the employee's FMLA leave (or her prior medical condition) to justify such an examination.

In sum, the Postal Service may order a fitness-for-duty examination upon Albert's return only if her post-reinstatement behavior provides a reason for doing so. Since it appears that the "erratic behavior" Albert allegedly engaged in prior to [*28] her leave was related to her depression and the medication she was taking, the Service may not rely on that behavior as reason for an examination at this time. This approach is consistent with that taken by the Merit Systems Protection Board (MSPB) in *Harris v. Department of the Air Force, 62 M.S.P.R. 524 (1994)*. There, the agency considered only the employee's "behavior or actions between the time that she returned to duty . . . and the time she was ordered to submit to a psychiatric examination" in holding that the order was unjustified and therefore invalid. *62 M.S.P.R. at 528.*

The MSPB has also recognized that an agency may not base employment actions on conduct that satisfies the conditions of the FMLA but not the agency's more-restrictive standards. In *Gross v. Department of Justice, 77 M.S.P.R. 83 (1997)*, the Board explained that "an agency may not apply a more restrictive leave policy than that provided under the FMLA, and it may not deny an employee leave under the FMLA for failure to follow the agency's leave procedures." *77 M.S.P.R. at 87* (overturning an agency's suspension of employee for

failure to comply with agency's leave-request policy). Cf. *George v. Associated [*29] Stationers, 932 F. Supp. 1012 (N.D. Ohio 1996)*(FMLA leave may not be considered as basis for employment action even if company acts pursuant to uniformly applied policy). Similarly, because Dr. Smith's submissions comport with the FMLA standards, the Postal Service may not order Albert to undergo a psychological examination because it deems those submissions insufficient to satisfy its own agency standards. See *Ellshoff v. Department of the Interior, 76 M.S.P.R. 54 (1997)*(agency could not deny employee FMLA leave since her medical certification satisfied the FMLA requirements even though it did not satisfy the more stringent requirements of the agency's leave policy).

The suggestion that the Postal Service's own regulations could impose further conditions on an employee's exercise of rights under the FMLA is unpersuasive in light of the FMLA's provision that "it shall be unlawful for any employer to interfere with [or] restrain the exercise of" rights provided by the FMLA. *29 U.S.C. § 2615*(a)(1). The FMLA suggests an employer may impose additional conditions, beyond those specified in the FMLA itself, on an employee's return to work only in certain limited circumstances which [*30] do not apply here. *29 U.S.C. § 2614*(a)(4) ("Nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.") Since Albert's relationship with the Postal Service is governed neither by a collective bargaining agreement, nor by state or local law, the FMLA regulations do indeed supersede the agency's standards.

D. The Rehabilitation Act and the ADA

The Postal Service turns finally to the Rehabilitation Act and the ADA in its attempt to justify its conduct. The Service maintains that these statutes allow employers to require examinations that are "job-related" and "consistent with business necessity," *42 U.S.C. § 12112*(d)(4), and argues that the proposed examination satisfies these conditions. The defendant claims a fitness-for-duty examination is needed because Dr. Smith's certifications do not adequately allay its concerns about Albert's ability to perform the essential functions of her position in the face of the "erratic behavior" she allegedly exhibited prior to taking leave. The Postal Service contends that the FMLA should be read to allow pre-reinstatement medical examinations, [*31] such as this one, that are consistent with the ADA.

Albert argues that the ADA is inapplicable because she is not disabled, and is not pursuing any claim under the ADA. The Service responds that the ADA provisions regarding medical examinations and inquiries are applicable to all employees, and cites several cases which hold that employers may require employees who have not sought accommodations to undergo job-related medical examinations without violating the ADA. *E.g., Yin v. California, 95 F.3d 864 (9th Cir. 1996)*(ADA does not preclude examination of employee whose health problems "have had a substantial and injurious impact on [her] job performance"); *Deckert v. City of Ulysses, Kan., 1995 U.S. Dist. LEXIS 14526, 1995 WL 580074,* **6-7 (D. Kan. Sept. 6, 1995)(ADA not violated by requiring police officer who has suddenly begun to perform poorly to undergo examination). Albert argues that these cases are distinguishable because they involve claims under the ADA. But this distinction is inconsequential -- the only ADA claim in these cases is the claim that the ADA prohibits the challenged medical examinations, and the legitimacy of an examination under the "business necessity" standard of the ADA does [*32] not depend on whether the employee challenges the examination.

Nonetheless, that the ADA does not preclude employers from requiring employees who suffer performance problems that may be health related to undergo medical examinations does not mean that the FMLA permits all such examinations. The ADA does not confer upon employers an affirmative right to conduct job-related examinations, but merely exempts such examinations from its prohibitions. *42 U.S.C. § 12112*(d)(4)(A)("A covered entity shall not require a medical examination ... unless such examination ... is shown to be job-related and consistent with business necessity.") (emphasis added). Compare *42 U.S.C. § 12112*(d)(4)(B) ("A covered entity may make inquiries into the ability of an employee to perform job-related functions.")(emphasis added). There is, of course, no logical reason that an examination which does not violate the ADA cannot violate the FMLA -- indeed, it would not be surprising to find that the prohibitions of these different statutes are not coextensive. n6

n6 It would be far more surprising if the juxtaposition of these statutes (each of which seeks to safeguard employees' rights in different ways) were to deprive employees of a right so explicitly granted in the FMLA -- the right to be reinstated upon submitting "a simple statement" of fitness to return.

[*33]

The Postal Service cites one case in support of its theory that examinations permissible under the ADA are

duty examination only by bringing a complaint before the Merit Systems Protection Board under the Civil Service Reform Act. But at the same time, the Service reasons that its conduct was permissible because it conformed to agency regulations. The Postal Service cannot simultaneously rely on these regulations and expect to shield them from any substantive evaluation.

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The suggestion that the Postal Service's own regulations could impose further conditions on an employee's exercise of rights under the FMLA is unpersuasive in light of the FMLA's provision that "it shall be unlawful for any employer to interfere with [or] restrain the exercise of" rights provided by the FMLA. *29 U.S.C. § 2615*(a)(1). The FMLA suggests an employer may impose additional conditions, beyond those specified in the FMLA itself, on an employee's return to work only in certain limited circumstances which [*30] do not apply here. *29 U.S.C. § 2614*(a)(4) ("Nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.") Since Albert's relationship with the Postal Service is governed neither by a collective bargaining agreement, nor by state or local law, the FMLA regulations do indeed supersede the agency's standards.

D. The Rehabilitation Act and the ADA

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Albert argues that the ADA is inapplicable because she is not disabled, and is not pursuing any claim under the ADA. The Service responds that the ADA provisions regarding medical examinations and inquiries are applicable to all employees, and cites several cases which hold that employers may require employees who have not sought accommodations to undergo job-related medical examinations without violating the ADA. *E.g., Yin v. California, 95 F.3d 864 (9th Cir. 1996)*(ADA does not preclude examination of employee whose health problems "have had a substantial and injurious impact on [her] job performance"); *Deckert v. City of Ulysses, Kan., 1995 U.S. Dist. LEXIS 14526, 1995 WL 580074,* **6-7 (D. Kan. Sept. 6, 1995)(ADA not violated by requiring police officer who has suddenly begun to perform poorly to undergo examination). Albert argues that these cases are distinguishable because they involve claims under the ADA. But this distinction is inconsequential -- the only ADA claim in these cases is the claim that the ADA prohibits the challenged medical examinations, and the legitimacy of an examination under the "business necessity" standard of the ADA does [*32] not depend on whether the employee challenges the examination.

Nonetheless, that the ADA does not preclude employers from requiring employees who suffer performance problems that may be health related to undergo medical examinations does not mean that the FMLA permits all such examinations. The ADA does not confer upon employers an affirmative right to conduct job-related examinations, but merely exempts such examinations from its prohibitions. *42 U.S.C. § 12112*(d)(4)(A)("A covered entity shall not require a medical examination ... unless such examination ... is shown to be job-related and consistent with business necessity.") (emphasis added). Compare *42 U.S.C. § 12112*(d)(4)(B) ("A covered entity may make inquiries into the ability of an employee to perform job-related functions.")(emphasis added). There is, of course, no logical reason that an examination which does not violate the ADA cannot violate the FMLA -- indeed, it would not be surprising to find that the prohibitions of these different statutes are not coextensive. n6

n6 It would be far more surprising if the juxtaposition of these statutes (each of which seeks to safeguard employees' rights in different ways) were to deprive employees of a right so explicitly granted in the FMLA -- the right to be reinstated upon submitting "a simple statement" of fitness to return.

[*33]

The Postal Service cites one case in support of its theory that examinations permissible under the ADA are

necessarily permissible under the FMLA. In *Porter v. United States Alumoweld Co., 125 F.3d 243 (4th Cir. 1997)*, a machine operator who was fired for refusing to undergo a functional capacities examination after he suffered several periods of incapacity following a series of back injuries claimed that his termination violated both the ADA and the FMLA. The court held that the ADA did not prohibit the required examination because the EEOC had explained that a medical examination following an "on-the-job injury which appears to affect [an employee's] ability to do essential job functions" is job-related. *125 F.3d at 246* (citation omitted).

The court then held that the employee could not establish that the examination violated the FMLA by showing that it sought more than the fitness-for-duty certification the FMLA allows an employer to require from a returning employee. The Porter court pointed out that "the FMLA certification is a health verification distinct from the ADA-prescribed exam." *125 F.3d at 247*. There is no indication that Porter was returning from an FMLA [*34] leave, or in any way entitled to the FMLA's protections. It appears that he was arguing that the FMLA prohibits employers from requiring any and all physical examinations since all exceed the bounds of the FMLA certification requirements. As the court explained, "under Porter's reading of the FMLA, that Act would be violated every time an employer requested a fitness for duty exam under the ADA, a request which requires the disclosure of more medical information than would be available from the FMLA's 'simple statement of an employee's ability to return to work.'"

Albert's argument is not nearly so broad and is more convincing. She claims that the appropriate way to reconcile the statutes is to recognize that an employee's return from FMLA leave does not in and of itself provide a sufficient business justification to satisfy the ADA standards. Albert maintains that "the business needs of the employer under the ADA are sufficiently met by the provision of a fitness-for-duty certification by the employee pursuant to the FMLA." If it were otherwise, that is, if an employer could justify a fitness-for-duty examination by alleging that a certification adequate under the FMLA was nonetheless [*35] insufficient for its business needs, the FMLA's prohibition on requiring any "additional information" beyond "a simple statement of an employee's ability to return to work" would be nullified. See 29 C.F.R. § 825.310(c). In effect, the FMLA answers in the negative the question whether an employee's FMLA leave can itself provide a job-related need for a fitness-for-duty examination where the employer has no present reason to doubt the employee's ability to work.

This can perhaps be seen more clearly by examining what it would mean to accept the Service's claim. The Service's purported business justification for requiring the examination goes something like this: the erratic behavior Albert exhibited prior to her leave created a legitimate, job-related reason for concern, and the documentation she has submitted is inadequate to alleviate that concern or to allow us to evaluate her contention that she is fit to return to work. The most basic problem with this argument is that it depends on the alleged inadequacy of a certification sufficient for the FMLA purposes for which it was offered. This alleged justification amounts to a claim that even though an employee's FMLA certification [*36] does not indicate any continuing incapacity, and even though there is no present reason to doubt her abilities, the employer's need to determine whether the employee has recovered sufficiently to perform her job functions provides an adequate business reason for a fitness-for-duty examination. Such a "need" could be asserted in the case of any employee returning from FMLA leave. This reading would negate the provisions of *29 U.S.C. § 2614*(a)(4) and 29 C.F.R. § 825.310 requiring an employer to reinstate an employee upon receipt of her health care provider's certification that she is fit for duty, without demanding additional information, much less an examination. The FMLA makes it the health care provider's responsibility, rather than the employer's, to evaluate an employee's health condition to determine if she is sufficiently recovered to return to work. Accordingly, an employer cannot claim that its inability to independently assess the employee's health justifies requiring an examination.

Holding that an employer needs some reason beyond an employee's having taken FMLA leave to justify ordering a fitness-for-duty examination does not imply that there is never adequate reason [*37] to require a returning employee to undergo such an examination. Indeed, the FMLA contemplates that this may happen. 29 C.F.R. § 825.310(b)("Requirements under the [ADA] that any return-to-work physical be job-related and consistent with business necessity apply.") The Postal Service argues that this provision can only be read to mean that examinations permitted under the ADA are necessarily permitted under the FMLA as well.

However, this is neither the only available reading nor the most plausible. Instead, the dividing line suggested by the FMLA, and by common sense, is the existence of some business need for an examination independent of the employee's having taken FMLA leave. The FMLA regulations provide examples of situations in which returning employees may and may not be required to submit to medical examinations:

An attorney could not be required to submit to a medical examination ... just because her leg had been amputated. The essential functions of [her] job do not require use of both legs; therefore such an inquiry would not be job related. An employer may require a warehouse laborer, whose back impairment affects the ability to lift, to be examined by an orthopedist [*38] ...

29 C.F.R. § 825.310(b). These examples suggest that an employer may have sufficient business justification to require an employee returning from FMLA leave to undergo examination only if she suffers from a continuing disability that the employer has reason to believe might affect her job performance. This reading is supported by the fact that the permissible examination is of a laborer whose present condition "affects" the ability to lift.

Moreover, this seems the most sensible way to reconcile the concerns of the ADA and the FMLA. Rather than concluding that the FMLA precludes all examinations permitted by the ADA, as Porter argued and the Porter court rightfully rejected, or that any examination permitted under the ADA is permissible under the FMLA, as the Postal Service urges, a more moderate approach is appropriate. The ADA and the FMLA do not conflict if the ADA's business necessity requirement requires more than an employee's having taken FMLA leave. In sum, an employer may not order an employee returning from FMLA leave to submit to a fitness-for-duty examination because of that leave, or because of an underlying condition that the employee's health care [*39] provider has certified will not interfere with the employee's ability to work, or because the employer views the certification as inadequate for its own purposes. An employer only has a sufficient "business need" to examine a returning employee where the employee's ongoing limitations may interfere with her ability to work.

V.

The Postal Service violated Albert's right to restoration under the FMLA by failing to reinstate her once it received a certification from her treating psychologist that she was fit to return to work. While Albert is entitled to return to work without having to submit to a psychological examination, she is not entitled to the full scope of relief she has requested. The FMLA cannot support a permanent injunction preventing the Postal Service from ever conditioning her employment on such an examination. Once Albert returns to work, the Service may order her to undergo a fitness-for-duty examination if it has sufficient reason under the ADA/Rehabilitation Act and its own agency regulations.

As explained above, I am prepared to issue a final judgment to this effect unless the Postal Service can demonstrate that it has a good faith basis for believing further discovery [*40] might be relevant as to Albert's eligibility for the protections of the FMLA. The Court will arrange to discuss this issue with counsel.

Dated: Boston, Massachusetts

May 5, 1998

Morris E. Lasker

U.S.D.J.

UNITED STATES POSTAL SERVICE ™

Request for or Notification of Absence

Employee's Name (Last, First, MI)	Social Security No.	Date Submitted	No. of Hours Requested

Installation (For PM leave, show City, State, and ZIP Code)	N/S Day	Pay Loc.	D/A Code	From Date	Hour

Time of Call or Request	Scheduled Reporting Time	Employee Can Be Reached At (If needed)	Thru Date	Hour
		☐ No Call		

Type of Absence
- ☐ Annual
- ☐ Carrier 701 Rule
- ☐ LWOP (See Reverse)
- ☐ Sick (See Reverse)
- ☐ Late ☐ COP
- ☐ Other: _____

Documentation (For Official Use Only)
- ☐ For COP Leave (CA1 on File)
- ☐ For Advanced Sick Leave (1221 on File)
- ☐ For Military Leave (Orders Reviewed)
- ☐ For Court Leave (Summons Reviewed)
- ☐ For Higher Level (1723 on File)
- ☐ Scheme Training Testing, Qualifying (Memo on File)

Revised Schedule for (Date)

Approved in Advance ☐ Yes ☐ No

Begin Work	
Lunch-Out	
Lunch-In	
End Work	
Total Hours	

Remarks (Do Not Enter Medical Information)

I understand that the annual leave authorized in excess of amount available to me during the leave year will be changed to LWOP.

Employee's Signature and Date	Signature of Person Recording Absence and Date	Signature of Supervisor and Date Notified

Official Action on Application (Return copy of signed request to employee)

☐ Approved, not FMLA ☐ Approved, FMLA ☐ Pending Documentation Noted on Reverse.

☐ Disapproved (Give Reason)

Signature of Supervisor and Date

Leave Without Pay	Absence Without Leave	PP	Year		
		Day	Init	Hours
		Sat 01		
		Sun 02		
		Mon 03		
		Tue 04		
		Wed 05		
		Thur 06		
		Fri 07		
		Sat 08		
		Sun 09		
		Mon 10		
		Tue 11		
		Wed 12		
		Thur 13		
		Fri 14		

Warning: The furnishing of false information on this form may result in a fine of not more than $10,000 or imprisonment of not more than 5 years, or both. (18 U.S.C. 1001)

☐ Continued on Reverse

PS Form 3971, June 1995

LABOR RELATIONS

UNITED STATES
POSTAL SERVICE

IDENTICAL LETTERS SENT TO
OTHER NATIONAL UNIONS

May 22, 1997

Mr. William Quinn
National President
National Postal Mail Handlers'
Union
Suite 525
One Thomas Circle, NW
Washington, DC 20005-5802

Dear Bill:

This is a follow-up to our April 15 and May 2 correspondence concerning the April and May draft revisions to Publication 71, Notice for Employees Requesting Leave for Conditions Covered by the Family and Medical Leave Act (FMLA).

After considering all the recommendations and suggestions from the unions, enclosed is the last and final draft dated June 1997.

Should you have any questions regarding this matter, please contact Corine T. Rodriguez of my staff at (202)268-3823.

Sincerely,

Sherry A. Cagnoli
Manager
Contract Administration (NALC/NRLCA)

Enclosure

475 L'ENFANT PLAZA SW
WASHINGTON DC 20260-4100

UNITED STATES POSTAL SERVICE ™ DRAFT DRAFT

Notice for Employees Requesting Leave for Conditions Covered by the Family and Medical Leave Act

Under the Family and Medical Leave Act (FMLA), employees have certain obligations to provide notice and/or other information to their employers. Failure to provide such notice or documentation could result in denial of leave or other protections afforded under the Act.

I. Qualifying Conditions - The FMLA provides that employees meeting the eligibility requirements must be allowed to take time off for up to 12 workweeks in a leave year for the following conditions:

1. Because of the birth of a son or daughter (including prenatal care), or to care for such son or daughter. Entitlement for this condition expires 1 year after the birth.
2. Because of the placement of a son or daughter with you for adoption or foster care. Entitlement for this condition expires 1 year after the placement.
3. In order to care for your spouse, son, daughter, or parent who has a serious health condition. Also, in order to care for those who have a serious health condition and who stand in the position of a son or daughter to you or who stood in the position of a parent to you when you were a child.
4. Because of a serious health condition that makes you unable to perform the functions of your position.

II. Eligibility - To be covered by FMLA, you must have been employed by the Postal Service for a total of at least one year *and* must have worked a minimum of 1,250 hours during the 12-month period before the date your absence begins.

III. Type of Leave or Pay - Absences counted toward the 12 workweeks allowed for the qualifying conditions can be any one or combination of the following:

1. Time off you take as annual leave, sick leave, and/or LWOP in accordance with current leave policies and collective bargaining agreements.
2. In the case of job-related injuries or illnesses, time off during which you are receiving continuation of pay (COP) and/or time during which you are placed an the Office of Workers' Compensation Program (OWCP) payroll.

IV. Documentation - Supporting documentation is required for your leave request to receive final approval. Documentation requirements may be waived in specific cases by your supervisor.

1. For qualifying condition (1) or (2), you must provide the birth or placement date.
2. For condition (3) or (4), you must provide documentation from the health care provider stating:
   a. The health care provider's name, address, phone number, and "type of practice, and the patient's name.
   b. A certification that the patient's condition meets the FMLA definition of serious health condition, supporting medical facts, and a brief statement as to how the medical facts meet the definition's criteria.
   c. The approximate date the serious health condition commenced, its probable duration, and the probable duration of the patient's present incapacity, if different.
   d. Whether you will need to take leave intermittently or to work on a reduced schedule as a result of the serious health condition; and if so, the probable duration of such schedule, an estimate of the probable number of and the interval between episodes of incapacity, and the period required for recovery, it any.
   e. For pregnancy or a chronic serious health condition: whether the patient is presently incapacitated and the likely duration and frequency of episodes of incapacity.

continued

continued

f. If additional or continuing treatments are required: the nature and regimen of the treatments, an estimate of the probable number of treatments: the length of absence required by the treatments, and actual or estimated dates of the treatments, if known.

g. For your own serious health condition, including pregnancy or a chronic condition, whether you are unable to perform work of any kind, parts of job you are unable to perform, and if you must be absent for treatments.

h. To care for a family member with a serious health condition: whether the patient requires assistance for basic medical or personal needs or safety, or for transportation; or if not, whether your presence to provide psychological comfort would be beneficial to the patient or assist in the patient's recovery, and the probable duration of the need for care or an intermittent or reduced work schedule basis. You must indicate on the form the care you will provide and an estimate of the time period.

3. If the serious health condition is a result of a job-related injury or illness, the documentation requirements are provided separately.

4. If the time off requested is to care for someone other than a biological parent or child, appropriate explanation of the relationship may be required.

Supporting information that is not provided at the time the leave is requested must be provided within 15 days, unless this is not practical under the circumstances. If the Postal Service questions the adequacy of a medical certification, a second or third opinion may be required. These are obtained off the clock. However, the Postal Service will pay for these opinions, plus reasonable 'out of pocket' travel expenses incurred to obtain the opinions.

During your absence, you must keep your supervisor informed of your intentions to return to work and status changes that affect your ability to return.

V. Benefits

Health Insurance - To continue your health insurance during your absence, you must continue to pay the "employee portion" of the premiums. This continues to be withheld from your salary. If the salary for a pay period does not cover the full employee portion, you are required to make the payment. If this occurs, you will be advised of the procedures for payment. Failure to make the required payments will result in loss of coverage.

Life insurance - Your basic life insurance and any optional life insurance that you carry will continue while in a pay status. In an LWOP status these are continued at no cost to you for one year. After one year in a no-pay status this coverage is discontinued; and, you will have the option to convert the coverage to an individual policy.

Flexible Spending Account (FSA) - If you participate in the FSA program, see your employee brochure for the terms and conditions of continuing coverage during leave without pay.

VI. Return to Duty

At the end of your leave, you will be returned to the same position you held when the absence began (or a position equivalent to it), provided you are able to perform the functions of the position and would have held that position at the time you returned if you had not taken the time off.

In order to return to duty, if the absence is due to your own health condition and exceeds 21 calendar days, or is due to exposure to communicable or contagious disease, mental or nervous condition, diabetes, cardiovascular disease, epilepsy, or a condition involving hospitalization, you must submit medical evidence of your ability to return to work before returning to work. You must submit medical certification stating unequivocally that you are fit for full duties without hazard to yourself or others, or indicating the duties which you are capable of performing. The medical certification must contain detailed reports with sufficient data to make a determination that you can return to work without hazard to yourself or others. A Postal medical officer or contract physician evaluates the medical report and makes the final determination of suitability for return to duty.

LABOR RELATIONS

UNITED STATES
POSTAL SERVICE

May 2, 1997

Mr. William Quinn
National President
National Postal Mail Handlers
Union
Suite 525
One Thomas Circle, N.W.
Washington, DC 20005-5802

Dear Bill:

As a matter of general interest, enclosed is a final draft revision of Publication 71, Notice for Employees Requesting Leave for Conditions Covered by the Family and Medical Leave Act.

In response to suggestions and comments received after the last draft revision notice of April 15, 1997, a change has been made to Section III. Type of Leave or Pay and to Section VI. Return to Duty. Those changes are bolded and underlined for your convenience.

Should you have any questions concerning this matter, please contact Corine T. Rodriguez of my staff at (202) 268-3823.

Sincerely,

Sherry A. Cagnoli
Manager
Contract Administration (NALC/NRLCA)

Enclosure

475 L'ENFANT PLAZA SW
WASHINGTON DC 20260-4100

UNITED STATES POSTAL SERVICE TM

Notice for Employees Requesting Leave for Conditions Covered by the Family and Medical Leave Act

Under the Family and Medical Leave Act (FMLA), employees have certain obligations to provide notice and/or other information to their employers. Failure to provide such notice or documentation could result in denial of leave or other protections afforded under the Act.

I. Qualifying Conditions - The FMLA provides that employees meeting the eligibility requirements must be allowed to take time off for up to 12 workweeks in a leave year for the following conditions:

1. Because of the birth of a son or daughter (including prenatal care), or to care for such son or daughter. Entitlement for this condition expires 1 year after the birth.
2. Because of the placement of a son or daughter with you for adoption or foster care. Entitlement for this condition expires 1 year after the placement.
3. In order to care for your spouse, son, daughter, or parent who has a serious health condition. Also, in order to care for those who have a serious health condition and who stand in the position of a son or daughter to you or who stood in the position of a parent to you when you were a child.
4. Because of a serious health condition that makes you unable to perform the functions of your position.

II. Eligibility - To be covered by FMLA, you must have been employed by the Postal Service for a total of at least one year *and* must have worked a minimum of 1,250 hours during the 12-month period before the date your absence begins.

III. Type of Leave or Pay - Absences counted toward the 12 workweeks allowed for the qualifying conditions can be any one or combination of the following:

1. Time off you take as annual leave, sick leave, and/or LWOP in accordance with current leave policies and collective bargaining agreements.
2. In the case of job-related injuries or illnesses, time off during which you are receiving continuation of pay (COP) and/or time during which you are placed an the Office of Workers' Compensation Program (OWCP) payroll.

IV. Documentation - Supporting documentation is required for your leave request to receive final approval. Documentation requirements may be waived in specific cases by your supervisor.

1. For qualifying condition (1) or (2), you must provide the birth or placement date.
2. For condition (3) or (4), you must provide documentation from the health care provider stating:
   a. The health care provider's name, address, phone number, and type of practice, and the patient's name.
   b. A certification that the patient's condition meets the FMLA definition of serious health condition, supporting medical facts, and a brief statement as to how the medical facts meet the definition's criteria.
   c. The approximate date the serious health condition commenced, its probable duration, and the probable duration of the patient's present incapacity, if different.
   d. Whether you will need to take leave intermittently or to work on a reduced schedule as a result of the serious health condition; and if so, the probable duration of such schedule, an estimate of the probable number of and the interval between episodes of incapacity, and the period required for recovery, if any.
   e. For pregnancy or a chronic serious health condition: whether the patient is presently incapacitated and the likely duration and frequency of episodes of incapacity.

continued

National Postal Mail Handlers Union

FMLA NOTIFICATION OF LEAVE REQUESTED FOR BIRTH, PLACEMENT, OR CARE OF A CHILD

1. Employee's name: _____

2. Date of birth or placement: _____

3. Requested leave dates (employee is entitled up to 12 weeks):

   From: _____ To: _____

4. Is intermittent or reduced schedule leave being requested?

   Note: Intermittent leave or a reduced schedule for this purpose requires approval by the supervisor.

   Yes _____ No _____

   a. Requested schedule: _____

   b. Reason for request: _____

   c. From: _____ To: _____

The employee must also provide a completed Form PS 3971 for each pay period noting type of leave requested.

_____

(Employee's Signature) *(Date)*

NPMHU/FMLA Form 1

National Postal Mail Handlers Union

FMLA NOTIFICATION OF LEAVE REQUESTED FOR CARE OF FAMILY MEMBER

1. Employee's name: _____

2. Patient's name: _____

3. Relationship to employee: _____

4. Description of serious health condition (On the back of this form is a description of what is meant by a "serious health condition" under FMLA. If your condition qualifies under any of the categories described, please check the applicable category):

   (a)____ (b)____ (c)____ (d)____ (e)____ (f)____, or None of the above____.

5. Medical facts underlying serious health condition (you need not include a diagnosis or prognosis): _____
   _____
   _____
   _____

6. Date condition commenced: _____

7. Probable duration of condition: _____

8. Reason employee is needed (i.e., transportation, psychological support, treatment): _____
   _____
   _____

9. Is intermittent or reduced schedule leave being requested? Yes ____ No ____

   a. Requested schedule: _____

   b. Reason for request: _____

   The employee must also provide a completed Form PS 3971

_____
(Employee's Signature) (Date)

NPMHU/FMLA Form 2

A "Serious Health Condition" means an illness, injury, impairment, or physical or mental condition that involves one of the following:

a. **Hospital Care**

Inpatient care (i.e. an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity or subsequent treatment[1] in connection with or consequent to such inpatient care.

b. **Absence Plus Treatment**

A period of incapacity of more than three consecutive calendar days (including any subsequent treatment or period of incapacity relating to the same condition), that also involves:

(1)*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

(2) *Treatment* by a health care provider on at least one occasion which results in a *regimen* of continuing *treatment*[2] under the supervision of the health care provider.

c. **Pregnancy**

Any period of incapacity due to *pregnancy* or for *prenatal care*.

d. **Chronic Conditions Requiring Treatments**

A chronic condition which:

(1) Requires *periodic visits* for treatment by a health care provider, or by a nurse of 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[3] (e.g., asthma, diabetes, epilepsy).

e. **Permanent/Long-term Conditions Requiring Supervision**

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, a severe stroke, or the terminal stages of a disease.

f. **Multiple Treatments (Non-Chronic Conditions)**

Any period of *absence* to *receive multiple treatments* (including *any* period of recovery therefrom) 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 that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment*, such as cancer (chemotherapy, radiation, etc.) severe arthritis (physical therapy), kidney disease (dialysis).

---

[1] *Treatment* includes examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations.

[2] A *regimen of continuing treatment* includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition. A regimen of treatment does not include the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider.

[3] "Incapacity," for purposes of FMLA, is defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom.

National Postal Mail Handlers Union

FMLA NOTIFICATION OF LEAVE REQUESTED FOR EMPLOYEE'S SERIOUS ILLNESS

1. Employee's name: _____

2. Description of serious health condition (On the back of this form is a description of what is meant by a "serious health condition" under FMLA. If your condition qualifies under any of the categories described, please check the applicable category):

   (a)____ (b)____ (c)____ (d)____ (e)____ (f)____, or None of the above ____ .

3. Medical facts underlying serious health condition (you need not include a diagnosis or prognosis): _____

   _____

   _____

4. Date condition commenced: _____

5. Probable duration of condition: _____

6. Is intermittent or reduced schedule leave being requested? Yes _____ No _____

   a. Requested schedule: _____

   b. Reason for request: _____

The employee must submit a completed Form PS 3971.

_____ _____

(Employees Signature) *(Date)*

NPMHU/FMLA Form 3

A "Serious Health Condition" means an illness, injury, impairment, or physical or mental condition that involves one of the following:

a. **Hospital Care**

Inpatient care (i.e. an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity or subsequent treatment[1] in connection with or consequent to such inpatient care.

b. **Absence Plus Treatment**

A period of incapacity of more than three consecutive calendar days (including any subsequent treatment or period of incapacity relating to the same condition), that also involves:

(1)*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

(2) *Treatment* by a health care provider on at least one occasion which results in a *regimen* of continuing *treatment*[2] under the supervision of the health care provider.

c. **Pregnancy**

Any period of incapacity due to *pregnancy* or for *prenatal care*.

d. **Chronic Conditions Requiring Treatments**

A chronic condition which:

(1) Requires *periodic visits* for treatment by a health care provider, or by a nurse of 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[3] (e.g., asthma, diabetes, epilepsy).

e. **Permanent/Long-term Conditions Requiring Supervision**

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, a severe stroke, or the terminal stages of a disease.

f. **Multiple Treatments (Non-Chronic Conditions)**

Any period of *absence* to *receive multiple treatments* (including *any* period of recovery therefrom) 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 that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment*, such as cancer (chemotherapy, radiation, etc.) severe arthritis (physical therapy), kidney disease (dialysis).

---

[1] *Treatment* includes examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations.

[2] A *regimen of continuing treatment* includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition. A regimen of treatment does not include the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider.

[3] "Incapacity," for purposes of FMLA, is defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom.

National Postal Mail Handlers Union

FMLA CERTIFICATION OF HEALTH CARE PROVIDER

1. Employee's Name: _____

2. Patient's Name (if different from employee):

   Relationship to Employee: _____ Child _____ Spouse _____ Parent

3. The reverse side of this form describes what is meant by a "serious health condition" under the Family and Medical Leave Act. Does the patient's condition[1] qualify under any of the categories described? If so, please check the applicable category.

   (a) _____ (b) _____ (c) _____ (d)_____ (e) _____ (f) _____, or None of the above _____

4. Without stating a specific diagnosis, describe the medical facts which support your certification, including a brief statement as to how the medical facts meet the criteria of one of these categories: _____

   _____

   _____

   _____

5. (a) State the approximate date the condition commenced, and the probable duration of the condition: _____

   _____

   _____

   (b) Probable duration of the present incapacity (if different): _____

   _____

   (c) If the condition is a chronic condition (condition d) or pregnancy, state whether the patient is presently incapacitated[2] and the likely duration and frequency of episodes of incapacity: _____

   _____

6. (a) If additional treatments will be required for the condition, please describe: the nature of such additional treatments or continuing regimen of treatment under your supervision (e.g., prescription drugs, physical therapy requiring special equipment); the probable number of such treatments; the length of the employee's required absence for the treatments; and the actual or estimated dates of the treatments if known. _____

   _____

   _____

---

[1]Here and elsewhere on this form, the information sought relates only to the condition for which the employee is taking FMLA leave.

[2]"Incapacity," for purposes of FMLA, is defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom

A "Serious Health Condition" means an illness, injury, impairment, or physical or mental condition that involves one of the following:

a. **Hospital Care**

Inpatient care (i.e. an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity or subsequent treatment[1] in connection with or consequent to such inpatient care.

b. **Absence Plus Treatment**

A period of incapacity of more than three consecutive calendar days (including any subsequent treatment or period of incapacity relating to the same condition), that also involves:

(1)*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

(2) *Treatment* by a health care provider on at least one occasion which results in a *regimen* of continuing *treatment*[2] under the supervision of the health care provider.

c. **Pregnancy**

Any period of incapacity due to *pregnancy* or for *prenatal care.*

d. **Chronic Conditions Requiring Treatments**

A chronic condition which:

(1) Requires *periodic visits* for treatment by a health care provider, or by a nurse of 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[3] (e.g., asthma, diabetes, epilepsy).

e. **Permanent/Long-term Conditions Requiring Supervision**

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, a severe stroke, or the terminal stages of a disease.

f. **Multiple Treatments (Non-Chronic Conditions)**

Any period of *absence* to *receive multiple treatments* (including *any* period of recovery therefrom) 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 that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment*, such as cancer (chemotherapy, radiation, etc.) severe arthritis (physical therapy), kidney disease (dialysis).

---

[1] *Treatment* includes examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations.

[2] A *regimen of continuing treatment* includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition. A regimen of treatment does not include the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider.

[3] "Incapacity," for purposes of FMLA, is defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom.

7. (a) If medical leave is required for the employee's absence from work because of the employee's own condition (including absences due to pregnancy or a chronic condition), is the employee unable to perform work of any kind: _____

_____

_____

(b) If able to perform some work, is the employee unable to perform any one or more of the essential functions of the employee's job (the employee or the employer should supply you with information about the essential job functions):___

_____

_____

If yes, please list the essential functions the employee is unable to perform:_____

_____

_____

(c) If neither (a) nor (b) applies, is it necessary for the employee to be absent from work for treatment: _____

(d) Will it be necessary for the employee to take time off work intermittently or work on a less than full schedule due to the serious health condition, including treatment? Yes _____ No _____

If yes give the probable duration and necessary schedule: _____

8. (a) If leave is required to care for a family member of the employee with a serious health condition, does the patient require assistance for basic medical or personal needs or safety, or for transportation: _____

_____

(b) If no, would the employee's presence to provide psychological comfort be beneficial to the patient with a serious health condition who is receiving inpatient or home care. Explain the extent to which the employee is needed to care for the patient or assist in the patient's recovery: _____

_____

_____

_____

(c) If the patient will need care only intermittently or on a part-time basis, please indicate the probable duration of this need:

_____

_____

_____
(Type or print name of Health Care Provider)

_____ _____
(Signature of Health Care Provider) (Type of Practice)

_____ _____
(Address) (Telephone number)

_____
(Date)

NPMHU/FMLA Form 4

National Postal Mail Handlers Union

FMLA NOTIFICATION OF REQUEST FOR INTERMITTENT LEAVE OR FOR A REDUCED WORK SCHEDULE

If the need is for a seriously ill family member or for the employee's own serious health condition, attach FMLA Certification of Health Care Provider, *NPMHU/FMLA Form 4*. If the need is for the birth, placement or care of a child, attach FMLA Notification of Leave Requested for Birth, Placement, or Care of a Child, *NPMHU/FMLA Form 1*

1. Employee's name: _____

2. Patient's name (if different than employee): _____

3. Required reduced or intermittent schedule, including duration: _____

4. Reason for Request: _____

The employee must submit a completed Form PS 3971.

_____ _____

(Employees Signature) *(Date)*

NPMHU/FMLA Form5