FAMILY AND MEDICAL LEAVE
GUIDE FOR WASHINGTON EMPLOYERS

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I. THE FAMILY AND MEDICAL LEAVE ACT

A. What is the FMLA?

In 1993, Congress passed the FMLA to provide employees the right to take unpaid leave to tend to serious medical conditions without losing employment benefits and without fear of losing their jobs upon return from leave. More specifically, the FMLA seeks to:

> (1) 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;
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> (2) 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;
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> (3) Accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;
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> (4) 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
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> (5) Promote the goal of equal employment opportunity for women and men, pursuant to such clause.

29 U.S.C. § 2601.

B. What does the FMLA provide?

The FMLA provides eligible employees with up to twelve workweeks of unpaid leave within a 12 month period. 29 U.S.C. § 2612(a)(1). An employer may calculate the 12 month period by using the calendar year, any fixed 12 month period (such as a fiscal year or one required by state law), the 12 month period beginning when an employee first takes FMLA leave, or a "rolling" 12 month period measured backward from the date an employee uses FMLA leave. 29 C.F.R. § 825.200. Most employers elect the rolling 12 month period, as it prevents employees from taking leave at the end of one calendar year and combining it with leave at the beginning of the next. The employer must notify employees which method it has chosen.[1] Where the employer fails to fulfill this notice obligation, it must use the option that provides the most beneficial outcome for the employee. 29 C.F.R. § 825.200(e).

[1] *Thom v. Am. Stand., Inc.*, 666 F.3d 968, 974 (6th Cir. 2012) ("[E]mployers should inform their employees in writing of which method they will use to calculate the FMLA leave year."); *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1129 (9th Cir. 2001).

Family members of qualified servicemembers may receive more leave—up to 26 workweeks of unpaid leave in a 12 month period—to care for the servicemember. 29 U.S.C. § 2612(a)(3). If a husband and wife have the same employer, they may be limited collectively to 12 weeks of leave within a 12 month period, depending upon the reason for leave. 29 U.S.C. § 2612(f)(1). As explained below, leave may be taken intermittently where medically necessary. 29 U.S.C. § 2612(b)(1).

If the employer offers paid leave, and the employee's reason for leave qualifies under the FMLA, in most cases the employee or the employer may substitute paid leave for unpaid FMLA leave.[2] 29 U.S.C. § 2612(d)(2)(A). If substitution occurs, however, the employee is entitled to full FMLA protections, even if leave is taken under an employer policy.[3] Such paid leave reduces the amount of available FMLA leave. 29 U.S.C. § 2612(d)(1); 29 C.F.R. § 825.207(a). If the employer inadvertently fails to designate time away as FMLA leave, the employee is not entitled to additional leave solely because of that technicality.[4] 29 U.S.C. § 2612(d)(2)(B).

An employee ordinarily is entitled to receive health insurance benefits while on leave. 29 U.S.C. § 2614(a)(2); 29 C.F.R. § 825.209. Upon return from leave, an employee is usually entitled to restoration to the position held before leave or to one with equivalent requirements, pay, and benefits. 29 U.S.C. § 2614(a)(1).

C. Which employers are covered under the FMLA?

Generally, the statute applies to employers who employ 50 or more employees for each working day during 20 or more workweeks in the current or preceding year. 29 U.S.C. § 2611(4)(A)(i). Both full- and part-time employees are counted.[5] Courts sometimes apply more complex "coverage" tests when a company works with temporary or contract workers and those workers might count toward the 50-employee minimum for coverage.[6] The statute covers public agencies as well as public and private elementary and secondary schools, regardless of the number of employees. 29 C.F.R. § 825.104(a).

D. Which employees are covered by the FMLA?

To be covered by the FMLA, an employee must (1) work for an employer covered under the statute;[7] (2) for at least 12 months;[8] and (3) have provided at least 1,250 hours of service during

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[2] Parties that enter into certain contracts with the federal government must provide employees with up to 7 days of paid sick leave per year, including paid leave allowing for family care. The paid sick leave can substitute for (that is, run concurrently with) unpaid FMLA leave. Establishing Paid Sick Leave for Federal Contractors, 29 C.F.R. § 13 (2016).

[3] *Strickland v. Water Works & Sewer Bd. of City of Birmingham*, 239 F.3d 1199, 1205 (11th Cir. 2001).

[4] *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 82 (2002).

[5] *Mendel v. City of Gibraltar*, 727 F.3d 565, 571 (6th Cir. 2013) (city firefighters were employees because they were paid a "per call" wage and worked in exchange for compensation).

[6] Many courts use an "economic reality" test to determine whether an enterprise is covered. *Graziadio v. Culinary Institute of America*, 817 F.3d 415, 422 (2nd Cir. 2016) (under "economic reality" test, court considers whether the alleged employer: (1) had power to hire and fire employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined rate and method of payment, and (4) maintained employment records).

[7] For employees who work for more than one employer, the primary employer is responsible for FMLA procedure,

the 12-month period immediately before taking FMLA leave.[9] 29 U.S.C. § 2611(2)(A). The employee must also work at a location where at least 50 employees are employed by the employer within 75 miles of that site. 29 U.S.C. § 2611(2)(B).

The 12 months of service need not be consecutive months, but only cumulative. 29 C.F.R. § 825.110(b).[10]

The 1,250 "hours of service" requirement does not include time during which the employee is paid but not actually working (for example, during paid vacation).[11]

The 75 mile distance is determined by the shortest route to the facility where the employee is employed, measured by surface miles over public streets, roads, highways, or waterways, not as the crow flies. 29 C.F.R. § 825.111(b).[12] Therefore, employees in a remote outpost of a large employer may not be covered by the FMLA.[13]

Where an employer has fewer than 50 employees but is a subsidiary of a larger corporation within the same 75 mile radius, that employer may be covered by the FMLA. The courts may apply either an "integrated employer" or a "joint employer" test to determine whether the number of employees in the subsidiary may be aggregated with those in the parent corporation.[14]

There also are special rules for certain federal officers, airline flight crew employees, and publicly elected officials and their staffs.[15] 29 U.S.C. §§ 203(e)(2); 2611(2)(B)-(D).

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and the secondary employer must only reinstate the employee upon the primary employer's request. *Cuellar v. Keppel Amfels, L.L.C.*, 731 F.3d 342, 347 (5th Cir. 2013).

[8] *Hill v. Walker*, 737 F.3d 1209, 1215 (8th Cir. 2013) (absence 20 days before the 12-month mark was not FMLA-protected leave). However, an employer may not terminate an employee before 12 months of employment to avoid leave obligations. *Pereda v. Brookdale Senior Living Communities*, 666 F.3d 1269, 1275 (11th Cir. 2012); *Wages v. Stuart Management Corp.*, 21 F. Supp. 3d 985, 990 (D. Minn. 2014) (employee terminated one day before employee met the 12-month requirement may bring a claim). *But cf. Dunn v. Chattanooga Pub. Co.*, No. 1:12–CV–252, 2013 WL 145865 at *4 (E.D. Tenn. Jan. 14, 2013) (declining to follow *Pereda*).

[9] *McArdle v. Town of Dracut/Dracut Pub. Sch.*, 732 F.3d 29, 34 (1st Cir. 2013).

[10] *Rucker v. Lee Holding Co*., 471 F.3d 6, 10, 12 (1st Cir. 2006) (employee can aggregate service with employer to reach the 12-month minimum, even with a 5-year gap between periods of employment).

[11] *Saulsberry v. Fed. Exp. Corp.*, 552 F. App'x 424, 429-30 (6th Cir. 2014) (employee must work the entire 1,250 hours; paid time off is not included); *Mutchler v. Dunlap Mem'l Hosp.*, 485 F.3d 854, 857-58 (6th Cir. 2007) (bonus hours awarded on top of an employee's actual hours worked did not constitute "hours of service").

[12] *Bellum v. PCE Constructors, Inc.*, 407 F.3d 734, 738-39 (5th Cir. 2005); *Hackworth v. Progressive Cas. Ins. Co.*, 468 F.3d 722, 726-27 (10th Cir. 2006).

[13] *See, e.g. Tilley v. Kalamazoo County Road Comm'n,* 777 F.3d 303, 310 (6th Cir. 2015) (while public agencies are "employers" regardless of how many employees they have, their employees are not eligible unless the employer meets the 50 employees within 75 miles threshold).

[14] *Demyanovich v. Cadon Plating & Coatings, L.L.C.*, 747 F.3d 419, 428 (6th Cir. 2014); *Engelhardt v. S.P. Richards Co.*, 472 F.3d 1, 4 (1st Cir. 2006).

[15] *Hemminghaus v. Missouri*, 756 F.3d 1100, 1110 (8th Cir. 2014) (court reporter for publically elected state judge ineligible for FMLA leave); *Horen v. Cook*, 546 F. App'x 531, 534-35 (6th Cir. 2013) (same for judge's law clerk).

E. When can an employee take leave under the FMLA?

1. Ordinary Leave

The FMLA provides leave when:

(1) The birth of a child of the employee requires care for such child;

(2) The placement of a child with the employee for adoption or foster care requires care for such child;

(3) The employee must care for his or her spouse, child, or parent with a serious health condition;

(4) A serious health condition renders the employee unable to perform his or her job;

(5) An employee needs time off due to a qualifying military exigency; or

(6) An employee requires leave to care for an injured servicemember.

29 U.S.C. § 2612(a)(1)(A)-(E), (3).

The definitions are important, especially the following:

The definition of **"*spouse*"** has seen dramatic changes in the recent past. Until 2013, the federal Defense of Marriage Act (DOMA) defined "spouse" as "a person of the opposite sex who is a husband or wife." 1 U.S.C. § 7. This definition prevented same-sex couples who were married under state law from using FMLA for some kinds of leave. In June 2013, the Supreme Court invalidated DOMA[16], restoring the definition of spouse under the FMLA to "a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides." 29 C.F.R. § 825.102.

In 2015, the Department of Labor issued a rule changing that definition to recognize spousal status for FMLA purposes based on the state where the couple married, not the state where the couple resides. For example, if two people married in a state (like Washington) that recognizes same-sex marriage, the FMLA would consider them married even if they lived in a state that does not recognize same-sex marriage. On June 26, 2015, the Supreme Court held that state laws banning same-sex marriage violate the Fourteenth Amendment to the Constitution.[17] Same-sex spouses now are entitled to equal benefits under the FMLA, regardless of the state of residence or the state where the marriage was performed.

[16] *United States v. Windsor*, 570 US __, 133 S. Ct. 2675, 2693-95 (2013).
[17] *Obergefell v. Hodges*, 135 S. Ct. 2584, 2588, 192 L. Ed. 2d 609 (2015).

The definition of ***"parent"*** includes those who stood *in loco parentis* to an employee when the employee was under the age of 18.[18] 29 USC §§ 2611(7); 2611(12)(A).

For an employee on FMLA leave to provide **"*care*"** for a family member, he or she must be "in close and continuing proximity to the ill family member."[19] Care "involves some level of participation in ongoing treatment of" a family member's serious health condition.[20] Some courts have applied a lower standard, only requiring activities that have the potential to benefit the family member's serious health condition.[21]

A ***"serious health condition"*** includes an illness, injury, impairment, or physical or mental condition that involves either *inpatient care* or *continuing treatment* by a health care provider.[22] 29 U.S.C. § 2611(11). Ordinarily, unless complications arise, the common cold, the flu, upset stomach, headaches other than migraines, and routine dental or orthodontia problems do not rise to the level of a "serious health condition" and do not qualify for FMLA protection. 29 C.F.R. § 825.113(d). In some instances, however, the employee may have a serious health condition by experiencing several distinct medical issues at the same time, even if each issue alone does not meet the statutory definition.[23] Some courts suggest, however, that the medical issues need to be related to be treated collectively as a serious health condition.[24]

"Inpatient care" requires an overnight stay in a hospital, hospice, or residential medical care facility.[25] 29 C.F.R. § 825.114.

"Continuing treatment" requires any of the following:

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[18] *Coutard v. Mun. Credit Union*, 848 F.3d 102, 105 (2d Cir. 2017) (grandparent who raised employee from the age of four was a "parent" under the FMLA).

[19] *Tellis v. Alaska Airlines, Inc.*, 414 F.3d 1045, 1047 (9th Cir. 2005); *Shulman v. Amazon.com, Inc.*, No. C13-247RSM, 2013 WL 2403256, at *2–3 (W.D. Wash. May 30, 2013) (internet and telephone research into care options for family member is not "care").

[20] *Marchisheck v. San Mateo Cty.*, 199 F. 3d 1068, 1076 (9th Cir. 1999). *But cf. Ballard v. Chi. Park Dist.*, 741 F.3d 838, 840-43 (7th Cir. 2014).

[21] *Ballard*, 741 F.3d at 840-43 (assisting parent with basic medical, hygienic, and nutritional needs during a trip to Las Vegas qualified as "care"); *Gienapp v. Harbor Crest*, 756 F.3d 527, 531 (7th Cir. 2014) (grandmother primarily caring for her grandchildren could also be caring for her daughter at the same time).

[22] *Fitterer v. Washington Employment Sec. Dept.*, No. 2:14-CV-0404-TOR, 2015 WL 4619648, at *11 (E.D. Wash. July 31, 2015) (employee presented no evidence of a regimen of *continuing treatment* for migraines, just ongoing conversations with doctor about the causes of migraines; thus her migraines were not a "serious health condition" or "incapacity" under FMLA); *Long v. Mayco, Inc.*, No. CIV-15-1019-M, 2016 WL 6783249, at *3 (W.D. Okla. Nov. 16, 2016) (ongoing counseling sessions could establish that ADHD was a serious health condition); *Soles v. Zartman Constr., Inc.*, No. 4:14-CV-01791, 2016 WL 3458395, at *4 (M.D. Penn. Jun. 24, 2016) (eczema that required ongoing treatment by a physician could be a serious health condition).

[23] *Price v. City of Fort Wayne*, 117 F.3d 1022, 1024-25 (7th Cir. 1997); *Fries v. TRI Mktg. Corp.*, Civil No. 11-1052 (JNE/AJB), 2012 WL 1394410, at *5 (D. Minn. Apr. 23, 2012).

[24] *Marchisheck*, 199 F.3d at 1075-76 (psychological and physical conditions were not a serious health condition because they were not treated together).

[25] One court held that a fourteen hour hospital visit was not an "overnight stay" because the employee checked into emergency room just after midnight and left the same day. *Bonkowski v. Oberg Indus., Inc.*, 787 F.3d 190 (3d Cir. 2015).

(1) *Incapacity* for a period of more than three consecutive, full calendar days, and any subsequent treatment two or more times within thirty days of the first day of incapacity; or treatment on at least one occasion that results in a regimen of continuing treatment under the supervision of the health care provider. For either, the first in-person treatment must take place within seven days of the incapacity.

(2) Incapacity due to pregnancy or prenatal care.

(3) Incapacity due to a chronic serious health condition that continues over an extended period of time and requires at least twice-a-year visits for treatment by a health care provider.[26]

(4) Incapacity which is permanent or long-term due to a condition for which treatment may not be effective. Though no treatment occurs, the employee or family member must still be under the continuing supervision of a health care provider.

(5) Conditions requiring multiple treatments.

29 C.F.R. § 825.115(a)-(e).[27]

"Treatment" may include exams to determine whether a serious health condition exists or to evaluate that condition.[28] However, merely calling to make an appointment, scheduling rehabilitation, or obtaining a prescription-refill note are not "treatment."[29]

The FMLA definitions are different from similar phrases under disability law. The FMLA's "***incapacity***" analysis is narrow, evaluating the employee's ability to perform the current job, "even if that job is the only one the employee is unable to perform."[30] The Americans with Disabilities Act (ADA) and the Washington Law Against Discrimination (WLAD) more broadly define "disability." Under the ADA, the employer must determine whether a person can perform one or more "major life activities." 29 C.F.R. § 1630.2(j). The WLAD definition is even more

[26] *See Smith v. AS Am., Inc.*, 829 F.3d 616, 622 (8th Cir. 2016) (employee's back injury qualified as a chronic serious health condition because he visited an urgent care clinic twice in one year).

[27] *Hurley v. Kent of Naples, Inc.*, 746 F.3d 1161, 1167-68 (11th Cir. 2014) (medically beneficial leave for chronic illness still must meet incapacity standards); *Pivac v. Component Servs. & Logistics*, 570 F. App'x 899, 903 (11th Cir. 2014) (employee's depression and anxiety with single doctor visit and no further treatment does not constitute incapacity and continuing treatment); *Wonasue v. Univ. of Md. Alumni Ass'n*, 984 F. Supp. 2d 480, 496 (D. Md. 2013) (severe morning sickness is protected); *Kossowski v. City of Naples*, No. 2:13–cv–728–Ftm–29DNF, 2015 WL 505666, at *3 (M.D. Fla. Feb. 6, 2015) (bronchitis could be a serious health condition requiring continuing treatment with antibiotics).

[28] *Jones v. C&D Technologies, Inc.*, 684 F.3d 673, 678 (7th Cir. 2012).

[29] *Id.* at 679; *see also Darst v. Interstate Brands Corp.*, 512 F.3d 903, 911 (7th Cir. 2008).

[30] *Stekloff v. St. John's Mercy Health Sys.*, 218 F.3d 858, 861-62 (8th Cir. 2000); *see also Hurlbert v. St. Mary's Health Care Sys., Inc.*, 439 F.3d 1286, 1295 (11th Cir. 2006); *Conrad v. Eaton Corp.*, 303 F. Supp. 2d 987, 1003 (N.D. Iowa 2004).

expansive, encompassing a larger number of impairments and medical, mental, and psychological conditions. RCW 49.60.040(7)(c).[31]

The FMLA requirement of **"*three consecutive calendar days*"** of incapacity may be strictly interpreted.[32]

A **"*qualifying military exigency*"** means any circumstance that requires an employee to:

(1) Address issues that arise when a covered military member is notified of an impending call or order to active duty on short-notice;

(2) Attend military events and related activities;

(3) Arrange for or provide alternative childcare or to coordinate school activities;

(4) Make financial and legal arrangements or to act as the servicemember's representative;

(5) Attend counseling due to deployment or potential deployment;

(6) Spend time with a covered military member who is on short-term, temporary, rest and recuperation leave during the period of deployment; or

(7) Participate in or arrange for post-deployment activities.

A qualifying exigency might also include other events arising out of the servicemember's duties, if the employer and employee agree that there is an exigency and agree to the timing and duration of leave. 29 C.F.R. 825.126(b)(1)-(8).

Separate and distinct from leave due to a qualifying military exigency, an employee may also take ***military caregiver leave*** for a covered servicemember or veteran. 29 C.F.R. § 825.127(a). An employee may take military caregiver leave for a current servicemember who (1) is an immediate family member, (2) is "on the temporary disability retired list," and (3) has a "serious injury or illness" for which he or she is undergoing medical treatment, recuperation, or therapy or is in outpatient status. 29 C.F.R. § 825.127(b), (d). The "*serious injury or illness*" must be incurred or aggravated in the line of duty on active duty and must render the servicemember medically unfit to perform the duties of the office, grade, rank or rating. "*Outpatient status*" requires "a member of the Armed Forces [be] assigned to either a military medical treatment

[31] *Mesmer v. Charter Communications, Inc.*, No. 3:14-CV-05915-RBL, 2016 WL 1436135, at *5 (W.D. Wash. April 12, 2016) (to establish claim of failure to reasonably accommodate disability under WLAD, employee had to show: (1) employee had abnormality that substantially limited performance of job; (2) employee was qualified to perform job's essential functions; (3) employee gave notice of abnormality; and (4) upon notice, employer failed to adopt measures available and medically necessary to accommodate abnormality).

[32] *Russell v. N. Broward Hosp.*, 346 F.3d 1335, 1343-44 (11th Cir. 2003) (as FMLA requires three consecutive full days [72 hours or more] of incapacity, employee incapacitated for seven consecutive *partial* days did not have "serious health condition"); *White v. Beltram Edge Tool Supply*, 789 F.3d 1188, 1193 (11th Cir. 2015) (same).

facility as an outpatient; or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients." 29 C.F.R. § 825.127(b).

Military caregiver leave is also available to an employee whose immediate family member is a veteran who is "undergoing medical treatment, recuperation or therapy for a serious injury or illness." The veteran must have been released or discharged within the five years before the first date that the employee takes military caregiver leave. 29 C.F.R. § 825.127(b)(2). For veterans, a serious injury or illness may be:

> (1) a persisting serious injury or illness incurred or aggravated in the line of duty;
>
> (2) a physical or mental condition receiving a Department of Veterans Affairs Service-Related Disability Rating of 50 percent or greater, based at least in part on the veteran's specific condition requiring military caregiver leave;
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> (3) a physical or mental condition caused by a disability related to military service that substantially impairs the veteran from holding gainful employment; or
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> (4) an injury, including a psychological injury, for which the veteran is enrolled in the Department of Veteran Affairs Program of Comprehensive Assistance for Family Caregivers.

29 C.F.R. § 825.127(c)(2).

2. Intermittent Leave

In certain situations, an employee may qualify for intermittent leave (leave taken in separate blocks of time due to a single qualifying reason) or for a reduced leave schedule (a schedule that reduces an employee's usual number of working hours per workweek or hours per workday). 29 C.F.R. § 825.202(a). An employee may qualify for intermittent leave when:

> (1) The employee must care for his or her spouse, child, or parent with a serious health condition;
>
> (2) The employee has a serious health condition that makes him or her unable to perform the functions of the position;
>
> (3) There is a qualifying military exigency;
>
> (4) The employee must care for an injured servicemember.

29 U.S.C. § 2612(b)(1); 29 U.S.C. § 2612(a)(1), (3).

If an employee requires intermittent leave or leave on a reduced leave schedule for planned medical treatment, he or she must "make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations." 29 C.F.R. § 825.203.

An employer may transfer an employee on intermittent leave to an alternative position with similar pay and benefits, but the employer may not use the option to influence the employee's decision to take leave. 29 C.F.R. § 825.204(a)-(d). Further, an employee who no longer requires intermittent leave or a reduced leave schedule is generally entitled to return to the former position or one similar to it. 29 C.F.R. § 825.204(e). However, an employee who uses all of his or her FMLA leave and yet is still unable to perform an essential function of the job upon return may be subject to termination.[33]

In determining the amount of intermittent FMLA leave taken, an employer may count the time off by using an increment that is not greater than one hour and no larger than the shortest period of time the employer uses to account for other forms of leave. 29 C.F.R. § 825.205(a)(1). For example, if the employer tracks all other types of leave in half-hour increments, it must track intermittent FMLA leave using the same or shorter measure. On the other hand, if the employer tracks all other types of leave in four-hour increments, the maximum measure of intermittent FMLA leave is limited to one-hour increments. Regardless of the measure, an employee's FMLA leave entitlement may be reduced only by the amount of leave actually used. 29 C.F.R. § 825.205(a)(1). An explanation of how intermittent leave is calculated can be found at 29 C.F.R. § 825.205(b).

F. How does an employee request FMLA leave?

If leave is **foreseeable**, the employee must provide at least 30 days' notice before the leave is scheduled to begin, unless it is impracticable under the circumstances. If it is impracticable, the employee must give notice as soon as practicable. Notice must be given only one time, but the employee must inform the employer of any later changes. 29 C.F.R. § 825.302(a); 29 U.S.C. § 2612(e).

Employers are entitled to notice that provides enough information to conclude that the FMLA may apply and when the employee anticipates returning to work. 29 C.F.R. § 825.302(c). The employee must do more than merely disclose that he or she will be out without an anticipated return date or any further information about the reason for leave.[34] Employees who fail to comply with notice requirements may lose FMLA protection.[35]

On the other hand, the employer must be reasonable in determining whether notice is sufficient. The FMLA notice requirement is "not demanding"; the employee must simply put the employer on notice of a *probable* basis for FMLA leave.[36] Employers must "inquire further of the

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[33] *Scruggs v. Pulaski Cty.*, 817 F.3d 1087, 1093 (8th Cir. 2016) (juvenile detention officer who used all FMLA leave entitlement was properly terminated because, upon her return, she could not perform essential function of lifting 40 pounds).

[34] *Spurling v. C & M Fine Pack, Inc.*, 739 F.3d 1055, 1062-63 (7th Cir. 2014) (night shift employee must provide more information than that she needed time off to figure out why she was falling asleep on the job); *Curtis v. Costco Wholesale Corp.*, 807 F.3d 215, 220 (7th Cir. 2016) (employee's comment that he was contemplating taking "medical leave" did not provide sufficient notice).

[35] *Righi v. SMC Corp.*, 632 F.3d 404, 410-11 (7th Cir. 2011).

[36] *Valdivia v. Township High Sch. Dist. 214*, No. 16 C 10333, 2017 WL 2114965, at *4 (N.D. Ill. May 14, 2017) (citation omitted); *see also Burnett v. LFW Inc.*, 472 F.3d 471, 479 (7th Cir. 2006) (employee satisfies notice obligation by providing "sufficient information to show that he *likely* has an FMLA-qualifying condition").

employee if it is necessary to have more information about whether FMLA leave is being sought by the employee." 29 C.F.R. § 825.302(c). The test is whether the information is reasonably adequate to apprise the employer of the employee's intent to take leave.[37]

For first time requests, the employee is not required to assert rights under the FMLA. In fact, "the employee can be completely ignorant of the benefits" under the FMLA.[38] On the other hand, if the employee is seeking leave for a reason that previously qualified under the FMLA, the employee must specifically identify the qualifying reason for leave. Employees are expected to comply with employer questioning in order to determine whether FMLA applies; failure to cooperate may result in denial of leave.[39] 29 C.F.R. § 825.302(c).

The employer may require an employee to follow its usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances.[40] For example, an employer may require an employee to provide notice in a certain format or to a specific individual.[41] Unjustified failure to comply with employer policies may result in delay or denial of the FMLA request.[42] 29 C.F.R. § 825.302(d). Absent unusual circumstances, a denial of leave resulting from the employee's failure to follow the employer's usual and customary procedures for requesting leave will not constitute interference with FMLA rights.[43] If an employer does not enforce or inconsistently enforces its policy, however, a court may find the employee provided adequate notice even though he failed to comply with established protocol.[44] Nevertheless, an employee must follow an employer's policies, even if they have recently changed, assuming the employee receives notice of the changes.[45]

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[37] *Sarnowski v. Air Brooke Limousine*, 510 F.3d 398, 402-03 (3d Cir. 2007); *Woods v. DaimlerChrysler Corp.*, 409 F.3d 984, 990 (8th Cir. 2005). *See also Alfred v. Harris Cty. Hosp. Dist.*, 666 F. App'x 349, 354 (5th Cir. 2016) (employee's general discussion with her manager about her mother's illness was not adequate notice of an intention to take leave); *Nicholson v. Pulte Homes Corp.*, 690 F.3d 819, 826 (7th Cir. 2012) (employee's "causal conversation" about the challenges of dealing with a condition was not adequate notice); *Miles v. Nashville Elec. Serv.*, 525 F. App'x 382, 388 (6th Cir. 2013) (employee's voluntary resignation was not adequate notice).

[38] *Stoops v. One Call Commc'ns.*, 141 F.3d 309, 312 (7th Cir. 1998); *Arredondo v. Ecolab Inc.*, No. 2:14–CV–44, 2015 WL 1470563 at *3 (S.D. Tex. March 31, 2015). *See also Valdivia*, 2017 WL 2114965, at *4 ("An employee need not give direct notice of the seriousness of her health condition or even mention the FMLA or demand its benefits.").

[39] *Nebeker v. National Auto Plaza*, 643 F. App'x 817, 825 (10th Cir. 2016) (perceived hostile work environment was no excuse for employee's failure to request FMLA leave).

[40] *Acker v. Gen. Motors, LLC*, 853 F.3d 784, 788-89 (5th Cir. 2017); *Srouder v. Dana Light Axle Mfg., LLC*, 725 F.3d 608, 614 (6th Cir. 2013).

[41] *See Perry v. Am. Red Cross Blood Servs.*, 651 F. App'x 317, 328 (6th Cir. 2016) (employer's requirement that employees initiate FMLA leave requests through a specific administrator was reasonable).

[42] *Acker*, 853 F.3d at 789 (employee who failed to follow employer's call-in notification procedure was properly denied leave); *Norton v. LTCH*, 620 F. App'x 408, 410-411 (6th Cir. 2015) (employee failed to provide notice of intent to take leave, depriving employer of opportunity to determine whether FMLA covered late arrival and thus precluding claim).

[43] *Acker*, 853 F.3d at 789.

[44] *See Hudson v. Tyson Fresh Meats, Inc.*, 787 F.3d 861, 867 (8th Cir. 2015) (employee's text message to his supervisor stating that he "was having health issues" created jury issue even though employer's policy required employee to call in). *But cf. Lanier v. Univ. of Texas Southwestern Medical Cntr.*, 527 F. App'x 312, 317 (5th Cir. 2013) (employee's text message requesting removal from an on-call shift was not adequate notice of FMLA request).

[45] *See, e.g., Perry*, 651 F. App'x at 328 (6th Cir. 2016) (notice by flyer that employees should initiate FMLA leave

Before taking foreseeable leave for medical treatment, the employee must make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations. 29 C.F.R. § 825.302(e).

When the need for leave is **unforeseeable**, the employee must provide notice to the employer as soon as practicable.[46] 29 C.F.R. § 825.303(a). If the employee is unable to give notice in person, notice may be given by the employee's "spokesperson." 29 C.F.R. § 825.303(a). Content and compliance requirements are essentially the same as when the leave is foreseeable. 29 C.F.R. § 825.303(b), (c).

If an employee is unaware that she is suffering from a serious health condition or is otherwise unable to communicate her condition to her employer, she may be able to satisfy the notice requirement indirectly.[47] Some courts find that "clear abnormalities" in the employee's behavior[48] or "uncharacteristic or unusual conduct at work" may provide notice of a serious health condition and excuse the need for an express request for medical leave.[49]

One court has suggested that an employee who qualifies for FMLA leave can decline to take it in order to preserve leave for future use.[50]

G. What medical certification must the employee supply?

Generally, if an employee requests FMLA leave for medical reasons, an employer may require the employee to provide a certification prepared by the health care provider of the employee or relevant family member.[51] 29 U.S.C. § 2613(a). An employer requiring such certification must notify the employee of these requirements, either at the time the employee gives

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requests through a specific administrator was reasonable and obligated employee to comply).

[46] *Phillips v. Mathews*, 547 F.3d 905, 909 (8th Cir. 2008).

[47] *Valdivia*, 2017 WL 2114965, at *4.

[48] *Id.* (quoting *Stevenson v. Hyre Elec. Co.*, 505 F.3d 720, 724 (7th Cir. 2007)).

[49] *Valdivia*, 2017 WL 2114965, at *4 (employee's uncontrollable crying at work, together with statements to a supervisor that she was not eating or sleeping, plausibly put the employer on notice that the employee was suffering from a serious medical condition); *Byrne v. Avon Prods., Inc.*, 328 F.3d 379, 3829 (7th Cir. 2003) (previously model employee who suddenly began sleeping on the job raised a triable issue of fact as to whether his change in behavior was sufficient notice of a serious medical condition). However, the constructive notice exception remains a minority view. For courts taking a contrary approach, *see, e.g., Bosley v. Cargill Meat Sols. Corp.*, 705 F.3d 777, 783 (8th Cir. 2013) (noting that the Department of Labor has since amended the regulatory basis on which *Byrne* relied and declining to adopt the constructive notice exception for that reason); *Powers v. Covestro LLC*, No. 2:16-cv-05253, 2017 WL 1952230, at *8-9 (S.D.W. Va. May 10, 2017) (declining to follow *Byrne*'s constructive notice exception as dicta). Employers must also take care not to assume that an employee has a disability, as improper inquiries into disability status can violate the Americans with Disabilities Act (ADA). 42 U.S.C. § 12101 *et seq*.

[50] In *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1244 (9th Cir. 2014), the employee informed her employer of an FMLA-qualifying reason for taking time off, but requested that employer classify the leave as vacation instead of FMLA leave. When the employee was terminated during the leave, the court refused to accord the employee any FMLA protections. The court appeared to endorse the employee's discretion to take FMLA leave after paid vacation or sick days to extend the total leave beyond the 12 weeks provided by FMLA.

[51] *Holder v. Ill. Dep't of Corr.*, 751 F.3d 486, 494-95 (7th Cir. 2014); *Kinds v. Ohio Bell Tel. Co.*, 724 F.3d 648, 652 (6th Cir. 2013) (failure to provide a timely medical certificate can void a right to protected leave). *But see Oak Harbor Freight Lines, Inc. v. Antti*, 998 F. Supp. 2d 968, 975 (D. Or. 2014) (requiring a doctor's note for each absence of an intermittent leave interfered with employee's FMLA rights).

notice of the need for leave or within five business days thereafter. In the case of unforeseen leave, the employer should give notice within five days after leave begins. Unless impracticable, the employee must provide certification within 15 days of the request. 29 C.F.R. § 825.305(a), (b).

A request for medical certification should be in writing and explicitly state the number of days that the employee has to comply.[52] 29 C.F.R. § 825.305(a). Failing to request medical certification correctly may prevent an employer from denying FMLA leave.[53]

Certification should be "complete and sufficient." If an employee does not complete any applicable entries or provides "vague, ambiguous, or non-responsive" answers, the certification is considered deficient. The employer must notify the employee if a certification is incomplete and state in writing what additional information is necessary.[54] The employee has seven days to cure the problem, unless that amount of time is impracticable despite the employee's "diligent good faith efforts." Failure to cure a deficiency or to respond in a timely fashion may result in denial of FMLA leave.[55] 29 C.F.R. § 825.305(c)-(d).

Content requirements for medical certifications vary depending on the situation. Certifications generally require:

> (1) Information on the health care provider, including contact information;
>
> (2) The date on which the health condition began and its probable duration;
>
> (3) A description of the appropriate medical facts regarding the condition;
>
> (4) A statement that the employee requires leave, either due to his or her own personal injury or due to the condition of another party qualifying the employee for leave under the statute;
>
> (5) Estimates of the frequency and duration of treatments, including when the leave requested is intermittent.

29 U.S.C. § 2613(b); 29 C.F.R. § 825.306(a). If the employer has reason to doubt the certification, it may, at its own expense, require a second opinion from an independent health care provider to determine whether the employee or family member has a condition requiring FMLA leave. 29 U.S.C. § 2613(c). An employee who refuses to attend a second opinion examination may violate

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[52] *Branham v. Gannett Satellite Info. Network, Inc.*, 619 F.3d 563, 572 (6th Cir. 2010).

[53] *Id.* at 573.

[54] One court allowed an employee to maintain an FMLA interference claim because the employer did not seek clarification of an insufficient medical certification, even though doctors had not diagnosed the employee with a serious health condition at the time she requested FMLA leave. *Hansler v. Lehigh Valley Hosp. Network*, 798 F.3d 149, 155 (3d Cir. 2015).

[55] *Novak v. MetroHealth Med. Ctr.*, 503 F.3d 572, 579-80 (6th Cir. 2007); *Urban v. Dolgencorp of Tex., Inc.*, 393 F.3d 572, 576-77 (5th Cir. 2004); *Coffman v. Ford Motor Co.*, 719 F. Supp. 2d 856, 861 (S.D. Ohio 2010).

the FMLA.[56] Disagreements between original and second opinions are resolved by a third independent opinion, which is binding on both parties. 29 U.S.C. § 2613(c)-(d).

An employer may request recertification when reasonable. 29 U.S.C. § 2613(e). Generally, an employer cannot require recertification more often than every thirty days. If the estimated duration of the condition is more than thirty days, however, the employer must wait until that time expires before requesting recertification. 29 C.F.R. § 825.308(a)-(b). An employer may request certification at any time if (1) the employee requests an extension of leave, (2) circumstances have changed significantly, or (3) new information casts doubt upon the employee's stated reason for leave or upon the validity of the certification. Recertification is at the employee's expense, but it is not subject to second or third opinions. 29 C.F.R. § 825.308(c), (f).

H. How does the employer respond to the request for leave?

Absent extenuating circumstances, the employer must notify the employee within five business days whether he or she is eligible to take leave under the FMLA.[57] If an employee requests FMLA leave and does not qualify, the employer must explain why (*e.g.*, the employee failed to work 1,250 hours in the preceding 12 months), either in writing or orally. 29 C.F.R. § 825.300(b)(1)-(2). Prudent employers, however, will provide written notification.

At the same time that it provides the eligibility notice, the employer also should provide notice to the employee explaining rights and responsibilities under the FMLA. Such notice must include, at a minimum:

> (1) That the leave may be designated and counted against the employee's annual FMLA leave entitlement;
>
> (2) The applicable 12 month period for FMLA entitlement;
>
> (3) Any requirements for the employee to furnish certifications;
>
> (4) The employee's right to substitute paid leave, whether the employer will require the substitution of paid leave, the conditions related to any substitution, and the employee's entitlement to take unpaid FMLA leave if the employee does not meet the conditions for paid leave;
>
> (5) Any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments;
>
> (6) The possible consequences of failure to make such payments on a timely basis;

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[56] *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711, 713 (7th Cir. 1997); *Chapen v. Munoz*, No. 3:06-cv-00353-BES-VPC, 2009 WL 511114, at *4 (D. Nev. Feb. 25, 2009).

[57] See *Young v. Wackenhut Corp.*, No. 10-2608, 2013 WL 435971, at *6 (D.N.J. Feb. 1, 2013) (employee manual and federal FMLA poster do not satisfy *individual* notice requirements).

> (7) The employee's status as a "key employee" and the potential consequence that restoration may be denied following FMLA leave;
>
> (8) The employee's rights to maintenance of benefits during FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave; and
>
> (9) 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.

29 C.F.R. § 825.300(c)(1).

Assuming that the employee is *eligible* for leave, the employer next must determine whether the employee in fact *qualifies* for leave. Here the employer examines whether the employee has a serious health condition or fits under any of the other reasons for FMLA leave and otherwise qualifies for leave.

If the leave request is denied, the employer must notify the employee. If the request is granted, the employer must affirmatively designate leave as FMLA-qualifying and notify the employee in writing of the designation within five business days, absent extenuating circumstances. 29 C.F.R. § 825.300(d)(1), (4). The employer must specify (1) the amount of leave counted against the employee's FMLA leave entitlement and, if known, the number of hours, days, or weeks that will be counted, (2) whether it will require a fitness-for-duty certification, and (3) whether and how the employee may substitute paid leave for FMLA leave. 29 C.F.R. § 825.300(c)(1), (d).

The employer must designate leave as FMLA-qualifying based solely upon information provided by the employee or his or her spokesperson. The employee is required to provide enough information for the employer to make that designation. If there is insufficient information to make a designation, the employer should inquire further. Once enough information is obtained, the employer makes a designation and notifies the employee as outlined above. 29 C.F.R. § 825.301(a)-(b).

Disputes over whether the leave qualifies under FMLA are left in the first instance to the employer and employee to resolve. Such discussions must be documented. 29 C.F.R. § 825.301(c).

If an employer fails to timely or properly designate leave as FMLA-qualifying, it may do so retroactively with appropriate notice, provided the failure does not harm the employee. 29 C.F.R. § 825.301(d).[58] For example, the employer would not be permitted to retroactively designate leave if the earlier failure to designate caused the employee to lose the right to be

[58] *Ragsdale*, 535 U.S. at 82; *Coker v. McFaul*, 247 F. App'x 609, 618 (6th Cir. 2007); *Johnson v. Wheeling Machine Products*, 779 F.3d 514, 521 (8th Cir. 2015) ("[t]echnical violations of the FMLA are not actionable unless they harm the employee").

reinstated to the same position.[59] The employer and employee also can agree to retroactively designate leave. 29 C.F.R. § 825.301(d).

I. What happens during the leave?

An employee generally is entitled to receive health insurance benefits while on leave. 29 U.S.C. § 2614(a)(2); 29 C.F.R. § 825.209. An employee who chooses to maintain health coverage is still responsible for any employee-paid premiums. 29 C.F.R. § 825.210. The employer's obligation to provide health insurance benefits ends if the employee is more than 30 days delinquent on employee premiums; however, before it can terminate coverage, the employer must provide at least 15 days written notice to the employee. 29 C.F.R. § 825.212(a)(1). Also, if the employee fails to return to work after the leave, the employer may collect from the employee the premiums paid on his or her behalf during the leave. 29 U.S.C. § 2614(c)(2).

An employer is not to interfere with an employee's leave by assigning work-related tasks, but the employee does not have a right to be "left alone."[60] Courts distinguish between nondisruptive communications from an employer (such as short phone calls to request limited information) and requests that the employee create work product.[61] The employer may require employees on leave to complete administrative paperwork.[62] When an employee is on part-time work under FMLA, job responsibilities must diminish to a part-time level.[63]

An employer may require an employee on FMLA leave to periodically report his or her status and intent to return to work. If the employee chooses not to return to work, the employer's obligations under FMLA cease.[64] Conversely, an employee may need to take additional leave. In that case, the employee should give the employer at least two days' notice when practicable. 29 C.F.R. § 825.311(a)-(c). However, once an employee exhausts the 12 weeks of leave allowed under FMLA, any additional leave is not protected.[65]

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[59] *Downey v. Strain*, 510 F.3d 534, 541-42 (5th Cir. 2007). *But see Bellone v. Southwick–Tolland Reg'l Sch. Dist.*, 748 F.3d 418, 423 (1st Cir. 2014) (late notice of FMLA eligibility did not prejudice employee because his doctor's note showed the employee was not capable of returning to work before the end of the leave period).

[60] *Callison v. City of Phila.*, 430 F.3d 117, 121 (3d Cir. 2005); *O'Donnell v. Passport Health Communications, Inc.,* 561 F. App'x 212, 218 (3d Cir. 2014); *Allen v. Butler County Com'rs*, 331 F. App'x 389, 394–97 (6th Cir. 2009).

[61] *Massey-Diez v. Univ. of Iowa Cmty. Med. Servs., Inc.*, 826 F.3d 1149, 1158-59 (8th Cir. 2016). *Compare, e.g., Simmons v. Indian Rivers Mental Health Ctr.*, 652 F. App'x 809, 819 (11th Cir. 2016) (brief, limited phone calls from employer during leave did not interfere with FMLA rights) *and Tilley v. Kalamazoo Cty. Road Comm'n*, 654 F. App'x 675, 679-80 (6th Cir. 2016) (employer's phone calls inquiring about the location of a misplaced pager did not interfere with FMLA rights) *with Smith-Schrenk v. Genon Energy Servs., LLC*, No. H-13-2902, 2015 WL 150727, at *10 (S.D. Tex. Jan. 12, 2015) (denying summary judgment where the employer "continued assigning [the employee] work" during leave).

[62] *Callison*, 430 F.3d at 121; *O'Donnell,* 561 F. App'x at 218 (completing paperwork related to job promotion did not interfere with FMLA rights).

[63] *Anusie-Howard v. Todd*, 983 F. Supp. 2d 645, 650 (D. Md. 2013) (assigning full-time workload to part-time employee was adverse employment action prohibited under FMLA).

[64] *Bellone*, 748 F.3d at 424 (employee can be terminated for not returning to work after the expiration of leave); *Alford v. Providence Hosp.*, 561 F. App'x 13, 13–14 (D.C. Cir. 2014) (same).

[65] *Dixon v. Pub. Health Trust of Dade Cty.*, 567 F. App'x 822, 825–26 (11th Cir. 2014). An employer is not obligated to warn an employee that leave is about to expire. *Boileau v. Capital Bank Financial Corp.*, 646 F. App'x 436, 440

If an employee fraudulently uses FMLA leave, the employer may take adverse employment action against the employee.[66] An employer's honest, good-faith belief that an employee was misusing FMLA leave will defeat an employee's retaliation claim.[67]

J. What happens after the leave?

At the end of leave, the employer may require certification from a health care provider stating that the employee is healthy enough to return to work, so long as the requirement is uniformly applied. 29 C.F.R. § 825.312(a). An employer may also request an enhanced fitness-for-duty certification that addresses the employee's ability to perform specific tasks. To obtain the enhanced certification, the employer must provide written notice to the employee of the certification requirement and supply a list of job duties for the health care provider to review. 29 C.F.R. § 825.300(d)(3). The employer may not delay the employee's return to work after receiving the fitness-for-duty certification,[68] and the certification is not subject to second or third opinions.[69] 29 C.F.R. § 825.312(a)-(b). However, an employee who remains unable to work after exhausting his or her FMLA leave has no right to restoration, and failure to provide a fitness-for-duty certification disqualifies an employee from reinstatement.[70] 29 C.F.R. §§ 825.216(c); 825.312(e). If leave is intermittent, the employer may only request a certification of fitness to return to duty once every 30 days and only if "reasonable safety concerns exist regarding the employee's ability to perform his or her duties." 29 C.F.R. § 825.312(f).

Assuming the employee is medically able to work after the leave, he or she is entitled to return to the position held when leave commenced or to an equivalent one with equivalent benefits, pay and other terms and conditions of employment.[71] 29 U.S.C. § 2614(a)(1); 29 C.F.R. §

(6th Cir. 2016). If an employee would normally be required to work overtime, missed overtime hours during FMLA leave can count against leave entitlement; missed overtime hours will be unprotected if leave time is already exhausted. *Hernandez v. Bridgestone Americas Tire Operations, LLC*, 831 F.3d 940, 945 (8th Cir. 2016). Voluntary overtime hours that an employee does not work due to an FMLA-qualifying reason, however, *may not* be counted against the employee's FMLA leave entitlement. *Id.*

[66] *Sharif v. United Airlines, Inc.*, 841 F.3d 199, 206-07 (4th Cir. 2016) (terminating an employee for abusing intermittent leave and lying during an investigation was not retaliation).

[67] *Capps v. Mondelez Global, LLC*, 847 F.3d 144, 153-54 (3d Cir. 2017) (joining the Seventh, Eighth, and Tenth Circuits in holding that FMLA retaliation claims require proof of retaliatory intent); *DeWitt v. Southwestern Bell Telephone Co.*, 845 F.3d 1299, 1307, 1318-20 (10th Cir. 2017) (employer's good-faith belief that employee is engaging in misconduct defeats a retaliation claim even if employer is mistaken). *See also Dalpiaz v. Carbon Cty.*, 760 F.3d 1126, 1134 (10th Cir. 2014) ("What is important is . . . whether [the employer] terminated [the employee] because it sincerely, even if mistakenly, believed she had abused her sick leave and demonstrated significant evidence of untruthfulness.").

[68] If an employee fails to provide the requested fitness-for-duty certification, however, the employer may delay reinstatement until it receives the proper paperwork. *Bento v. City of Milford*, 213 F. Supp. 3d 346, 366 (D. Conn. 2016) (employee's rights were not violated by 6-day delay in reinstatement where employee failed to provide the enhanced fitness-for-duty certification).

[69] Before the return to work, the employer must accept the employee's physician's certification and return the employee to employment. After the return to employment, the FMLA protections no longer apply, and the employer may require a fitness for duty examination consistent with the ADA. *See White v. County of Los Angeles*, 170 Cal. Rptr. 3d 472, 481 (2014).

[70] *Jones v. Gulf Coast Health Care of Del., LLC*, 854 F.3d 1261, 1268 (11th Cir. 2017); *Edgar v. JAC Prods., Inc.*, 443 F.3d 501, 509 (6th Cir. 2006).

[71] The restoration provision "does not indicate a preference for restoring covered employees to their pre-leave

825.214. "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." 29 C.F.R. § 825.215(a). A position is not equivalent if it involves different responsibilities or decreased prestige or visibility.[72] However, a "mere inconvenience or an alteration of job responsibilities" does not violate the FMLA.[73]

Restoration should occur immediately upon an employee's return from leave, so long as the employee has given reasonable notice of his or her return.[74] However, an employee "has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed." 29 C.F.R. § 825.216(a). If the employee would have been terminated had he or she never taken leave, the employer has no duty to reinstate.[75] In fact, the employer may terminate an employee *during* FMLA leave so long as the reason for termination is unrelated to leave rights under the FMLA.[76] Alternatively, an employer may wait for the employee to return to work to impose discipline based on evidence discovered during leave, as long as the employer has no "sinister motive."[77]

An employer may deny reinstatement to "key" employees – salaried employees in the top ten percent of compensation among employees located within 75 miles of the employee's worksite – if denial is necessary to "prevent substantial and grievous economic injury" to employer operations. 29 C.F.R. § 825.216(b). Ordinarily, the employer must notify key employees before the leave is taken if it intends to deny reinstatement. 29 C.F.R. § 825.219(b). The wording of the notice must be precise.[78] If leave already has begun, the key employee must have a reasonable period of time to return to work after receiving notice. 29 C.F.R. § 825.219(b). Most courts rule

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positions over 'equivalent' positions," and it does not require an employer to hold open an employee's original position during leave. *Waag v. Sotera Defense Sols.*, 857 F.3d 179, 187 (4th Cir. 2017). If the original position is not available, the employee may be placed in an opening in another shift with the same responsibilities, compensation, and benefits. *Langenbach v. Wal-Mart Stores, Inc.*, 761 F.3d 792, 799–800 (7th Cir. 2014).

[72] *Breneisen v. Motorola*, 512 F.3d 972, 77 (7th Cir. 2008). *See also Nigh v. School Dist. of Mellen*, 50 F. Supp. 3d 1034, 1048-49 (W.D. Wisc. 2014) (while the test for equivalence is strict, it permits de minimis differences).

[73] *Berridge v. Nalco Co.*, No. CIV.A. 10-3219, 2014 WL 340596, at *7 (D.N.J. Jan. 30, 2014) (employee given same job, except for removal of important account); *see also Davies v. N.Y.C. Dep't of Educ.*, 563 F. App'x 818, 819–20 (2d Cir. 2014) (no retaliation when teacher assigned to a different classroom with more disruptive students); *Fiorentini v. William Penn Sch. Dist.*, 665 F. App'x 229, 234-35 (3d Cir. 2016) (teacher's reassignment from grades kindergarten through six to grades three through six was not an adverse employment action when her compensation and job title remained the same).

[74] *Hoge v. Honda of Am. Mfg., Inc.*, 384 F.3d 238, 247-48 (6th Cir. 2004).

[75] *Malloy v. U.S. Postal Serv.*, 756 F.3d 1088, 1090–91 (8th Cir. 2014).

[76] *Olson v. Penske Logistics, LLC*, 835 F.3d 1189, 1194-95 (10th Cir. 2016) (no retaliation found where employee's poor performance, not retaliatory intent, prompted dismissal); *Carrero-Ojeda v. Autoridad de Energia Electrica*, 755 F.3d 711, 720 (1st Cir. 2014); *Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972, 977 (8th Cir. 2005); *Smith v. Diffee Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 960-61 (10th Cir. 2002). *See also Stewart v. Davita*, No. 3:14–cv–00110, 2015 WL 4041986 (M.D. Tenn. July 1, 2015) (employer eliminated an executive assistant's position because of budget constraints and because the executive she supported left the company).

[77] *Adams v. Fayette Home Care & Hospice*, 452 F. App'x 137, 140 (3d Cir. 2011).

[78] *Neel v. Mid-Atl. of Fairfield*, 778 F. Supp. 2d 593, 602 (D. Md. 2011) (letter informing key employee that she *may* be denied reinstatement upon return from leave was insufficient).

that the employer has the burden of proving that the employee did not have a right to return to work after the FMLA leave.[79]

K. What are the employer's posting requirements?

The statute requires an employer, whether it has FMLA-eligible employees or not, to post notices explaining the important provisions of the FMLA. The notice must be displayed in conspicuous places on the employer's premises where notices to employees and applicants are customarily posted. Electronic posting is sufficient as long as it otherwise meets these requirements. 29 U.S.C. § 2619(a); 29 C.F.R. § 825.300(2), (a)(1).

If an employer has eligible employees, it must distribute the general notice to each employee, either by including it in an employee handbook or by distributing it to each employee upon hire. If the majority of employees do not speak English, the employer must provide the notice in a language that employees can understand. 29 C.F.R. 825.300(a)(3)-(4).

L. What are the FMLA's record keeping requirements?

The FMLA requires employers to maintain records "pertaining to their obligations under the Act." 29 C.F.R. § 825.500(a). These records must be kept for at least three years and are subject to inspection at the request of the Department of Labor. 29 C.F.R. § 825.500(a)-(b). The method of record keeping is generally up to the employer, but employers with FMLA-eligible employees must maintain:

> (1) Basic payroll and identifying employee data;
>
> (2) Dates FMLA leave is taken by employees;
>
> (3) If FMLA leave is taken by 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 the FMLA, if in writing, and copies of all written notices given to employees;
>
> (5) Any documents describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leave;
>
> (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.

29 C.F.R. § 825.500(b)-(c). Any records pertaining to medical histories must be kept separate and confidential. 29 C.F.R. § 825.500(g).

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[79] *Sanders v. City of Newport*, 657 F.3d 772, 780 (9th Cir. 2011); *Smith*, 298 F.3d at 963; *Throneberry*, 403 F.3d at 979; *Strickland*, 239 F.3d at 1208. *But see Rice v. Sunrise Express*, 209 F.3d 1008, 1018 (7th Cir. 2000).

M. How might employers be liable for FMLA violations?

Employers are prohibited from terminating or discriminating against employees who request or take leave under the FMLA.[80] 29 U.S.C. § 2615(a). Some courts will not allow the employee to recover for wrongful termination unless he or she actually was eligible for leave.[81] Courts have created a number of tests for establishing whether an employer wrongfully interfered with an employee's rights to FMLA leave.[82]

An employer may face liability for discriminating against a potential employee for past exercises of FMLA rights with previous employers. 29 C.F.R. § 825.220(a)(2) (prohibiting discrimination against any person "whether or not an employee").[83]

An employer may also be liable for less dramatic interference with an employee's FMLA rights. One court allowed an employee to sue for interference with FMLA rights when an employer merely discouraged—but did not prevent—the employee from taking leave.[84] Another court allowed an employee to sue for FMLA interference when an employer disclosed the employee's medical condition to coworkers who proceeded to ridicule him for it.[85] Unlawful

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[80] *Ostrowski v. Con-Way Freight, Inc.*, 543 F. App'x 128, 131-32 (3d Cir. 2013) (employee properly discharged for breach of contract by consuming alcohol, not requesting FMLA leave for inpatient alcohol rehab); *Lineberry v Richards*, No 11-13752, 2013 WL 438689 (E.D. Mich. February 5, 2013) (employee properly terminated for lying about her activities during vacation in Mexico while on FMLA leave).

[81] *Hurley*, 746 F.3d at 1166-68 (employee must be eligible for FMLA leave to assert retaliation or interference claims); *Hurlbert*, 439 F.3d at 1293, 1295-96 (employee must be entitled to FMLA benefits to claim interference); *Humenny v. Genex Corp.*, 390 F.3d 901, 904 (6th Cir. 2004) (where plaintiff is not an "eligible employee," court cannot consider wrongful termination claim). *But see Pereda*, 666 F.3d at 1273-75 (even if employee not eligible for leave, requesting FMLA leave is protected, allowing recovery for wrongful termination); *Reynolds v. Inter-Indus. Conf. on Auto Collision Repair*, 594 F. Supp. 2d 925, 928-29 (N.D. Ill. 2009) (same).

[82] *Janczak v. Tulsa Winch, Inc.*, 621 F. App'x 528, 531 (10th Cir. 2015) (whether (1) employee was entitled to FMLA leave; (2) some adverse action by employer interfered with employee's right to take FMLA leave; and (3) employer's action was related to exercise or attempted exercise of employee's FMLA rights); *Graziadio v. Culinary Institute of America*, 817 F.3d 415, 421 (2nd Cir. 2016) (whether (1) employee is eligible under FMLA; (2) defendant is employer under FMLA; (3) employee was entitled to take leave; (4) employee gave notice of intention to take leave; and (5) employee was denied FMLA benefits to which he or she was entitled); *Ferrari v. Ford Motor Co.*, 826 F.3d 885, 897 (6th Cir. 2016) (whether (1) employee engaged in an activity protected by the FMLA; (2) employer knew that employee was exercising FMLA rights; (3) employee suffered an adverse employment action; and (4) there was a causal connection between the protected FMLA activity and the adverse employment action).

[83] *See, e.g., Martin v. Okaloosa Cty. Bd. of Cty. Comm'rs,* No. 3:13cv375, 2015 WL 1485017 (N.D. Fla. Mar. 31, 2015).

[84] *Gordon v. U.S. Capitol Police*, 778 F.3d 158, 165 (D.C. Cir. 2015) (employer may not take action that has "a reasonable tendency" to interfere with FMLA rights, even if it does not dissuade employee from taking leave). *But cf. Han v. Emory Univ.*, 658 F. App'x 543, 547 (11th Cir. 2016) (employer's *de minimus* hour-reporting requirement while employee was on leave did not interfere with FMLA rights).

[85] *See Holtrey v. Collier Cty. Bd. of Comm'rs*, No. 2:16-cv-00034-SPC-CM, 2017 WL 119649, at *2 (M.D. Fla. Jan. 12, 2017). District courts disagree about whether disclosure of an employee's confidential medical information can support a claim for FMLA interference, however. *Compare Holtrey*, 2017 WL 119649, at *2, *and Mahran v. Benderson Dev. Co.*, No. 10-CV-715A, 2011 WL 1467368, at *4 (W.D.N.Y. Apr. 18, 2011), *with Bender v. City of Clearwater*, No. 8:04-CV-1929-T23EAJ, 2006 WL 1046944, at *12 (M.D. Fla. Apr. 19, 2006) (denying claim for FMLA interference because "[p]laintiff has not shown that the [the employer's] alleged actions stopped her from taking FMLA leave or prevented her from returning to work at the end of her approved leave").

intent on the part of an employer is not required for a finding of FMLA interference.[86] However, an employer will not be held liable for retaliation if it terminates an employee for exceeding his or her FMLA leave entitlement.[87]

Employers must take special care when seeking documentation from employees requesting intermittent FMLA leave. Several courts have held that an employer's request for "proof of need" of an employee's intermittent absence was evidence of inference with the employee's FMLA rights.[88] Once an employee provides a complete and sufficient certification signed by a health care provider, the employer may not request additional information from the provider. 29 C.F.R. § 825.307(a). The employer may, however, contact the health care provider for clarification or authentication of the medical certification. 29 C.F.R. § 825.307(a).

Sanctions for wrongful or retaliatory termination can include double the "wages, salary, employment benefits, or other compensation" lost by the employee by reason of the violation, plus interest and liquidated damages.[89] 29 U.S.C. § 2617(a)(1)(A). However, if an employer can show that it acted in good faith, then only single damages may be assessed.[90] 29 U.S.C. § 2617(a)(1)(A)(iii). One test of good faith under the FMLA requires the employer to show that "it honestly intended to ascertain the dictates of the FMLA and to act in conformance with it."[91] An employer may also defend against an interference claim by proving that termination or discipline would have occurred regardless of an employee's FMLA leave,[92] that the employer was not motivated to discriminate,[93] or that the employee did not suffer damages from the alleged interference.[94]

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[86] *Tennial v. United Parcel Serv., Inc.*, 840 F.3d 292, 308 (6th Cir. 2016).

[87] *Alexander v. The Board of Education of City of New York*, 648 F. App'x 118, 120 (2nd Cir. 2016); *Harrelson v. Lufkin Industries, Inc.*, 614 F. App'x 761, 764 (5th Cir. 2015) (employee with upper-respiratory condition exceeded FMLA entitlement, justifying termination for unexcused absences).

[88] *See Diamond v. Hospice of Fla. Keys*, No. 15-15716, 2017 WL 382310, at *6 (11th Cir. Jan. 27, 2017) ("proof of need" in the form of hospital discharge papers and gas and travel receipts from the town where employee's elderly parents lived was unrelated to employee's need for leave and may have discouraged her from exercising FMLA rights); *Oak Harbor Freight Lines, Inc. v. Antti*, 998 F. Supp. 2d 968, 975-78 (D. Or. 2014) (employer's practice of requiring a doctor's note for each absence during intermittent leave interfered with FMLA rights). However, employers may require periodic status updates from employees on leave so long as the reporting requirements do not discourage them from taking leave. *See* 29 C.F.R. § 825.309(a). *See also* Part I.I., *supra*.

[89] *Jackson v. City of Hot Springs*, 751 F.3d 855, 866 (8th Cir. 2014).

[90] *See Thorson v. Gemini, Inc.*, 205 F.3d 370, 383 (8th Cir. 2000).

[91] *Thom v. Am. Standard, Inc.*, 666 F.3d 968, 977 (6th Cir. 2012) (quoting *Hite v. Vermeer Mfg. Co.*, 446 F.3d 858, 868 (8th Cir. 2006)).

[92] *Gabriel v. Colorado Mountain Medical, P.C.* 628 F. App'x 598, 601 (10th Cir. 2015) (employer not liable because decision to terminate was unrelated to FMLA leave, but rather to documented performance deficiencies); *Beese v. Meridian Health Systems, Inc.*, 629 F. App'x 218, 221 (3rd Cir. 2015) (employer not liable because supervisors would have issued a final warning even if employer had not considered FMLA-protected absences); *Burciaga v. Ravago Americas, LLC*, 791 F.3d 930, 936 (8th Cir. 2015) (same).

[93] *Basch v. Knoll*, 619 F. App'x 457, 459 (6th Cir. 2015) (employer motivated to fire employee due to insubordination, not a desire to punish the employee for taking FMLA leave)

[94] *Theiss v. Walgreen Co.*, 632 F. App'x 829, 833 (6th Cir. 2015) (dismissing interference claims because employee was granted non-FMLA leave and thus suffered no harm from denial of FMLA leave during same period).

State agencies are subject to some but not all lawsuits under the FMLA.[95] Generally, supervisors can be held individually liable for FMLA violations.[96] 29 U.S.C. § 2617; 29 U.S.C. § 2611(4)(A). However, courts disagree as to whether a supervisor in a public agency can be held individually liable.[97]

II. WASHINGTON FAMILY AND MEDICAL LEAVE LAWS

The FMLA establishes minimum standards that employers must meet in providing employees leave. But the FMLA was not intended to discourage states from passing legislation that provides more generous family and medical benefits to their employees. 29 U.S.C. § 2651(b). Some states, including Washington, provide more generous benefits to their employees than the FMLA requires.

A. What is the WFLA?

The Washington Family Leave Act (WFLA) is Washington's version of the FMLA. Washington passed the WFLA in 1989, four years before the enactment of its federal counterpart. In 2006, however, Washington adopted the federal framework and mirrored the WFLA after the FMLA. Like the FMLA, the WFLA provides 12 weeks of unpaid leave for certain medical reasons, birth or placement of a child, and care of family members with a serious health condition.

B. How does the WFLA differ from the FMLA?

While the current WFLA is modeled after the FMLA, there are a few important differences:

(1) The WFLA defines family member to include registered domestic partners. RCW 49.78.020(7); RCW 49.78.904. The FMLA covers same-sex marriages but not registered domestic partnerships or civil unions.

(2) The WFLA provides for a civil penalty of at least $1,000 for each violation. RCW 49.78.320.

(3) While leave under the WFLA must generally be taken concurrently with any leave under the FMLA, any leave taken for sickness or temporary disability

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[95] *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 730-32 (2003) (states are subject to damages suits under the FMLA family-care provisions, 29 U.S.C. § 2612(a)(1)(A)-(C)); *Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 37 (2012) (states are immune from damages suits under the FMLA self-care provisions, 29 U.S.C. § 2612(a)(1)(D)).

[96] *Darby v. Bratch*, 287 F.3d 673, 683 (8th Cir. 2002) ("If an individual meets the definition of employer as defined by the FMLA, then that person should be subject to liability in his individual capacity."); *Haybarger v. Lawrence Cty.. Adult Prob. & Parole*, 667 F.3d 408, 417 (3d Cir. 2012) (individual with supervisory authority who is responsible in whole or part for the FMLA violation is subject to liability).

[97] *Compare Haybarger*, 667 F.3d at 417 (FMLA permits "individual liability against supervisors at public agencies"), *and Modica v. Taylor*, 465 F.3d 174, 186 (5th Cir. 2006) (public employees may be held individually liable under FMLA), *with Dawkins v. Fulton Cty. Gov't*, 733 F.3d 1084, 1090 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 2293 (2014) (public officials sued in their individual capacity are not individually liable under FMLA), *and Mitchell v. Chapman*, 343 F.3d 811, 829 (6th Cir. 2003) (FMLA "does not impose individual liability on public agency employers").

because of pregnancy or childbirth is provided for *in addition* to leave otherwise available through the FMLA or the WFLA. RCW 49.78.390.

(4) Like the FMLA, the WFLA requires that employers restore an employee to the original position or to a similar position upon return from leave; however, the WFLA requires that the equivalent position be located within 20 miles of the workplace from where the employee took leave. RCW 49.78.280.

(5) The WFLA does not have the military exigency or military caregiver leave provisions present in the FMLA.

(6) It is easier to prove discriminatory intent under the WFLA's "substantial factor" test than under the FMLA's "determinative factor" test.[98]

C. What is the WPDL?

The Washington Pregnancy Disability Leave (WPDL) is a regulation issued by the Washington State Human Rights Commission. The WPDL provides for additional benefits and protections to Washington women who wish to take leave related to pregnancy or childbirth. Specifically, WAC 162-30-020 requires employers to (1) "provide a woman a leave of absence for the period of time that she is sick or temporarily disabled because of pregnancy or childbirth" and (2) "treat a woman on pregnancy related leave the same as other employees on leave for sickness or other temporary disabilities." If a woman takes leave under this regulation, her employer must "allow [her] to return to the same job, or a similar job of at least the same pay," unless business necessity dictates otherwise. This leave is in addition to leave provided for under the WFLA or the FMLA.

D. When is the WPDL applicable?

As noted above, the WPDL applies whenever an employee "is sick or temporarily disabled because of pregnancy or childbirth." WAC 162-30-020(4)(a). "Pregnancy" means actual pregnancy, the potential to become pregnant, and pregnancy-related conditions, which include related medical conditions, miscarriage, pregnancy termination, and the complications of pregnancy. WAC 162-30-020(2)(a)-(b). Furthermore, an "employer" under the WPDL is broader than either the FMLA or the WFLA, including "any person [who acts] in the interest of an employer, directly or indirectly, who employs eight or more persons." However, the WPDL does not cover "any religious or sectarian organization not organized for private profit." WAC 49.60.040(11).

[98] WFLA requires proof that discriminatory intent is a "substantial factor" in the employer's decision to terminate or discipline an employee seeking medical leave (i.e., a "significant motivating factor," but not necessarily sole or primary factor). *Willhite v. Farmers New World Life Ins. Co.*, 189 Wash.App. 1024, at *3 (2015). Under FMLA, some courts hold employees must prove FMLA leave was the "determinative factor" in negative employment action (i.e., the primary factor). *Hatchett v. Philander Smith College,* 251 F.3d 670, 677 (8th Cir. 2001).

E. How should the employer reconcile FMLA requirements with Washington law governing pregnancy disability leave?

Some employees would like to take as much time as possible after recovering from pregnancy-related medical problems to spend time with the newborn. Managing leave under these circumstances requires reconciling the FMLA with Washington law.

The WPDL and the WFLA do *not* run concurrently. They run *consecutively*, meaning that the employee can take leave under the two laws back-to-back. Under most circumstances the FMLA will run concurrently with either or both the WPDL and the WFLA.[99]

Therefore, where both the WFLA and the WPDL apply, an employee may be entitled to more leave than allowed for under the FMLA alone.[100] Even after the employee's FMLA leave is exhausted, her employer may be required by state law to continue to grant her unpaid leave until her leave allotment under both the WPDL and the WFLA is exhausted.

The safest approach for Washington employers is to **stack** and **credit** leave. The employer would apply FMLA leave **first** while the employee is disabled due to pregnancy or childbirth (**stack** leave). Then, when the pregnancy-related disability ceases, the employer would **credit** the employee's FMLA account in an amount equal to the length of FMLA leave exhausted during the pregnancy-related disability.

The Department of Labor and Industries suggests a slightly different analysis. In its view, at the onset of a pregnancy-related disability, the FMLA and the WPDL begin to run. When the disability ends, WPDL leave ceases, and the employee's 12 weeks of WFLA leave begin to run.[101] As a practical matter, however, the result is the same: (1) FMLA leave is used during the first 12 weeks; (2) the WPDL permits leave for as long as the employee is disabled; and (3) the employee gets another 12 weeks of leave under the FMLA or the WFLA.

This analysis is complicated. Examples may help.

- Jane has an unremarkable pregnancy and recovery. She works up to the moment that her baby is born, then is temporarily disabled for a period of 6 weeks, as established by her doctor. She wants as much time as possible with her child.

The employer should designate Jane's first 6 weeks after delivery as FMLA leave. Then, after her disability ends, the employer should credit her FMLA account with those 6 weeks of FMLA leave. Jane has 12 more weeks of bonding time with her newborn, or a total of 18 weeks off. Her FMLA entitlement is exhausted for the year. (In L&I's view, the WPDL covered Jane's first 6 weeks off. Then, the WFLA covers her next 12 weeks off.)

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[99] WASH. ST. DEP'T OF LABOR AND INDUS., WASHINGTON STATE FAMILY LEAVE ACT Q&A 2 (2010), *available at* http://www.lni.wa.gov/WorkplaceRights/files/FamilyLeaveFAQs.pdf.
[100] *Id.*
[101] *Id.*

- Beth's pregnancy is more complicated. She is placed on bed rest 12 weeks before delivery, then recovers 12 weeks after delivery. Beth then wants to take another six weeks to bond with her baby before returning to work.

The employer should designate Beth's 12 weeks of bed rest as FMLA leave. From delivery, she should continue on unpaid disability leave for another 12 weeks. Then, after her disability ends, the employer should credit her FMLA account with 12 weeks of leave that would have been available under Washington law. Jane would have up to 12 more weeks of bonding time with her newborn, although she only wants to take 6 weeks. She would have another 6 weeks of FMLA leave to use later in the year. (In L&I's terms, Beth's 12 weeks of bed rest and 12 weeks of post-delivery disability would be covered by the WPDL. Then, she would receive up to 12 more weeks off covered by the WFLA, including the 6 weeks of bonding time she would want after she recovered.)

- Nancy's medical status is similar to Jane's. She works right up until delivery, then takes 8 (rather than 6) weeks to recover. However, Nancy had taken 12 weeks of leave two months before her delivery because her husband was very ill. She would like as much time as possible with her newborn.

The employer should not designate Nancy's pregnancy leave as FMLA leave, because she already exhausted her FMLA entitlement. Therefore, her 6 weeks of pregnancy leave qualifies solely as pregnancy disability leave under Washington law, and she is entitled to no further FMLA leave for bonding. In other words, the 6 weeks of leave were covered under the WPDL. But Nancy had already exhausted her FMLA/WFLA leave earlier in the year. Thus, she is unable to take any additional time under FMLA/WFLA.

Differences between the FMLA and the WFLA may affect leave entitlements in less common ways. For example, if an employee misses work to care for a seriously-ill domestic partner, leave would be covered by the WFLA, but *not* the FMLA.[102] Such an employee could take 12 weeks of leave under the WFLA and then 12 *more* weeks of leave under FMLA – for a different qualifying reason – during the same year. On the other hand, the FMLA provides for up to 26 weeks of military caregiver leave or leave for a qualifying military exigency, but WFLA does not. An employee therefore could exhaust all military-related FMLA leave, then take 12 *more* weeks under WFLA for a serious health condition in the same year.

F. How do ERISA and COBRA apply?

The Employee Retirement Income Security Act of 1974 (ERISA) governs retirement and welfare plans, including health insurance plans. ERISA preempts state laws relating to employee benefit plans that are covered by ERISA. 29 U.S.C. § 1144(a). This preemption is very broad.[103]

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[102] The FMLA now covers spouses in a same-sex marriage, but not domestic partnerships. See *infra* § I. E. While the passage of the marriage equality referendum in Washington converted most domestic partnerships into legal marriages, it preserved domestic partnerships for couples if one person was 62 or older at the time of enactment. RCW 26.60.030(2).

[103] *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 140 (1990); *California Div. of Labor Standards Enf't v.*

Under the federal Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), employees and others covered under a group health insurance plan have the right to continue to participate in the plan after a "qualifying event." 26 C.F.R. § 54.4980B-4. A qualifying event includes the death of a covered employee, an employee's termination of employment or reduction in hours, and divorce or legal separation between an employee and his or her spouse. 26 C.F.R. § 54.4980B-4. Taking FMLA leave is not a COBRA-qualifying event. 26 C.F.R. § 54.4980B-10, Q-1.

State law cannot dictate when health insurance is available to an employee on leave. Indeed, if the employee does not return to work after FMLA coverage ceases, a COBRA-qualifying event may occur. 26 C.F.R. § 54.4980B-10, Q-4. Under those circumstances, the employer may be required to issue a COBRA notice to ensure that the employee does not lose coverage.

The interplay among FMLA, the WFLA and the WPDL creates this risk. One of the examples noted above illustrates the problem.

- Beth is placed on bed rest 12 weeks before delivery, then recovers 12 weeks after delivery. Beth then wants to take another six weeks to bond with her baby before returning to work.

The employer designates Beth's 12 weeks of bed rest as FMLA leave. Her insurance continues without interruption under FMLA. After her FMLA leave expires, she continues on unpaid disability leave for another 12 weeks. The status of her insurance during these 12 weeks is uncertain. The FMLA no longer applies. Washington law (whether the WFLA or the WPDL) cannot require the insurer to continue coverage, as federal and not state law governs the plan.

The employer therefore should determine whether to issue Beth a COBRA notice after the first 12 weeks of absence. In some cases, the summary plan description or the plan may clarify whether Beth will lose coverage. Or the plan administrator or insurer may provide guidance. Absent further direction, the employer should consider issuing a COBRA notice so that Beth and her dependents can retain coverage under COBRA until she returns from her leave.

Dillingham Constr., 519 U.S. 316, 324 1997).