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FAMILY AND MEDICAL LEAVE ACT (“FMLA”)

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NOTE: The purpose of this presentation, and the accompanying materials, is to inform you of interesting and important legal developments. While current as of the date of presentation, the information given today may be superseded by court decisions and legislative amendments. We cannot render legal advice without an awareness and analysis of the facts of a particular situation. If you have questions about the application of concepts discussed in the presentation or addressed in this outline, you should consult your legal counsel. ©2026 Ratwik, Roszak & Maloney, P.A.

I. WHEN IS AN EMPLOYEE ELIGIBLE FOR LEAVE UNDER THE FMLA?

A. In order to be eligible for an FMLA leave, the employee must:

1. Have been employed by the employer for at least 12 months; and
 - a. The 12 months an employee must have been employed by the employer need not be consecutive months.
 - b. Subject to exceptions regarding a written agreement concerning the employer's intention to rehire the employee after the break in service or the fulfillment of a Uniformed Services Employment and Reemployment Rights Act ("USERRA") covered service obligation, employment periods prior to a break in service of seven years or more need not be counted in determining whether the employee has been employed by the employer for at least 12 months.
2. Have been employed for at least 1,250 hours of service during the 12-month period immediately preceding the start of the leave; and
 - a. USERRA-covered service.
 - i. A person reemployed following USERRA-covered service has the hours that would have been worked for the employer added to any hours actually worked during the previous 12-month period to meet the hours of service requirement.
 - ii. In order to determine the hours that would have been worked during the period of absence from work due to or necessitated by USERRA-covered service, the employee's pre-service work schedule can generally be used for calculations.
3. Be employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.

29 C.F.R. § 825.110(a), (b), (c).

B. The entitlement to leave for the birth or placement of a child (see II.A and II.B below) expires at the end of the 12-month period beginning on the date of such birth or placement. 21 U.S.C. § 2612(a)(2)

II. WHEN DOES AN EMPLOYEE HAVE THE RIGHT TO TAKE LEAVE UNDER THE FMLA?

- A. The birth of a son or daughter of the employee and in order to care for such son or daughter;
- B. The placement of a son or daughter with the employee for adoption or foster care;
- C. 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. A serious health condition that makes the employee unable to perform the functions of the position of such employee;
- E. Qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty (or has been notified of an impending call or order to covered active duty status);
- F. To care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the covered servicemember.

29 C.F.R. § 2612(a); 29 C.F.R. § 825.112(a).

III. COMMON FMLA QUESTIONS.

A. How Much Leave Does the FMLA Provide to Eligible Employees?

- 1. The FMLA allows up to a total of 12 workweeks in any 12 months of leave for: (A) the birth of a child; (B) the placement of a child for adoption or foster care; (C) caring for the employee's spouse, son, daughter, or parent with a serious health condition; (D) the employee's own serious health condition; and (E) qualifying exigencies related to the employee's spouse, son, daughter, or parent's active duty in the military (or notification of impending call or order to covered active duty). 29 C.F.R. § 825.100(a).
- 2. The FMLA allows up to 26 workweeks in a single 12-month period of leave for: (F) a covered servicemember with a serious injury or illness. 29 C.F.R. § 825.100(a).

B. Is FMLA leave provided with or without compensation?

1. If an employer provides paid leave for fewer than 12 workweeks (or 26 workweeks in the case of leave provided for (F) a covered servicemember with a serious injury or illness), the additional weeks of leave necessary to attain the 12 workweeks (or 26 workweeks, as appropriate) of leave required under the FMLA may be provided without compensation. 29 C.F.R. § 2612(d)(1).
2. For any part of the 12-week period of such leave, 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 for: (A) the birth of a child; (B) the placement of a child for adoption or foster care; (C) caring for the employee's spouse, son, daughter, or parent with a serious health condition; or (E) qualifying exigencies related to the employee's spouse, son, daughter, or parent's active duty in the military (or notification of impending call or order to covered active duty).
3. For any part of the 12-week period of such leave, 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 for: (C) caring for the employee's spouse, son, daughter, or parent with a serious health condition; or (D) the employee's own serious health condition.
 - a. Note. Nothing in the FMLA requires 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.
4. For any part of the 26-week period of such leave, an eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, family leave, or medical or sick leave of the employee for leave provided for: (F) a covered servicemember with a serious injury or illness.
 - a. Note. Nothing in the FMLA requires an employer to provide paid sick leave or paid medical leave in any situation in which the employer would not normally provide any such paid leave

29 U.S.C. § 2612(d)(2).

C. Are Eligible Employees Entitled to Continued Health Insurance Benefits During FMLA Leave?

1. During any FMLA leave, an employer must maintain the employee's coverage under any group health plan on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period. 29 C.F.R. § 825.209.
2. 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:
 - a. The continuation, recurrence, or onset of either a serious health condition of the employee or the employee's family member, or a serious injury or illness of a covered servicemember, which would otherwise entitle the employee to leave under FMLA; or
 - b. Other circumstances beyond the employee's control.

29 C.F.R. § 825.213.

D. What Reinstatement Rights does an Employee Have After Taking FMLA Leave?

1. Restoration.
 - a. An employee who takes leave under the FMLA for the intended purpose of the leave shall be entitled, on return from such leave, to be restored by the employer to the position of employment held by the employee when the leave commenced; or to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment. 29 U.S.C. § 2614(a)(1).
 - b. Limitations on an Employee's Right to Reinstatement.
 - i. 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. For instance, 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. 29 C.F.R. § 825.216.

ii. Key Employee. An employer may deny restoration to a salaried 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 if:

- such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer;
- 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
- in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice.

29 U.S.C. § 2614(a)(3).

iii. Fitness-for-duty certification.

- 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 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. 29 C.F.R. § 825.312.
- 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 if the employer has provided the required notice. 29 C.F.R. § 825.313(d).

- 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 notice required. 29 C.F.R. § 825.312; 29 C.F.R. § 825.313(d).
- If an employer provides the notice required, an employee who does not provide a fitness-for-duty certification or request additional FMLA leave is no longer entitled to reinstatement under the FMLA. 29 C.F.R. § 825.312.
- If an employer provides the notice required, 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. 29 C.F.R. § 825.313(d).
- Note. Requirements under the Americans with Disabilities Act (“ADA”), as amended, apply. 29 C.F.R. § 825.312.

- iv. If the employee is unable to perform an essential function of the position because of a physical or mental condition, the employee has no right to restoration to another position under the FMLA. The employer's obligations may, however, be governed by the ADA, as amended. 29 C.F.R. § 825.216(c).
- v. Fraud. An employee who fraudulently obtains FMLA leave from an employer is not protected by FMLA's job restoration or maintenance of health benefits provisions. 29 C.F.R. § 825.216(d).

2. Benefits.

- a. The taking of leave under the FMLA shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced. 29 U.S.C. § 2614(a)(2).
- b. Nothing in the employment and benefits protection section of the FMLA shall be construed to entitle any restored employee to:
 - i. the accrual of any seniority or employment benefits during any period of leave; or
 - ii. 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.

29 U.S.C. § 2614(a)(2).

E. Is an Employee Required to Follow an Employer's Normal Call-in Procedures When Taking FMLA Leave?

1. When the need for FMLA leave is foreseeable at least 30 days in advance and an employee fails to give timely advance notice with no reasonable excuse, the employer may delay FMLA coverage until 30 days after the date the employee provides notice. 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.
2. When the need for FMLA leave is foreseeable fewer than 30 days in advance and an employee fails to give notice as soon as practicable under the particular facts and circumstances, the extent to which an employer may delay FMLA coverage for leave depends on the facts of the particular case.
3. When the need for FMLA leave is unforeseeable and an employee fails to give notice in accordance with the FMLA, the extent to which an employer may delay FMLA coverage for leave depends on the facts of the particular case.
4. If an employer does not waive the employee's obligations under its internal leave rules, the employer may take appropriate action under its internal rules and procedures for failure to follow its usual and customary notification rules, absent unusual circumstances, as long as the actions are taken in a manner that does not discriminate against employees taking

FMLA leave and the rules are not inconsistent with the FMLA section on employee notice requirements for unforeseeable FMLA leave.

29 C.F.R. § 825.304(b)-(e).

IV. FMLA LEAVE FOR A “SERIOUS HEALTH CONDITION.”

A. What is a “Serious Health Condition?”

1. “Serious health condition” means an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility or continuing treatment by a health care provider. 29 U.S.C. § 2611(11).
2. “Continuing treatment by a health care provider” occurs if there is:
 - a. A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:
 - i. Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services 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.
 - b. Any period of incapacity related to pregnancy, or for prenatal care;
 - c. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition;
 - d. A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective with the employee or family member under the continuing supervision of a health care provider; or
 - 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, for:

- i. Restorative surgery after an accident or other injury; or
- ii. Condition that would likely result in a period of incapacity of more than three consecutive full calendar days in the absence of medical intervention or treatment.

29 C.F.R. § 825.102.

B. How Much Time Does an Employer Have to Request a Medical Certification of a Serious Health Condition?

1. An employer may require that a request for leave for (C) caring for the employee's spouse, son, daughter, or parent with a serious health condition, (D) the employee's own serious health condition, or (F) a covered servicemember with a serious injury or illness be supported by a certification issued by the health care provider. 29 U.S.C. § 2613(a).
2. In most cases, the employer should request that an employee furnish certification at the time the employee gives notice of the need for leave or within five business days thereafter, or, in the case of unforeseen leave, within five business days after the leave commences. 29 C.F.R. § 825.305(b).
3. 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. 29 C.F.R. § 825.305(b).

C. What Information May an Employer Request as Part of a Certification?

1. When leave is taken because of an employee's own serious health condition, or the serious health condition of a family member, an employer may require an employee to obtain a medical certification from a health care provider that sets forth the following information:
 - a. The name, address, telephone number, and fax number of the health care provider and type of medical practice/specialization;
 - b. The approximate date on which the serious health condition commenced, and its probable duration;

- c. A statement or description of appropriate medical facts regarding the patient's health condition for which FMLA leave is requested;
- d. If the employee is the patient, information sufficient to establish that the employee cannot perform the essential functions of the employee's job as well as the nature of any other work restrictions, and the likely duration of such inability;
- e. If the patient is a covered family member with a serious health condition, information sufficient to establish that the family member is in need of care and an estimate of the frequency and duration of the leave required to care for the family member;
- f. If an employee requests leave on an intermittent or reduced schedule basis for planned medical treatment of the employee's or a covered family member's serious health condition, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the dates and duration of such treatments and any periods of recovery;
- g. If an employee requests leave on an intermittent or reduced schedule basis to care for a covered family member with a serious health condition, a statement that such leave is medically necessary to care for the family member, and an estimate of the frequency and duration of the required leave.

29 C.F.R. § 825.306(a).

- 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 FMLA. 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. 29 C.F.R. § 825.307(b).
- 3. 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. 29 C.F.R. § 825.307(c).

4. An employer may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless an exception applies.
 - a. Less than 30 Days. An employer may request recertification in less than 30 days if:
 - i. The employee requests an extension of leave;
 - ii. Circumstances described by the previous certification have changed significantly; or
 - iii. The employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification.
 - b. More than 30 days. If the medical certification indicates that the minimum duration of the condition is more than 30 days, an employer must wait until that minimum duration expires before requesting a recertification, unless one of the provisions allowing the employer to request recertification in less than 30 days applies. For example, if the medical certification states that an employee will be unable to work, whether continuously or on an intermittent basis, for 40 days, the employer must wait 40 days before requesting a recertification.
 - c. In all cases, an employer may request a recertification of a medical condition every six months in connection with an absence by the employee.

29 C.F.R. § 825.308.

5. The Department of Labor developed optional forms for use in obtaining medical certification that meet the FMLA's certification requirements. 29 C.F.R. § 825.306(b).
6. If the employee fails to provide the employer with a complete and sufficient requested certification permitted by the FMLA's regulations, despite the opportunity to cure the certification, or fails to provide any certification, the employer may deny the taking of FMLA leave, in accordance with the FMLA's regulations. 29 C.F.R. § 825.305(d).

D. Must an Employee Sign a Medical Release as Part of a Medical Certification?

1. While an employee may choose to comply with the certification requirement by providing the employer with an authorization, release, or waiver allowing the employer to communicate directly with the health care provider of the employee or his or her covered family member, the employee may not be required to provide such an authorization, release, or waiver. In all instances in which certification is requested, it is the employee's responsibility to provide the employer with complete and sufficient certification and failure to do so may result in the denial of FMLA leave. 29 C.F.R. § 825.306(e).

E. What Happens if an Employee Does not Submit a Requested Medical Certification or Fitness-for-Duty Certification?

1. In the case of foreseeable leave, if an employee fails to provide certification in a timely manner, then an employer may deny FMLA coverage until the required certification is provided. 29 C.F.R. § 825.313(a).
2. In the case of unforeseeable leave, an employer may deny FMLA coverage for the requested leave if the employee fails to provide a certification within 15 calendar days from receipt of the request for certification unless not practicable due to extenuating circumstances. Absent such extenuating circumstances, if the employee fails to timely return the certification, the employer can deny FMLA protections for the leave following the expiration of the 15-day time period until a sufficient certification is provided. If the employee never produces the certification, the leave is not FMLA leave. 29 C.F.R. § 825.313(b).

F. If an Employee has a Medical Condition that Limits Her to a 40-Hour Workweek, and Her Employer Wants to Assign Her to Work Eight Hours of Overtime in a Week, May the Employee Use FMLA Leave for the Overtime?

1. “Yes. Employees with proper medical certifications may use FMLA leave in lieu of working required overtime hours.
2. The regulations clarify that the hours that an employee would have been required to work but for the taking of FMLA leave can be counted against the employee’s FMLA entitlement.

3. Employers must select employees for required overtime in a manner that does not discriminate against workers who need to use FMLA leave.”

FMLA Frequently Asked Questions, U.S. DEP’T OF LABOR: WAGE AND HOUR DIVISION, <https://www.dol.gov/agencies/whd/fmla/faq>.

V. FMLA NOTICE, CERTIFICATION, AND TIMING REQUIREMENTS.

A. What are an Employer’s Posting and General Notice Requirements?

1. Employers must post and keep posted on its premises, in conspicuous places where employees are employed, a notice explaining the FMLA’s provisions and providing information concerning the procedures for filing complaints of violations of the FMLA with the Wage and Hour Division. The notice must be posted prominently where it can be readily seen by employees and applicants for employment. 29 C.F.R. § 825.300(a)(1).
 - a. Covered employers must post this general notice even if no employees are eligible for FMLA leave. 29 C.F.R. § 825.300(a)(2).
 - b. Electronic posting is sufficient to meet this posting requirement as long as it otherwise meets the employer notice requirements. 29 C.F.R. § 825.300(a)(1).
2. If an FMLA-covered employer has any eligible employees, it shall also provide this general notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring.
 - a. In either case, distribution may be accomplished electronically.
 - b. To meet this requirements, employers may duplicate the text of the Department's prototype notice (WHD Publication 1420) or may use another format so long as the information provided includes, at a minimum, all of the information contained in that notice.

C.F.R. § 825.300(a)(3), (4).
3. Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer shall provide the

general notice in a language in which the employees are literate. Likewise, employers furnishing FMLA notices to sensory-impaired individuals must also comply with all applicable requirements under Federal or State law. C.F.R. § 825.300(a)(4).

B. How Much Notice Must an Employee Give Before Taking FMLA Leave?

1. 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: (A) an expected birth, (B) placement for adoption or foster care, (C) planned medical treatment for a serious health condition of the employee or of a family member, or (F) the planned medical treatment for a serious injury or illness of a covered servicemember. 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. 29 C.F.R. § 825.302(a).
 - a. Note. 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. When an employee becomes aware of a need for FMLA leave less than 30 days in advance, it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day. In all cases, however, the determination of when an employee could practicably provide notice must take into account the individual facts and circumstances. 29 C.F.R. § 825.302(b).
2. For foreseeable leave due to a qualifying exigency notice must be provided as soon as practicable, regardless of how far in advance such leave is foreseeable. 29 C.F.R. § 825.302(a).
3. Whether FMLA 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. 29 C.F.R. § 825.302(a).
4. In those cases where the employee is required to provide at least 30 days notice of foreseeable leave and does not do so, the employee shall explain the reasons why such notice was not practicable upon a request from the employer for such information. 29 C.F.R. § 825.302(a).

C. What Information Must an Employee Give When Providing Notice of the Need for FMLA Leave?

1. 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. Depending on the situation, such information may include:
 - a. that a condition renders the employee unable to perform the functions of the job;
 - b. that the employee is pregnant or has been hospitalized overnight;
 - c. whether the employee or the employee's family member is under the continuing care of a health care provider;
 - d. if the leave is due to a qualifying exigency, that a military member is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty), and that the requested leave is for a qualifying exigency;
 - e. if the leave is for a family member, that the condition renders the family member unable to perform daily activities, or that the family member is a covered servicemember with a serious injury or illness; and
 - f. the anticipated duration of the absence, if known.

29 C.F.R. § 825.302(c).

2. When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA. 29 C.F.R. § 825.302(c).
3. When an employee seeks leave due to a FMLA-qualifying reason, for which the employer has previously provided FMLA-protected leave, the employee must specifically reference the qualifying reason for leave or the need for FMLA leave. 29 C.F.R. § 825.302(c).
4. In all cases, 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. 29 C.F.R. § 825.302(c).

D. How Much Time does an Employer Have to Respond to an Employee's Request for FMLA Leave?

1. When an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances. 29 C.F.R. § 825.300(b)(1).
 - a. Employee eligibility is determined (and notice must be provided) at the commencement of the first instance of leave for each FMLA-qualifying reason in the applicable 12-month period. All FMLA absences for the same qualifying reason are considered a single leave and employee eligibility as to that reason for leave does not change during the applicable 12-month period. 29 C.F.R. § 825.300(b)(1).
 - b. If, at the time an employee provides notice of a subsequent need for FMLA leave during the applicable 12-month period due to a different FMLA-qualifying reason, and the employee's eligibility status has not changed, no additional eligibility notice is required. If, however, the employee's eligibility status has changed, the employer must notify the employee of the change in eligibility status within five business days, absent extenuating circumstances. 29 C.F.R. § 825.300(b)(3).
 - c. The eligibility notice must state whether the employee is eligible for FMLA leave. If the employee is not eligible for FMLA leave, the notice must state at least one reason why the employee is not eligible. 29 C.F.R. § 825.300(b)(2).
2. Each time the eligibility notice is provided, employers must also provide written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. If leave has already begun, the notice should be mailed to the employee's address of record. 29 C.F.R. § 825.300(c)(1).
 - a. Note. If the specific information provided by the notice of rights and responsibilities changes, the employer shall, within five business days of receipt of the employee's first notice of need for leave subsequent to any change, provide written notice referencing the prior notice and setting forth any of the information in the

notice of rights and responsibilities that has changed. 29 C.F.R. § 825.300(c)(4).

3. Employers are also expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA. 29 C.F.R. § 825.300(c)(5).

E. How Soon After an Employee Provides Notice of the Need for Leave Must an Employer Notify the Employee that the Leave Will be Designated and Counted as FMLA Leave? What Information must the Employer Notify the Employee of?

1. When the employer has enough information to determine whether the leave is being taken for a FMLA-qualifying reason (e.g., after receiving a certification), the employer must notify the employee whether the leave will be designated and will be counted as FMLA leave within five business days absent extenuating circumstances. 29 C.F.R. § 825.300(d)(1).
 - a. The designation notice must be in writing. 29 C.F.R. § 825.300(d)(4).
 - b. Only one notice of designation is required for each FMLA-qualifying reason per applicable 12-month period, regardless of whether the leave taken due to the qualifying reason will be a continuous block of leave or intermittent or reduced schedule leave. 29 C.F.R. § 825.300(d)(1).
2. Notice regarding Other Leaves. If the employer requires paid leave to be substituted for unpaid FMLA leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, the employer must inform the employee of this designation at the time of designating the FMLA leave. 29 C.F.R. § 825.300(d)(1).
3. Notice regarding Fitness-for-duty certification.
 - a. If the employer will require the employee to present a fitness-for-duty certification to be restored to employment, the employer must provide notice of such requirement with the designation notice. If the employer will require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the employee's position, the employer must so indicate in the

designation notice, and must include a list of the essential functions of the employee's position. 29 C.F.R. § 825.300(d)(3).

- b. If the employer handbook or other written documents (if any) describing the employer's leave policies clearly provide that a fitness-for-duty certification will be required in specific circumstances, the employer is not required to provide written notice of the requirement with the designation notice, but must provide oral notice no later than with the designation notice. 29 C.F.R. § 825.300(d)(3).
4. If the information provided by the employer to the employee in the designation notice changes, the employer shall provide, within five business days of receipt of the employee's first notice of need for leave subsequent to any change, written notice of the change. 29 C.F.R. § 825.300(d)(5).
5. Hours, Days, or Weeks. The employer must notify the employee of the amount of leave counted against the employee's FMLA leave entitlement. If the amount of leave needed is known at the time the employer designates the leave as FMLA-qualifying, the employer must notify the employee of the number of hours, days, or weeks that will be counted against the employee's FMLA leave entitlement in the designation notice. If it is not possible to provide the hours, days, or weeks that will be counted against the employee's FMLA leave entitlement, then the employer must provide notice of the amount of leave counted against the employee's FMLA leave entitlement upon the request by the employee, but no more often than once in a 30-day period and only if leave was taken in that period. The notice of the amount of leave counted against the employee's FMLA entitlement may be oral or in writing. If such 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). Such written notice may be in any form, including a notation on the employee's pay stub. 29 C.F.R. § 825.300(d)(6).

F. What Records Must an Employer Keep?

1. For no less than three years, covered employers who have eligible employees must maintain records that must disclose the following :
 - a. Basic payroll and identifying employee data;

- i. Note. Covered employers with no eligible employees must maintain these records. 29 C.F.R. § 825.500(d).
 - b. Dates FMLA leave is taken;
 - c. If FMLA leave is taken by eligible employees in increments of less than one full day, the hours of the leave;
 - d. Copies of employee notices of leave furnished to the employer under FMLA, if in writing, and copies of all written notices given to employees as required under FMLA and these regulations;
 - e. Any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves;
 - f. Premium payments of employee benefits;
 - g. Records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave;
2. Records and documents relating to 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. The Genetic Information Nondiscrimination Act of 2008's ("GINA") and the ADA's confidentiality requirements could apply to records and documents. Disclosure of these records to unauthorized individuals can result in liability. 29 C.F.R. § 825.500.

VI. INTERACTION BETWEEN THE FMLA AND THE MINNESOTA PAID LEAVE LAW ("MPLL").

An employer may require leave taken under the MPLL to run concurrently with leave taken for the same purpose under the FMLA. Minn. Stat. § 268B.27, subd. 1.