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Checklist – Family and Medical Leave Act Administration and Audits

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Checklist Provided for Use in Lexis Practice Advisor by: Betsy Johnson and Johnnie A. James, Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

The Family and Medical Leave Act (FMLA) requires covered employers to provide unpaid job-protected leave to eligible employees. Employers must navigate various coverage, eligibility, notice, and other requirements to meet the full range of their FMLA obligations. In order to avoid violations and employee claims, employers should periodically evaluate their level of compliance. This checklist provides a convenient reference tool that summarizes the FMLA's key requirements. You can use it to audit an employer's FMLA administration practices.

For more information about FMLA leave administration, see the practice notes entitled *Understanding Employer Coverage, Employee Eligibility, and Qualifying Bases for FMLA Leave*; *Navigating Employer Rights and Obligations Under the FMLA*; *Understanding FMLA Interference and Retaliation Claims*; *Calculating FMLA Leave Entitlements*; *Obtaining Medical and Fitness for Duty Certifications*; *Counseling Employers Regarding FMLA Intermittent Leaves and Reduced Leave Schedules*; *Coordinating FMLA Leave, Other Leave Entitlements, and Paid Time Off*; *Handling Confidential Medical Information in the Employee Leaves and Disability Context*; *Navigating End of FMLA Leave Issues and the Employee's Return to Work*; *Handling FMLA Leave Abuse*; and *Disciplining and Terminating Employees on FMLA Leave*.

State family and medical leave provisions may differ. Therefore, you may need to take different or additional steps to determine whether leave is triggered and to advise the employer on how to administer such leave. For more information on state and local leave requirements, see the practice notes for the relevant state in the Attendance, Leaves, and Disability Management topic.

A. Employer Coverage. Determine whether the employer is required to provide FMLA leave.

(1) Private Employers. Private employers must have fifty or more employees in twenty or more workweeks in the current or preceding calendar year. 29 C.F.R. § 825.104(a).

a) Employees of joint employers must be counted by each employer to determine coverage. 29 C.F.R. § 825.104(c)(2).

b) Employees of integrated businesses as defined by 29 C.F.R. § 825.104(c)(2) must be included when determining coverage.

(2) Public Agencies. Public agencies, including federal, state, and local governments, are covered employers regardless of the number of employees employed. 29 C.F.R. § 825.104(a).

(3) Schools. Public and private elementary and secondary schools are covered regardless of the number of employees employed. 29 C.F.R. § 825.104(a).

(4) Successors-in-Interest. Successors-in-interest are covered employers whether or not they meet FMLA coverage requirements. 29 C.F.R. § 825.104(a).

B. Employee Eligibility. Determine whether the employer accurately evaluates employee eligibility. To be eligible for FMLA leave, an employee must:



(1) Work for a Covered Employer. 29 C.F.R. § 825.110(a).

(2) Work at Least Twelve Months for that Employer. 29 C.F.R. § 825.110(a)(1). The employee does not have to work twelve consecutive months. However, if a break in service is seven years or more, the time worked prior to the break is not counted unless covered by the Uniformed Services Employment and Reemployment Rights Act; a collective bargaining agreement; or other written agreement. 29 C.F.R. § 825.110(b)(1-2).

(3) Work at Least 1,250 hours for that Employer in the Preceding Twelve Months. 29 C.F.R. § 825.110(a)(2). Special rules apply to airline flight crew employees; and

(4) Work at a Location that Has at Least Fifty Employees within a Seventy-five Mile Radius. 29 C.F.R. § 825.110(a)(3).

C. Leave Entitlements. Determine whether the employer provides the requisite amount of leave for the corresponding FMLA-qualifying events.

(1) Up to Twelve Weeks of Leave. Events triggering up to twelve weeks of unpaid leave in a twelve-month period for eligible employees:

- a) The birth of a child, placement of a child for adoption or foster care; or to bond with a child. Such leave entitlement expires one year after birth or placement;
- b) The employee's spouse, child, or parent's serious health condition;
- c) The employee's own serious health condition - when it prevents the employee from performing one or more essential functions of his or her job; or
- d) Qualifying exigencies. Qualifying exigencies arise when the employee's spouse, child (of any age), or parent who is a member of the Armed Forces (including the National Guard and Reserves) is on covered active duty or was notified of an impending call or order to covered active duty.

29 C.F.R. § 825.100(a); 29 C.F.R. § 825.112(a)(1-6).

(2) Up to Twenty-Six Weeks of Leave. Military caregiver leave triggers up to twenty-six weeks of unpaid leave for eligible employees during a single twelve-month period.

- a) Military caregiver leave is for caring for a covered service member with a serious injury or illness if the employee is the spouse, child, parent, or next of kin. Eligible family members of both current service members and certain veterans are entitled to military caregiver leave.
- b) An eligible employee is limited to a combined total of twenty-six weeks of leave for any FMLA-qualifying reasons during this single twelve-month period. Up to twelve of the twenty-six weeks may be for an FMLA-qualifying reason other than military caregiver leave. For example, if an employee uses ten weeks of FMLA leave for his or her own serious health condition during the single twelve-month period, the employee has up to sixteen weeks of FMLA leave left for military caregiver leave.

29 C.F.R. § 825.100(a); 29 C.F.R. § 825.112(a)(5-6).

D. Twelve-Month Period for Calculating Leave. Determine whether the employer uses a proper twelve-month period for the corresponding FMLA-qualifying event.

(1) FMLA-Qualifying Events (Other than Military Caregiver Leave). The employer may use any the four following methods to establish the twelve-month period:

- a) Calendar year: Twelve months running from January 1 through December 31;
- b) Any fixed twelve-month period: For example, a fiscal year;
- c) A twelve-month period measured forward from the first date an employee takes FMLA leave; or

- d) A “rolling” twelve-month period measured backward from the date an employee uses any FMLA leave. 29 C.F.R. § 825.200(b)(1-4).

(2) Military Caregiver Leave. The single twelve-month period for military caregiver leave differs from the twelve-month period used for other FMLA-qualifying events. It begins on the first day the employee takes military caregiver leave and ends twelve months later, regardless of the twelve-month period established by the employer for other FMLA leave. 29 C.F.R. § 825.200(f).

E. Notice Requirements. Determine if and how the FMLA’s notice requirements are met.

(1) Employee Notice. Employees must request leave thirty days in advance of the leave, unless the need for leave is unforeseeable or does not allow for thirty days’ notice; in such cases, the request must be as soon as possible under the circumstances. 29 C.F.R. § 825.302(a).

- a) Employees must comply with the employer’s requirements for requesting leave, and provide enough information for the employer to determine whether the FMLA applies. 29 C.F.R. § 825.302(c), (d).
- b) How does the employer handle employee absences when no notice is provided? For example, rigid application of “no-show/no-call” and other attendance policies may interfere with an employee’s rights under the FMLA, Americans with Disabilities Act (ADA), and/or state law.

(2) Employer Notice. Employers may be required to provide notices in languages other than English if a significant portion of the workforce is not literate in English. 29 C.F.R. § 825.300(a)(4). Additionally, employers must comply with all applicable federal and state notice requirements for sensory-impaired individuals. 29 C.F.R. § 825.300(a)(4).

- a) FMLA poster: Does the employer display the FMLA poster entitled Employee Rights and Responsibilities under the Family and Medical Leave Act in plain view for all employees and applicants to see? A copy of the poster may be obtained at DOL Form WH 1420: Employee Rights and Responsibilities under the Family and Medical Leave Act; 29 C.F.R. § 825.300(a)(1).
- b) Handbook, written materials, new hires: In addition to displaying a poster, does the employer include in its employee handbook (or other written material about leave and benefits) the same information that the poster includes? If the employer does not have a handbook or written materials, does the employer give this notice to new employees upon their hiring? 29 C.F.R. § 825.300(a)(1), (3).
- c) Eligibility notice, and rights and responsibilities notice: When the employer receives an FMLA leave request or when it becomes aware that an employee’s absence may qualify for FMLA leave, does it—within five days—give the employee (i) an “eligibility” notice; and (ii) a “rights and responsibilities” notice (each time it provides an eligibility notice)? The U.S. Department of Labor (DOL) issued Form WH-381 entitled “Notice of Eligibility and Rights & Responsibilities” which employers may use to satisfy these two notice requirements. 29 C.F.R. § 825.300(b), (c). A copy of the form may be obtained at FMLA Notice of Eligibility and Rights & Responsibilities (Form WH-381).
- d) Designation notice: Does the employer provide a written designation notice to the employee within five business days of having enough information to determine whether the leave is FMLA-qualifying? 29 C.F.R. § 825.300(d). The DOL issued Form WH-382 entitled “Designation Notice” which employers may use to satisfy this notice requirement. A copy of the form may be obtained at FMLA Designation Notice (Form WH-382). If the requested leave is not FMLA-qualifying, the notice may be a simple written statement that the leave does not qualify and will not be designated as FMLA leave. 29 C.F.R. § 825.300(d)(4).

- e) List of employee's essential functions: If the employer requires the employee to provide a fitness-for-duty certification specifically addressing the employee's ability to perform the essential functions of his or her job before returning to work, does the employer provide a list of the essential functions of the employee's job before or with the designation notice; and does such notice indicate that the fitness-for-duty certification must address the employee's ability to perform those essential functions? 29 C.F.R. § 825.300(d)(3).

F. FMLA Policy Requirements. Most employers have and distribute some form of employee handbook. If so, the handbook must include an FMLA policy that contains—at a minimum—the information in the DOL's FMLA poster. 29 C.F.R. § 825.300(a)(3). For more information about drafting FMLA policies, see the note entitled Drafting FMLA Policies. Therefore, when drafting or reviewing an FMLA policy, be sure it includes at least the following provisions:

- (1) **Leave Entitlements – Both Basic and Military Family Leave;**
 - (2) **How the Employer Calculates the Twelve-Month Period;**
 - (3) **Eligibility Requirements;**
 - (4) **Employee and Employer Responsibilities;**
 - (5) **Definitions;**
 - (6) **Use of Leave;**
 - (7) **Substitution of Paid for Unpaid Leave;**
 - (8) **Benefits and Protections;**
 - (9) **Unlawful Employer Acts;** and
 - (10) **Enforcement Provisions.**
- 29 C.F.R. § 825.300(a-d).

G. Certification to Support Leave. Determine if the employer requires medical certifications/re-certifications. 29 C.F.R. § 825.300(c)(ii). If so, confirm:

- (1) **Forms.** The employer uses the right form for the corresponding FMLA-qualifying event. There are five separate forms:

- a) FMLA Certification of Health Care Provider for Employee's Serious Health Condition (Form WH-380-E);
- b) FMLA Certification of Health Care Provider for Family Member's Serious Health Condition (Form WH-380-F);
- c) FMLA Certification of Qualifying Exigency For Military Family Leave (Form WH-384);
- d) FMLA Certification for Serious Injury or Illness of Covered Servicemember—for Military Family Leave (Form WH-385); and
- e) FMLA Certification for Serious Injury or Illness of a Veteran for Wage and Hour Division Military Caregiver Leave (Form WH-385V).

- (2) **Medical Certification.** Be sure the employer complies with the following certification requirements:

- a) Timing for submission: The employer must give the employee at least fifteen calendar days to obtain required medical certification. 29 C.F.R. § 825.305(b).
- b) Second and third opinions: If the employer requests a second or third opinion, it must satisfy the following requirements.
 - (i) The employer may choose the health care provider for the second opinion, except that in most cases the employer may not regularly contract with or otherwise regularly use the services of the health care provider; and

(ii) When 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 at the employer's expense. The third opinion is final and binding. The third health care provider must be approved by the employer and the employee. 29 C.F.R. § 825.307(b), (c).

c) **Recertification:** The employer may not require recertification more often than every thirty days, unless the employee requests an extension of leave; the employee's circumstances have changed; or the circumstances and facts cast doubt on the employee's need for FMLA leave. 29 C.F.R. § 825.307(a), (c).

d) **Contacting health care providers:** The employer must comply with the requirements of 29 C.F.R. § 825.307(a) when it contacts an employee's healthcare provider. Specifically:

(i) The employer may not contact the health care provider if the employee submits a complete and sufficient certification signed by the health care provider. 29 C.F.R. § 825.307(a).

(ii) The employer may contact the health care provider to clarify and authenticate the medical certification (whether initial certification or recertification) after the employer has given the employee an opportunity to cure any deficiencies as set forth in 29 C.F.R. § 825.305(c) – generally, seven calendar days.

(iii) The employer must use a health care provider, a Human Resources professional, a leave administrator, or a management official to contact the health care provider, but not the employee's direct supervisor. 29 C.F.R. § 825.307(a).

(iv) "Authentication" means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document; no additional medical information may be requested. 29 C.F.R. § 825.307(a).

(v) "Clarification" means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response. Employers may not ask health care providers for additional information beyond that required by the certification form. 29 C.F.R. § 825.307(a).

(vi) The employer must obtain a Health Insurance Portability and Accountability Act (HIPAA) authorization from the employee before contacting his or her health care provider. If an employee does not provide such authorization allowing the employer to clarify the certification, and does not otherwise clarify the certification, the employer may deny FMLA leave. 29 C.F.R. § 825.307(a).

(3) Military-Based Certifications. When applicable, does the employer comply with the certification requirements for:

- a) Military family leave?
- b) Qualifying exigency leave?
- c) Military caregiver leave for a current service member? and
- d) Military caregiver leave for a veteran?

29 C.F.R. § 825.310.

(4) Separate Files.

- a) Does the employer maintain medical information separately from personnel files?
- b) Are the files locked and secure?
- c) Does the employer restrict access to employee medical files to select HR and/or benefits employees that need to know? and



- d) Does the employer prohibit line managers and supervisors from accessing employee medical information, especially the employee's immediate supervisor/manager?

29 C.F.R. § 825.500(g).

H. Benefit Continuation. 29 C.F.R. § 825.209.

- (1) **Unpaid Leave.** Does the employer maintain the employee's coverage under any group health plan at the same level and under the same conditions as would be maintained had the employee continuing actively working? 29 C.F.R. § 825.209(b). If family member coverage is provided, it must be maintained during FMLA leave. Id. The employee must continue to make any normal contributions to the cost of the health insurance premiums. 29 C.F.R. § 825.210(a).
- (2) **Paid Leave.** If paid leave is substituted for FMLA leave, are the employee's health plan premiums paid by the method normally used during paid leave (usually payroll deduction)? 29 C.F.R. § 825.207.
- (3) **Benefit Cancellation.** If the employer cancels an employee's health coverage:
- Are premium payments more than thirty days late?
 - Does the employer provide at least fifteen days' prior written notice to the employee before coverage stops?
 - Once the employee returns to work, does employer restore the employee to coverage/benefits equivalent to those the employee would have had if leave had not been taken and coverage had not lapsed?
- 29 C.F.R. § 825.212(a), (b), (c).
- (4) **Repayment of Premiums.** If the employer pays the employee's health plan premium, for example, to ensure that it can provide the employee with equivalent benefits upon return from FMLA leave, does the employer require the employee to repay these amounts when he or she does not return to work because of circumstances beyond the employee's control—including an FMLA-qualifying medical condition? 29 C.F.R. § 825.213(a).

- (5) **Parity among Leaves.** Does the employer provide benefits (other than group health insurance) to employees on FMLA to the same extent it provides those benefits to employees on other forms of leave? 29 C.F.R. § 825.209(h).

I. Job Restoration.

- (1) **Same or Equivalent Job.** When the employee returns from FMLA leave, is he or she restored to the same or equivalent job? An equivalent job is one that is virtually identical to the original job in terms of pay, benefits, and other employment terms and conditions (including shift and location). 29 C.F.R. § 825.214.
- (2) **Refusal to Reinstatement – Key Employees.** When the employer refuses to reinstate an employee:
- Can it establish restoration will cause "substantial and grievous economic injury" to its operations? 29 C.F.R. § 825.218.
 - Is the employee a "key" employee (as defined in the FMLA)? 29 C.F.R. § 825.217.
 - Did the employer notify the employee in writing of his or her status as a "key" employee; provide the reasons for denying job restoration; and give the employee a reasonable opportunity to return to work after receiving the employer's notice? 29 C.F.R. § 825.219.

J. Recordkeeping Requirements. Employers must generally keep various types of payroll, benefit, and leave-related documentation for at least three years. 29 C.F.R. § 825.500(b). The following sections delineate which documents various types of employers must maintain as well as the pertinent Genetic Information Nondiscrimination Act of 2008 (GINA) and the ADA requirements that apply to various types of documentation:



(1) Covered Employers with Eligible Employees Must Maintain:

- a) Payroll and employee data, including name, address, and occupation; rate or basis of pay and terms of compensation; daily and weekly hours worked per pay period; additions to or deductions from wages; and total compensation paid.
 - (i) If an employer is not required to keep minimum wage and overtime records for an FMLA-eligible employee (i.e., because the employee is not covered by, or is exempt from, the Fair Labor Standards Act), the employer does not have to maintain a record of actual hours worked, provided that:
 - (ii) Eligibility for FMLA leave is presumed for any employee who has been employed for at least 12 months; and
 - (iii) For employees who take intermittent or reduced schedule leave, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written record.
- b) Dates FMLA leave is taken;
 - (i) Such information may be included in time records, requests for leave, and so forth;
 - (ii) The records must designate the time off as FMLA leave and may not include leave required under state law, or an employer plan which is not also covered by the FMLA;
 - (iii) If FMLA leave is taken in increments of less than a full day, the hours of the leave must be included.
- c) Copies of employee requests for FMLA leave, if in writing;
- d) Copies of the employer's FMLA-required notices to employees;
- e) Documents describing employee benefits, and/or employer policies and practices for paid and unpaid leaves (electronic and written);
- f) Employee benefits premium payments; and
- g) Records of any dispute between the employer and employee regarding designation of leave, including any written statements regarding the reasons for the designation and disagreement.

29 C.F.R. § 825.500(c)(1-7).

(2) Covered Employers with No Eligible Employees Must Maintain:

- a) Payroll and employee data, including name, address, and occupation;
- b) rate or basis of pay and terms of compensation;
- c) daily and weekly hours worked per pay period;
- d) additions to or deductions from wages; and
- e) total compensation paid.

29 C.F.R. § 825.500(c)(1).

(3) Covered Employers Who Are Also Joint Employers Must Maintain:

- a) all the records required in section J.(1) above for their primary employees; and
- b) only payroll and employee data for their secondary employees, including the following:
 - (i) name, address, and occupation;
 - (ii) rate or basis of pay and terms of compensation;
 - (iii) daily and weekly hours worked per pay period;
 - (iv) additions to or deductions from wages; and
 - (v) total compensation paid.

29 C.F.R. § 825.500(c)(1-7), (e).

(4) Employers of Airline Flight Crew Employees. Special rules apply. 29 C.F.R. § 825.803.

(5) GINA and ADA Requirements. Certifications, recertifications, and medical histories must be maintained as confidential medical records, and kept separate and apart from employee personnel files. 29 C.F.R. § 825.500(g).

- a) If GINA applies, employers must comply with the confidentiality requirements of Title II of GINA. 29 C.F.R. § 1635.9.



b) If the ADA applies, employers must comply with the ADA's confidentiality requirements (29 C.F.R. § 1630.14(c)(1)), except that:

- (i) supervisors and managers may be informed about work restrictions and accommodations;
- (ii) first aid and safety personnel may be informed if the employee's physical or medical condition requires emergency treatment; and
- (iii) government officials investigating FMLA compliance—or other relevant law—must be given such information upon request.

29 C.F.R. § 825.500(g).

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