

PERSONNEL SERVICES BULLETINS (PSBs)

440-8R

Subject: Guidelines on the Family and Medical Leave Act of 1993

Supersedes: Personnel Services Bulletin No. 440-8

Date: April 17, 2000

PURPOSE

To amend the procedure which coordinates the granting of leave under the Family and Medical Leave Act of 1993 ("FMLA") with leave provisions contained in the Citywide Agreement between the City of New York and District Council 37, the "Leave Regulations for Employees Who Are Under the Career and Salary Plan," and the "Leave Regulations for Management Employees." Personnel Policy and Procedure Bulletin No. 600-94 established interim guidelines on the FMLA based on the U. S. Department of Labor's Interim Final Rule. This Personnel Services Bulletin establishes guidelines based on the federal agency's Final Rule.

BACKGROUND

The federal Family and Medical Leave Act of 1993 entitles eligible City employees to 12 weeks of leave in a 12-month period for child care and for the serious health condition of the employee or covered family members. The FMLA became effective on August 5, 1993 for managers and employees in original jurisdiction positions; on February 5, 1994, it became effective for employees covered under collective bargaining agreements with the City of New York. (See Memorandum to Agency Heads dated August 23, 1993.)

GENERAL PROVISIONS

The following FMLA provisions are integrated with existing time and leave benefits contained in the Citywide Agreement, the "Leave Regulations for Employees Who Are Under the Career and Salary Plan," and the "Leave Regulations for Management Employees." FMLA provisions apply to eligible full-time and part-time employees in all jurisdictional classifications (competitive, non-competitive, labor, and exempt) and include provisional, temporary, and seasonal employees. Each agency must designate an FMLA Coordinator to assist in effectuating these provisions.

1. Certain individuals are excluded from the definition of "employee" under the FMLA. A person who:

- a. is not subject to the civil service laws of the political subdivision which employs the employee, **and**
- b. holds a public elective office; or
- c. is selected by the holder of such public elective office to be a member of his/her personal staff; or
- d. is appointed by such public elective officeholder to serve on a policymaking level; or
- e. is an immediate adviser to such public elective officeholder with respect to the constitutional or legal powers of the office of such officeholder; or
- f. is an employee in the legislative branch or legislative body of...
[the] political subdivision

is not eligible for FMLA leaves.

2. An eligible employee is one who has worked for the employer for a total of at least 12 months preceding the start of the leave. The 12 months need not be consecutive. If an employee is maintained on the payroll for any part of a week, the week counts as a week of employment. To be eligible, the employee must also have actually worked 1,250 hours over the 12-month period immediately preceding the start of the leave.

3. An eligible employee is entitled to a total of 12 weeks of leave in a 12-month period. Leave may be taken upon the birth of a child to the employee, to care for such child; or upon the placement of a child with the employee for adoption or foster care, to care for such child ("FMLA child care leave"). Leave may also be taken to care for a child of the employee when the child has a serious health condition, as defined herein; to care for the employee's parent or spouse when such person has a serious health condition; and for the employee's own serious health condition.

"Child" means a biological, adopted or foster child of the employee; a legal ward or stepchild of the employee; or a child for whom the employee stands in loco parentis. A child must either be under the age of 18 or incapable of self-care because of mental or physical disability. "Spouse" means a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides. "Parent" means the biological parent of the employee, or a person who stands or stood in loco parentis for the employee when the employee was a child, as defined herein; it does not include "in-laws."

4. In addition, an eligible employee with a domestic partner may take up to 12 weeks of leave to care for the employee's domestic partner if such person has a serious health condition. Any FMLA leave already taken during the previous 12 months, pursuant to Section 3 above, will be subtracted from the 12 weeks allowed for this purpose. Leave taken for this purpose does not diminish the employee's entitlement to the 12 weeks of FMLA leave permitted pursuant to Section 3 above. "Domestic Partner" means domestic partner as defined in Section 1-112 (121) of the Administrative Code of the City of New York.

5. The 12-month period in which the 12 weeks of leave entitlement occurs is a "rolling" 12-month period measured backward from the date any FMLA leave is to be used. Under this method of leave calculation, each time an employee is to take FMLA leave, the leave entitlement would be the balance of the 12 weeks which had not been used during the immediately preceding 12 months.

6. Serious health condition, as further explained below, means an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider.

A serious health condition which involves inpatient care (i.e., overnight stay) in a hospital, hospice, or residential medical facility also includes any period of incapacity, and any subsequent treatment, related to such inpatient care.

Incapacity means inability to work, attend school, or perform other regular daily activities due to the serious health condition, or consequent treatment, or recovery from the serious health condition. When leave is taken for the employee's own serious health condition, incapacity means the inability to work at all or to perform any one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act of 1990 and its implementing regulations.

A serious health condition which involves continuing treatment by a health care provider includes one or more of the following:

- a. A period of incapacity of more than three consecutive calendar days, and any subsequent

treatment or period of incapacity relating to the same condition, that also involves treatment two or more times by a health care provider, a nurse or physician's assistant under the direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

b. A period of incapacity of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves 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; or

c. Any period of incapacity due to pregnancy or for prenatal care; or

d. Any period of incapacity due to a chronic serious health condition which requires periodic visits for treatment, continues over an extended period of time, and may cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.); or

e. A period of incapacity which is long term or a permanent incapacity due to a condition for which treatment may not be effective (e.g., Alzheimer's Disease, stroke, etc.). Active treatment by a health care provider may not be necessary but continuing supervision by a health care provider is required; or

f. Any period of absence to receive multiple treatments (including any period of recovery resulting from treatment) 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 restorative surgery after an injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical treatment, such as cancer (chemotherapy, radiation, etc.), kidney disease (dialysis), etc.

7. Health care providers include doctors of medicine or osteopathy authorized to practice medicine or surgery; podiatrists, dentists, clinical psychologists, optometrists, chiropractors in certain instances, nurse practitioners, nurse-midwives, and clinical social workers, authorized to practice in the state; and Christian Science practitioners listed with the First Church of Christ Scientist in Boston, Massachusetts; or any other health care provider determined by the U.S. Department of Labor to be capable of providing health care services.

8. Leave taken for the employee's own serious health condition or to care for a covered relative's serious health condition may be taken on an intermittent or reduced leave schedule in cases of medical necessity. Certification from a health care provider stating the medical necessity for leave on an intermittent or reduced leave basis and the duration and schedule of the leave satisfies the medical necessity requirement. However, the employee must attempt to schedule leave so as not to disrupt the agency's operations. If an employee requests intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment, including a period of recovery from a serious

health condition, the employer may require the employee to transfer temporarily to an available alternative position for which the employee is qualified and which has equivalent pay and benefits, which better accommodates recurring periods of leave than does the employee's regular position. Transfer to an alternative position shall require compliance with any applicable collective bargaining agreement, federal law (such as the Americans with Disabilities Act), and State law.

9. Entitlement to FMLA child care leave expires 12 months after the birth or placement of the child with the adoptive or foster parent. Child care leave may not be taken on an intermittent or reduced leave schedule. Paid annual leave and non-FLSA compensatory time must be used concurrently with FMLA child care leave, but if FMLA leave is to be extended by City provided child care leave (for birth or adoption), only that portion of the FMLA leave which is not coincident with paid leave is to be counted against the City child care leave entitlement. If an employee commences child care leave and has no annual leave or compensatory time, FMLA child care leave is to be counted in its entirety against the City child care leave entitlement. If FMLA child care leave has not been taken and the 12-month eligibility period has elapsed, City child care leave may be taken at any time until the child's fourth birthday.

10. When the need for FMLA leave is foreseeable, an employee must give the agency FMLA Coordinator at least 30 calendar days advance notice before the leave begins. If the employee does not, the employer can delay the start of the FMLA leave. If leave is to be delayed by the agency because of the employee's failure to comply with the 30-day requirement, it must be clear that the employee had notice of this requirement. It is therefore imperative that the notice entitled "Your Rights under the Family and Medical Leave Act of 1993" be posted conspicuously at the worksite and, where appropriate, included in the agency's employee handbook. If the employee's foreseeable leave is to be delayed because there was no reasonable cause for the untimely notification, an administrative review must be conducted by designated agency personnel. If the need for leave is unforeseeable, the employee is ordinarily required to give notice within one or two business days of when the need for leave becomes known to the employee.

In those cases where paid leave is used concurrently with FMLA leave, if the City's notice requirements are less stringent than the notice requirements of the FMLA, only the less stringent requirements may be imposed.

11. When an employee requests leave for an FMLA qualifying purpose but does not request to use FMLA leave, it is the agency's responsibility to designate such leave as FMLA leave. Such designation may be made before or after the leave commences, as long as it is made within two business days, absent extenuating circumstances, of the agency acquiring knowledge that the leave is for an FMLA qualifying purpose. If the agency learns, subsequent to the commencement of leave, that the leave or some portion thereof, is or was for an FMLA qualifying purpose, the agency must designate such leave as FMLA leave retroactively to, and/or prospectively from, the FMLA qualifying event.

The agency may designate leave as FMLA leave after the employee returns to work only if the agency was not aware of the reason for the leave prior to such time or the agency preliminarily designated leave as FMLA leave while awaiting medical certification. In the former instance, leave must be designated as FMLA leave within two business days of the employee's return to work, with appropriate notice to the employee. In the latter case, the preliminary designation of FMLA leave becomes final upon receipt of medical certification confirming the leave was for an FMLA qualifying purpose. If the employee requests leave to be counted as FMLA leave after returning to work, the employee must notify the agency of the FMLA qualifying purpose of the leave within two business days of returning to work.

If the agency's initial notice to the employee designating FMLA leave is oral, the agency must confirm the designation in writing, in any format, no later than the following payday or, if there is less than one week between the oral notice and the next payday, written notice must be no later than the subsequent payday.

12. When an employee requests leave for an FMLA qualifying purpose, the attached Form DP-2494, "Request for Leave under the Family and Medical Leave Act," and a copy of the notice entitled "Your Rights under the Family and Medical Leave Act of 1993" must be immediately provided to the employee. The employee must, in turn, submit the completed form as soon as practicable. Please note that the agency may not deny or delay the leave because the employee has not submitted written notice as long as the employee has provided timely oral notice of the need to take leave for an FMLA qualifying reason. The agency FMLA Coordinator or designee must sign the request form indicating the disposition and return it to the employee within 5 working days of receipt. The approved request form may be used as written confirmation of an FMLA designated leave, as required in Section 11, if it is returned to the employee within the time constraints stated in Section 11.

Please note that the request form contains notice to the employee of specific obligations of the employee and the consequences of the failure to meet these obligations, as well as certain obligations of the employer. Among the items discussed are the requirements for documents to support the leave and the return to work, the employee's status as a "key" employee, the right to be restored to the same or equivalent position, and the requirement to substitute paid leave.

13. Appropriate paid leave balances (including managers' vested or sub-managerial leave balances as applicable) must be used concurrently with FMLA leave. For instance, all paid sick leave must be used and counted against the 12-week FMLA leave entitlement if absence is due to the employee's own serious health condition. If all sick leave balances have been exhausted and annual leave is used due to the employee's own serious health condition, the annual leave used shall be counted against the FMLA entitlement. Compensatory time balances, except for compensatory time subject to the Fair Labor Standards Act, must also be used and counted against the FMLA entitlement. Similarly, all paid annual leave and non-FLSA compensatory time must be used and counted as FMLA leave if absence is for any other FMLA qualifying purpose. After all leave balances have been exhausted, any leave that is advanced or granted for either the employee's own serious health condition or other FMLA qualifying reasons will be counted against the employee's FMLA entitlement. If an employee chooses to use FLSA compensatory time for an FMLA qualifying purpose, such time used may not be counted against the employee's FMLA leave entitlement.

14. An employee will be required to present medical documentation to support a request for FMLA leave when a serious health condition is involved. For the employee's own serious health condition, such documentation should include the date the serious health condition commenced, the probable duration of the condition, the diagnosis, the regimen of treatment prescribed, a statement that the employee is unable to perform all or any one of the essential functions of the employee's position, or in the case of leave to care for a covered relative's serious health condition, a statement that the relative requires assistance for basic medical needs, hygiene, nutritional needs, safety, transportation, or psychological comfort. Documentation should be requested at the time the employee requests leave or in the case of unforeseen leave, soon after the leave commences. Documentation must be provided within 15 calendar days from the agency's request where practicable. (Use attached Form DP-2496, "Certification of Physician or Health Care Provider" or if not practicable, provide appropriate documentation in another form.)

15. An employee will be required to present documentation to support a request for FMLA leave to care for a newborn child or a child who has been adopted or

received into foster care. Documentation should be requested at the time the employee requests leave, or in the case of unforeseen leave, soon after the leave commences. Documentation must be provided within 15 calendar days from the agency's request where practicable. (See attached Form DP-2495, "Child Care Leave Certification under the Family and Medical Leave Act.")

16. An employee on FMLA leave for his/her own serious health condition may be required to provide medical documentation certifying fitness to return to work before restoration.

17. An employee who returns from FMLA leave must be restored to his or her previous position or to an equivalent position. An equivalent position is a position in the same civil service title which has the same pay, benefits, and working conditions (including the same worksite or a geographically proximate worksite). A geographically proximate worksite is one that does not involve a significant increase in commuting distance or time. If the employee is denied restoration or other benefits, the agency must be able to show that the employee would not have continued to be employed, or to have received the benefits, if the employee had been continuously employed during the leave period.

18. FMLA leave is not considered a break in service for the purpose of pay and benefits; however, the time spent on unpaid leave is not counted as service in determining benefits, including pensions.

19. Where the restoration of a "key" employee would cause substantial and grievous economic injury to its operations, an employer may refuse to restore such employee provided certain procedures have been followed. A "key" employee is a salaried employee who is among the highest paid ten percent of salaried and unsalaried City employees. A "key" employee must be advised in writing of his/her status as such, and the implications of such status, at the time leave is requested. If it is determined, while the employee is on leave, that restoration will cause grievous economic injury, the agency must notify the employee by certified mail that it intends to deny restoration on completion of leave and must state the basis for its determination. The "key" employee must be given a reasonable time in which to return to work. If he/she does not return to work at that time, the "key" employee may still request restoration at the end of the leave period. If the agency's determination remains the same, the employee must be notified by certified mail that restoration is denied. Please note that "key" employees who are also permanent employees covered under Civil Service Law, Section 75, must be restored to their positions unless the appropriate procedures required by Civil Service Law have been followed. In addition, "key" employees who are on City provided child care leave concurrent with FMLA child care leave are to be restored to their positions pursuant to the City's leave provisions.

20. Group health insurance must be maintained for an employee on FMLA leave on the same terms as if the employee had continued to work. However, the employer may recover its share of health plan premiums for the period of time the employee was on unpaid leave if the employee does not return to work after the FMLA leave has expired, unless there is a continuation or onset of a serious health condition or another circumstance occurs which is beyond the employee's ability to control. The NYC Office of Labor Relations has issued additional information on health insurance and welfare funds under separate cover.

21. FMLA leave records must be maintained by the agency as described in Section 825.500 of the regulations issued by the U.S. Department of Labor, which is attached.

22. Employees who exercise their rights under the FMLA are protected as described in Section 825.220 of the regulations issued by the U.S. Department of Labor, which is attached.

23. The Office of Payroll Administration has issued instructions under separate

cover with regard to the Payroll Management System and FMLA leave.

William J. Diamond
Commissioner

Attached Forms:

[Request for Leave Under the Family and Medical Leave Act](#) (in pdf format)

[Child Care Leave Certification under the Family and Medical Leave Act](#) (in pdf format)

[Certification of Physician or Other Health Care Provider](#) (in pdf format)

[Sections of Federal Law](#)

[Your Rights Under the Family and Medical Leave Act of 1993](#) (in pdf format)

Inquiries: Citywide Personnel Policies
and Standards Division (212) 386-0552

Issue No. 1-2000

The City of New York
Department of Citywide Administrative Services

Request for Leave under the Family and Medical Leave Act

Employee's Name

Employee's Title

Name of Agency

Employee's Salary

Work Location

I am requesting leave for (Check one):

1. ___ Child care due to (Check one):
a. ___ Birth of child
b. ___ Placement of child for adoption
c. ___ Placement of child for foster care

Note: Child care leave taken under the Family and Medical Leave Act must be concluded 12 months after the birth or placement of the child. Taking child care leave under the Family and Medical Leave Act does not diminish an employee's right to child care leave under the Citywide Agreement between the City of New York and District Council 37, the "Leave Regulations for Employees Who are Under the Career and Salary Plan," and the "Leave Regulations for Management Employees."

2. ___ Care of seriously ill (check one):
a. ___ spouse
b. ___ parent
c. ___ child

___ Check here if intermittent leave or a reduced leave schedule is being requested.

3. ___ Employee's own serious health condition that makes the employee unable to perform the employee's job functions.

___ Check here if intermittent leave or a reduced leave schedule is being requested.

Note: All requests for leave under the Family and Medical Leave Act require appropriate documentation (see the applicable certification forms).

Date of commencement of leave _____

Probable date of return to work _____

Note: Employees who have worked for the City of New York for at least 12 months, and who have worked 1250 hours in the last 12 months, are entitled to a total of 12 weeks of Family and Medical Leave per year.

Employee's Signature

Date

FACTS YOU SHOULD KNOW

1. Employees are required to exhaust the appropriate paid leave before taking unpaid leave. Both paid leave and unpaid leave will be counted against their annual FMLA leave entitlements.
2. Employees must provide acceptable certification by a physician or other health care provider of their own serious health condition or the serious health condition of a covered family member within 15 calendar days of this request for leave, where practicable. Leave may be denied if such documentation is not provided. Certification of fitness to return to work may be required. Employees requesting intermittent leave or leave on a reduced leave schedule which is medically necessary must advise the agency, upon request, of the reasons the intermittent/reduced leave schedule is necessary and of the schedule for treatment, if applicable. The employee and the agency must attempt to work out a schedule which meets the employee's needs without unduly disrupting the operations of the agency.
3. Employees requesting child care leave must provide proof of the fact and date of birth, placement for adoption, or placement for foster care of the child within 15 calendar days of this request for leave, where practicable. Leave may be denied if such documentation is not provided.
4. Employees are entitled to restoration to the same or an equivalent position upon return from FMLA leave, except as set forth in number 5 below.
5. Employees who are designated as "key" employees may be denied restoration following FMLA leave if restoration would cause grievous economic injury to the operations of the agency. "Key" employees will be notified that they have been so designated within 5 business days of receipt of this form.
6. Employees' group health insurance coverage will be maintained for the duration of approved FMLA leave; however, employees must pay the premiums for any optional riders. Health plan premiums paid by the City during the period of unpaid leave may be recovered if the employee fails to return to work.

FOR AGENCY USE ONLY	
_____ Approved	_____ "Key" Employee
_____ Denied	_____ Not "Key" Employee
_____ Signature of Agency FMLA Coordinator	_____ Date

The City of New York
Department Citywide Administrative Services

Child Care Leave Certification under the Family and Medical Leave Act

I, _____, am the parent of a child born; or placed for
Name of Employee

adoption; or placed for foster care (circle one) on _____.
Date of Birth or Placement

Note: A copy of the birth certificate; physician's or other health care provider's letter; attorney's letter; letter from an adoption agency or the appropriate State agency; or other appropriate documentation attesting to the fact and date of birth or placement of the child must be attached. Child care leave taken under the Family and Medical Leave Act must be concluded 12 months after the birth, placement for adoption, or placement for foster care of the child.

Note: A doctor's note is required for any portion of the child care leave that is charged to sick leave, in accordance with regular sick leave documentation procedures.

Signature of Employee

Date

The City of New York
Department of Citywide Administrative Services

CERTIFICATION OF PHYSICIAN OR OTHER HEALTH CARE PROVIDER

under the Family and Medical Leave Act

1. Employee's Name	2. Patient's Name (if different from employee)
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3. The attached sheet describes what is meant by a “**serious health condition**” under the Family and Medical Leave Act. Does the patient’s condition¹ qualify under any of the categories described? If so, please check the applicable category.

(1) ____ (2) ____ (3) ____ (4) ____ (5) ____ (6) ____, or None of the above ____

4. Describe the **medical facts** which support your certification, including a brief statement as to how the medical facts meet the criteria of one of these categories.

5.a. State the approximate **date** the condition commenced, and the probable **duration** of the condition (and also the probable duration of the patient’s present **incapacity**² if different).

b. Will it be necessary for the employee to work only **intermittently or to work on a less than full schedule** as a result of the condition (including treatment described in Item 6 below)? _____ If yes, give the probable duration.

c. If the condition is a **chronic condition** (condition #4) or **pregnancy**, state whether the patient is presently incapacitated² and the likely duration and frequency of **episodes of incapacity**².

6.a. If additional **treatments** will be required for the condition, provide an estimate of the probable number of such treatments.

If the patient will be absent from work or other daily activities because of **treatment** on an **intermittent** or **part-time** basis, also provide an estimate of the probable number of treatments and the intervals between such treatments, actual or estimated dates of treatment, if known, and period required for recovery, if any.

¹ Here and elsewhere on this form, the information sought relates **only** to the condition for which the employee is taking FMLA leave.

² “**Incapacity**,” for purposes of FMLA, is defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom.

- b. If any of these treatments will be provided by another provider of health services (e.g., physical therapist), please state the nature of the treatments.

- c. **If a regimen of continuing treatment** by the patient is required under your supervision, provide a general description of such regimen (e.g., prescription drugs, physical therapy requiring special equipment).

7.a. If medical leave is required for the employee's **absence from work** because of the **employee's own condition** (including absences due to pregnancy or a chronic condition), is the employee **unable to perform work** of any kind?

b. If able to perform some work, is the employee **unable to perform any one or more of the essential functions of the employee's job** (the employee or the employer should supply you with information about the essential job functions)? _____ If yes, please list the essential functions the employee is unable to perform.

c. If neither a. nor b. applies, is it necessary for the employee to be **absent from work for treatment**? _____

8.a. If leave is required to **care for a family member** of the employee with a serious health condition, **does the patient require assistance** for basic medical or personal needs or safety, or for transportation? _____

b. If no, would the employee's presence to provide **psychological comfort** be beneficial to the patient or assist in the patient's recovery? _____

c. If the patient will need care only **intermittently** or on a part-time basis, please indicate the probable **duration** of this need.

(Signature of Health Care Provider)

(Type of Practice)

(Address)

(Telephone Number)

To be completed by the employee needing family leave to care for a family member:

State the care you will provide and an estimate of the period during which care will be provided, including a schedule if leave is to be taken intermittently or if it will be necessary for you to work less than a full schedule.

(Employee Signature)

(Date)

A “**Serious Health Condition**” means an illness, injury impairment, or physical or mental condition that involves one of the following:

1. **Hospital Care**

Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity² or subsequent treatment in connection with or consequent to such inpatient care.

2. **Absence Plus Treatment**

A period of incapacity² **of more than three consecutive calendar days** (including any subsequent treatment or period of incapacity² relating to the same condition), that also involves:

1. **Treatment³ two or more times** by a health care provider, by a nurse or physician’s assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or
2. **Treatment** by a health care provider on **at least one occasion** which results in a **regimen of continuing treatment⁴** under the supervision of the health care provider.

3. **Pregnancy**

Any period of incapacity due to **pregnancy**, or for **prenatal care**.

4. **Chronic Conditions Requiring Treatments**

A **chronic condition** which:

- (1) Requires **periodic visits** for treatment by a health care provider, or by a nurse or physician’s assistant under direct supervision of a health care provider;
- (2) Continues over an **extended period of time** (including recurring episodes of a single underlying condition); and
- (3) May cause **episodic** rather than a continuing period of incapacity² (e.g., asthma, diabetes, epilepsy, etc.).

5. **Permanent/Long-Term Conditions Requiring Supervision**

A period of **incapacity²** which is **permanent or long-term** due to a condition for which treatment may not be effective. The employee or family member must be **under the continuing supervision of, but need not be receiving active treatment by, a health care provider**. Examples include Alzheimer’s, a severe stroke, or the terminal stages of a disease.

6. **Multiple Treatments (Non-Chronic Conditions)**

Any period of absence to receive **multiple treatments** (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for **restorative surgery** after an accident or other injury, or for a condition that **would likely result in a period of incapacity² of more than three consecutive calendar days in the absence of medical intervention or treatment**, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis).

³ Treatment includes examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations.

⁴ A regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition. A regimen of treatment does not include the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider.

PERSONNEL SERVICES BULLETINS (PSBs)

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

- **Section Number:** 825.220
- **Section Name:** How are employees protected who request leave or otherwise assert FMLA rights?

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

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

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

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

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

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

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

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

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

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

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

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

(d) Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA. For example, employees (or their collective bargaining representatives) cannot ``trade off'' the right to take FMLA leave against some other benefit offered by the employer. This does not prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a ``light duty'' assignment while recovering from a serious health condition (see Sec. 825.702(d)).

In such a circumstance the employee's right to restoration to the same or an equivalent position is available until 12 weeks have passed within the 12-month period, including all FMLA

leave taken and the period of ``light duty."`

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

825.500 - What records must an employer keep to comply with the FMLA?

· **Section Number:** 825.500

· **Section Name:** What records must an employer keep to comply with the FMLA?

(a) FMLA provides that covered employers shall make, keep, and preserve records pertaining to their obligations under the Act in accordance with the recordkeeping requirements of section 11(c) of the Fair Labor Standards Act (FLSA) and in accordance with these regulations. FMLA also restricts the authority of the Department of Labor to require any employer or plan, fund or program to submit books or records more than once during any 12-month period unless the Department has reasonable cause to believe a violation of the FMLA exists or the DOL is investigating a complaint. These regulations establish no requirement for the submission of any records unless specifically requested by a Departmental official.

(b) **Form of records.** No particular order or form of records is required. These regulations establish no requirement that any employer revise its computerized payroll or personnel records systems to comply. However, employers must keep the records specified by these regulations for no less than three years and make them available for inspection, copying, and transcription by representatives of the Department of Labor upon request. The records may be maintained and preserved on microfilm or other basic source document of an automated data processing memory provided that adequate projection or viewing equipment is available, that the reproductions are clear and identifiable by date or pay period, and that extensions or transcriptions of the information required herein can be and are made available upon request. Records kept in computer form must be made available for transcription or copying.

(c) **Items required.** Covered employers who have eligible employees must maintain records that must disclose the following:

(1) Basic payroll and identifying employee data, including name, address, and occupation; rate or basis of pay and terms of compensation; daily and weekly hours worked per pay period; additions to or deductions from wages; and total compensation paid.

(2) Dates FMLA leave is taken by FMLA eligible employees (e.g., available from time records, requests for leave, etc., if so designated). Leave must be designated in records as FMLA leave; leave so designated may not include leave required under State law or an employer plan which is not also covered by FMLA.

(3) If FMLA leave is taken by eligible employees in increments of less than one full day, the hours of the leave.

(4) Copies of employee notices of leave furnished to the employer under FMLA, if in writing, and copies of all general and specific written notices given to employees as required under FMLA and these regulations (see Sec. 825.301(b)). Copies may be maintained in employee personnel files.

(5) Any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves.

(6) Premium payments of employee benefits.

(7) Records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and for the disagreement.

(d) Covered employers with no eligible employees must maintain the records set forth in paragraph (c)(1) above.

(e) Covered employers in a joint employment situation (see Sec. 825.106) must keep all the records required by paragraph (c) of this section with respect to any primary employees, and must keep the records required by paragraph (c)(1) with respect to any secondary employees.

(f) If FMLA-eligible employees are not subject to FLSA's recordkeeping regulations for purposes of minimum wage or overtime compliance (i.e., not covered by or exempt from FLSA), an employer need not keep a record of actual hours worked (as otherwise required under FLSA, 29 CFR 516.2(a)(7)), provided that:

(1) eligibility for FMLA leave is presumed for any employee who has been employed for at least 12 months; and

(2) with respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written record maintained in accordance with paragraph (b) of this section.

(g) Records and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements (see 29 CFR Sec. 1630.14(c)(1)), except that:

(1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;

(2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and

(3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

(Approved by the Office of Management and Budget under control number 1215-0181)

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

US Department of Labor, Code of Federal Regulations Pertaining to ESA, Title 29 Labor, Chapter V, Part 825 The Family and Medical Leave Act of 1993

Your Rights

Under The

Family and Medical Leave Act of 1993

FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to “eligible” employees for certain family and medical reasons.

Employees are eligible if they have worked for a covered employer for at least one year, and for 1,250 hours over the previous 12 months, and if there are at least 50 employees within 75 miles.

Reasons For Taking Leave:

Unpaid leave must be granted for *any* of the following reasons:

- to care for the employee’s child after birth, or placement for adoption or foster care;
- to care for the employee’s spouse, son or daughter, or parent, who has a serious health condition; or
- for a serious health condition that makes the employee unable to perform the employee’s job.

At the employee’s or employer’s option, certain kinds of *paid* leave may be substituted for unpaid leave.

Advance Notice and Medical Certification:

The employee may be required to provide advance leave notice and medical certification. Taking of leave may be denied if requirements are not met.

- The employee ordinarily must provide 30 days advance notice when the leave is “foreseeable.”
- An employer may require medical certification to support a request for leave because of a serious health condition, and may require second or third opinions (at the employer’s expense) and a fitness for duty report to return to work.

Job Benefits and Protection:

- For the duration of FMLA leave, the employer must maintain the employee’s health coverage under any “group health plan.”
- Upon return from FMLA leave, most employees must be

restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.

- The use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee’s leave.

Unlawful Acts By Employers:

FMLA makes it unlawful for any employer to:

- interfere with, restrain, or deny the exercise of any right provided under FMLA:
- discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.


Enforcement:

- The U.S. Department of Labor is authorized to investigate and resolve complaints of violations.
- An eligible employee may bring a civil action against an employer for violations.

FMLA does not affect any Federal or State law prohibiting discrimination, or supersede any State or local law or collective bargaining agreement which provides greater family or medical leave rights.

For Additional Information:

Contact the nearest office of the Wage and Hour Division, listed in most telephone directories under U.S. Government, Department of Labor.

 U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

WH Publication 1420
June 1993