

FMLA Basics

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Basics of the Act²

The Family and Medical Leave Act was enacted in 1993. The purposes of the Act are to allow employees to balance their work and family life by taking reasonable unpaid leave in a manner that accommodates the legitimate interests of the employer.

1. What employees are eligible to take leave under the FMLA?

An eligible employee is one who:

- (a) works for a covered employer;
- (b) has been employed by that employer for at least 12 months;
- (c) worked for the covered employer at least 1,250 hours during the previous 12 months; and
- (d) has been employed at a work-site where that employer has 50 or more employees within 75 miles of that site.

In determining the number of employees for purposes of these eligibility criteria, part-time employees, employees on leave of absence who are expected to return to work, and employees from a temporary agency who the employer will continue to use must be counted.

Eligibility for leave based upon the number of months employed and the number of hours worked is determined as of the date leave commences.

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² The information contained in this paper is found in the United States Department of Labor Family and Medical Leave Act regulations in 29 C.F.R. Part 825.

2. What employers are “covered employers” under the FMLA?

A covered employer is one that engages in commerce or in any industry or activity affecting commerce that employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. In addition, all public agencies are covered employers.

3. What leave is authorized is authorized by the FMLA?

The FMLA allows an eligible employee of a covered employer to take up to twelve work-weeks of unpaid, job-protected leave in a twelve month period:

- because of the birth of a child or to care for the newborn child;**
- because of the placement of a child with the employee for adoption or foster care;**
- because the employee is needed to care for a family member (spouse, child, or parent) with a serious health condition; or**
- because the employee’s own serious health condition makes the employee unable to perform the functions of his or her job.**

“Caring for” a family member can mean several things:

- It encompasses both physical and psychological care and includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor, etc.**
- It includes providing psychological comfort and reassurance which would be beneficial to a child, spouse, or parent with a serious health condition who is receiving inpatient or home care.**
- It includes situations where the employee may be needed to fill in for others who are caring for the family members, or to**

make arrangements for changes in care, such as transfer to a nursing home.

An employee's right to leave for the birth of a child or placement of a child for adoption/foster care ends 12 months after the child's birth or placement with the employee. If a husband and wife work for the same employer, they are limited to a combined total of 12 weeks of FMLA leave for the birth of a child, to care for the child after birth, or for placement of a child for adoption or foster care. This limitation also applies when employee co-workers are needed to care for a parent with a serious health condition.

4. What is a "serious health condition"?

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

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

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

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

(A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

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

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

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

(A) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

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

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

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

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

Remember that absences attributable to incapacity for pregnancy or prenatal care or for treatment due to a chronic serious health condition qualify for FMLA leave even though the employee or the immediate family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three days.

5. How much leave may an employee take?

An eligible employee is entitled to 12 weeks of unpaid leave in a twelve-month period. An employer is permitted to choose any one of the following methods for determining the “12-month period” in which the 12 weeks of leave entitlement occurs:

(1) The calendar year;

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

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

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

It is incumbent upon the employer to provide notice to its employees as to which of these 12-month periods it will use in calculating leave. This information should be contained in the employer’s personnel manual.

Whatever calculation basis is selected by the employer, it must be applied uniformly and consistently to all employees. An employer

may switch to another method of calculating the 12-month period only after giving 60-days advance notice of the change to all employees. The transition to a new method of calculating FMLA leave must take place in a manner that allows employees to retain a full 12 weeks of leave under whichever method is of greater benefit to the employee.

If a holiday falls during a period of FMLA leave, the holiday still counts as a day of FMLA leave. However, if for some reason the employer must close down operations for a period of time, that period of time will not count as leave for persons who are on FMLA leave.

6. Is FMLA leave paid or unpaid?

FMLA leave is unpaid leave. An employer may require its employees to exhaust all paid leave concurrently with their FMLA leave. If an employer does not require the exhaustion of paid leave concurrently with FMLA leave, the employee has the option of electing to use paid leave concurrently with FMLA leave or keeping the accrued paid leave in reserve and taking unpaid FMLA leave.

If the FMLA leave is taken for the birth of a child or to care for the child after birth; for the placement of a son or daughter with the employee for adoption or foster care; or for the care of the employee's spouse, son, daughter, or parent who has a serious health condition, the employer may require exhaustion of accrued paid vacation leave, personal leave, or family leave. If the FMLA leave is taken in order to care for the employee's spouse, son, daughter, or parent that has a serious health condition or because of the employee's own serious health condition that makes the employee unable to perform the functions of his/her job, the employer may require exhaustion of accrued paid sick leave in addition to accrued paid vacation or personal leave. If an employee takes sick leave for any condition that is not a "serious

health condition” under the FMLA, the employer may not designate such leave to be FMLA leave.

FMLA regulations allow an employer to designate workers’ compensation leave as FMLA leave so long as the injury is one that meets the criteria for a “serious health condition” under the Act. However, if an employee on workers’ comp leave is certified to return for light-duty work but is unable to return to the same or equivalent job, the employee may decline the light-duty job and remain on unpaid FMLA leave for the remainder of the 12-week period.

An employer may not require an employee to exhaust comp time while on FMLA leave.

7. Are employees entitled to benefits while on FMLA leave?

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. All employers covered by FMLA, including public agencies, are subject to the Act’s requirements to maintain health coverage.

The same group health plan benefits provided to an employee prior to taking FMLA leave must be maintained during the FMLA leave.

If an employer provides a new health plan or benefits or changes health benefits or plans while an employee is on FMLA leave, the employee is entitled to the new or changed plan/benefits to the same extent as if the employee were not on leave.

Notice of any opportunity to change plans or benefits must also be given to an employee on FMLA leave.

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

Except as required by COBRA and for “key” employees, an employer’s obligation to maintain health benefits during leave (and to restore the employee to the same or equivalent employment) under FMLA ceases if and when:

- the employment relationship would have terminated if the employee had not taken FMLA leave (e.g., if the employee’s position is eliminated as part of a nondiscriminatory reduction in force and the employee would not have been transferred to another position);**
- an employee informs the employer of his or her intent not to return from leave (including before starting the leave if the employer is so informed before the leave starts); or**
- the employee fails to return from leave or continues on leave after exhausting his or her FMLA leave entitlement in the 12-month period.**

An employee’s entitlement to benefits other than group health benefits during a period of FMLA leave (e.g., holiday pay) is to be determined by the employer’s established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as appropriate). For example, if the employer has a policy stating that vacation and sick leave do not accrue when an employee is out on unpaid leave, then such benefits do not accrue while an employee is out on unpaid FMLA leave.

8. What are an employee’s rights upon returning to work from FMLA leave?

On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence.

There are some limited exceptions to this job restoration requirement (as for certain "key" employees and when an employer has had a reduction in force that eliminates the employee's position).

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

9. What are an employee's remedies if he/she feels his/her FMLA rights have been violated or if he/she feels the employer has retaliated against him/her for exercising FMLA rights?

An employee who believes the employer has violated the FMLA may file a complaint with the Department of Labor or may file a private lawsuit. 29 U.S.C. § 2617(a). There is no requirement that an employee pursue an administrative remedy prior to bringing suit under the FMLA. A lawsuit for violation of the FMLA must be brought within two years of the last action the employee contends was a violation of the Act, or within three years if the violation is alleged to be willful. 29 U.S.C. § 2617 (c).

To state a claim for violation of the FMLA, an employee must show that he or she has exercised a protected right under the FMLA, was adversely affected by an employment action, and that either he or she was treated less favorably than an employee who did not request FMLA leave or that there was a causal connection

between the employee's protected activity and the adverse employment action. An employer may defend an action by showing that:

- the employee is not an eligible person under the FMLA
- the reason for taking leave was not a "serious health condition" under the FMLA
- the employer had a legitimate non-discriminatory reason for taking the employment action.

10. What damages are available for violation of the FMLA?

An employer who violates the FMLA is liable to an eligible employee affected by the violation for damages, equitable relief (injunction, reinstatement, etc.), and attorneys' fees, expert witness fees, and costs. Available damages include:

- (a) wages or benefits lost by reason of the violation;
- (b) if wages and benefits were not denied or lost, then actual monetary losses sustained as a direct result of the violation, up to a sum equal to 12 weeks of wages;
- (c) interest on lost wages/benefits or actual monetary losses; and
- (d) liquidated damages equal to the sum of the lost wages/benefits or actual monetary losses and interest. 29 U.S.C. § 2617(a)(1)(A)(i)-(iii). Liquidated damages may be denied by the Court if the employer proves that it acted in good faith and had a reasonable basis for believing that its action was not a violation of the FMLA.

Mechanics of the Act

1. What notices are required of the Employer?

First, all covered employers, regardless of whether or not they have any employees eligible to take leave, must post, in a conspicuous place, a United States Department of Labor-approved notice summarizing the pertinent provisions of the FMLA and

telling employees how to file a complaint with DOL's Wage and Hour Division if they suspect a violation of the Act. An employer can obtain this DOL-approved notice from the DOL website (at <http://www.dol.gov/esa/regs/compliance/posters/pdf/fmlaen.pdf>) or from the company that provides your other workplace notices.

If a significant number of the workforce are not literate in English, the notice must be provided in a language in which the employees are literate. There is a Spanish version of the FMLA notice on the DOL website as well.

An employer who fails to post this notice may not take any adverse action against an employee, including denying FMLA leave, for failing to furnish the employer with advance notice of the need to take leave. Also, if there is a willful failure to post the notice, civil penalties may be imposed on the employer.

If a covered employer with eligible employees has an employee handbook that addresses employment benefits, this handbook has to include an FMLA policy that sets out the employees' entitlements and obligations under the FMLA. It is very important that the FMLA policy in the personnel manual identify the 12-month period that will be used by the employer for calculating FMLA leave. In lieu of having an extensive FMLA policy in the employee handbook, an employer can get informational publications from local DOL Wage and Hour offices to incorporate into the personnel manual.

When an employee requests leave, the employer must provide a written notice to the employee that includes, as appropriate, the following information:

- that the leave will be counted against the employee's annual FMLA leave entitlement;
- any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so;

- the employee’s right to substitute paid leave and whether the employer will require the substitution of paid leave, and the conditions related to any substitution;
- any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments, and the possible consequences of failure to make such payments on a timely basis (i.e., the circumstances under which coverage may lapse);
- any requirement for the employee to present a fitness-for-duty certificate to be restored to employment;
- the employee’s status as a “key employee” and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial;
- the employee’s right to restoration to the same or an equivalent job upon return from leave; and
- the employee’s potential liability for payment of health insurance premiums paid by the employer during the employee’s unpaid FMLA leave if the employee fails to return to work after taking FMLA leave.

The Department of Labor has created a prototype for this notice which may be found on its website. This DOL prototype is WH-381 and is called “Employer Response to Employee Request for Family or Medical Leave.” This notice may be enlarged but not abridged. This notice must be provided to the employee within a “reasonable time” (1 or 2 business days if feasible) of receipt of the employee’s notice of need for leave. If leave has already started, the notice should be mailed to the employee’s address of record.

In addition to these written notice requirements, the Department of Labor’s rules place an affirmative obligation on the employer to responsively answer questions concerning an employee’s rights and responsibilities under the FMLA.

2. What notices are required of the Employee?

An employee may invoke the protections of the FMLA without actually referring to the FMLA or using terms like “serious health

condition.” If an employee requests leave and gives a reason that the employer thinks may be an FMLA-qualifying reason, it is up to the employer to ascertain whether FMLA leave is appropriate. It should waste no time making this determination because the request for leave is the employee’s “notice” that triggers the employer’s obligation to provide the written notice discussed in paragraph 1 of this section.

An employee must give at least 30 days advance notice before FMLA leave is to commence if the need for the leave is foreseeable for the expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or a family member. If 30 days notice is not practicable, notice must be given as soon as practicable. “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 the need for leave is foreseeable but not in time to give 30 days notice, “as soon as practicable” would mean at least verbal notice to the employer within 1-2 business days of when the need for leave became known to the employee.

The employee’s notice need not be in writing and must be sufficient to make the employer aware that the employee needs FMLA-qualifying leave. Notice must include the anticipated timing and length of the leave.

If an employer has a uniform policy for requesting leave, employees may be made to comply with that policy in requesting FMLA leave. An employee’s failure to comply with the employer’s leave request policy does not authorize an employer to disallow FMLA leave if the employee gives timely verbal or other notice. The employee may be disciplined for failing to comply with the employer’s policy.

When an employee requires intermittent FMLA leave for the purpose of receiving medical treatment, the employee must consult with the employer and make a reasonable effort to schedule the leave so as not to disrupt unduly the employer’s operations, subject to the approval of the health care provider. If

the employee does not make this effort, the employer may engage in dialog with the employee and require the employee to attempt to make such arrangements.

FMLA employee notice requirements may be waived by the employer.

An employer may not impose stricter notice requirements on employees than those provided by the FMLA, but, if the employer has a policy with less strict notice requirements for taking leave, those less strict notice requirements will apply. For example, if an employee is going to be using accrued vacation time for a period of FMLA leave and the employer's notice requirement for vacation time is only 2 weeks, then the employee may give only 2 weeks notice instead of the 30 days required by the FMLA. If the FMLA leave is unpaid, then the notice requirements of the FMLA will apply unless the employer has a less strict notice requirement that applies to unpaid leave.

If an employee fails to give 30 days notice for foreseeable leave with no reasonable excuse, the employer may delay the employee's leave until at least 30 days notice has been given. This does not apply if the employer has failed to comply with the employer notice requirements of the FMLA.

3. Who designates the leave as FMLA leave?

It is ALWAYS the obligation of the employer to designate leave, paid or unpaid, as FMLA-qualifying and to give notice of the designation to the employee. In the case of intermittent leave or leave on a reduced schedule, only one notice from the employer is required.

The employer's decision to designate leave as FMLA leave must be based upon information received from the employee or from the employee's spokesperson (i.e., spouse, physician). The employer is allowed to make reasonable inquiries of the employee or the employee's spokesperson in order to make the decision. If an

employee refuses to cooperate with the employer and will not explain the reasons for the requested leave, the leave may be denied.

Once the employer has the knowledge to designate the leave as FMLA leave, it must promptly (within 1-2 business days) provide notice to the employee that the leave is designated as FMLA leave.

If there is a dispute between an employer and an employee as to whether paid leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employer, and such discussions and the decision must be documented.

Currently, DOL rules provide that, if an employer knows that leave is for an FMLA-qualifying reason and fails to designate the leave as FMLA leave, no retroactive designation may be made regardless of whether the employee is still on leave or has returned to work. The employee is still entitled to the protections of the FMLA even though the time will not count against the employee's FMLA leave total. This rule was disapproved by the United States Supreme Court in a case called *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002). The DOL has not acted to revise its rules so employers are operating a bit in the dark here. To be safe, an employer should designate leave to be FMLA leave as soon as the FMLA-qualifying reason for the leave is known.

If an employer learns that leave is for an FMLA-qualifying reason while the employee is out on leave, the FMLA-qualifying leave may be retroactively designated to the extent that the leave period qualified as FMLA leave.

If an employer learns that leave was for an FMLA-qualifying reason after the employee returns to work, a retroactive designation may be made if it is made within 2 business days of the employee's return to work.

If leave was for an FMLA-qualifying reason but the employer was never aware of it, the employee has an obligation to notify the employer within 2 business days of returning to work that the leave was for an FMLA purpose. The employer may then retroactively designate the leave as FMLA leave.

If the employer knows the reason for the leave but is awaiting medical certification or a second or third opinion, a preliminary designation of FMLA leave should be made. Upon receipt of the information, the designation becomes final. If the information does not confirm that the reason for the leave was an FMLA-qualifying reason, the employer must withdraw the preliminary designation and give written notice to the employee.

4. When can intermittent leave or leave on a reduced schedule be taken?

Employees must specially ask for intermittent leave or leave on a reduced schedule and there must be a medically necessary reason for this type of leave. Leave may be taken intermittently or on a reduced leave schedule:

- when medically necessary for planned and/or unanticipated medical treatment of a related serious health condition by or under the supervision of a health care provider or for recovery from treatment or recovery from a serious health condition.
- It may also be taken to provide care or psychological comfort to an immediate family member with a serious health condition.
- Intermittent leave may be taken for a serious health condition which requires treatment by a health care provider periodically rather than for one continuous period of time and may include leave of periods from an hour or more to several weeks.
- Intermittent or reduced schedule leave may be taken for absences where the employee or family member is incapacitated or unable to perform the essential functions

of the position because of a chronic serious health condition even if the employee does not receive treatment by a health care provider.

If the employee establishes the need for this type of leave for the employee's own serious health condition or for the serious health condition of a spouse, child, or parent, the employer must allow this type of leave. Intermittent leave or leave on a reduced schedule may be taken after the birth of a child or for the placement of a child for adoption or foster care only if the employer agrees.

An employee who is entitled to intermittent leave or leave on a reduced schedule must attempt to schedule leave so as not to disrupt the employer's operations. There is no limit on the size of an increment of leave when an employee takes intermittent leave or leave on a reduced schedule, but an employer may limit the increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave, provided it is one hour or less.

5. Medical Certifications and Fitness-for-Duty exams

A medical certification may be required whenever leave is requested for the employee's own serious health condition or in order to care for a spouse, child or parent with a serious health condition. The request for medical certification must be made by the employer in writing. This is a part of the standard notice that is given by the employer when FMLA leave is requested.

The DOL website has a form that can be used by the employer for medical certifications. It is form WH-380 ("Certification of Health Care Provider"), and it contains all the information that is permissible to be obtained from the employer's health care provider for the initial medical certification as well as for any second or third opinions. It is a good practice for the employer to

attach the employee's written job description to this form to enable the health care provider to determine whether the employee is able to perform the functions of his or her job.

When the need for leave is foreseeable and 30 days notice has been given, the medical certification should be provided before leave begins. If this is not possible, the employee should have at least 15 calendar days to produce the medical certification (unless it is not practicable under the particular circumstances despite the employee's diligent good faith efforts). In the case of unforeseen leave, the certification should be provided within two business days after the leave starts.

When the employer provides the written notice of the need for a medical certification, it must also advise the employee of the anticipated consequences of failure to provide adequate certification. Also, if a medical certification is provided but the employer finds it to be incomplete, the employer should advise the employee and give the employee a reasonable opportunity to cure any deficiency. If the certification is complete, no additional information may be sought by the employer. However, with the employee's permission, a health care provider representing the employer may contact the employee's health care provider to clarify and authenticate the certification.

If the employer has reason to doubt the validity of a medical certification, it may require the employee to obtain a second opinion from a health care provider of the employer's choosing and at the employer's expense. This second opinion health care provider may not be employed on a regular basis by the employer. In the event that the first and second opinions differ, the employer may require a third opinion by a health care provider agreed upon by both the employer and the employee and at the employer's expense. The third opinion is binding and final. The employee is entitled to receive a copy of the second and third medical opinions upon request.

The employee is provisionally entitled to leave while the second and third opinions are being obtained. If the leave ultimately turns out not to be FMLA leave, the provisional designation may be revoked.

When an employer has a policy that imposes less stringent requirements for medical certification and the employee is substituting paid leave while on FMLA leave, only the employer's less stringent sick leave certification requirements can be imposed on the employee. It is best practice for an employer to make its personnel policies mimic FMLA requirements.

Recertification may be required under some circumstances. For pregnancy, chronic, or permanent/long-term conditions under continuing supervision of a health care provider, the employer may request recertification no more often than every 30 days and only in connection with an absence by the employee unless the circumstances described in the previous certification have changed significantly (i.e., severity or duration of condition) or the employer receives information that casts doubt upon the employee's stated reason for the absence.

If the minimum duration of incapacity set out in the original medical certification is for over 30 days, then the employer may not request recertification during that 30-day period unless the employee requests an extension of the leave period, the circumstances described in the original certification have changed significantly (i.e., severity or duration), or the employer receives information that casts doubt upon the continuing validity of the certification.

The employer must allow a minimum of 15 calendar days for receipt of the recertification unless it is not practicable under the particular circumstances to do so despite the employee's diligent good faith efforts.

Recertifications are at the employee's expense, and no second or third opinion may be requested in connection with a recertification.

An employer may ask for an entirely new medical certification, with its rights to a second and third opinion as well, once the employee has his or her first absence or makes a first request for leave in a new FMLA year. This is true even if the employer has recently requested and obtained a recertification in the prior leave year.

6. Fitness-for-Duty Exams

In those cases in which the employee took leave on the basis of his or her own serious health condition, 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. If the employer has a personnel manual, it should explain the employer's uniformly applied policy regarding any requirement for fitness-for-duty certification to return to work. If the employer does not have such a uniformly applied policy or practice, it may not require the employee returning from FMLA leave to provide such a certification.

When the employer provides the written notice in response to an employee's request for FMLA leave, any requirement for a fitness-for-duty exam should be contained in the notice.

A fitness for duty certification need only state that the employee is able to return to work. With the employee's permission, a health care provider employed by the employer may contact the employee's health care provider for purposes of clarifying the employee's fitness to return to work.

The employer can delay the employee's return to work until the fitness-for-duty certification is submitted unless the employer

failed to provide the appropriate notice that the exam would be required. If the employer has sought and obtained permission for its own health care provider to contact the employee's health care provider to seek clarification regarding the fitness-for-duty statement, return to work may not be delayed pending this consultation.

If a fitness-for-duty certification is required and the employee never produces the certification, the employee may be terminated in accordance with employer policy.

A fitness-for-duty certification is at the employee's expense.

No fitness-for-duty certification can be required of an employee who is taking FMLA leave on an intermittent basis.