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**Note:** This policy summarizes the Family and Medical Leave Act (FMLA) and implementing regulations, including family and medical leave for an employee seeking leave because of a relative's military service. For provisions on leaves in general, see DEB. For provisions addressing leave for an employee's military service, see DEBB.

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<b>General Provisions</b>	All ESCs are “covered employers” under the FMLA, without regard to the number of employees employed. The term “employer” includes any person who acts directly or indirectly in the interest of an ESC to any of the ESC's employees. <i>29 U.S.C. 2611(4), 2618(a); 29 C.F.R. 825.104(a)</i>
Covered Employers	
“Eligible Employee”	“Eligible employee” means an employee who: <ol style="list-style-type: none"><li>1. Has been employed by an ESC for at least 12 months. The 12 months need not be consecutive;</li><li>2. Has been employed by an ESC for at least 1,250 hours of service during the 12-months immediately preceding the commencement of leave; and</li><li>3. Is employed at a worksite where 50 or more employees are employed by the ESC within 75 miles of that worksite.</li></ol> <p><i>29 U.S.C. 2611(2); 29 C.F.R. 825.110</i></p> <p>[An ESC that has no eligible employees must comply with the requirements at General Notice, below.]</p>
Qualifying Reasons for Leave	An ESC shall grant leave to eligible employees: <ol style="list-style-type: none"><li>1. For the birth of a son or daughter, and to care for the newborn child.</li><li>2. For placement with the employee of a son or daughter for adoption or foster care. [For the definitions of “adoption” and “foster care,” see 29 C.F.R. 825.122]</li><li>3. To care for the employee's spouse, son or daughter, or parent with a serious health condition.</li><li>4. Because of a serious health condition that makes the employee unable to perform the functions of the employee's job. [For the definition of “serious health condition,” see 29 C.F.R. 825.113]</li><li>5. Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty) [see Qualifying Exigency, below]. [For the definition of “military member,” see 29 C.F.R. 825.126(b). For the definition of “covered active duty” and “call to covered active duty status,” see 29 C.F.R. 825.102]</li><li>6. To care for a covered servicemember with a serious injury or illness incurred in the line of duty if the employee is the spouse, son, daughter, parent, or next of kin of the service-</li></ol>

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member. [For the definitions of “covered servicemember” and “serious injury or illness,” see 29 C.F.R. 825.102, .122]

*29 U.S.C. 2612(a); 29 C.F.R. 825.112*

For provisions regarding treatment for substance abuse, see 29 C.F.R. 825.119.

*Qualifying  
Exigency*

An eligible employee may take FMLA leave for one or more of the following qualifying exigencies arising out of the fact that the employee’s spouse, son, daughter, or parent is a military member [see Qualifying Reasons for Leave, above]:

1. Short-notice deployment.
2. Military events and related activities.
3. Childcare and school activities.
4. Financial and legal arrangements.
5. Counseling.
6. Rest and recuperation.
7. Post-deployment activities.
8. Parental care.
9. Additional activities, provided that the ESC and employee agree that the leave shall qualify as an exigency, and agree to both the timing and duration.

*29 C.F.R. 825.126*

*Pregnancy or  
Birth*

Both the mother and father are entitled to FMLA leave to be with a healthy newborn child (i.e., bonding time) during the 12-month period beginning on the date of birth. In addition, the mother is entitled to FMLA leave for incapacity due to pregnancy, for prenatal care, or for her own serious health condition following the birth of the child. The mother is entitled to leave for incapacity due to pregnancy even though she does not receive treatment from a health-care provider during the absence, and even if the absence does not last for more than three consecutive calendar days. The husband is entitled to FMLA leave if needed to care for his pregnant spouse who is incapacitated during her prenatal care, or following the birth of a child if the spouse has a serious health condition. [For the definition of “needed to care for,” see 29 C.F.R. 825.124] *29 C.F.R. 825.120*

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Definitions

*“Equivalent Position”*

An “equivalent position” is one that is virtually identical to the employee's former position in terms of pay, benefits, and working conditions, including privileges, perquisites, and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority. *29 C.F.R. 825.215(a)*

*“Next of Kin”*

“Next of kin of a covered servicemember” (for purposes of military caregiver leave) means:

1. The blood relative specifically designated in writing by the covered servicemember as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. The designated individual shall be deemed to be the covered servicemember's only next of kin; or
2. When no such designation has been made, the nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority:
  - a. Blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions,
  - b. Brothers and sisters,
  - c. Grandparents,
  - d. Aunts and uncles, and
  - e. First cousins.

If there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously.

*29 C.F.R. 825.127(b)(3)*

*“Parent”*

“Parent” (for purposes of family, medical, and qualifying exigency leave) means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee when the employee was a son or daughter. This term does not include parents “in law.” *29 C.F.R. 825.122(b)*

For the definition of “parent of a covered servicemember” for purposes of military caregiver leave, see *29 C.F.R. 825.127(d)(2)*.

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<i>“Son or Daughter”</i>	<p>“Son or daughter” (for purposes of family and medical leave) means a biological, adopted, or foster child; a stepchild; a legal ward; or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and “incapable of self-care because of a mental or physical disability” at the time that FMLA leave is to commence. <i>29 C.F.R. 825.122</i></p> <p>For the definition of “son or daughter on active duty or call to active duty status” for purposes of qualifying exigency leave, see <i>29 C.F.R. 825.122</i>.</p> <p>For the definition of “son or daughter of a covered servicemember” for purposes of military caregiver leave, see <i>29 C.F.R. 825.127(d)(1)</i>.</p>
<i>“Spouse”</i>	<p>“Spouse” means a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including common law marriage in states where it is recognized. <i>29 C.F.R. 825.122</i></p>
<b>Leave Entitlement and Use</b>	<p>Except in the case of military caregiver leave, an eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks of leave during a 12-month period for any one or more of the qualifying reasons.</p>
Amount of Leave	<p>A husband and wife who are employed by the same ESC may be limited to a combined total of 12 weeks of FMLA leave during any 12-month period if leave is taken for the birth of a son or daughter, the placement of a child for adoption or foster care, or to care for a parent with a serious health condition.</p> <p><i>29 U.S.C. 2612(a), (f); 29 C.F.R. 825.120(a)(3), .200, .201</i></p>
<i>Determining the 12-Month Period</i>	<p>Except with respect to military caregiver leave, an ESC may choose any one of the following methods for determining the “12-month period” in which the 12 weeks of leave entitlement occurs:</p> <ol style="list-style-type: none"><li data-bbox="561 1457 870 1488">1. The calendar year;</li><li data-bbox="561 1514 1386 1581">2. Any fixed 12-month “leave year,” such as a fiscal year, or a year starting on an employee's “anniversary” date;</li><li data-bbox="561 1606 1378 1673">3. The 12-month period measured forward from the date any employee's first FMLA leave begins; or</li><li data-bbox="561 1698 1427 1766">4. A “rolling” 12-month period measured backward from the date an employee uses any FMLA leave.</li></ol> <p><i>29 C.F.R. 825.200(b)</i></p>

*Military Caregiver  
Leave*

In the case of military caregiver leave, an eligible employee's FMLA leave entitlement is limited to a total of 26 workweeks of leave during a "single 12-month period." The "single 12-month period" is measured forward from the date an employee's first FMLA leave to care for the covered servicemember begins, regardless of the method used by the ESC to determine the 12-month period for other FMLA leaves. During the "single 12-month period," an eligible employee's FMLA leave entitlement is limited to a combined total of 26 workweeks of FMLA leave for any qualifying reason. *29 C.F.R. 825.200(f), (g)*

A husband and wife who are employed by the same ESC may be limited to a combined total of 26 weeks of FMLA leave during the "single 12-month period" if leave is taken as military caregiver leave, for the birth of a son or daughter, for the placement of a child for adoption or foster care, or to care for a parent with a serious health condition. *29 C.F.R. 825.127(e)(3)*

*Summer  
Vacation and  
Other Extended  
Breaks*

If an ESC's activity temporarily ceases and employees generally are not expected to report for work for one or more weeks (e.g., a school closing for two weeks for the Christmas/New Year holiday), those days do not count against the employee's FMLA leave entitlement. Similarly, the period during the summer vacation when the employee would not have been required to report for duty is not counted against the employee's FMLA leave entitlement. *29 C.F.R. 825.200(h), .601(a)*

Intermittent or  
Reduced Leave  
Schedule

FMLA leave may be taken intermittently or on a reduced leave schedule under certain circumstances. "Intermittent leave" is FMLA leave taken in separate blocks of time due to a single qualifying reason. A "reduced leave schedule" is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday.

For leave taken because of the employee's own serious health condition, to care for a spouse, parent, son, or daughter with a serious health condition, or military caregiver leave, there must be a medical need for leave and it must be that such medical need can be best accommodated through an intermittent or reduced leave schedule. Leave due to a qualifying exigency may also be taken on an intermittent or reduced schedule basis.

When leave is taken after the birth of a healthy child or placement of a healthy child for adoption or foster care, an employee may take leave intermittently or on a reduced leave schedule only if the ESC agrees.

*29 U.S.C. 2612(b); 29 C.F.R. 825.102.202*

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<i>Transfer to Alternative Position</i>	If an employee requests intermittent or reduced schedule leave that is foreseeable based on planned medical treatment, the ESC may require the employee to transfer temporarily to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. <i>29 U.S.C. 2612(b)(2); 29 C.F.R. 825.204</i>
<i>Calculating Leave Use</i>	When an employee takes leave on an intermittent or reduced schedule, only the amount of leave actually taken may be counted toward the employee's leave entitlement. An ESC must account for intermittent or reduced schedule leave using an increment no greater than the shortest period of time that the ESC uses to account for use of other forms of leave, provided the increment is not greater than one hour. <i>29 C.F.R. 825.205</i>
Substitution of Paid Leave	Generally, FMLA leave is unpaid leave. However, an employee may choose to substitute accrued paid leave for unpaid FMLA leave. If an employee does not choose to substitute accrued paid leave, the ESC may require the employee to do so. The term "substitute" means that the paid leave provided by the ESC, and accrued pursuant to established policies of the ESC, will run concurrently with the unpaid FMLA leave. An employee's ability to substitute accrued paid leave is determined by the terms and conditions of the ESC's normal leave policy. <i>29 U.S.C. 2612(d); 29 C.F.R. 825.207(a)</i>
<i>Compensatory Time</i>	If an employee requests and is permitted to use accrued compensatory time to receive pay during FMLA leave, or if an ESC requires such use, the compensatory time taken may be counted against the employee's FMLA leave entitlement. <i>29 C.F.R. 825.207(f)</i>
<i>FMLA and Workers' Compensation</i>	<p>A serious health condition may result from injury to the employee "on or off" the job. If the ESC designates the leave as FMLA leave, the leave counts against the employee's FMLA leave entitlement. Because the workers' compensation absence is not unpaid, neither the employee nor the ESC may require the substitution of paid leave. However, an ESC and an employee may agree, where state law permits, to have paid leave supplement workers' compensation benefits.</p> <p>If the health-care provider treating the employee for the workers' compensation injury certifies that the employee is able to return to a "light duty job" but is unable to return to the same or equivalent job, the employee may decline the ESC's offer of a "light duty job." As a result, the employee may lose workers' compensation payments, but is entitled to remain on unpaid FMLA leave until the employee's FMLA leave entitlement is exhausted. As of the date workers' compensation benefits cease, the substitution provision</p>

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becomes applicable and either the employee may elect or the ESC may require the use of accrued paid leave.

*29 C.F.R. 825.207(e)*

Maintenance of  
Health Benefits

During any FMLA leave, an ESC 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.

An employee may choose not to retain group health plan coverage during FMLA leave. However, when the employee returns from leave, the employee is entitled to be reinstated on the same terms as before taking leave without any qualifying period, physical examination, exclusion of pre-existing conditions, and the like.

*29 U.S.C. 2614(c); 29 C.F.R. 825.209*

*Payment of  
Premiums*

During FMLA leave, the employee must continue to pay the employee's share of group health plan premiums. If premiums are raised or lowered, the employee would be required to pay the new premium rates. *29 C.F.R. 825.210*

*Failure to Pay  
Premiums*

Unless an ESC has an established policy providing a longer grace period, an ESC's obligations to maintain health insurance coverage cease if an employee's premium payment is more than 30 days late. In order to terminate the employee's coverage, the ESC must provide written notice to the employee that the payment has not been received. Such notice must be mailed to the employee at least 15 days before coverage is to cease, advising that coverage will be dropped on a specified date at least 15 days after the date of the letter unless the payment has been received by that date. Coverage for the employee may be terminated at the end of the 30-day grace period, if the required 15-day notice has been provided.

Upon the employee's return from FMLA leave, the ESC must still restore the employee to coverage/benefits equivalent to those the employee would have had if leave had not been taken and the premium payment(s) had not been missed. The employee may not be required to meet any qualification requirements imposed by the plan, including any new preexisting condition waiting period, to wait for an open season, or to pass a medical examination to obtain reinstatement of coverage.

*29 C.F.R. 825.212*

*Recovery of  
Benefit Cost*

If an employee fails to return to work after FMLA leave has been exhausted or expires, an ESC may recover from the employee its share of health plan premiums during the employee's unpaid FMLA

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	<p>leave, unless the employee's failure to return is due to one of the reasons set forth in the regulations. An ESC may not recover its share of health insurance premiums for any period of FMLA leave covered by paid leave. <i>29 C.F.R. 825.213</i></p>
<p>Right to Reinstatement</p>	<p>On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave began, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee is entitled to reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence. However, an employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. <i>29 C.F.R. 825.214, .216(a)</i></p>
<p><i>Moonlighting During FMLA Leave</i></p>	<p>If an ESC has a uniformly applied policy governing outside or supplemental employment, the policy may continue to apply to an employee while on FMLA leave. An ESC that does not have such a policy may not deny FMLA benefits on the basis of outside or supplemental employment unless the FMLA leave was fraudulently obtained. <i>29 U.S.C. 2618(e); 29 C.F.R. 825.216(e)</i></p>
<p><i>Reinstatement of School Employees</i></p>	<p>An ESC shall make the determination of how an employee is to be restored to "an equivalent position" upon return from FMLA leave on the basis of established school board policies and practices. The "established policies" must be in writing, must be made known to the employee before the taking of FMLA leave, and must clearly explain the employee's restoration rights upon return from leave. Any established policy which is used as the basis for restoration of an employee to "an equivalent position" must provide substantially the same protections as provided in the FMLA. For example, an employee may not be restored to a position requiring additional licensure or certification. <i>29 C.F.R. 825.604</i></p>
<p><i>Pay Increases and Bonuses</i></p>	<p>An employee is entitled to any unconditional pay increases that may have occurred during the FMLA leave period, such as cost of living increases. Pay increases conditioned upon seniority, length of service, or work performed must be granted in accordance with the ESC's policy or practice with respect to other employees on an equivalent leave status for a reason that does not qualify as FMLA leave.</p> <p>Equivalent pay includes any bonus or payment, whether it is discretionary or non-discretionary. However, if a bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold, or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied, unless otherwise paid to employees on an equiva-</p>

lent leave status for a reason that does not qualify as FMLA leave. For example, if an employee who used paid vacation leave for a non-FMLA purpose would receive the payment, then the employee who used paid vacation leave for an FMLA-protected purpose also must receive the payment.

*29 C.F.R. 825.215(c)*

*Key Employees*

An ESC may deny job restoration to a key employee if such denial is necessary to prevent substantial and grievous economic injury to the operations of the ESC. *29 U.S.C. 2614(b); 29 C.F.R. 825.217-.219*

**Notices and Medical Certification**

Employer Notices

*General Notice*

Every covered employer must post on its premises a notice explaining the FMLA's provisions and providing information concerning the procedures for filing complaints with the Department of Labor's Wage and Hour Division. The notice must be posted prominently where it can be readily seen by employees and applicants for employment. Covered employers must post this general notice even if no employees are eligible for FMLA leave.

If an ESC has any eligible employees, it shall also:

1. Include the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist; or
2. Distribute a copy of the general notice to each new employee upon hiring.

Electronic posting is sufficient if it meets the other requirements of this section.

If an ESC's workforce is comprised of a significant portion of workers who are not literate in English, the ESC shall provide the general notice in a language in which the employees are literate.

*29 C.F.R. 825.300(a)*

*Eligibility Notice*

When an employee requests FMLA leave, or when an ESC acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the ESC must notify the employee of the employee's eligibility to take FMLA leave. If the employee is not eligible for FMLA leave, the notice must state at least one reason why the employee is not eligible.

The ESC must provide the eligibility notice within five business days, absent extenuating circumstances. Notification of eligibility may be oral or in writing. The ESC shall translate the notice in any situation in which it is required to translate the general notice.

*29 C.F.R. 825.300(b)*

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<i>Rights and Responsibilities Notice</i>	<p>Each time an ESC provides an eligibility notice to an employee, the ESC shall also provide a written rights and responsibilities notice. The rights and responsibilities notice must include the information required by the FMLA regulations at 29 C.F.R. 825.300(c)(1). The notice may be distributed electronically if it meets the other requirements of this section. The ESC shall translate the notice in any situation in which it is required to translate the general notice. <i>29 C.F.R. 825.300(c)</i></p>
<i>Designation Notice</i>	<p>When an ESC has enough information to determine whether leave is being taken for an FMLA-qualifying reason, the ESC must notify the employee whether the leave will be designated as FMLA leave. If the ESC determines that the leave will not be designated as FMLA-qualifying, the ESC must notify the employee of that determination. Absent extenuating circumstances, an ESC must provide the designation notice within five business days.</p> <p>The designation notice must include the information required by the FMLA regulations at 29 C.F.R. 825.300(d)(1) (substitution of paid leave), (d)(3) (fitness for duty certification), and (d)(6) (amount of leave charged against FMLA entitlement). For further provisions on designation of leave, see 29 C.F.R. 825.301.</p> <p><i>29 C.F.R. 825.300(d)</i></p>
<i>Retroactive Designation</i>	<p>An ESC may retroactively designate leave as FMLA leave, with appropriate notice to the employee, if the ESC's failure to timely designate leave does not cause harm or injury to the employee. In addition, an ESC and an employee may agree that leave will be retroactively designated as FMLA leave. <i>29 C.F.R. 825.301(d)</i></p>
Employee Notice	<p>An employee giving notice of the need for FMLA leave must state a qualifying reason for the leave and otherwise satisfy the requirements for notice of foreseeable and unforeseeable leave, below. The employee does not need to expressly assert rights under the Act or even mention the FMLA. <i>29 C.F.R. 825.301</i></p>
<i>Foreseeable Leave</i>	<p>An employee must provide at least 30 days' advance notice before FMLA leave is to begin if the need for leave is foreseeable based upon an expected birth, placement for adoption or foster care, or planned medical treatment of the employee, a family member, or a covered servicemember. If 30 days' notice is not practicable, the employee must give notice as soon as practicable. For leave due to a qualifying exigency, the employee must provide notice as soon as practicable regardless of how far in advance the leave is foreseeable.</p> <p>When planning medical treatment, the employee must consult with the ESC and make a reasonable effort to schedule the treatment</p>

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so as not to disrupt unduly the ESC's operations, subject to the approval of the health-care provider.

*29 C.F.R. 825.302*

*Unforeseeable  
Leave*

When the approximate timing of leave is not foreseeable, an employee must provide notice to the ESC as soon as practicable under the facts and circumstances of the particular case. It generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the ESC's usual and customary notice requirements applicable to such leave. *29 C.F.R. 825.303*

*Compliance with  
ESC  
Requirements*

An ESC may require an employee to comply with its usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. If an employee does not comply with usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA leave may be delayed or denied. *29 C.F.R. 825.302(d)–.303(c)*

Certification of  
Leave

An ESC may require that an employee's FMLA leave be supported by certification, as described below. The ESC must give notice of a requirement for certification each time certification is required. At the time the ESC requests certification, the ESC must advise the employee of the consequences of failure to provide adequate certification. *29 C.F.R. 825.305(a)*

*Timing*

In most cases, the ESC should request certification at the time the employee gives notice of the need for leave or within five business days thereafter or, in the case of unforeseen leave, within five business days after the leave commences. The ESC may request certification at a later date if the ESC later has reason to question the appropriateness of the leave or its duration. The employee must provide the requested certification to the ESC within 15 calendar days after the ESC's request, unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts. *29 C.F.R. 825.305(b)*

*Incomplete or  
Insufficient  
Certification*

The ESC shall advise an employee if it finds a certification incomplete or insufficient and shall state in writing what additional information is necessary to make the certification complete and sufficient. The ESC must provide the employee with seven calendar days (unless not practicable under the particular circumstances despite the employee's diligent, good faith efforts) to cure any such deficiency.

A certification is "incomplete" if one or more of the applicable entries have not been completed. A certification is "insufficient" if it is complete, but the information provided is vague, ambiguous, or

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non-responsive. A certification that is not returned to the ESC is not considered incomplete or insufficient, but constitutes a failure to provide certification.

*29 C.F.R. 825.305(c)*

*Medical  
Certification of  
Serious Health  
Condition*

When leave is taken because of an employee's own serious health condition, or the serious health condition of a family member, an ESC may require the employee to obtain medical certification from a health-care provider. An ESC may use DOL optional form WH-380E when the employee needs leave due to the employee's own serious health condition and optional form WH-380F when the employee needs leave to care for a family member with a serious health condition. An ESC may not require information beyond that specified in the FMLA regulations.

An employee may choose to comply with the certification requirement by providing the ESC with an authorization, release, or waiver allowing the ESC to communicate directly with the health-care provider.

For the definition of "health-care provider," see 29 C.F.R. 825.125.

*29 C.F.R. 825.306*

*Genetic  
Information*

An ESC subject to the Genetic Information Nondiscrimination Act (GINA) shall comply with the GINA rules with respect to a request for medical information. [See DAB at Safe Harbor] *29 C.F.R. 1635.8(b)(1)(i)(A)*

*Authentication  
and Clarification*

If an employee submits a complete and sufficient certification signed by the health-care provider, an ESC may not request additional information from the health-care provider. However, the ESC may contact the health-care provider for purposes of clarification and authentication of the certification after the ESC has given the employee an opportunity to cure any deficiencies, as set forth above. To make such contact, the ESC must use a health-care provider, a human resources professional, a leave administrator, or a management official. Under no circumstances may the employee's direct supervisor contact the employee's health-care provider.

"Authentication" means providing the health-care provider with a copy of the certification and requesting verification that the information on the form was completed and/or authorized by the health-care provider who signed the document; no additional medical information may be requested.

"Clarification" means contacting the health-care provider to understand the handwriting on the certification or to understand the meaning of a response. An ESC may not ask the health-care pro-

vider for additional information beyond that required by the certification form. The requirements of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule must be satisfied when individually identifiable health information of an employee is shared with an ESC by a HIPAA-covered health-care provider.

*29 C.F.R. 825.307(a)*

*Second and Third  
Opinions*

If the ESC has reason to doubt the validity of a medical certification, the ESC may require the employee to obtain a second opinion at the ESC's expense. If the opinions of the employee's and the ESC's designated health-care providers differ, the ESC may require the employee to obtain certification from a third health-care provider, again at the ESC's expense. *29 C.F.R. 825.307(b), (c)*

*Foreign Medical  
Certification*

If the employee or a family member is visiting another country, or a family member resides in another country, and a serious health condition develops, the ESC shall accept medical certification as well as second and third opinions from a health-care provider who practices in that country. If the certification is in a language other than English, the employee must provide the ESC with a written translation of the certification upon request. *29 C.F.R. 825.307(f)*

*Recertification*

An ESC may request recertification no more often than every 30 days and only in connection with an absence by the employee, except as set forth in the FMLA regulations. The ESC must allow at least 15 calendar days for the employee to provide recertification.

As part of the recertification for leave taken because of a serious health condition, the ESC may provide the health-care provider with a record of the employee's absence pattern and ask the health-care provider if the serious health condition and need for leave is consistent with such a pattern.

*29 C.F.R. 825.308*

*Certification—  
Qualifying  
Exigency Leave*

The first time an employee requests leave because of a qualifying exigency, an ESC may require the employee to provide a copy of the military member's active duty orders or other documentation issued by the military, which indicates that the military member is on covered active duty or call to covered active duty status, and the dates of the covered military member's covered active duty service.

The ESC may also require that the leave be supported by a certification that addresses the information at 29 C.F.R. 825.309(b). The ESC may use DOL optional form WH-384, or another form containing the same basic information, for this certification. The ESC may not require information beyond that specified in the regulations.

*29 C.F.R. 825.309*

*Certification—  
Military Caregiver  
Leave*

When an employee takes military caregiver leave, an ESC may require the employee to obtain a certification completed by an authorized health-care provider of the covered servicemember. In addition, the ESC may request that the employee and/or covered servicemember address in the certification the information at 29 C.F.R. 825.310(c). The ESC may also require the employee to provide confirmation of a covered family relationship to the seriously injured or ill servicemember.

An ESC may use DOL optional form WH-385, or another form containing the same basic information, for this certification. The ESC may not require information beyond that specified in the regulations. An ESC must accept as sufficient certification “invitational travel orders” (“ITOs”) or “invitational travel authorizations” (“ITAs”) issued to any family member to join an injured or ill servicemember at his or her bedside.

An ESC may seek authentication and/or clarification of the certification under the procedures described above. Second and third opinions, and recertifications, are not permitted for leave to care for a covered servicemember.

*29 C.F.R. 825.310*

*Intent to Return  
to Work*

An ESC may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work. The ESC's policy regarding such reports may not be discriminatory and must take into account all of the relevant facts and circumstances related to the individual employee's leave situation. *29 C.F.R. 825.311*

*Fitness for Duty  
Certification*

As a condition of restoring an employee who took FMLA leave due to the employee's own serious health condition, an ESC may have a uniformly applied policy or practice that requires all similarly situated employees (i.e., same occupation, same serious health condition) 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. An ESC may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. *29 C.F.R. 825.312*

*Failure to Provide  
Certification*

If the employee fails to provide the ESC with a complete and sufficient certification, despite the opportunity to cure, or fails to provide any certification, the ESC may deny the taking of FMLA leave. This provision applies in any case where an ESC requests a certification, including any clarifications necessary to determine if certifications are authentic and sufficient. *29 C.F.R. 825.305*

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	<p>For failure to provide timely certification of foreseeable leave, see 29 C.F.R. 825.313(a). For failure to provide timely certification of unforeseeable leave, see 29 C.F.R. 825.313(b). For failure to provide timely recertification, see 29 C.F.R. 825.313(c). For failure to provide timely fitness-for-duty certification, see 29 C.F.R. 825.313(d).</p>
<p><b>Miscellaneous Provisions</b></p>	
<p>Records</p>	<p>An ESC shall make, keep, and preserve records pertaining to its obligations under the FMLA in accordance with the recordkeeping requirements of the Fair Labor Standards Act (FLSA) and the FMLA regulations. An ESC shall keep these records for no less than three years and make them available for inspection, copying, and transcription by representatives of the DOL upon request.</p> <p>If the ESC is preserving records electronically, the ESC must comply with 29 C.F.R. 825.500(b). An ESC that has eligible employees must maintain records with the data set forth at 29 C.F.R. 825.500(c). An ESC that has no eligible employees must maintain just the data at 29 C.F.R. 825.500(c)(1). For ESCs in a joint employment situation, see 29 C.F.R. 825.500(e).</p> <p>Records and documents relating to certifications, recertifications, or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files.</p> <p>If GINA is applicable, records and documents created for purposes of FMLA leave that contain family medical history or genetic information shall be maintained in accordance with the confidentiality requirements of GINA [see 29 C.F.R. 1635.9], which permit such information to be disclosed consistent with the requirements of the FMLA. [For information regarding GINA, see DAB(LEGAL)]</p> <p>If the Americans with Disabilities Act (ADA) is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements [see 29 C.F.R. 1630.14(c)(1)], except as set forth in this section of the regulations.</p> <p><i>29 C.F.R. 825.500</i></p>
<p>Prohibition Against Discrimination and Retaliation</p>	<p>The FMLA prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights. <i>29 U.S.C. 2615; 29 C.F.R. 825.220</i></p>