

## Family Medical Leave Checklist

This checklist should be used as a guide when processing any request for Family Medical Leave Act (FMLA) leave. Each of these criteria must be met prior to granting FMLA leave. If you have any questions regarding employee eligibility for FMLA leave, please contact Natividad Valdez, Esq. Phone: 360-352-3304 Email: [natividadvaldez@wha.org](mailto:natividadvaldez@wha.org)

### Employee Request for FMLA Leave

#### 1) Have I told my employees about their rights under the FMLA?

The employer must include a FMLA policy in the employee handbook or if there is not an employee handbook the employer must provide written notice of FMLA rights. The Employer must post a notice summarizing applicable provisions of FMLA, notice of FMLA rights, obligations, and designations after an employee requests leave, notice of medical certification and fitness for duty requirements, and notice of key employee designation.

#### 2) Are you a covered employer?

A covered employer has at least 50 employees for each working day of each of 20 or more calendar work weeks in the current or preceding calendar year. This means that many employers with fluctuating seasonal workforces are covered even though they sometimes have fewer than 50 employees.

#### 3) Is the employee eligible for FMLA leave?

FMLA leave is available to those employees who work at a site with 50 or more employees or at a worksite that is within 75 miles of a worksite that has 50 or more employees. The employee must have also been employed by the employer for at least 12 months (not necessarily continuous or consecutive) and completed at least 1,250 hours of work in the preceding twelve months (the hours must be hours actually worked, vacation and sick time do not count toward the requirement).

#### 4) Why is the employee requesting leave?

The FMLA provides up to 12 weeks of leave in a 12-month period (employer may choose a calendar year, year based upon the employee's anniversary date, or a rolling method). FMLA leave may be provided for:

- an employee's own **serious health condition** that makes the employee unable to perform the essential functions of the job;
- care for the employee's spouse, child or parent with a **serious health condition**; or
- care for a child after birth or placement for adoption or foster care (if both parents work for the same employer, and are both eligible for FMLA leave, these two employees are jointly entitled to a total of 12 weeks leave for the new child).

**5) Does the employee want the FMLA leave to care for the serious health condition of a spouse, child or parent?**

The term "parent" does not include a parent "in-law". The terms son or daughter do not include individuals age 18 or over unless they are "incapable of self-care" because of mental or physical disability that limits one or more of the "major life activities" as those terms are defined in regulations issued by the Equal Employment Opportunity Commission under the [Americans With Disabilities Act \(ADA\)](#).

**6) Does the employee or the employee's spouse, child or parent have a serious health condition?**

A serious health condition is an illness, injury, impairment, or physical or mental condition that involves:

- Any period of incapacity (inability to work, attend school or perform other regular daily activities due to the serious health condition) or treatment related to inpatient care (overnight stay in the hospital).
- Absence of more than three consecutive calendar days plus treatment by a health care provider. Meaning, a period of incapacity of more than 3 consecutive calendar days and any subsequent treatment or period of incapacity that also involves:
  - Two or more treatments by a health care provider or by a nurse or physician's assistant under the direct supervision of the health care provider; OR
  - 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 (e.g. a course of medication or therapy to resolve the health condition); OR
  - Any period of incapacity due to pregnancy or for prenatal care.
- Any period of incapacity due to a chronic serious health condition - continues over extended period of time, requires periodic visits to health care provider, and may involve occasional episodes of incapacity (e.g. asthma, diabetes, or epilepsy).
- A period of incapacity due to a permanent or long-term condition requiring supervision for which treatment may not be effective (e.g. a severe stroke, terminal stages of an illness).
- Any period of absence to receive multiple treatments for non-chronic conditions, including restorative surgery after an accident or other injury or for a condition that would likely result in a period of incapacity for more than three days if not treated (e.g. burn treatments, chemotherapy, or physical therapy for severe arthritis).

**7) Have I asked the employee for medical certification to ensure the validity of the employee's request for FMLA leave?**

An employer can request medical certification from the employee's health care provider for leave taken. A second medical opinion may be obtained at the employer's expense. A third opinion may be obtained with a physician that both the employer and employee agree upon, however it is at the employer's expense and is considered binding. Request for certification must be in writing, within two days of notice of leave and must allow the employee at least 15 days to return it. The employer may not contact the health care provider without a release from the employee.

### **8) Is the medical certification complete?**

A certification for the employee's own serious health condition should include:

- The identity of the health care provider and the type of medical practice;
- What part of the definition of "serious health condition" applies to the employee and the medical facts that support the certification, including a brief statement as to how the medical facts meet the criteria of a "serious health condition;"
- The approximate date the serious health condition commenced, and its probable duration, including the probable duration of the patient's present incapacity;
- Whether intermittent leave or reduced leave would be necessary and if so, the duration;
- If the condition is pregnancy or a chronic condition within the definition (above), whether the employee is presently incapacitated and the likely duration and frequency of episodes of incapacity;
- If additional treatments will be required for the condition, an estimate of the probable number and interval between such treatments, or estimated dates of the treatment if known;
- A general description of the period of the regimen of continuing treatment;
- Whether the employee is unable to perform the essential functions of his/her job.

If leave is required to care for a family member of the employee with a serious health condition the certification should include:

- Whether the patient requires assistance for basic medical or personal needs, for safety, or for transportation; or if not, whether the employee's presence to provide psychological comfort would be beneficial to the patient or assist in the patient's recovery;
- The employee's statement of the form of care he or she will provide and an estimate of the time period;
- If the care will be needed intermittently or on a reduced leave schedule basis and the probable duration.

### **9) Does the employee want FMLA leave for the care for a child after birth, placement for adoption or foster care or for disability due to birth or pregnancy?**

Pregnancy disability leave or maternity leave for the birth of a child would be considered qualifying FMLA leave for a serious health condition and may be counted in the 12 weeks of leave so long as the employer properly notifies the employee in writing of the designation. Remember that in Washington female employees who suffer from sickness or temporary disability related to pregnancy or childbirth are eligible for leave **in addition** to FMLA leave. Also note that in October 2009, employees in Washington will be eligible for **paid** leave for the birth of the child of the employee and in order to care for that child; or because of the placement of a child with the employee for adoption.

### **10) Has the employee given proper notice for the desired FMLA leave?**

An employee must provide 30 days notice if the need for leave is foreseeable. For unforeseeable leave, the employee must notify the employer as soon as reasonably practicable which is generally one or two business days after the employee learns of the need for leave.

**11) Have I told the employee that their leave is designated as FMLA leave?**

Generally written notice must be provided to employees requesting leave under the FMLA within one or two business days after the employer receives the request for leave. However, the United States Supreme Court invalidated a Department of Labor regulation that provided that if notice was not given, the leave did not count against the 12 weeks of FMLA leave. Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81 (2002). As a result, an employer's failure to give timely notice would extend the leave to the extent that the employee could show prejudice by the lack of notice. Nonetheless, providing the required notice is imperative to avoid unnecessary lawsuits.

**12) Does the employee have any accrued paid time off?**

The FMLA only requires the employer to provide unpaid leave. However, the law permits an employee to elect, or the employer to require the employee, to use accrued paid leave, such as vacation or sick leave, for some or all of the FMLA leave period. When paid leave is substituted for unpaid FMLA leave, it may be counted against the 12-week FMLA leave entitlement if the employee is properly notified of the designation when the leave begins. Accordingly, employers should require its employees to use their paid leave to the extent they have it.

**13) Have I properly stored any information (notes, emails, medical certification, and any other communication) related to the employee's FMLA leave?**

Records and documents relating to medical certifications, re-certifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in a locked cabinet **separate** from the personnel files. Only those with a need-to-know should have access to the information in the FMLA records. Need-to-know should be limited to:

- Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
- Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

**14) Have I retained health insurance for the employee?**

The FMLA does not require the employer to provide health insurance coverage, but it does have requirements for employers who already provide a group health insurance plan. The employer must continue any employee group health insurance plan for the employee for the duration of the leave under the same conditions as prior to the employee's leave. Accordingly, if the employee paid some or all of the premiums, it must continue to do so during the FMLA leave. If you make changes to your health insurance coverage, the employee on FMLA leave is entitled to benefit from these changes to the same extent as a current employee. Further, you must notify any employee who is out on FMLA leave of any changes.

## **Employee's Return from FMLA Leave**

### **1) Have I asked the employee for a fitness for duty certification?**

An employer may require an employee to provide fitness for duty certification upon return; however it must be uniformly applied for all employees. If an employer requires certification, the employee must be made aware at the time the leave is designated as FMLA leave. An employer may not seek a second or third opinion in a fitness for duty certification. The certification may only request information related to the employee's particular health condition for which FMLA leave was taken and need only be a simple statement from a health care provider that the employee is able to return to work. A fitness for duty certification may not be required for return from intermittent leave.

### **2) Is the employee eligible for their same position upon return from FMLA leave?**

Employees returning from FMLA leave must generally be restored to the same or 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, pre-requisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority. If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, etc., as a result of the leave, the employee shall be given a reasonable opportunity to fulfill those conditions upon return to work.

An employee on FMLA leave has no greater rights to job protection than employees who were not on leave. As such, if there is a layoff or reorganization and the employee was selected for layoff without regard to their FMLA leave, the employee may lose reinstatement rights. The employee is not entitled to reinstatement if the employee cannot perform the essential functions of the job. Key employees (a "key employee" is a salaried FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed by the employer within 75 miles of the employee's worksite) may be exempt from reinstatement requirements if they are informed of that **prior** to leave.