

**FMLA and New Jersey Paid Family Leave Update:
New Responsibilities for Employers**

**An Overview of the Family and Medical Leave Act of
1993 For In-House Counsel and Human Resources
Personnel**

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I. Overview of the Family and Medical Leave Act of 1993 (FMLA)

The FMLA was enacted in 1993 in recognition of the fact that, in an age when all adults in many families are in the work force, employer's leave policies often do not permit employees to balance their family obligations and their work responsibilities. In addition, a lack of job security for employees who need to miss work during their own serious illness or that of an immediate family member, places an undue hardship on single-parent families, and families who depend on two incomes to make ends meet. Id. Congress also realized that the burden for care of children and dependent family members often falls disproportionately on women and may encourage employers to discriminate against female employees. Family and Medical Leave Act of 1993, 29 U.S.C. §2601(5-6). To alleviate these concerns Congress enacted the FMLA to allow employees a reasonable amount of time off from work to deal with a medical condition, while maintaining a degree of job security.

Generally, the FMLA requires that an employer grant an eligible employee up to 12 workweeks of leave during any 12 month period for reasons of birth, adoption or foster placement of a child in the home, or as a result of the need to care for oneself or an immediate family member in the event of a serious health condition. See 29 U.S.C. §2612. The employee can request intermittent or reduced leave, rather than a continuous period of leave, if medically necessary. §2612(b). The Act also requires that the employer retain health benefits in any group health plan for an employee during FMLA

leave. 29 U.S.C. §2614(c). In addition, the Act provides job security as it mandates an employee be returned to the same or an equivalent position when the FMLA leave ends.

29 U.S.C. §2614(e).

A. Employers Under the Act

The Act applies to private employers if they employ more than 50 people each day during 20 or more calendar workweeks in the current or preceding calendar year. 29 U.S.C. §2611. The FMLA also applies to public agencies, federal, state and local governments and Territories or possessions of the United States. 29 C.F.R. §825.108(a) (2000). All public agencies (state or Federal) are covered regardless of the number of employees. 29 C.F.R. §825.108(d).

B. Employees Under the Act

Eligible employees under the Act are those employees who have been employed for at least 12 months by a covered employer and have worked at least 1,250 hours during the 12 month period immediately preceding the commencement of leave. In addition, to be eligible, an employee must be stationed at a worksite where at least fifty other employees are employed by the employer within a seventy-five mile radius. 29 C.F.R. §825.110. The employer has the burden of showing whether an employee is eligible. The employer can use any accurate method of accounting of actual hours worked that is allowed under the Fair Labor Standards Act. §825.110(c). The regulations state that once the employer designates an employee as “eligible” under the Act, it cannot later dispute that eligibility. §825.110(d).

1. Eligibility For Leave

The Second Circuit has held that an employer can challenge employee eligibility for FMLA leave, even after it has designated the employee as “eligible” for such leave. Woodford v. Cmty. Action of Greene County, 268 F.3d 51, 57 (2nd Cir. 2001). The court found 29 C.F.R. §825.110(d) invalid as it impermissibly broadens the eligibility requirements that are clearly articulated in the language of the FMLA. Id. at 55; see also Davis v. Staffwork, Inc., LLC, 2005 WL1401622 (N.D. Okla 2006) (court declines to apply equitable estoppel principals against employer; summary judgment granted on FMLA claims); Brugnard v. BellSouth Telecommunications, Inc., 231 F.3d 791, 797 (11th Cir. 2000). The Act states that an employee must work at least twelve months and at least 1,250 hours before becoming eligible for FMLA leave status. Id.

However, under the regulation, if an employer mistakenly designates an employee as eligible when she has not met these requirements, the employer must allow that employee to take FMLA leave. See id. The regulation is therefore in direct conflict with the language of the Act. Id. Consequently, the court deemed the regulation invalid and did not allow the Plaintiff to claim protection under the FMLA simply because the employer had mistakenly designated her as eligible. Id. at 57.

2. Vacation Time Counts Toward Leave

The U.S. District Court for the District of Maine held that an employee’s accrued vacation time can be used to achieve one year of employment and thus gain eligibility for FMLA leave. Ruder v. MaineGeneral Med. Ctr., 204 F.Supp.2d 16, 20 (D. Me. 2002). In Ruder, the Plaintiff worked at MaineGeneral for fifty one weeks before taking leave time. Id. at 18. He had, however, accumulated two weeks of unused vacation time and argued that he should be allowed to use these two weeks towards his eligibility status. Id. The

court agreed, citing 29 C.F.R. §825.110(b) which provides “If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits ...are provided by the employer ... the week counts as a week of employment.” Id. The court held that the most natural reading of this regulation allows an employee to use his accrued vacation time to obtain the one year eligibility threshold of the FMLA. Id. at 20. See also, Adley v. SuperValu, Inc., 2007 WL2226040 (D. Minn. 2007).

C. Calculating the Twelve Month Period For Eligibility

An employee is allowed to take up to twelve weeks of leave within a twelve month period. An employer is permitted to choose any one of four methods for determining the twelve month period in which the twelve weeks of leave occurs. 29 C.F.R. §825.200(b).

- The first method is a “calendar method” that allows an employee can take up to twelve weeks leave in any given calendar year.
- The second method is that the employee may take twelve weeks in any fixed twelve month period, such as a fiscal year, year required by State law, or a year starting on an employee’s anniversary date.
- The third method measures the twelve month period from the date an employee’s first FMLA leave begins.
- The fourth method is a “rolling” method, where the twelve month period is measured backwards from the date an employee uses any FMLA leave. §825.200(b)(1-4).

An employer can select any one of the four methods as long as it is applied **consistently** and **uniformly** to all employees. §825.200(d)(1).

1. Notice of Change of Calculation Method:

An employer who wishes to change the method by which it calculates the twelve month period must give at least sixty days notice to all employees. Id. During the transition, each employee must retain the full benefit of the twelve weeks of leave under the method that is most beneficial to that employee. Id.

2. Failure to Select a Method:

If an employer fails to select one of the aforementioned methods of calculation, the option that provides the most beneficial outcome for the individual employee will be used. §825.200(e).

3. Duty to Inform Employees of Calculation Method:

Although this section specifically requires notice must be given when changing methods of calculation, there is no explicit provision requiring the employer give notice of the initial selection of calculation method. In Bachelder v. American West Airlines, 259 F.3d 1112 (9th Cir. 2001), the Court held, however, that the regulations “plainly contemplate” that the employer’s choice of calculation method will be an open one, not a secret. Bachelder, 259 F.3d at 1127. The court found a duty to inform all employees of the selected method of calculation. Id. at 1128. This duty, the court reasoned, is implicit in the general requirements that an employer inform an employee of his or her rights under the FMLA and the provision requiring notice of any change of calculation method. Id. at 1127. Failure to make this notification at the outset (i.e. either in employee handbook or some other method) results in application of the method most beneficial to

the employee. Id. at 1128. But see Coker v. McFaul, (6th Cir. 2007) (court affirmed summary judgment dismissal of FMLA claims; no prejudice in employer's failure to notify employee of method for calculating intermittent leave).

II. Notice Requirements

A. General Notice

1. Posting Notice

Employers that are covered by the FMLA have an obligation to notify all employees about existence of the Act, its general terms and conditions. 29 U.S.C. § 2619. Employers are required to post, and keep posted in a conspicuous place where employee notices are usually displayed, a notice approved by the Secretary, setting forth the pertinent provisions of the Act. Id. This notice must also include information on filing a charge for violations of the Act. Id. The U.S. Department of Labor has prepared an appropriate poster that can be obtained at the division's local office or over the Internet. Failure to post this information can result in a fine of up to \$100 for each separate offense. Id.

2. Employee Handbook

If the employer prepares an employee handbook or other information on employee benefits, FMLA rights and responsibilities must be included in this literature. 29 C.F.R. §825.301.

B. Individual Notice

Written notice of specific expectations and obligations of an employee who requests leave must be provided within one or two days of the employee's request for

leave. §825.301(b&c). This notice can be given to the employee in person or mailed to her home. §825.301(c). If an employee has previously received this information, a new notice need only be sent once every six months. Id. This notice must include, as applicable:

- That leave will be counted against the employee’s FMLA allotment
- Any requirements for employee to furnish medical certification of her condition
- Information about the substitution of paid leave for unpaid time
- Requirements, if any, that the employee continue to pay any premiums related to benefits, the payment arrangements and/or consequences of failing to pay
- Requirements for a fitness for duty certification
- The employee’s status as a “key employee” and potential consequences
- The employee’s right to restoration
- The employee’s potential liability for health insurance premiums paid during leave if she fails to return to work. §825.301(b)(1)(i-viii).
- Any periodic “reports” the employer may require on the employee’s status while on leave. §825.301(b)(2).

A version of this notice (WH-381) prepared by the Department of Labor is available on the Internet. Employers also must answer any questions that an employee may have concerning her rights and responsibilities under the Act. §825.301(d).

C. Notification of FMLA Leave Status

The Department of Labor Regulations state that once an employer has determined it will grant FMLA leave to an employee, it must notify that employee of the “designation” of their leave as “FMLA-qualifying” leave. §825.208 (a). This notice can

be included in the notice of specific expectations and obligations required under §825.301(b). Once the employer has learned that the leave is being taken for a “FMLA-qualifying” purpose, the employer must, absent extenuating circumstances, notify the employee of the designation within two business days. §825.208(b)(2). If an employer fails to notify the employee of this designation, the regulation states that any leave taken does not apply towards the employee’s annual allotment of FMLA leave. §825.700(a).

1. Ragsdale v. Wolverine World Wide, Inc.

This provision, Section §825.208(b)(2), which deals with the consequences of failing to designate FMLA leave, has been ruled unconstitutional, by the Supreme Court. Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81 (2002).

In Ragsdale, the Defendant had in place a leave policy that far exceeded the requirements of the FMLA. As a result, the Plaintiff was allowed thirty weeks of leave with continued health insurance benefits. Upon the end of the thirty week leave, the employer denied Plaintiff’s request for further leave, and terminated her when she did not return to work. The employer never notified the Plaintiff that twelve of her thirty weeks of leave were designated as FMLA leave. Consequently, the Plaintiff filed suit, claiming that under the provisions of 29 C.F.R. §825.700 she was entitled to an additional twelve weeks of leave, as her time taken did not count towards her FMLA allotted leave.

The Court held that penalizing the employer for a failure to notify the Plaintiff of her FMLA designation, by requiring it provide an additional twelve weeks of leave, is contrary to the Act. Here, the Court noted, the regulation’s penalty creates an irrebuttable presumption that the employee suffered losses from the violation by immediately imposing liability without requiring the employee to offer any evidence of loss or

prejudice. The Court held this penalty alters the FMLA's cause of action in a fundamental and impermissible way. Id. Even if an employer does not designate leave as "FMLA" leave, time taken can be counted towards the employee's twelve week maximum amount of FMLA leave.

2. Detrimental Reliance By Employee

Federal Court have held that, where an employer notifies an employee that her leave request has qualified under the FMLA and the employee relies on this information, the employer is estopped from confining the leave to a twelve week period. *Duty v. Norton-Alcoa Proppants*, 293 F.3d 481, 493 (8th Cir. 2002). Unlike the plaintiff in *Ragsdale*, in *Duty* the employee was notified that thirty four weeks of leave qualified under the FMLA. *Id.* at 486-7. The employer later claimed, as a defense, that only twelve weeks of the employee's leave were "FMLA" protected. *Id.* at 493. Although the Act provides for a maximum of twelve weeks of protected leave, the court held the employer was estopped from claiming that only twelve weeks of the leave were FMLA qualified because the employee had relied on the employer's initial assertion that all thirty four weeks were covered by the Act. *Id.* The employee was permitted to assert claims against the employer based on the entire thirty four week period. *Id.* Compare *Reed v. Lear Corp.*, 2008 WL312907 (E.D. Mo. 2008) (since there was no detrimental reliance by employee, summary judgment for employer on FMLA claims).

D. What Notice Must An Employee Requesting Leave Give To An Employer?

1. Foreseeable Leave

Under the FMLA the employee is required to give the employer notice of an intention to take FMLA leave. In cases of foreseeable leave, the Act requires that the

employee notify the employer at least thirty days before the start of the leave. 29 C.F.R. §825.301; 29 U.S.C. § 2612(e). Where an employee does not have 30 days notice of the need for leave, she must notify the employer of her intention to take leave “as soon as practicable”. *Id.* The Department of Labor regulations define “as soon as practicable” as when possible and practicable, taking into account all the facts and circumstances of a particular case. 29 C.F.R. §825.302(b).

a. What Must the Employee Say?

In giving notice for a foreseeable leave, the employee must give at least verbal notice, including duration and timing of leave. The employee must explain the reasons for the leave in a way sufficient to make an employer aware that the employee is requesting “FMLA-qualifying” leave. 29 C.F.R. §825.208(a)(1), §825.302(c). An employee need not explicitly mention or assert rights under the FMLA, but could state, for example, that the leave is needed for an expected birth. §825.208(a)(2), §825.302(c). It is then up to the employer to inquire if any additional information is needed to determine if FMLA leave is being sought. *Id.* The employer may inquire further to determine if a serious health condition is involved or to require medical certification to support the need for leave. *Id.*

2. Unforeseeable Leave

In cases where there is little or no advance notice that leave is needed, the employee is expected to provide notice “as soon as practicable” under the facts and circumstances of a particular case. 29 C.F.R. §825.303(a). Except for cases of extraordinary circumstances, notification within one to two days of learning of the need

for leave is expected. Id. In cases of a serious health condition, verbal notice is sufficient. Id. The regulations permit a person other than the employee to provide notice. Id.

Here, as with foreseeable leave, the employee or person providing notice need not explicitly mention the FMLA or an intention to assert rights thereunder. §825.303(b). The notifying person need only make the employer aware of a condition that would qualify for FMLA leave and then it is up to the employer to inquire further. Id.

3. What is Sufficient to Put the Employer on Notice of FMLA-Qualifying Leave?

What is sufficient to put an employer on notice that the leave requested is FMLA-qualifying depends on the facts of each case.

In Collins v. NTN-Bower Corp., 272 F.3d 1006, 1008 (7th Cir. 2001), the Plaintiff called in sick to the employer, saying nothing except that she was feeling “sick”. The court held that the term “sick” was insufficient to imply a serious health condition existed, and therefore did not suggest to the employer that the FMLA could be applicable. Id. at 1009. As such, termination of the employee due, in part, to this absence was not in violation of the FMLA. Id. But see Larson v. Endodontic & Per. Assoc, Ltd., 2006 WL2038600 (N.D. Ill. 22006) (report by employee of possible need for radiation treatment with indefinite dates was sufficient notice to employer; employer had burden to request additional information).

III. A Serious Health Condition

An employee can take FMLA leave if she has a “serious health condition” or is needed to care for an immediate family member who suffers from a “serious health

condition.” 29 U.S.C. §2612(a)(1)(C-D). The statute defines “a serious health condition” as illness, injury, impairment or physical or mental condition that involves either:

- Inpatient care in a hospital, hospice or residential medical care facility; or
- Continuing treatment by a health care provider (a “HCP”). §2611(11).

A. Who Is a Health Care Provider (a “HPC”) Under the Act?

A HPC under the FLMA can mean a medical doctor, doctor of osteopathy, podiatrists, dentists, clinical psychologists, nurse, nurse practitioner, midwives and Christian Science practitioners. 29 C.F.R. §825.800. Chiropractors can be considered HCP’s, but only for purposes of manual manipulation of the spine to correct a problem confirmed by an X-ray. Id.

B. What Constitutes “Inpatient Care”, “Incapacity” and “Treatment” Under the Act?

1. Inpatient Care

“Inpatient care” can be an overnight stay in a medical facility and any period of incapacity or subsequent treatment in relation to the inpatient care. 29 C.F.R. §825.114(a)(1).

2. Incapacity and Treatment

Regulations define “incapacity” as the inability to work, attend school or perform other regular daily activities due to the serious health condition, including the treatment thereof or recovery therefrom. Id. “Continuing treatment” by a HCP includes one or more of the following:

- 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 at least twice by an HCP; or

- Treatment once by an HCP that results in a continuing regime of treatment under the HCP
- Any period of incapacity due to pregnancy or prenatal care.
- Any period of incapacity due to a chronic “serious health condition” which:
 - Requires periodic visits for treatment to an HCP; or
 - Continues over an extended period of time; or
 - Is episodic in nature such as asthma, diabetes, epilepsy, etc.
- Incapacity that is permanent or long-term and for which treatment is not effective, such as Alzheimer’s, severe stroke, or the terminal stages of a disease. Here the patient can be under supervision and not actual treatment by a HCP.
- A period of absence to receive multiple treatments (including recovery thereof) for restorative surgery after an injury, or for a condition that, if left untreated, would result in absence of more than three consecutive calendar days. §825.114(a)(3).

For purposes of this section, “treatment” includes a course of prescription medicine such as antibiotics or therapy requiring special equipment (i.e. oxygen tank). §825.114(b).

C. What Types of Illnesses Qualify as Serious Health Conditions?

Because FMLA leave is intended for serious illness, and not as a substitute for ordinary sick days, minor illnesses such as the common cold, flu, ear aches, upset stomach, minor ulcers, headaches other than migraines, routine dental or orthodontia problems and periodontal disease are not “ordinarily” considered “serious health conditions.” See Id. Likewise, a regime that includes only over the counter medicine and can be initiated without visiting a HCP is not alone sufficient to be considered “continuing treatment.” Id.

Procedures/illnesses that do not qualify as a “serious health condition” include plastic surgery, unless inpatient care is needed or complications develop. Id. However,

restorative plastic surgery after an injury or removal of cancerous growths are sufficient to qualify under the Act. Id.

Mental health conditions and treatment for substance abuse can qualify as “serious health conditions” if they meet the other criteria under the regulations. §825.114(d); see Scamihorn v. General Truck Drivers, Office, Food and Warehouse Union, Local 952, 282 F.3d 1078, 1080 (9th Cir. 2002). In Scamihorn, the court stated that depression suffered by the Plaintiff’s father was precisely the type of health problem the FMLA was intended to address. Id. As long as the Plaintiff could show that his father’s illness met the objective criteria of 29 C.F.R. §825.114(a), then his leave to care for his father would be FMLA protected. See id. Likewise, the court in Rankin v. Seagate Technologies, Inc., 246 F.3d 1145, 1148 (8th Cir. 2001), confirmed that a serious health condition should be defined by an objective test that can be applied consistently based on the facts of each case.

1. Minor Illnesses Can Become “Serious Health Condition”

It is possible for minor illnesses, even those the regulations specifically designate not “ordinarily” sufficient, to become “serious health conditions” if the objective criteria of the regulations are met. Miller v. AT&T Corp., 250 F.3d 820, 832 (4th Cir. 2001). In Miller, the Plaintiff suffered from the flu. Because the regulations specifically state that the flu does not “ordinarily” meet the requirements of a “serious health condition”, the employer argued it could never be a sufficient reason to take FMLA leave. Id. at 831. The court disagreed, holding that section 825.114 does not automatically exclude the flu from coverage under the FMLA. Id. at 832. Here, because the Plaintiff’s flu included a period of incapacity of three consecutive calendar days and involved treatment at least

twice by a HCP, it could qualify as a serious health condition under the Act. See id. If the common illnesses listed in section 825.114(b) meet objective criteria of the regulations they may be considered a “serious health condition” sufficient to trigger FMLA-qualifying leave. See id.

IV. Medical Certification

An employer may require that a request for leave related to a medical condition be supported by a certification issued by the employee’s HCP, or the HCP of the family member who suffers from the medical condition. 29 U.S.C. §2613(a). The employer cannot require an employee to obtain the certification from a specialist. If the individual issuing the certification is considered a HCP under the FMLA, the employer must accept the certification. See Giuliani v. Minnesota Vikings Football Club, L.L.C., 2001 WL 667797 (D. Minn. 2001).

A. What Must Be Included On the Medical Certification?

The employer may require that the certification include the date on which the medical condition commenced, the probable duration and any appropriate medical facts regarding the condition. 29 U.S.C. §2613(b). If the leave is requested for the purpose of caring for a family member, the certification can require a statement regarding how long the employee is needed for such care. §2613(b)(4)(A). If the leave is due to the employee’s own illness, the certification should include a statement that the employee is unable to perform the functions of the position. §2613(b)(4)(B). This means that the employee is unable to work, or is unable to perform any one of the essential functions of the job. 29 C.F.R. §825.115. The employer may provide to the HCP a list of the essential functions to aid in the assessment. Id.

B. Reduced or Intermittent Certification

When reduced or intermittent leave is requested, information about dates on which treatment is scheduled and the duration of such treatment can be required. §2613(b)(5). An employer may also require a statement of medical necessity for the specific type of leave and expected duration of leave. §2613(b)(6). It must be such that the medical necessity is best accommodated through an intermittent or reduced leave schedule. 29 C.F.R. §825.117. A certification that fails to explain the medical necessity for intermittent or reduced leave fails to trigger an employees request for such leave. See Haggard v. Levi Strauss & Co., No. 00-2648, 2001 U.S. App. LEXIS 9886, at *3 (8th Cir. May 18, 2001).

C. Recertification

After initial medical certification is provided, the employer can require subsequent recertification on a reasonable basis. 29 U.S.C. §2613(e). For pregnancy, chronic or permanent conditions under the continuing supervision of a HCP, requesting recertifications every thirty days is acceptable. 29 C.F.R. §825.308. An employer can receive recertifications more frequently if the employee requests an extension of leave, the circumstances as described in previous certifications have dramatically changed or the employer receives information that casts doubts on the employee's stated reason for the absence. §825.308(a)(1-2). Recertification is done at the employer's expense. §825.308(e). An employer cannot ask for a second opinion based on a recertification, therefore, before such a request is made, an employer should assess the validity of the employee's initial certification and decide if a second opinion is warranted. Id.

D. Notice of Medical Certification

An employer's request for medical certification must be made either at the time leave is requested, or within two business days of either the request for leave, or the start of leave if unforeseeable. 29 C.F.R. §825.305(c). This notice must be given each time a medical certification is required. §825.305(a). The employee must provide the certification either by the time the leave commences or within fifteen days of the employer request, whichever is longer. §825.305(b). In addition, the employer must advise the employee of the consequences of failing to provide certification or of receiving incomplete certification. §825.305(d).

E. Incomplete Certification

In the case of an incomplete certification, the employer must give the employee a reasonable time correct the problems. Miller, 250 F.3d at 836. Where the employer's certification form does not request or require certain information, the employer cannot deem the information obtained incomplete without giving the employee such time to correct the problems or provide the additional information. Id. However, where the employee is notified that the certification is incomplete and fails to submit a timely correction, his certification does not meet requirements. See Burge v. Dept. of the Air Force, No. 01-3005, 2001 U.S. App. LEXIS 3615, at *5-7 (Fed. Cir. March 8, 2001). An employer can contact an employee's HCP for purposes of clarification and authentication of the certification if the employee gives permission and the employer's HCP makes the contact, not the employer itself. 29 C.F.R. §825.307(a-c). The Department of Labor has developed a certification form (WH-380) that is available on the Internet and asks all the appropriate questions.

F. Verifying Medical Certification/ Second and Third Opinions

If the employer has a reason to doubt the validity of a medical certification, the employer can require the employee get a second opinion. §2613(c)(1). The HCP providing the second opinion can be selected by the employer, however, cannot be a regularly used employee of the business. §2613(c)(2). This second opinion is done at the employer's expense. In the case of a conflict between the first and second opinions, a third opinion from a different HCP, agreed upon by the parties can be required. §2613(d)(1). This third opinion is final and binding. §2613(d)(2).

G. Fitness for Duty Certification

As a condition of returning to one's position after an FMLA leave ends, and employer has the right to require the employee submit a fitness-for-duty certification at the employee's expense. 29 U.S.C. §2614(a)(4). The employer must have a uniformly applied practice or policy that requires each employee to receive certification from a HCP stating that the employee is able to resume work. Id. This fitness-for-duty certification can only include information regarding the particular condition, which was the reason for the FMLA leave. 29 C.F.R. §825.310(c). An employer must give notice of a fitness-for-duty certification requirement in the employee handbook or to individual employees when leave is taken. §825.310(e). As long as the employer gave proper notice, it can delay reinstatement of the employee to their position until certification is received. §825.310(f).

V. Return to Work Issues

A. The Restoration Provision

In order to provide a level of job security to employees who need to take leave, the FMLA has a restoration provision. This requires that employees' returning to work must be restored to the same position or an equivalent position, with equivalent pay, benefits and other terms and conditions of employment. 29 U.S.C. §2614(e)(1). An employee need not physically return to work to be eligible for reinstatement. Watkins v. J&S Oil Co., Inc., 164 F.3d 55, 60 (1st Cir. 1998). It is sufficient that the employee is in contact with the employer regarding the prospect of returning to work. Id. Upon returning to work the employee must not lose any employment benefit that accrued prior to beginning leave. §2614(e)(2). An employer must provide the returning employee with the same rights and benefits, as she would have, had she not taken leave. §2614(e)(3). The returning employee is entitled to the same or equivalent position even if she has been replaced, or her position has been restructured to accommodate her absence. 29 C.F.R. §825.214(a).

B. Equivalent Position

Department of Labor regulations define an equivalent position as one that is virtually identical to the employee's former position in pay, benefits and working conditions. 29 C.F.R. §825.215(a). The position must have the same or substantially similar duties as the former position and require substantially equivalent skill, effort, responsibility and authority. Id. If an employee is no longer qualified for a position because they missed some education, certification or renewal of a license, the employer must provide the employee a reasonable opportunity to fulfill those conditions.

§825.215(b). See Hood v. Transitional Hosp. Corp. of Nevada, 2008 WL304732 (D. Nev. 2008); (offer of reinstatement to new position raised jury question).

C. Equivalent Pay

A returning employee has the right to equivalent pay, including any unconditional pay increases that occurred during the employee's leave. §825.215(c). The employee also has a right to the same or equivalent pay premiums. For example, if the employee's former position provided a shift differential or a consistent amount of overtime, the employee must receive a position that has equivalent earning opportunities. Id. However, the employee is not entitled to any pay increases based on seniority, length of service or work performed, unless it is the employers regular practice to do so. Id.

D. Equivalent Benefits

All benefits provided or made available to an employee must be resumed upon the employee's return from leave in the same manner and at the same levels as pre-leave. §825.215(d). These benefits may be subject to any changes that took place during the leave time. Id. An employer cannot require an employee to requalify for any benefits upon return from leave. Therefore, if the employee makes a contribution to benefits that may lapse without payment, the employer needs determine how the contribution will be paid during the employee's leave time. Id. In order to avoid FMLA requalification violations, an employer may wish to pay the employee's contributions for the duration of the leave and recoup the money from the employee when they return to work. Id. Although the employee is not entitled to accrue any benefits during the leave period (i.e. vacation, sick time) the FMLA leave cannot be considered a "break in service" for the purposes of any benefit plan. §825.215(d)(2&4).

E. Equivalent Terms and Conditions of Employment

To restore the employee to equivalent terms and conditions of employment the employee must be reinstated to a geographically proximate worksite that does not involve a significant increase in commuting time or distance. 29 C.F.R. §825.215(e)(1). The employee must be returned to the same shift, or an equivalent work schedule. §825.215(e)(2). The Department of Labor regulations do not treat different shifts involving the same duties and pay as equivalent jobs. Hunt v. Rapides Healthcare System, L.L.C., 277 F.3d 757, 765 (5th Cir. 2001). However, if the employee's shift has been eliminated or their overtime opportunities decreased uniformly, there is no duty to reinstate with those benefits. 29 C.F.R. §825.216(a). The equivalent position must also have the same or equivalent opportunity for bonuses, profit-sharing and other similar payments. §825.215(e)(3). The parties, of course, can agree to place the returning employee in a position that better accommodates her needs or to give her a promotion. §825.215(e)(4).

F. Limitations On Employer's Duty To Reinstatement

In order to be relieved of its duty to reinstate, an employer must be able to show that an employee would not otherwise have been employed at the time they return to work. If the employee is laid off during the time she is on leave, the employer has the burden of proving the employee would have been laid off during that time period even if they had been working continuously. 29 C.F.R. §825.216(a). There is no right to restoration if the employee was hired for a specific project or term and that project or term has ended before the employee returns from leave. §825.216(b).

G. Unable To Perform Exception

An exception to the restoration requirement comes if the employee cannot perform an essential function of the job. §825.214(f). This is true even if this inability is due to the same “serious health condition” that caused the employee’s leave. Id. An essential function of the job can include the ability to work a particular number of hours per week. Tardie v. Rehabilitation Hosp. of R.I., 168 F.3d 538, 544 (1st Cir. 1999). An employer is not required under the FMLA to place this type of employee in a different position to accommodate her abilities. 29 C.F.R. §825.214(f); see Tardie, 168 F.3d at 544. However, an employer should be aware that there may be responsibility to accommodate this employee under the Americans with Disabilities Act. Id.

H. “Key” Employees Exception

An employer is not required to reinstate “key” salaried employees if doing so would cause the employer substantial and grievous economic injury. §825.216(c). A “key” employee is a salaried employee who is among the highest paid ten percent of all employees, both hourly and salaried, employed within a seventy-five mile radius of the worksite. 29 C.F.R. §825.217(a). The Department of Labor regulations provide a formula for determining if an employee is a “key” employee under the Act. See §825.217(c). Determination of whether an employee is a “key” employee should be made at the time the employer is notified of the employee’s intent to take leave. §825.217(c).

1. Notice Of “Key” Employee Status

In addition, the employer should provide the employee with written notice if the employee is designated “key”, and the possible consequences of this designation, at the

time the employee gives notice of intended leave. 29 C.F.R. §825.219(a). If the leave begins unexpectedly, the employer should provide this notice when the leave commences. Id. If the employer needs time to determine if an employee should be designated as “key”, written notice of designation should be made as soon as practicable after being notified of the intended leave. Id. If an employer does not give proper notice under this section, it must reinstate the employee regardless of economic loss. Id.

2. Substantial And Grievous Economic Injury

When making a determination if the restoration of a “key” employee will cause substantial and grievous economic injury, the employer may take into consideration the ability to temporarily replace the employee. 29 C.F.R. §825.218(b). If the employee cannot be temporarily replaced, then the cost of reinstating the employee can be considered in the evaluation. Id. The regulations specifically state that this is not a precise calculation. §825.218(c). The employer should consider if reinstating the employee, threatens the economic viability of the employer or would cause substantial long term economic hardship. Id. Minor inconveniences and costs that the employer would experience in the normal course of doing business cannot be the basis of the decision. Id.

3. Notice Of Determination That Reinstatement Will Cause Substantial And Grievous Economic Injury

If an employer makes a determination that substantial and grievous economic injury will occur as a result of reinstating a “key” employee, the employer must notify the employee in writing. 29 C.F.R. §825.219(b). This notification should be made before the employee’s leave commences and be delivered either in person or by certified mail. Id. If the employee’s leave has already begun when the determination is made, the employer

must provide a reasonable time in which the employee can return to work, before denying reinstatement. Id. If the employee does not return to work upon notification, but still requests reinstatement at the end of the leave period, the employer must reevaluate the company's situation and make a determination at that time if substantial and grievous injury is still likely to occur. §825.219(d). Health benefits must continue until the employee informs the employer that she will not return to work, or the time when the employer actually denies reinstatement (i.e. at the end of the leave period). §825.219(c).

I. Employee Notice Of Intent To Return To Work

An employer can have a policy that requires an employee on FMLA leave to periodically report on her status and intent to return to work. 29 C.F.R. §825.309(a). If an employee says, unequivocally, that she will not return to work, an employer's duty to reinstate and maintain health benefits ceases. §825.309(b). If, however, the employee says she may not be able to return to work, but expresses a desire to do so, the employer is not relieved of its obligations under the FMLA. Id. In addition, an employee's recognition that an employer is refusing to offer equivalent employment may not be considered an unequivocal or voluntary resignation. See Watkins v. J&S Oil Co., Inc., 164 F.3d at 60.

VI. Violations Of The Act

An employer may not interfere with, restrain or deny the exercise of or the attempt to exercise any right provided under the Act. 29 U.S.C. §2615(a)(1). Terminating an employee based on their use of or request for FMLA leave is unlawful interference with the Act's provisions. See Bachelder, 259 F.3d at 1125. Department regulations clearly prohibit the use of FMLA leave as a negative factor in an employment

decision. Id. An employee need only prove that the FMLA leave was one factor in making a decision to terminate her, to prove a violation of the Act. Id.

An employer is prohibited from discharging or in any other way discriminating against a person for opposing or complaining about unlawful employer practices in violation of the FMLA. 29 C.F.R. §825.220. In addition, an employer may not discharge or discriminate against an employee for, filing a charge or instituting a proceeding related to the Act, giving information or testifying in an inquiry or proceeding. Id.