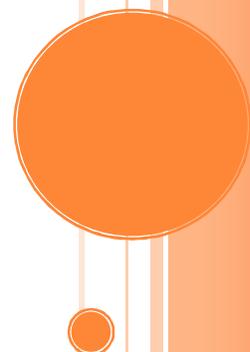


# THE FAMILY AND MEDICAL LEAVE ACT: QUESTIONS AND ANSWERS

*An AAUP Guidebook*

By Saranna R. Thornton and Kathi S. Westcott



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## Introduction

The American Association of University Professors (AAUP) receives many inquiries from professors, administrators, and lawyers about the application of the federal Family and Medical Leave Act (FMLA) to faculty members at colleges and universities. The federal FMLA and its regulations have triggered a number of questions about their application to faculty members. To clarify how to apply the FMLA in academic settings, this guidebook is broken into sections in which specific mandates are introduced and explained through a series of questions and answers. Unless noted otherwise, questions and answers apply to the mandates of the federal FMLA.

In 1993, Congress enacted the FMLA to promote family stability and economic security by making it easier for employees to integrate work and family responsibilities. In 2008, Congress amended the FMLA to add leave entitlements for qualifying military exigencies and for family members to care for military service members seriously injured in the line of duty. In 2009, the US Department of Labor revised and clarified the FMLA regulations, and Congress added a second set of military family leave amendments in 2010. Congress intended the FMLA to maximize workplace efficiency, to minimize employment discrimination based on gender and pregnancy, and to promote equal employment opportunities for women and men.

In addition to the federal laws, some states and municipalities also have laws that provide some form of family and medical leave benefits. Faculty handbooks, letters of appointment, and collective-bargaining agreements may also grant college and university personnel additional family and medical leave benefits.

**This guide provides general legal information about the FMLA in the academic workplace, and it is not intended as legal advice for specific employees.** The guide focuses on federal mandates but is not exhaustive. Rather, the AAUP seeks to educate the academic community by providing a general overview of a developing area of the law. **If you have questions about your specific circumstances, the Association urges you to consult a lawyer experienced in higher-education or employment law.**

# Questions and Answers for College and University Faculty and Academic Professionals

## I: WHO THE FMLA COVERS

Virtually all full-time faculty and many part-time faculty at US colleges and universities are entitled to benefits under the FMLA. To qualify for these benefits, faculty and academic professionals must work for a covered employer. Additionally, they must meet specific criteria regarding length of service and employer notification to qualify individually for leave.

Under the FMLA, most full-time faculty and some part-time faculty are entitled to take unpaid, job-protected leave in a twelve-month period for certain family and medical reasons. There are five specific categories of FMLA leave for which eligible employees may take up to twelve weeks of unpaid, job-protected leave. They are:

- Pregnancy or birth of a child;
- Adoption or placement of a child in foster care;
- Employee's serious health condition;
- Employee's need to care for a family member with a serious health condition;
- Qualifying military exigency.

The 2008 National Defense Authorization Act FMLA amendments provide that up to 26 weeks of unpaid, job-protected leave be made available to eligible employees who need to care for covered military service members with serious injury or illness.

**Question 1.** Are most U.S. colleges and universities required by law to provide family and medical leave?

**Answer.** Yes. The FMLA applies to:

- all private colleges and universities with fifty or more employees within a seventy-five mile radius for at least twenty work weeks in the current or preceding year;<sup>1</sup>
- all public colleges and universities as public agencies, "regardless of the number of employees."<sup>2</sup>

**Question 2.** Who is entitled to leave under the FMLA?

**Answer.** To be eligible for FMLA leave, employees must work for a college or university for at least twelve months before the leave begins.<sup>3</sup> The twelve months need not be consecutive or continuous. For example, a full-time professor on a nine-month contract qualifies for FMLA leave after the third month of the second year of his or her appointment. The FMLA counts noncontinuous periods of service with the same employer toward the twelve-month total as long as the time between periods of employment doesn't exceed seven years.<sup>4</sup>

Work during any part of one week counts as a full work week.<sup>5</sup> For example, a faculty member who works for one or more days during the week that includes a two-day fall break, or who works for one or more days during Thanksgiving week (which might include a two-day break), would be regarded as having worked for the entire week.

Employees must also work at least 1,250 hours during the twelve months immediately preceding the start of FMLA leave.<sup>6</sup> The Fair Labor Standards Act of 1938 defines activities that count as time spent working. In calculating the 1,250 hours needed to qualify for FMLA leave, all time performing work related to the position, as opposed to compensated time, counts toward the 1,250 hours. The US Department of Labor (DOL) considers full-time salaried employees, including faculty members who often work outside the classroom, who work at least twelve months for one employer FMLA-eligible. FMLA regulations stipulate that college and university employers claiming that a full-time faculty member is ineligible for FMLA leave bear the burden of demonstrating that the member worked less than 1,250 hours during the previous twelve months.<sup>7</sup> The regulations state that the determination of 1,250 hours of work is not based on a compensation agreement or letter of appointment that does not reflect all of the hours actually spent working.<sup>8</sup> Thus, for determining FMLA eligibility, hours are determined by the work employees do—not just the work for which they are paid. For example, many faculty who are nine- or ten-month employees may be expected to perform scholarly work during the summer. Whether or not faculty are compensated for summer work through stipends, if the work is expected or performed with the employer's knowledge, the hours count toward the employee's family and medical leave eligibility.

Finally, faculty who work for public institutions are FMLA-eligible regardless of the number of campus employees. At private universities or colleges, fifty or more employees must work within seventy-five miles of the work site to qualify for FMLA leave.<sup>9</sup> For example, if the university employs 800 people, and you and five other faculty members teach all of your classes

in an office building twenty-five miles from campus, under federal law, you are eligible for FMLA leave.<sup>10</sup>

**Question 3.** I am a part-time faculty member, and I have been teaching at my university for more than twelve months. Am I entitled to FMLA leave?

**Answer.** To determine if you worked 1,250 hours in the twelve months preceding your FMLA leave, you must put together a record of the hours you spent teaching, grading, preparing lectures, holding office hours, attending department meetings, serving on committees, writing letters of recommendation, and so on. Include all the work you do—not just work you are paid to do.

Under the Fair Labor Standards Act (FLSA), “hours worked” includes, but is not limited to, all time spent in physical or mental exertion (whether burdensome or not), which are controlled by the employer and pursued necessarily and primarily for the benefit of the employer.<sup>11</sup> Therefore, responsibilities you accept beyond those required by your letter of appointment do count toward the 1,250 hours of work required to qualify for FMLA benefits if: (1) the work benefits your institution; (2) your administration knows or has reason to believe you are doing the work; and (3) while knowing or having reason to believe that you are doing the work, your administration does not use its “managerial powers” to stop you from performing it.<sup>12</sup> Consequently, the number of hours you work for your college or university is not limited to time on campus or teaching.<sup>13</sup>

Some examples:

- You are a part-time faculty member and not formally assigned to serve on a university committee. Nevertheless, you serve on a departmental curriculum-review committee with your dean’s knowledge. The time spent on the committee does count toward your eligibility for FMLA benefits.
- You are a part-time faculty member and have applied for outside research grants from sources such as the National Science Foundation or the National Institutes of Health. If the funds would “benefit” your college or university, perhaps by providing funds to finance graduate student research assistantships or administrative overhead, and if your department chair, dean, or, for example, vice president for

institutional advancement knew you applied for the grant and made no effort to stop you, then the application time counts toward the 1,250 hours.

- As a part-time professor, and with your department chair's knowledge, you serve on the dissertation committee for a graduate student at your institution. Time spent meeting with the student, reviewing dissertation drafts, preparing for and attending the dissertation defense, and conferring with other committee members counts toward the 1,250 hours for FMLA purposes.

In cases where employers do not maintain an accurate record of hours worked by an employee (for example, executive, administrative and professional employees as defined by the FLSA), the employer bears the burden of proving that the employee has not worked the 1,250 hours necessary to qualify for FMLA leave. This doesn't mean that you are required to maintain a record of the hours you work each week (for example, a personal time card), but doing so may help to establish your eligibility for FMLA leave. As a general rule, you have worked 1,250 hours in the last twelve months if you have worked:

- an average of 24 hours a week for 52 weeks of the year; or
- an average of 104 hours a month in each of the 12 months of the year; or
- 40 hours a week for more than 31 weeks (or 7 months) of the year.

**Question 4.** I am a full-time faculty member, but I have a course release for research. Consequently, I teach one course a semester. Do I meet the 1,250-hour eligibility test for FMLA benefits?

**Answer.** Probably. The regulations presume that full-time teachers at an institution of higher education meet the 1,250 hour test.<sup>14</sup> Time spent on research counts exactly like time spent teaching or holding office hours. To dispute your eligibility for FMLA leave, your administration would have to clearly demonstrate that you did not work 1,250 hours on teaching, service, and research during the twelve months preceding your proposed date of leave.

**Question 5.** I am a full-time faculty member and I work at home two days a week. I spend this time grading papers, preparing lectures, and engaging in research for a book. Does my work at home count for the purposes of determining my eligibility for FMLA leave?

**Answer.** Yes, as long as your department chair or dean knows that you are carrying out your responsibilities—grading papers, writing letters of recommendation, and undertaking academic research—it does not matter whether you work in the office or at home.<sup>15</sup> If you attend an out-of-town academic conference, for example, to interview candidates for a faculty position at your university, or if you attend a conference to present a paper, the time spent on these activities would also count toward the hours you have worked for FMLA-eligibility purposes.

**Question 6.** I am a full-time visiting professor with a multiyear contract. Do I qualify for FMLA benefits?

**Answer.** Yes, so long as you have already worked at the college for at least twelve months and you meet the 1,250-hour requirement—based on the number of hours you actually work.

**Question 7.** I am a graduate student instructor teaching a full course load at my university while I finish my degree. Do I qualify for FMLA benefits?

**Answer.** Probably, as long as you have been working on the university's payroll for at least twelve months and you have worked 1,250 hours in the twelve months before taking FMLA leave. Your work need not have been as a graduate student instructor. It could also be in some other capacity, such as a teaching assistant, research assistant, or student representative on a curriculum-review committee. Time you spend researching and writing your dissertation probably would not count toward the 1,250-hour requirement. An exception might be, perhaps, if a member of your dissertation committee obtains an outside research grant that puts you on the university's payroll as a research assistant on a joint research project, the results of which you would also use as a part of your dissertation.

**Question 8.** My husband and I share an appointment in the same department at our college. Are we both entitled to FMLA benefits?

**Answer.** Yes, as long as both of you have been employed at the institution for at least twelve months and you have each individually worked at least 1,250 hours in the twelve months preceding commencement of the FMLA leave you are taking. There are some limitations regarding the maximum amount of leave spouses employed by the same college or university can take.<sup>16</sup> Married couples may be required to share their total leave entitlement for events such as the birth or adoption of a child, placement of a child for foster care, or military caregiver leave, although leave can be extended if the individual faculty member or academic professional faces his or her own serious health condition.<sup>17</sup>

**Question 9.** I taught full-time at my university for two years and then left the workforce for three years to stay home and care for my young children. I am returning to full-time employment at the university next semester. Will I need to work for twelve months before becoming eligible to take FMLA leave?

**Answer.** You will be eligible for FMLA benefits on the first day that you return to work at your university. Under the FMLA, if a break in service with a given employer is less than seven years, the prior period of service does count toward the twelve months/1,250 hours of employment necessary to become FMLA eligible. However, the FMLA only requires employers to keep personnel records for three years, and the burden of proving that you are an FMLA eligible employee may fall on you. If necessary, you can prove that you were employed using a W-2 form, old pay stubs, a signed employment contract, or affidavit from your former supervisor or coworkers.<sup>18</sup>

**Question 10.** My university maintains campuses and educational programs in several foreign countries. Although I normally teach at our US campus, I will be spending the next two years teaching at our campus in the Middle East. If I need FMLA leave while I am teaching abroad, will I be eligible to use it?

**Answer.** Maybe. The FMLA applies only to employees who are employed within any state of the United States, the District of Columbia, or any territory or possession of the United States.<sup>19</sup> Employers are not required to offer FMLA leave to employees who are working in foreign countries. However, your university may elect to maintain your eligibility for FMLA leave while you are teaching at one of its foreign campuses.

**Question 11.** I have taught full-time at my college for more than twelve months. I plan to lead one of my college's study-abroad programs this summer. If I need FMLA leave while I am overseas on my college program, may I take it?

**Answer.** Yes. Your eligibility for leave depends on your employment status with your US college. As long as you are still an employee of your US-based college or university and meet the 1,250 hours and twelve months requirements, you are eligible for leave. However, if you need leave for your own serious health condition while you are abroad, your college may require you to provide a medical certification of your condition. You will need to obtain the certification from an authorized health-care provider in the host country, and if the certification is not in English, you may be required to also provide an English translation.<sup>20</sup> If you lead a study-abroad program for another US-based college or university where you do not satisfy the 1,250 hours/twelve months of service requirement, that employer is not obligated to provide you with FMLA benefits.

**Question 12.** I am a foreign citizen with a work visa and teach full time at a US university. I need to take FMLA leave to care for my mother who has a serious health condition and who lives outside of the US. May I take FMLA leave?

**Answer.** If you have worked for at least 1,250 hours at your university in the last year and been employed there for at least twelve months, you are eligible for FMLA leave for a qualifying reason (for example, to care for a parent with a serious health condition). Your entitlement to leave does not depend on the geographic location of your mother. However, your institution may require a medical certification of your mother's condition from a health-care provider who practices in her country of residence. You may be held responsible for ensuring that the certification is provided in English or that there is an English translation of the certification.<sup>21</sup>

**Question 13.** I taught full-time at my university for nine months before my National Guard unit was activated and deployed abroad. I am returning to full-time employment at the university after twelve months of military service. How many months will I need to work following my return before becoming eligible to take FMLA leave?

**Answer.** You will be eligible for FMLA benefits the day you return to your university position. When an employee's break in service occurs because he/she is fulfilling a National Guard or Reserve military obligation, the time the employee would otherwise have worked for the employer (if not in military service) must also be counted in determining whether the employee meets the FMLA's requirement for twelve months of total service with the employer.<sup>22</sup> Because you were working for your university full-time before your deployment, for FMLA purposes, you are credited with full-time employment at your university for all of the months you served in the National Guard.

**Question 14.** I have been a full-time faculty member at my college for ten months. My wife is pregnant, and our baby is due in three months. When I requested to take FMLA leave following the birth of my child, my dean turned me down, telling me that I am not eligible to take FMLA leave because I have not been employed for one year. How does the FMLA apply in a situation like mine?

**Answer.** Your eligibility for FMLA leave is determined by your status on the first day you will utilize leave, not by your status on the date when you notify your employer about your need for leave. If an employee will cross the twelve month/1,250 hour threshold prior to the first day of planned leave, the employee is entitled to take leave for any FMLA-qualifying condition.<sup>23</sup>

**Question 15.** I took twelve weeks of FMLA leave from October 1 through early December to care for my father who was diagnosed with cancer and required surgery and chemotherapy. Just two weeks into January, my mother was in an automobile accident. She needs surgery and rehabilitative treatment. When will I be eligible to take FMLA leave to care for her?

**Answer.** It depends on how your college or university defines the FMLA leave year.<sup>24</sup> FMLA regulations allow four options:

- The calendar year;
- Any other type of fixed twelve-month leave year (for example, the employer's fiscal year, the academic year);
- A twelve-month period measured forward from the date an employee first takes FMLA leave; or
- A rolling twelve-month period measured backwards from the date an employee's first FMLA leave begins.

Employers may select any one of the four mechanisms to measure leave years, but they must apply it uniformly across all employees. Typically, you can check your faculty handbook or employee-benefits website to determine how your school defines the FMLA leave year. If your institution has not specified one of the mechanisms above, the default in your situation must be the option that provides the most beneficial outcome for you.<sup>25</sup>

If your university defines its FMLA leave year as a calendar year, you will be eligible to take another twelve weeks of FMLA leave immediately to care for your mother. If your school defines FMLA leave years as based on a fiscal year beginning on July 1, you won't be eligible to take more FMLA until that date because you used up your twelve weeks of leave in the fall semester. Alternatively, if your employer counts FMLA leave years based on the first date you take FMLA leave, then you won't be eligible to take more FMLA leave until the upcoming October. Should your university use the rolling leave year measured backwards, the fact that you used all twelve weeks of your entitlement would mean that you would also have to wait until October 1 to take additional FMLA leave.

A college or university that hasn't adopted a specific leave year, or that wishes to change the type of leave year (for example, from fiscal year to calendar year) may do so, but must give employees sixty days' notice of the planned change. During the sixty-day transition period any employee who needs to take FMLA leave must be able to use the leave year definition that affords them the greatest leave benefit. Under no circumstances can the measurement of leave years be altered in order to avoid the FMLA's leave requirements.<sup>26</sup>

**Question 16.** My brother is a covered military service member under the 2008 FMLA amendments and has suffered a serious injury in the line of duty while on a foreign deployment.

I have been employed full-time by my university for more than twelve months. Do I qualify to take FMLA leave to care for my brother?

**Answer.** The provisions for an employee seeking leave to care for a service member with a serious injury or illness are more expansive than those for taking FMLA leave for other qualifying reasons. Employees are not entitled to take FMLA leave to care for siblings suffering from a serious health condition because siblings are not covered family members under this provision of the law.<sup>27</sup> However, because you seek leave to care for your brother who is a service member, more expansive definitions of a family member apply. Under the 2008 National Defense Authorization Act amendments, qualified employees eligible to take FMLA leave include the service member's spouse, son, daughter, parent, or next of kin. Next of kin is the service member's nearest blood relative (other than a spouse, son, daughter, or parent) and includes, in order of priority, a blood relative who has legal custody of the service member, siblings, grandparents, aunts and uncles, first cousins, or any other blood relative designated by the service member as his or her next of kin. In cases where there is more than one family member at the same level of relationship to the covered service member, all relatives at that level are considered next of kin. Therefore, if you and your brother have additional siblings, all of those siblings are considered to be next of kin, and all of you would be entitled to take Family and Medical Leave.<sup>28</sup>

## **II: TYPES OF FMLA LEAVE: CONTINUOUS BLOCKS, REDUCED-SCHEDULE AND INTERMITTENT LEAVE**

Many faculty positions provide substantial flexibility in scheduling work. To the extent a professor can schedule teaching, research, and other duties around FMLA-qualifying events, he or she might not need to utilize FMLA leave in some situations. For example, a female professor is permitted to take FMLA leave for prenatal care, but if she can schedule her doctor's visits for days that she normally doesn't teach or have other on-campus obligations, she might not need to utilize any of her FMLA leave for this purpose.

Suppose that a professor has knee surgery in the late summer and then needs physical therapy two mornings a week for a period of two months. The professor may be able to schedule his or her surgery and therapy around other on-campus work duties and thus may not need to take FMLA leave.

In cases in which the workplace flexibility inherent in many faculty positions doesn't accommodate FMLA-qualifying reasons for leave, there are three ways to utilize FMLA leave entitlements. One is to take leave as a continuous block of time. For example, suppose a professor's father, who lives in another state, has a heart attack. The professor may need to take FMLA leave in a continuous block (of twelve weeks or less) to attend to his or her father's medical needs while he is recovering and is in rehabilitative treatment.

Under the FMLA, you are not required to exhaust your annual FMLA leave entitlement all at one time. You may *always* take your FMLA leave in shorter time periods if each individual time period of leave is taken for a *different* FMLA-qualifying reason. For example, you might use four weeks of leave at the beginning of the year because your mother needs hip-replacement surgery. Then, a few months later, you might need to take another two weeks of FMLA leave to care for your spouse who has an FMLA-defined serious health condition. A few months later, you might need to take some more FMLA leave—up to six weeks of your remaining entitlement—because you have a baby.

A second way to utilize FMLA leave entitlements is to take “reduced-schedule” leave by working part-time. For example, suppose a female professor gives birth at the beginning of her college's summer break. Rather than take twelve weeks of continuous leave when classes resume, she might seek to work part-time during the fall semester, perhaps teaching two courses instead of her usual three.

A third type of leave is “intermittent leave.” In this case, a faculty member's blocks of leave alternate with blocks of time in which the professor works full-time, with a single qualifying reason necessitating the need for leave.<sup>29</sup> For example, a professor who needs chemotherapy treatments for cancer might be unable to work for one week out of every six. If this professor takes off one week out of every six, he or she would be taking intermittent FMLA leave. A professor taking leave to care for a service member with a serious injury may want to take FMLA leave on an intermittent basis to take the service member to physical therapy appointments. Under certain circumstances, you may take your twelve weeks of FMLA leave a few hours, days, or weeks at a time.

**Question 1.** My spouse has a serious health condition requiring visits to a regional medical center for two three-day periods out of every month. May I take FMLA leave intermittently—six days every month to accompany my spouse out of town for his medical treatments?

**Answer.** Yes, if your spouse has a medical need that is best accommodated through intermittent treatments, you may elect to take an intermittent-leave schedule. Intermittent leave is leave taken in separate blocks of time due to a single illness or injury. Such blocks of time can last as long as you need, for example, one hour, one day, one week, or one month.<sup>30</sup> At the same time, you may be obliged to confer with your department chair in an effort to schedule your spouse’s treatments at a time that will not unduly disrupt the college’s operations. If that is not possible, your administration may assign you temporarily to an “alternative position” for which you are qualified—and which better accommodates your need for intermittent leave.<sup>31</sup> For example, if you need to be absent from work for two distinct three-day periods out of every month, you might assume an administrative position or be assigned nonteaching responsibilities during the semester(s) you will be on leave. Such a temporary transfer must comply with other laws, such as the Americans with Disabilities Act (ADA), and, where applicable, collective-bargaining agreements, and the position must provide “equivalent pay and benefits.”<sup>32</sup>

**Question 2.** My wife will deliver our baby soon. May I take intermittent leave or work part-time following our baby’s birth?

**Answer.** Yes. You don’t need your administration’s approval to take FMLA leave following your child’s birth—if you take the leave as one continuous block. If you want to take your FMLA leave on an intermittent basis, and there is no medical need for you to do so (for example, your child or spouse does not have a serious health condition), you need your employer’s approval to take leave in this form.<sup>33</sup> For example, you might want to take two weeks of FMLA leave when your wife and the baby come home from the hospital. You might also want to take some or all of the remaining ten weeks of your FMLA leave to be with the baby later during the year, for example, if your wife is returning to a job outside your home. Alternatively, a faculty member whose wife gives birth during the summer might want to teach only one course in the fall semester, instead of his normal three courses. In this case, the faculty member would be requesting FMLA leave in the form of a part-time work schedule, which requires administrative approval.<sup>34</sup>

**Question 3.** I need to take a few hours every week to drive my mother to doctor-prescribed physical therapy treatments following a serious car accident. She cannot transport herself. May I take FMLA leave on an intermittent basis to assist her?

**Answer.** Yes. However, if you can schedule your classes and your other on-campus duties so you are free one morning or afternoon a week, then you may take the time needed to care for your mother without taking any FMLA leave or interrupting your professional responsibilities on campus. Also, unless the health-care provider overseeing medical treatment objects, your employer may legally ask you to schedule planned medical treatments around your nonteaching days so that the FMLA leave you take is time away from your research and/or service duties.<sup>35</sup>

**Question 4.** I have recently been diagnosed with a serious illness. May I take FMLA leave in the form of course reductions from my normal teaching schedule?

**Answer.** Probably. If you take FMLA leave for your own serious health condition, and your health-care provider determines that for medical reasons you should not teach full-time, your administration is obligated to allow you to work a reduced schedule.<sup>36</sup>

But, what if you are requesting FMLA leave for a covered family member with a serious health condition? Potentially, although your administration may ask you to schedule your work so that taking FMLA is unnecessary. For example, suppose you teach Monday, Wednesday, and Friday: two courses in the morning and two courses in the afternoon. You have requested a two-course reduction so that you will have Monday, Wednesday, and Friday mornings to take your child to physical therapy following a severe accident. Instead, your administration might offer to switch your Monday, Wednesday, and Friday morning classes to Tuesday and Thursday. If you accept the new teaching schedule and are still able to perform your other nonclassroom duties, then the administration may not count the time you take to care for your sick family member as FMLA leave.

Alternatively, your administration may ask you to switch your family member's medical treatments to Tuesday and Thursday so that you take your leave time away from your research and/or service duties, not your teaching responsibilities. If the health-care provider caring for your family member insists on a Monday, Wednesday, and Friday treatment schedule for

medical reasons, then your administration must give you the leave schedule you originally requested.<sup>37</sup>

Also, remember that if you do not want to teach a new schedule that the administration has proposed to accommodate your teaching schedule and necessary medical appointments, you still have the option to take up to twelve straight weeks of unpaid FMLA leave to care for your seriously ill family member. Your dean or department chair might prefer to give you the reduced schedule that you originally requested rather than lose your services entirely for up to twelve weeks.

**Question 5.** Normally I teach four courses a semester. I am adopting a child and would like to take FMLA leave by teaching only two courses in the upcoming semester. My dean has denied my request for a two-course reduction. Instead, he has offered me a one-course reduction and also told me to reduce my service and research work by the amount of time I would spend on teaching the second course. Must I accept this schedule?

**Answer.** Possibly. When an employee wants to take reduced-schedule FMLA leave for adoption, foster-care placement, or birth of a child, the employer has the right to deny the request or to offer a different reduced-schedule leave than the one the employee proposed.<sup>38</sup> If you don't like the reduced-leave schedule that your employer offered (or if your request for a reduced-leave schedule is denied), you still have the right to take your FMLA leave in one continuous block following your child's adoption.

**Question 6.** If I take leave in the form of a reduced teaching schedule, how should my administration count that leave against the annual FMLA leave to which I am entitled?

**Answer.** When calculating how much FMLA leave you take in a semester when working a reduced schedule, your administration must use your regular work schedule (that is, teaching plus nonteaching duties) as the baseline for determining leave taken. If your schedule varies, the number of hours normally worked is calculated by examining the twelve weeks prior to the beginning of the leave period.<sup>39</sup> For example, suppose you normally teach three courses a semester. While certain time periods require more work than others (for example, weeks you grade midterm or final exams), you determine that in an average week you spend three hours a

course in the classroom (that is, nine hours); two hours preparing lecture notes, writing homework assignments, and holding office hours for each hour spent in the classroom (that is, eighteen hours); and one hour grading papers for each hour spent in the classroom (nine hours). Thus, on average, you spend thirty-six hours a week on teaching duties.

Suppose you also serve on several college committees (twelve hours a week) and spend twelve hours a week on your own academic research. Accordingly, your normal, baseline schedule indicates that you work sixty hours a week. If you reduce your teaching schedule by one course, you reduce your workweek by twelve hours or one-fifth. Thus, every week of the semester that you are teaching part-time counts as one-fifth of a week of FMLA leave used, except for full weeks of vacation (like spring break when you use no FMLA leave). Every five weeks of the semester teaching on this reduced schedule would result in a one-week deduction from your twelve weeks of FMLA leave. Thus, if your semester is fifteen weeks long, you will use three weeks of FMLA leave working this reduced schedule.

**Question 7.** I know that sometimes employees can use paid personal leave or paid sick leave to take FMLA leave without any pay reduction. If I take FMLA leave by working a reduced schedule, am I entitled to take paid leave under any of my college's other benefits programs? If not, how much will my salary and fringe benefits be reduced?

**Answer.** As a general rule, faculty members and academic professionals, as salaried professional employees, are exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA).<sup>40</sup> Because you are an "exempt" employee, your administration is not ordinarily allowed to make hourly deductions from your salary for hours of work that you miss. But the FMLA permits salary deductions for any hours taken as intermittent or reduced FMLA leave within the workweek without effecting an employee's exempt status under the Fair Labor Standards Act.<sup>41</sup>

Therefore, your salary must be reduced on a basis that is proportional to the amount of leave time you take.<sup>42</sup> For example, if you usually work sixty hours a week and take FMLA leave in the form of a one-course reduction for one semester, how much is your salary reduced? In the example in Question 6, the total amount of leave taken was three weeks.

Example 1—The Nine-Month Contract. Suppose you are on a nine-month contract (about 36 weeks), and suppose you are paid \$60,000 a year. Divide \$60,000 (the annual salary)

by 36 weeks to calculate your weekly salary:  $\$60,000 \div 36 = \$1,666.67$ . Because your reduced schedule results in three full weeks of FMLA leave, multiply three weeks by the  $\$1,666.67$  weekly salary:  $3 \times \$1,666.67 = \$5,000.00$  reduction in annual pay.

Example 2—The Twelve-Month Contract. If you are on a twelve-month contract, divide the annual salary by fifty-two weeks to determine the weekly salary:  $\$60,000 \div 52 = \$1,153.85$ . The pay reduction would then be calculated by multiplying the three weeks of FMLA leave by the weekly salary:  $3 \times \$1,153.85 = \$3,461.54$  reduction in annual pay.

Some institutions have *personal* leave policies that allow faculty members to reduce their work loads by one or more courses but which mandate pay reductions that are much larger than those permitted under the FMLA. For example, at a college where the usual course load is six courses a year, the administration might require a full-time professor to reduce his salary by one-sixth for each one-course reduction when he takes personal, rather than FMLA, leave. Using the facts and salaries in the first example above, that would result in an annual pay reduction of  $\$10,000$ —substantially more than the pay reduction under the nine-month contract FMLA example above. If your college or university has a personal-leave plan such as the ones described above, you should explore whether it or FMLA leave best meets your needs.

Alternatively, some colleges and universities allow a faculty member to take personal leave in the form of course reductions, but then administrators reduce the full-time faculty member's salary by the amount of money the college spends to find a replacement to teach the course(s) of the faculty member on leave. For example, if it costs the school  $\$500$  in search costs and  $\$3,500$  in salary to hire a replacement faculty member, the faculty member who takes personal (not FMLA) leave in the form of a one-course reduction in teaching load has his salary reduced by a total of  $\$4,000$ .

Both of these types of formulas should not apply to professors who take FMLA leave, because the personal leave and "replacement" formulas described above require the professor to take a larger pay reduction than that stipulated by the FMLA. Your institution must compensate you for teaching and nonteaching duties as well if those duties are part of your work. Your institution may elect to provide, through its own policies, more generous family and medical-leave benefits than those established by the FMLA, but it may not offer a family and medical-leave benefit less generous than that available under the FMLA.<sup>43</sup>

Your institution may not eliminate work-place benefits that are normally provided to full-time employees when you switch to a reduced-leave schedule. However, benefits such as

health insurance, which are provided to faculty members based on the number of hours worked, may be reduced proportionately if you take FMLA leave by working on a part-time basis.<sup>44</sup> So, if you normally accrue eight hours of paid sick leave a month of employment, and you take FMLA leave by working half time, then you would accrue only four hours of paid sick leave a month while you are on a reduced-schedule leave.

**Question 8.** I want to take FMLA leave on an intermittent basis, but I am not entitled to paid personal time off or paid sick leave under my university's benefits package. How much are my salary and benefits going to be reduced?

**Answer.** Your salary may be reduced on a basis that is proportional to the amount of leave time you actually take.<sup>45</sup> For example, suppose you must miss one full week of work out of every four weeks for an FMLA-qualifying reason (for example, to care for your parent after her chemotherapy treatments). Also, suppose you are on a nine-month (or thirty-six week) contract, and earn \$60,000 a year. Divide your salary by thirty-six weeks to calculate your weekly salary:  $\$60,000 \div 36 = \$1,666.66$ . For each week of work (that is, five business days) that you miss during the academic year to take FMLA leave, your salary may be reduced by \$1,666.66.

If, instead, you are on a twelve-month contract, divide your annual salary of \$60,000 by fifty-two weeks:  $\$60,000 \div 52 = \$1,153.85$ . In this case, for each week of work that you miss during the academic year for FMLA leave, your salary should be reduced by \$1,153.85. Leave taken during a full week of spring break, full weeks of winter break, or full weeks of summer break for an FMLA-qualifying reason should not result in a pay reduction (or in a credit against your FMLA leave) *if* your college or university does not have classes scheduled during those breaks and/or if faculty are normally not required to report to the office for duty during those breaks.<sup>46</sup>

While the FMLA permits salary deductions for any hours taken within the workweek as intermittent or reduced-schedule leave, if your institution has more generous family medical-leave benefits, then the more generous institutional policy must apply.<sup>47</sup> Therefore, if your institution already permits faculty to take days off *with pay* for family or personal medical treatments, then you are entitled to do the same.

If you take intermittent leave, all benefits, including health insurance, normally provided to full-time appointments must also be available while you take FMLA leave. However, any

benefits that are provided to you based on the number of hours worked may be reduced proportionately.<sup>48</sup> So, in the above example, if you normally accrue eight hours of paid sick leave a month of your appointment, then you would accrue only six hours of paid sick leave a month while on intermittent leave.

**Question 9.** I need to take FMLA leave by working a part-time (or an intermittent) schedule. Can my department chair transfer me from my full-time teaching position to an administrative position during the period I will be on leave?

**Answer.** If your administration is concerned that your proposed leave schedule would be too disruptive to students enrolled in your courses, student research that you supervise, or to some other aspect of your normal work schedule, then you may be assigned to an “alternative position” that would better accommodate your leave.<sup>49</sup> The equivalent position need not have equivalent duties, although it must have equivalent pay and benefits. For example, if you take reduced-schedule leave by reducing your normal course load from four courses a semester to two courses, you are teaching part-time. However, your institution may not pay you its adjunct faculty rates for teaching your remaining courses, but must pay you based on a calculation of your normal rate of pay, adjusted proportionately for the amount of leave you are actually using.<sup>50</sup>

In selecting an alternative position for you, your administration must consider several FMLA mandates. First, it may not assign you to an alternative position for which you are not qualified.<sup>51</sup> For example, if you are a chemistry professor, you may not be assigned to teach on a reduced schedule in the physics department. Nor may you be assigned to administrative positions for which you are not qualified. For example, a sociology professor may not be assigned to be a department administrative assistant.

Your administration also may not transfer you to an alternative position in order to discourage you from taking leave or retaliate against you for taking leave.<sup>52</sup> For example, a professor cannot be assigned to assist a secretary in the academic dean’s office or to help the custodians clean up buildings on campus. If you work for a state university with several campuses, you cannot be assigned to teach courses at a distant campus as a means to discourage you from taking FMLA leave. Arguably, a teaching schedule upon your return from FMLA leave that is unusual or inappropriate, given your expertise and the practice in your

department, raises the issue of whether you are being “punished” for exercising your FMLA rights. For example, rolling over course requirements from one semester to the next resulting in an additional course load may be viewed as not only burdensome but also as not returning the faculty member to a position substantially the same as she or he occupied prior to taking leave.<sup>53</sup>

If an alternative position better accommodates your need for a reduced-schedule (or intermittent) leave, does not cause an undue hardship for you, is a position for which you are qualified, and offers equivalent pay and benefits, then you do not have the right to refuse this position in favor of some other alternative position that may be more to your liking.

If your “serious health condition” (under the FMLA) also qualifies as a “disability” (under the ADA), your institution may be required to provide a reasonable accommodation that will allow you to keep your original position.<sup>54</sup> For example, suppose you have a heart attack that leaves you with an ADA-qualified disability. You need (and want) to work a part-time schedule, and your physician has recommended you reduce your teaching load from four classes a year to two classes. In this case, rather than transfer you to an administrative position (under the FMLA), your administration might make a reasonable accommodation for your disability by allowing you to teach one class a semester and hiring a qualified adjunct faculty member to teach the classes that you would have taught, if not for the disability. (See Section 17.)

Also note that if your employer proposes an alternative position (or reasonable accommodation) that complies with the law, but is one that you find undesirable, you still have the right to take your FMLA leave in a single block of time. For example, following the birth or adoption of your child, you may desire to take your FMLA leave by working part-time. If your employer proposes that you switch to an administrative position that you find undesirable during the time you will be on leave, you may still elect to take up to twelve weeks of your FMLA leave in a single block. Because twelve-week leaves do not fit neatly into semesters, sometimes, rather than lose your services for a twelve-week time period, your institution may try to find you an alternative position that you do find desirable.

**Question 10.** The intermittent FMLA leave I need to take for my serious health condition necessitates that I alternate one week of leave with one week of work for the first eight weeks of the upcoming semester. Because my leave schedule is not compatible with my normal teaching schedule, my dean has asked me to just take twelve weeks of FMLA leave. Frankly, I

can't afford to take twelve weeks of unpaid leave, and I do want to work during the weeks that I am able to do so. Must I take twelve weeks of FMLA leave when I only need four?

**Answer.** With a few exceptions, employees cannot be required to take more leave than they need to address their FMLA-qualifying circumstance.<sup>55</sup> If you want to return to full-time work in the ninth week of the semester and you are medically able to perform the essential functions of your position during the parts of the semester when you will not be on leave, your dean must allow you to return to work as you have proposed. While it may not be practical for you to teach classes during the eight weeks that you will use intermittent leave or to return to the classroom nine weeks into the semester, your dean may reassign you to an "equivalent position" for the duration of the semester. An equivalent position is one that is "virtually identical" to the position you held before your leave began. Equivalency applies to the pay, benefits, working conditions, privileges, and status of your position. The equivalent position must involve the same or substantially similar duties and responsibilities and must entail substantially equivalent skill, effort, responsibility and authority as your normal position.<sup>56</sup> In the case of a faculty member, an equivalent position could exclude classroom duties but include working full-time on research and on service normally performed by faculty in the department (for example, serving on committees and advising students).

### **III: FMLA LEAVE FOR YOUR OWN SERIOUS HEALTH CONDITION**

The FMLA permits eligible employees to take leave when they are suffering from a "serious health condition." Because many FMLA-related disputes arise from disagreements about what constitutes a serious health condition, this section first uses the US Department of Labor's regulations governing the FMLA to define a serious health condition and follows up with a series of questions meant to illustrate the application of the regulations. You should be aware that a medical problem may simultaneously qualify as a serious health condition under the FMLA and be considered a disability under the Americans with Disabilities Act or under the workers'-compensation (WC) laws of your state.<sup>57</sup> (See Section 17.) If you are ill, but your illness fails to qualify as a serious health condition under the FMLA, check your institution's sick-leave policy, and, where applicable, your collective-bargaining agreement, which may still provide you with either paid or unpaid leave if you need time off from work.

**Question 1.** I want to take FMLA leave for my own medical needs. How do I know if my medical problem qualifies as a “serious health condition” under the FMLA?

**Answer.** A "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves:

- Any period of time during which you are unable to work (that is, incapacitated) or receiving treatment connected with inpatient care (for example, an overnight stay) in a hospital, hospice, or residential medical care facility; or
- A period of incapacity that leaves you unable to work for three or more full *calendar* days and also involves continuing treatment by (or under the supervision of) a health-care provider; or
- any period of incapacity due to pregnancy, or for prenatal care; or
- any period of incapacity due to a *chronic* serious health condition or for treatment of a chronic serious health condition (for example, asthma, diabetes, or epilepsy); or
- a period of incapacity that is due to a condition for which treatment may not be effective (for example, Alzheimer's, stroke, or a terminal disease); or,
- any absences to receive multiple treatments (including necessary periods of recovery from treatments) when the treatments are made by a health-care provider or following a referral by a health-care provider for a condition that likely would result in incapacity of more than three consecutive days if it was left untreated (for example, chemotherapy for cancer or dialysis for kidney disease).<sup>58</sup>

**Question 2.** Do I have to see a state licensed medical doctor (M.D.) for diagnosis and treatment of a serious health condition?

**Answer.** No. FMLA regulations define a broad scope of health-care professionals as qualified health-care providers. Health-care providers must, however, be licensed to practice in their state. The US Department of Labor’s list of qualified health providers includes doctors of medicine or osteopathy, podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (but only for manual manipulation of the spine to correct a subluxation diagnosed by X-ray). Other qualified health-care providers include nurse practitioners, certified nurse midwives, clinical social workers, and physician assistants. Christian Science Practitioners listed

with the First Church of Christ Scientist are designated as qualified health-care providers—although employers may require a second opinion (but not treatment) from another type of qualified provider. The list also includes any health-care provider from whom your employer, or the benefits manager of your employer’s group health plan, will accept certification of a serious health condition to verify a claim for health insurance benefits. In the case of foreign countries, a qualified health-care provider is one of the providers in the above list who: (1) practices in a country other than the United States; (2) is authorized to practice under the laws of that country, and (3) is performing within the scope of his/her practice as defined by that nation’s laws.<sup>59</sup>

**Question 3.** I have been diagnosed with clinical depression by my health-care provider, who is recommending that I switch to a part-time teaching schedule for a semester. Does the FMLA only apply to physical conditions, or may I take FMLA leave for a mental condition?

**Answer.** FMLA regulations acknowledge that mental illnesses may constitute serious health conditions. If you are under the care of a qualified health-care provider who diagnoses you as too incapacitated to work full-time, or who thinks your treatment requires part-time work, and you are under a regime of continuing treatment by a health-care provider (for example, medication, or psychological counseling), then your clinical depression may qualify as a serious health condition entitling you to FMLA leave.<sup>60</sup> Working a reduced or part-time schedule must be agreed to by your employer.<sup>61</sup>

**Question 4.** I have experienced a medical condition that left me unable to work for three successive calendar days. I understand that to be classified as having a “serious health condition” I also need to receive “continuing treatment” by (or under the supervision of) a health-care provider. What constitutes “continuing treatment”?

**Answer.** Continuing treatment requires an in-person visit to a qualified health-care provider or someone under the qualified provider’s supervision (e.g, a physician assistant, a physical or occupational therapist). E-mails, text messages, or phone conversations do not count as in-person visits. Continuing treatment may be defined as at least one visit to a qualified health-care provider with a regimen of continuing medical care (for example, prescription medication or

physical therapy). The requirement to receive continuing treatment may also be satisfied by making two in-person visits to a qualified health-care provider within thirty days of the first day of incapacity, unless extenuating circumstances beyond the employee's control prevent a follow-up visit within the thirty-day period. In both types of "continuing treatment," the first (or only) in-person visit must occur within seven days of the first day of incapacity. The decisions made during this visit regarding the need for additional treatment visits or a continuing regimen of medical treatments are left to you and your health-care provider.<sup>62</sup>

**Question 5.** I have experienced a medical condition that left me unable to work for three successive calendar days and had a doctor's appointment within a week of my first day of incapacity. I was scheduled for a follow-up visit within the thirty-day time frame, but an assistant from the doctor's office called to cancel the visit because the doctor had to perform an emergency surgery. Is my medical leave not covered by the FMLA because of this?

**Answer.** When circumstances beyond your control prevent you from receiving required "continuing treatments" in the period set forth by federal regulations, your qualification for FMLA leave are not affected. Federal regulations do not define a complete list of extenuating circumstances, but specify they are based on the facts of the individual situation. So, if your doctor has to cancel your appointment for an emergency surgery, or the doctor's office is closed because of snow, or you cannot schedule your appointment within the requisite amount of time because the doctor's patient calendar is full, it doesn't affect your entitlement to FMLA leave for a serious health condition because all of those circumstances are beyond your control.<sup>63</sup>

**Question 6.** When is a *chronic* condition also a "serious health condition" for which I may be entitled to FMLA leave?

**Answer.** In the case of a chronic condition, the period of incapacity need not last three or more days. Incapacities that stem from a chronic condition might only last part of a day (for example, an asthma attack). A chronic health condition is one which:

- requires periodic visits (at least twice a year) for treatment by a qualified health-care provider, or person under the supervision of a qualified health-care provider (for example, physician assistant or a nurse practitioner); and

- continues over an extended period of time; and
- may cause episodic, rather than a continuing period of, incapacity (for example, asthma, diabetes, or epilepsy).<sup>64</sup>

**Question 7.** I have terminal cancer and sometimes experience periods of incapacity that last a day or two. But, because my disease is terminal, I no longer receive continuing treatment from my health-care provider. Am I still entitled to FMLA leave during my days of incapacity?

**Answer.** You are entitled to FMLA leave even though your periods of incapacity do not extend for three or more days and even though you do not receive continuing treatments. In the case of diseases or medical conditions that are permanent or long-term, all periods of incapacity are covered. You also need not be receiving active treatment from your health-care provider but must be under the supervision of a qualified health-care provider. Examples that fall under this category of “serious health condition” include terminal diseases and strokes.<sup>65</sup>

**Question 8.** I was in an automobile accident and admitted to the hospital for an overnight stay. I do not know when I will be discharged. Does the time I am missing from work count as FMLA leave? Does my FMLA leave conclude when I am discharged from the hospital? What if I need restorative surgery at some point after my discharge from the hospital?

**Answer.** Any medical condition that necessitates an overnight stay in a hospital (or other medical facility) for inpatient care is defined as a serious health condition. Your leave entitlement covers the period you receive inpatient treatment as well as time following your discharge when you are incapable of working or need to miss work to obtain follow-up treatment from a qualified health-care provider.<sup>66</sup> Work absences due to multiple follow-up treatments that you need for physical or occupational therapy after your accident are covered by the FMLA, as is leave that you might need to take to have restorative surgery and to recover from it.<sup>67</sup>

**Question 9.** My doctor diagnosed me as having the flu and recommended that I stay home from work for a week. Is the flu a serious health condition under the FMLA?

**Answer.** Typically, conditions such as the flu, common cold, earaches, upset stomachs, minor ulcers, headaches (other than migraine), and routine dental or orthodontia problems do not constitute serious health conditions under the FMLA. However, if you have complications (for example, respiratory problems) from the flu that require an overnight stay in a hospital, or your flu is serious enough to leave you incapacitated for three or more calendar days and you are under treatment of a health-care provider, then your ailment may constitute a serious health condition under the FMLA.<sup>68</sup> Check your school's medical leave policy for faculty. If you are not entitled to FMLA leave, you may be entitled to (paid) sick leave under your institution's workplace benefits policies to recover from the flu. (See Section 14.)

**Question 10.** I have a substance-abuse problem. Am I entitled to take FMLA leave for treatment?

**Answer.** Possibly. Substance abuse may qualify as a serious health condition if the criteria in Answer 1 of this section are met. However, in order to take FMLA leave for substance abuse, you will need a qualified health-care provider to refer you to treatment by a qualified health-care provider. Work absences caused by an employee's misuse of a substance, rather than for *treatment* of substance abuse, are not protected under the FMLA.<sup>69</sup>

Likewise, an employee may take FMLA leave to care for a covered family member who is being treated by a health-care provider for substance abuse. But the employee is not entitled to FMLA leave to care for a covered family member who is abusing a substance. For example, if Professor Doe needs to miss work to check his or her spouse into a rehabilitation facility, this absence may qualify for FMLA leave. However, if Professor Doe misses work because his or her spouse is at home abusing alcohol or drugs, that absence is not covered under the FMLA.

**Question 11.** May I take my accumulated, paid sick leave for my own serious health condition and then up to twelve more weeks of leave as unpaid FMLA leave for that serious health condition?

**Answer.** Perhaps. But, your college or university has the right *not* to agree to such a leave arrangement. Under the FMLA, your institution is permitted to have a policy that requires you to concurrently use your accumulated paid sick leave along with unpaid FMLA leave for recovery from your own serious health condition.<sup>70</sup> For example, suppose you have accumulated twelve weeks of sick leave and you use all of it for your serious health condition. You are paid during the time that you are on sick leave, but because your institution requires you to take the two types of leave concurrently, you have also used up all twelve weeks of your FMLA leave. However, if your administration knows you are on sick leave for your own serious health condition but chooses not to designate your sick leave as FMLA leave, you may be able to take the two types of leave consecutively. It is your employer's responsibility to designate your leave as FMLA leave and to notify you in writing if that leave will be paid or unpaid.<sup>71</sup> (See Section 14.)

**Question 12.** I have already used up two weeks of my accumulated paid sick leave this fiscal year for various minor illnesses (for example, colds, or ear infections). Now I must have major surgery before the end of the year, and my doctor recommends that I take twelve weeks of leave following the operation. I had assumed I could use my twelve weeks of unpaid FMLA leave for this purpose, but my dean says I have already used two weeks of FMLA leave and I may take only ten weeks following the surgery. Is this correct?

**Answer.** Probably not. Many college and university sick-leave policies allow for paid leave for minor as well as serious health conditions. FMLA leave, however, is not authorized for minor health ailments but is permitted for *serious* health conditions.<sup>72</sup> Thus, the two weeks of sick leave you took earlier in the year for minor health conditions would not count as FMLA leave and, therefore, you should still have twelve weeks of FMLA leave remaining this year.

**Question 13.** May I take FMLA leave to have elective surgery and to recuperate from the operation?

**Answer.** It depends on the nature of the elective surgery. FMLA leave is available for absences from work necessitated by elective surgery and recuperation from that surgery if the elective surgery is the treatment you have chosen for an FMLA-qualified "serious health condition." For example, you might have debilitating arthritis that could be managed either with pain

medication and physical therapy, or with surgery. If you and your doctor decide that the elective surgery is the better course of action for you, you may take FMLA leave. Your department chair may ask you to have the surgery at the time that will least disrupt your classes, but if your doctor recommends scheduling the surgery at a different time, it would appear that you may take FMLA leave for the surgery and necessary recuperation period.

You may not take FMLA leave for elective surgery that is not for the treatment of a serious health condition. For example, you could not take FMLA leave for elective cosmetic surgery to remove wrinkles on your face.<sup>73</sup>

If you do have elective surgery to treat an ailment that fails to qualify as a serious health condition and there are medical complications, what started out as a non-qualifying FMLA medical problem could become a “serious health condition.” For example, if you experience a complication during an outpatient, cosmetic surgery and end up spending two nights in the hospital, your work absences resulting from these complications are likely to qualify for FMLA leave.

**Question 14.** I am able to do a substantial amount of my work (like writing lectures, grading, and conducting research) at home. I was in an automobile accident, and for the time being I cannot stand, walk, or drive. However, I can recline on my bed at home and work on my laptop computer. How do I know if I have a serious health condition that leaves me incapacitated for three or more days? When defining a serious health condition does “incapacitated” mean not being able to do any work, or just not being able to do work on campus?

**Answer.** You are incapacitated under the FMLA if your medical condition makes you unable to perform one or more of the essential functions of your job. Your college or university may designate which functions of your position are “essential,” and your health-care provider may use this list to designate which of these essential functions you are unable to perform. If you are able to work from bed but cannot travel to campus, you may still be incapacitated if an essential part of your job is meeting classes, supervising students and staff in a research lab, and so on.<sup>74</sup>

**Question 15:** I have a serious health condition that leaves me unable to perform some of the essential functions of my position, and I want to utilize some of my available FMLA leave. When I documented my medical condition and submitted my request for leave, my department chair

suggested that I take a “light-duty” assignment—working part-time, instead of taking a continuous block of FMLA leave as I originally requested. I’d prefer to take a continuous block of FMLA leave to recover from my condition. What are my options?

**Answer.** Your employer is permitted to offer you alternative options, such as a light-duty assignment. However, your college or university may not require you to take a light-duty assignment in lieu of taking FMLA leave. The choice of whether or not to take a continuous block of leave for your own serious health condition or accept a light-duty assignment is yours.<sup>75</sup> If you do take a light-duty assignment, the time you spend working on this assignment may not be counted against your annual FMLA leave entitlement.<sup>76</sup>

**Question 16:** I was injured while working on campus. The injuries I have experienced qualify as a serious health condition under the FMLA. Am I entitled to both FMLA leave and leave under the workers’-compensation laws in my state?

**Answer.** Workers’-compensation (WC) laws are typically enacted by states and cover workers who are injured while working. Workers’-compensation benefits vary from state to state, but typically include medical treatment, rehabilitation, and income replacement for employees who are unable to work. WC laws are typically not *leave* laws, and most states do not require employers to provide a specific amount of leave following a workplace injury. Additionally, most states do not require employers to reinstate employees who take leave following a workplace injury. However, FMLA leave doesn’t differentiate between injuries sustained at work or elsewhere. If you are an FMLA-eligible employee and your health-care provider certifies your injury is a serious health condition, you may elect (or your employer may require you) to take FMLA leave—which is job-protected.<sup>77</sup>

**Question 17.** My health-care provider has certified me as recovered enough from my workplace injury to return to a light-duty assignment. Can I be required to return to work if I am also taking FMLA leave?

**Answer.** If you are still unable to perform one or more of the essential functions of your job because of your work-related injury, you cannot be required to accept a light-duty position.

Instead, you may continue to take any of your remaining weeks of FMLA leave. If your state's WC law requires you to take a light-duty assignment to continue to receive workers' compensation, and you choose not to accept the light-duty assignment, your WC benefits may be discontinued. You would then be able to use any accrued leave you have from your employer's sick leave, vacation leave, or other paid time-off programs for compensation for the remainder of your FMLA leave.<sup>78</sup>

#### **IV: FMLA LEAVE FOR PREGNANCY OR THE BIRTH OF A CHILD**

Covered employees may take FMLA leave for the birth of a child for several qualifying reasons. These include: (1) a biological mother taking FMLA leave for pre-natal care, medical leave that might be necessitated by a pregnancy-related complication that qualifies as a serious health condition (as defined by the FMLA), and postpartum leave to medically recover from childbirth; (2) a spouse taking FMLA leave to accompany his wife on prenatal visits or to care for his wife who has a serious health condition resulting from her pregnancy; and (3) a parent (of either sex) taking FMLA leave to bond with their newborn child.

A pregnant woman who is unable to work full time has the option to work a reduced schedule or to take continuous FMLA leave or intermittent FMLA leave for prenatal care. A woman may take any of her twelve weeks of FMLA leave prior to, or following, the birth of her child.<sup>79</sup>

Under federal law as of late 2012, a "spouse" is a husband or wife. The federal FMLA does not recognize same-sex marriage partners as spouses. A husband is entitled to FMLA leave to care for his pregnant wife if she is incapacitated or to care for his wife following the birth of their child.<sup>80</sup> Spousal benefits are sometimes extended to domestic partners or to couples in a same-sex marriage under state law or the employer's workplace benefits policies.

Under the FMLA, parents may take up to twelve weeks of unpaid leave following the birth of their child.<sup>81</sup> Unlike spousal FMLA benefits, FMLA parental benefits recognize a variety of different family relationships. A "parent" is defined as a biological parent, stepparent, foster parent, legal guardian, or anyone who stands in *loco parentis* to a baby (for example, aunt, uncle, or grandparent).

Parents may utilize FMLA leave to be with their healthy newborn child or to help care for a newborn child with a serious health condition. Covered employees are entitled to take FMLA leave as a continuous block for the purpose of bonding with their newborns. However, if

they want to take reduced-schedule or intermittent FMLA leave to bond with their baby, they must have the consent of their employer. Leave to care for a newborn with a serious health condition follows the same regulations as FMLA leave to care for any covered family member with a serious health condition (that is, spouse, parent, son or daughter) and is covered in Section 6. Leave taken for a newborn with a serious health condition may be taken as a continuous block of time, through a part-time work schedule, or on an intermittent basis.

**Question 1.** I am pregnant. How much leave am I entitled to under the FMLA and can I take any of this leave as paid leave?

**Answer.** Under the FMLA, you are entitled to up to twelve weeks of unpaid leave within a twelve-month period.<sup>82</sup> Leave taken for the birth of a child must be completed within twelve months following the date of birth. If needed, you can take leave before the baby is born for prenatal care and for any pregnancy-related complications that necessitate your absence from work.<sup>83</sup> You may also take leave after the baby is born.<sup>84</sup>

Two types of leave are related to the birth of a child: short-term medical disability leave and child-care leave. Short-term medical disability leave (also known as sick leave) may be taken for pregnancy-related complications, to recover from normal childbirth, and for postpartum complications. If you have a normal delivery, your period of disability will probably be around six weeks. If you have a Cesarean delivery or other postpartum complications, your doctor or nurse-midwife may determine that your period of disability is eight weeks or longer. Leave taken *after* you have physically recovered from childbirth (or leave taken by a father) is categorized as child-care or child-rearing leave. There are a few situations that might allow you to take some or all of your twelve weeks of FMLA leave as *paid* leave:

- If your institution has an informal policy or past practice that provides *paid* leave for short-term medical disabilities, and you meet the criteria used to grant such paid leave in the past, your administration must permit you to take paid leave before and following the birth of your child on terms at least as generous as those allowed for people taking medical leave for non-maternity-related reasons.<sup>85</sup> For example, if your institution has a past practice of providing fully paid leaves for faculty members who are medically disabled for up to six months, then you are entitled to fully paid medical leave of up to six months duration for any medical disability associated with pregnancy and childbirth.

- If your institution has a *formal* short-term medical-disability policy (for example, sick leave) that covers faculty, and you meet the specific eligibility criteria, your administration must permit you to take up to twelve weeks of paid leave before and following the birth of your child.<sup>86</sup>
- If your institution has a paid child-care leave policy that allows parents to take leave following the birth of a child, you may elect, or your administration may require, that you take this paid leave concurrently with your FMLA leave.<sup>87</sup>
- If you live in Puerto Rico or in one of the five states (California, Hawaii, New Jersey, New York, and Rhode Island) that have temporary disability-insurance (TDI) programs, you may be able to receive a partial wage replacement during your maternity leave. TDI typically provides between six and eight weeks of payments following childbirth, with pay equal to a preset percentage of a worker's normal weekly wages. State TDI funds are financed through either a mandatory employee contribution or mandated contributions from both employees and employers. Because this leave is based on the concept of individual worker disability, it is available only to biological mothers. If you suffer serious complications from the birth of a child, TDI payments can extend beyond eight weeks.
- If you live in a state that has a paid family-leave law, you may be entitled to partial wage replacement while you are on maternity leave. California became the first state to pass a paid family-leave law in 2002. The state of Washington followed suit in 2007 and New Jersey in 2008.<sup>88</sup> Paid family-leave laws differ from TDI programs because they extend leave beyond the person experiencing a temporary disability and provide partial wage replacement to covered workers who need to care for seriously ill children, spouses, and, in California, domestic partners. Paid family leave is also available to parents to bond with newborns or newly adopted children, or recently placed foster children. Table 1 outlines pertinent features of the three states' programs.

**Table 1—States With Paid Family-Leave Laws**

	California	New Jersey	Washington
Maximum length of leave	6 weeks	6 weeks	5 weeks
Type of leave	Family	Family	Parental only
State has TDI program	Yes	Yes	No
Benefit structure	55 percent of weekly pay up to cap	66 percent of weekly pay up to cap	Flat payment (\$250/week in 2015)
Employee contribution	Yes	Yes	Yes
Employer contribution	No	No	No
Part-time workers eligible	Yes	Yes	Yes
Workers in companies with less than 50 employees eligible for paid leave benefits.	Yes	Yes	Yes

**Question 2.** I heard that states had the option to provide paid family leave through their unemployment-insurance programs. May I take paid FMLA leave following the birth of my child through one of these programs?

**Answer.** Probably not. On June 13, 2000, the Department of Labor established a birth and adoption unemployment-compensation rule. It gave state agencies that administer federal-state unemployment-compensation (UC) programs the authority to experiment in providing partial wage replacement for parents who took a qualifying leave or who left employment following the birth of a child or placement of a child for adoption. This rule was repealed in November 2003, after no states took advantage of the option to experiment with their UC programs.

**Question 3.** I want to take FMLA leave following the birth of my child. When must my FMLA leave conclude?

**Answer.** Any FMLA leave taken for the birth of your child must be completed within twelve months of the birth or placement date of the child, unless state law or your institution’s policy provides for a longer leave period.<sup>89</sup>

You have multiple options for how to use your leave benefits (continuous-block, reduced-schedule, or intermittent). Although twelve weeks of FMLA leave may not cover a whole semester of full-time leave, you are entitled to take your leave in one continuous twelve-week block. If this means you return to work with just a few weeks left in the semester, your employer can assign you to alternate full-time work in an equivalent position. Such a position would be one that is virtually identical to your former position in terms of pay, benefits, working conditions, privileges and status. The position must also involve the same or substantially similar duties and responsibilities, entailing substantially equivalent skill, effort, responsibility, and authority.<sup>90</sup> If you normally teach three courses a semester and return from FMLA leave two weeks before the semester concludes, your administration may assign you to spend these weeks working full-time at your usual salary, conducting your research, advising students, and doing other college service typically performed by faculty members of your rank. You may not be assigned to perform work that involves substantially different duties (for example, secretarial or custodial work).

If you take your FMLA leave in continuous weeks, you may take it at your own discretion during any time in the twelve months after the birth of your child. For example, suppose that your child is born three weeks prior to the conclusion of the fall semester and that your university has a four-week winter break. You may use three weeks of FMLA leave at the end of the fall semester and then use your four weeks of paid time off during the winter break, followed by nine more weeks of FMLA leave during the spring semester. Full weeks when classes are not in session may not be counted as part of your FMLA leave. So your three weeks in the fall and nine weeks in the spring count as one continuous block of FMLA leave.

Another possibility is to take a combination of full-time and reduced-schedule FMLA leave. In this case, you might take six weeks of FMLA leave following the birth of your child to recover physically and then spend the next twelve weeks working half-time in order to bond with your child. However, you should note that while your administration must allow you to take continuous FMLA leave anytime during the twelve months following the birth of your child, if you seek to work part-time for purposes of bonding with your new baby, you must also have your employer's approval for that component of your FMLA leave.<sup>91</sup> In contrast, you do not need your employer's approval to work a part-time schedule following childbirth, if you are doing so because of your own serious health condition (as defined by the FMLA) or to care for your newborn baby who has a "serious health condition."

**Question 4.** Under my college’s medical-leave policy I am entitled to six weeks of *paid* leave following the birth of my child. May I take my twelve weeks of FMLA leave after my paid leave concludes for a total of eighteen weeks off from work?

**Answer.** Not necessarily. Your college administration has the right to designate that your six weeks of postpartum medical leave will run concurrently with your FMLA leave. This will leave you with six more weeks of FMLA leave remaining that you can take any time in the twelve months following the birth of your child.<sup>92</sup>

**Question 5.** I am having a difficult pregnancy. Is it possible for me to take some FMLA leave before my baby is born?

**Answer.** Yes. The FMLA allows for any medically necessary pregnancy-related leave.<sup>93</sup> This may include any period of time you are unable to work due to a pregnancy complication or for prenatal care (for example, for both routine and other doctor’s visits, medical testing, and so on). Both the leave you take before and after your baby’s birth will count toward your twelve weeks of FMLA leave. Check your university’s short-term disability policy (that is, sick-leave policy) to determine if you can take medically necessary pregnancy leave as *paid* leave. But twelve weeks is the maximum amount of time you may take under the FMLA, no matter how that leave is characterized (for example for pregnancy, childbirth, or a “serious health condition”).

**Question 6.** My wife, who works for another employer, is pregnant. How much FMLA leave am I entitled to? And is it possible that I can take some of it as *paid* leave?

**Answer.** Under the FMLA, you are entitled to up to twelve weeks of *unpaid* leave in the twelve months following the birth of your child.<sup>94</sup> Options for taking paid leave may exist if your university has a leave policy that provides for *paid* parental leave, paid vacation leave, or paid personal leave.<sup>95</sup> Although male professors do not experience medical disabilities as a result of childbirth, under some institutions’ internal policies they may be entitled to combine paid sick leave with FMLA leave. For example, if your university has a policy that allows employees to use paid sick leave to care for a sick family member, you may be able to combine this leave with

your FMLA leave to take paid time off to care for your wife following the birth of your child. If you take your FMLA leave as continuous weeks of leave, you may schedule it at your convenience anytime during the twelve months following the birth of your child. However, should you desire to take FMLA leave to bond with your newborn child by working on a part-time schedule, or to take it in multiple blocks of time (that is, intermittent leave) which add up to a total of twelve weeks, you must have your employer's permission.

**Question 7.** My wife, who is also a full-time employee at my university, is pregnant. We are both eligible for FMLA leave and wondering how much FMLA leave we can both take?

**Answer.** Although your university may offer you more generous terms of leave, or your state may mandate more generous leave benefits, under the FMLA you and your wife are eligible for a total of twelve weeks of leave for the birth of your child or to care for the (healthy) child following birth.<sup>96</sup> You can split up these twelve weeks any way the two of you desire. For example, your wife might take six weeks of FMLA leave immediately following the birth of your child to physically recover from childbirth. (This leave is for her own serious health condition and does not count against the twelve weeks of leave the two of you must share.) Then, your wife might take an additional four weeks to bond with the baby before returning to work. Because your wife has used four of the twelve weeks of leave the two of you must share, you may take up to eight weeks of FMLA leave to bond with your child, as long as the leave concludes within one year of the baby's birth. You may take the leave at the same time that your wife does, or following her return to work. When your wife returns to work she would still have two weeks of FMLA leave remaining in her annual entitlement to use for a different FMLA-qualifying reason (for example, her own serious health condition, the serious health condition of a child, spouse, or parent, and so on). And, you would still have four weeks of FMLA leave that you could use, if necessary, for an FMLA-qualifying reason other than the birth of your child.

**Question 8.** My wife, who works full-time at my university, delivered our baby two months prematurely. The baby is in the neonatal intensive-care unit (NICU) at the hospital. We are both eligible for FMLA leave and wonder how our baby's premature birth will affect the amount of leave we can utilize?

**Answer.** Following the birth of a healthy child, spouses who work for the same employer are eligible for a combined total of twelve weeks of FMLA leave to bond with the child or to care for the healthy child.<sup>97</sup> When the baby has a serious health condition, as defined by the FMLA, both parents may take additional FMLA leave up to their individual maximums. For example, suppose your baby’s serious health condition persists for twelve weeks following birth, and your wife uses her twelve weeks of FMLA leave to recover from childbirth and to be with your baby in the NICU. In this case, your wife has not used any of the twelve weeks parents (working for the same employer) must share for the “birth of a child.” Thus, you remain entitled to take all twelve weeks to be with your child—regardless of whether the baby’s health requires your presence at the time you choose to take the leave. However, you must conclude your leave within twelve months of your baby’s birth.<sup>98</sup>

**Question 9.** My wife, who is also a full-time employee at my university, is pregnant. While she has accumulated some medical leave, she is not yet eligible for FMLA leave. I have been employed at the university for a longer period of time and am eligible to take FMLA leave. How much leave am I entitled to following the birth of our child?

**Answer.** Spouses who work for the same employer are entitled to a total of twelve weeks of FMLA for bonding with a new child or to care for a healthy new baby.<sup>99</sup> Your wife can use her medical leave to recover from the temporary physical disabilities associated with childbirth according to your university’s policy. If your institution has a policy to provide additional time off in the form of parental leave, your wife may be able to use it as well. Because your wife does not yet qualify for FMLA leave, none of her medical disability or parental leave can be counted as FMLA leave. Consequently, you will be able to use some or all of your twelve-week leave entitlement to stay home with your new child—as long as your leave concludes by twelve months following your child’s birth.<sup>100</sup>

**Question 10.** I live in a state where marriage same-sex couples can marry. I married my same-sex partner several years ago, and she is now pregnant. How much FMLA leave may I take?

**Answer.** Unless your state, municipality, faculty handbook, or, if applicable, collective-bargaining agreement provides for spousal FMLA leave benefits for your same-sex wife (or

domestic partner), you may not be entitled to FMLA leave for the purpose of caring for your partner if she has pregnancy complications or needs your care following childbirth.<sup>101</sup> Where state or municipal statutes provide a more generous set of family and medical-leave benefits, you are entitled to take leave under the provisions of your state or municipal law. (See Section 16.) The District of Columbia and the following states have adopted laws mandating some type of family and medical leave for same-sex couples: California, Connecticut, Hawaii, Massachusetts, New Jersey, New Mexico, Oregon, Rhode Island, Wisconsin, and Vermont.<sup>102</sup>

Parents are entitled to FMLA leave to bond with their healthy newborn children or to care for their babies who have serious health conditions. Parental FMLA-leave entitlements are more comprehensive than spousal entitlements. Specifically, a parent is defined as a biological parent, stepparent, foster parent, legal guardian, or person standing in *loco parentis* to the baby.<sup>103</sup> Current federal regulations recognize that many children do not live in a nuclear family with a biological father and mother. Regulations are meant to ensure that an employee who actually has day-to-day responsibility for caring for a child is entitled to take FMLA leave—whether or not the employee has a biological or legal relationship to the child.<sup>104</sup> If you are an employee who meets the twelve months/1,250 hour test, then you are entitled to up to twelve weeks of FMLA leave as a parent of the baby—either to bond with the baby after birth, or to care for a baby with a serious health condition. If your college or university has questions about your relationship to the baby, your employer may require reasonable documentation or a statement of the family relationship. The Department of Labor has stipulated that, in the absence of legal documentation, a simple statement describing your parental relationship to your child is all you need to provide.<sup>105</sup>

**Question 11.** My baby is due in late May. We do not have summer school at my college, and full-time faculty normally spend summers doing research, preparing new courses, or engaging in other service work for the school. When I requested to take FMLA leave during the fall semester, my dean told me to count the twelve weeks of summer break as FMLA leave and report back to teaching full-time in the fall. Must I do so?

**Answer.** If you have a baby, adopt a child, care for a seriously ill parent, spouse, or child, or use summer break to recover from your own serious health condition, you may still be entitled to twelve weeks of FMLA leave during the regular school year.<sup>106</sup> The FMLA specifies that leave

used does not count against your twelve-week entitlement as long as the leave is taken when your employer's business activity has temporarily ceased and when employees are generally not expected to report for work for one or more weeks. For faculty, this would typically include full weeks during winter break, spring break, or summer break. In your case, the only time that counts against your twelve weeks leave entitlement is before your summer break begins.

Leave that is taken on a continuous basis during a week when there is a holiday and school is in session for only part of the week does count as one full week of FMLA leave. So, a professor taking continuous FMLA leave during the week that includes a two-day Thanksgiving break, or a two-day fall break, would be utilizing one week of FMLA leave. For a professor taking reduced-schedule leave or intermittent leave, the holidays would not count against their FMLA leave.

**Question 12.** My college has a paid parental-leave policy that allows a new parent who is the primary caregiver to take up to one semester of fully paid leave. May I take an additional twelve weeks of unpaid leave in the next semester under the FMLA?

**Answer.** Maybe. When an employer's own policy, a collective-bargaining agreement, or state law mandate more generous benefits than those authorized by the FMLA, the employee is entitled to the more generous set of benefits. However, when an employee chooses to take an FMLA-qualifying leave (for example, leave following the birth of a child) as *paid* leave, the employer may insist that the paid leave benefit run concurrently with the employee's FMLA benefits.<sup>107</sup> If your employer mandates that the two types of leave run concurrently, you will not be entitled to take more than one semester of leave under the FMLA. But, if your administration does *not* insist that your paid parental leave run concurrently with your FMLA leave, then you may be entitled to take additional unpaid FMLA leave, in a subsequent semester, as long as the leave concludes within one year of the birth of your child.

**Question 13.** My wife is having pregnancy-related complications and needs me to care for her at home while she is on strict bed rest. How much FMLA leave may I take in this case?

**Answer.** A husband is entitled to take up to twelve weeks of FMLA leave to care for his wife if she is incapacitated (at home or in the hospital), if she is diagnosed with a "serious health

condition” as defined under the FMLA, or if he is needed to care for her during her prenatal care (for example, take her for medical testing or treatment if she is unable to drive).<sup>108</sup>

Depending on how much care your wife needs for her serious health condition, you may elect, at your discretion, to take your FMLA leave in a continuous block, or to take it in the form of reduced-schedule or intermittent leave. When your wife’s health condition necessitates your preference for a part-time or an intermittent-leave schedule, you do not need your employer’s permission to do so. But your administration is allowed to modify your duties by temporarily transferring you to an alternative position for which you are qualified and which has equivalent pay and benefits.<sup>109</sup>

Your administration may *not* transfer you to another position or modify your duties as a means to discourage you from taking leave or to otherwise create a hardship for you. For example, if you are a biology professor who normally teaches two small upper-level courses in the afternoons, your administration may not transfer you to a part-time schedule in which you teach a very large introductory biology class at 8:30 a.m. as a means of “accommodating” your request for reduced-schedule leave.<sup>110</sup>

**Question 14.** My daughter is pregnant, but she will be unable to care of her baby after it is born. Although I don’t intend to adopt my grandchild, I will be taking care of the baby on a day-to-day basis, and I will be supporting the child financially. Am I entitled to take up to twelve weeks of FMLA leave following the birth of my grandchild?

**Answer.** Grandparents are not normally entitled to FMLA leave following the birth of a grandchild. However, the FMLA regulations explicitly recognize a wide variety of family situations. If you become the child’s legal guardian, you will be entitled to FMLA leave as a “parent” of a newborn child. Moreover, if you have *loco parentis* standing for the child, you may also qualify for FMLA leave under parental entitlements.<sup>111</sup> You are in *loco parentis* to a child if you have assumed the obligations of a parental relationship without going through the formalities of a legal adoption.<sup>112</sup> Your college or university may ask you to document your relationship to your grandchild. If legal documentation is unavailable, you may provide your employer with a simple written statement asserting that you are acting in *loco parentis* for your grandchild.

**Question 15.** My university calculates the FMLA leave on an academic year. During the fall semester, I took two weeks of FMLA leave to care for my spouse who is a qualified service member with a serious injury. I am pregnant, and our baby is due during the spring semester. How much FMLA leave may I take for the birth of our child?

**Answer.** Under the military-caregiver leave provisions of the FMLA, employees are allowed to take up to twenty-six weeks of leave to care for a covered service member. If the twenty-six week leave entitlement is not exhausted, the employee may take up to twelve weeks of FMLA leave for any other qualifying reasons (for example, birth or adoption of a child, employee's serious health condition). Because you used less than fourteen weeks of FMLA leave (twenty-six weeks minus twelve weeks), you continue to retain your full twelve-week leave entitlement for the birth of a child.<sup>113</sup>

**Question 16.** I took the entire fall semester (sixteen weeks) as FMLA leave to care for my mother who is a qualified service member with a serious injury. I am pregnant, and my baby is due during the spring semester. How much FMLA leave may I take for the birth of my child?

**Answer.** An employee who takes military caregiving leave, is entitled to a maximum of twenty-six weeks of FMLA leave in a leave year for all qualifying reasons. Because you have used sixteen of your twenty-six week leave entitlement, you are entitled to a maximum of ten weeks of FMLA leave for the birth of your child.<sup>114</sup>

#### **V: FMLA LEAVE FOR ADOPTION OR FOSTER-CARE PLACEMENT OF A CHILD**

Like leave for the birth of a biological child, twelve weeks of FMLA leave for adoption or placement of a child in foster care is available to qualified employees. Qualified faculty may take FMLA leave before the actual date of placement or adoption when absences from work are a necessary part of the process (for example, home inspections, appearances in court, consultation with attorneys). Employees are entitled to FMLA leave whether they adopt their child through a licensed agency or through a private adoption.<sup>115</sup> Both domestic and international adoptions are covered. FMLA leave for adoption or foster placement of a healthy

child must conclude twelve months following the date of adoption or placement, not the date of the first use of FMLA leave.<sup>116</sup>

**Question 1.** I am adopting an older child. My college tells me I can take FMLA leave only for the adoption of a baby. Is this true?

**Answer.** No. The FMLA applies to the adoption or foster-care placement of any child under the age of eighteen.<sup>117</sup>

**Question 2.** I am adopting a child from a foreign country and will have to make several trips abroad as part of the adoption process. May I take FMLA leave for these trips before the child is placed with me, and how much leave am I entitled to once I have brought my child back to the United States?

**Answer.** You are entitled to FMLA leave for absences from work that are required for the adoption, as long as you have not used up your annual twelve weeks of FMLA leave for another qualifying reason.<sup>118</sup> But remember that you may not need to take FMLA leave for the home study or some other legal adoption requirements from your annual twelve-week allotment of FMLA leave. For example, if you teach Mondays, Wednesdays, and Fridays, you may be able to schedule the home study or other required meetings on Tuesdays and Thursdays. By doing so, you continue to perform all your teaching and nonteaching responsibilities (for example, holding office hours, grading papers, doing research, and attending committee meetings) while saving your unpaid FMLA leave for trips out of the country or for after your child arrives in the United States. Your eligibility for adoption or foster-placement leave expires twelve months following the official date of adoption or foster placement, not the date you first utilize FMLA leave for this purpose.<sup>119</sup>

**Question 3.** I am adopting a child, but I do not know exactly when the child will arrive. The adoption agency says the child probably will not arrive until mid-semester. My department chair wants me to take the entire semester as FMLA leave. Must I do this?

**Answer.** If you are taking your FMLA leave as a continuous block of one to twelve weeks off work, you, not your department chair, decide how much FMLA leave you will take for the adoption of your child and when that leave should commence. For example, your department chair may not require that you take twelve weeks of FMLA leave if you want to take only eight weeks to care for a newly adopted child. Special rules apply to primary and secondary school teachers, but *not* college or university faculty, regarding taking leave near the end of an academic term.<sup>120</sup> Nevertheless, it may be possible to accommodate your need for FMLA leave and to also accommodate the needs of your students and your colleagues. For example, you and your department chair may determine that it is too disruptive pedagogically for you to teach classes only during the first half of the semester. Thus, you may both agree that you will assume some administrative responsibilities, work on your research, and serve on faculty committees the first part of the semester prior to the start of your FMLA leave. During this period, you would perform modified duties but not be on FMLA leave. Consequently, you would be entitled to your normal pay and benefits.

Another approach would be to work full-time before the adoption date and then switch to a part-time schedule to allow you time to bond with your child. This is called “reduced-schedule leave.” Under the FMLA, employees who take reduced-schedule leave for adoption or foster-care placement must have their employer’s approval to work on a part-time or “reduced” schedule.<sup>121</sup>

**Question 4.** My wife and I are both full-time employees of our university. How much FMLA leave may we take to adopt a child?

**Answer.** Although your university may offer you more generous terms of leave, or your state may mandate more generous terms, under the FMLA, you and your wife are eligible for a combined total of twelve weeks of FMLA leave for adoption or foster-care placement.<sup>122</sup> You can divide these twelve weeks any way the two of you desire. For example, you might each use a week of FMLA leave to attend to pre-adoption legal requirements, leaving you both with a combined ten weeks to utilize following the adoption. You have many options for taking this leave. You both could take five full weeks of FMLA leave, consecutively or concurrently, to bond with your adopted child. Or, your wife could take four weeks of FMLA leave to bond with your adopted child and you might subsequently take the remaining six weeks. You just need to make

sure that you both conclude the remaining ten weeks of FMLA leave that you share within twelve months following the adoption date.

After you use your combined total of twelve weeks of FMLA leave for the adoption, you retain the rest of your individual FMLA leave entitlements for other FMLA-qualifying reasons. For example, suppose that your wife has taken a total of five weeks FMLA leave for adoption (one week prior to the adoption and four weeks after), she would have up to seven weeks of FMLA leave remaining during your university's twelve-month leave year for a different FMLA-qualifying reason. If you have taken a total of seven weeks of FMLA leave (one week prior to the adoption and six weeks after), you would have up to five weeks of FMLA leave remaining for a different qualifying reason.

**Question 5.** I took six weeks of FMLA leave for the adoption of a child during the fall semester. We just started our spring semester, and my adopted child has developed a serious health condition. My department chair says that because I already concluded my FMLA leave for the adoption of my child, I cannot take additional FMLA leave this spring. What are my leave entitlements?

**Answer.** You are entitled to use part or all of your annual twelve week FMLA leave allotment to bond with a newly adopted child or a foster-care child who has been newly placed with you. If, after the conclusion of your leave for adoption or foster placement, your child develops a serious health condition, that is considered a different qualifying event, and you may use whatever remains of your annual twelve-week leave allotment to care for your child.

#### **VI: FMLA LEAVE FOR THE SERIOUS HEALTH CONDITION OF A FAMILY MEMBER**

The FMLA permits faculty members to take leave to care for a family member who has been diagnosed with a "serious health condition." The definition of a serious health condition is the same as described in Section 3. You can take leave to care for your spouse, biological, adopted, or foster child under the age of eighteen; your child over the age of eighteen who is incapable of self-care because of a mental or physical disability; and your parents. Parents-in-law are not included. A child who you can take leave to care for may also be a person for whom you are the legal guardian or for whom you stand in *loco parentis*. Some states have enacted their own family- and medical-leave laws, which include more expansive definitions of family members

and thus provide greater entitlements to leave than the federal FMLA. When state law offers more generous benefits than federal law, you are entitled to the former.<sup>123</sup> If you have a family member who is ill, but his or her condition fails to meet the FMLA's definition of a serious health condition, check your institution's sick-leave policy, and where applicable, your collective-bargaining agreement, which may provide either paid or unpaid leave to care for a sick family member.<sup>124</sup>

When a husband and wife are both eligible for FMLA leave and both work for the same college or university, the amount of leave they may take to care for either of their parents with a serious health condition may be limited to a combined total of twelve weeks.<sup>125</sup>

**Question 1.** Who is considered a "family member" under the FMLA?

**Answer.** The federal FMLA covers your spouse, parent, son, or daughter. A spouse is defined as a husband or wife, and includes those in common-law marriages, but it doesn't include same-sex spouses because federal law, as of late 2012, does not recognize same-sex marriages. However, some states extend family and medical-leave benefits to same-sex spouses or domestic partners. The District of Columbia and the following states have enacted laws mandating some type of family and medical leave for same-sex couples: California, Connecticut, Hawaii, Massachusetts, New Jersey, New Mexico, Oregon, Rhode Island, Wisconsin, and Vermont.<sup>126</sup>

Your parent refers to a biological parent, stepparent, foster parent, adoptive parent, legal guardian, or an individual who stood in *loco parentis* to you. FMLA leave is not available to care for parents-in-law.

A son or daughter is defined as your biological child, adopted child, foster child, stepchild, legal ward, or a child for whom you are standing in *loco parentis*. For you to take FMLA leave, your child must be under the age of eighteen, or, if he or she is eighteen or older, must be incapable of self-care due to a mental or physical impairment.<sup>127</sup>

**Question 2.** My same-sex domestic partner has cancer. How much FMLA leave may I take?

**Answer.** The FMLA does not cover employee leave to care for domestic partners. You may qualify for leave if your state or municipality mandates that employers provide FMLA benefits

for domestic partners in long-term relationships. Alternatively, your employer may elect to offer these benefits, even if they are not required by state or local law. Check your faculty handbook and, if applicable, your collective-bargaining agreement to determine whether your college or university has a leave policy that would allow you to take the time you need.

**Question 3.** I recently took twelve weeks of FMLA leave following the birth of my baby. Six weeks of leave was to recover from childbirth and the other six weeks were to bond with my child. Our pediatrician just diagnosed my baby as asthmatic. May I take additional FMLA leave this year to care for my baby while he is suffering from this serious health condition?

**Answer.** Possibly. It depends on when you took your leave and how the twelve-month period is defined in your faculty handbook. Your entitlement to twelve weeks of FMLA leave is on an annual basis. No matter how the leave clock is calculated, it will reset within a year, and you will be entitled to twelve weeks of FMLA leave annually, until your child is eighteen years old, to care for him or her.<sup>128</sup>

Employers can choose to define “any twelve-month period” in one of four ways:

- The calendar year
- Any fixed twelve-month leave year, such as the fiscal or academic year, or the beginning of a professor’s appointment
- The twelve-month period measured forward from the date your first FMLA leave begins
- A “rolling” twelve-month period measured backward from the date an employee uses any FMLA leave

However the twelve-month period is defined, the definition must be consistently applied to all FMLA-eligible employees. In your case, how the twelve-month period is defined makes a difference. Under the first three options, it is possible to stack FMLA leave back to back. For instance, under the first two options, you could take twelve weeks of FMLA leave at the end of the calendar year or other fixed year, and another twelve weeks immediately thereafter at the beginning of the next year. Under the third option, the next twelve-month period starts the first time FMLA leave is taken after any previous twelve-month period is completed. Only the last option—the “rolling” method—disallows “stacking.” Under that option, each time you take

FMLA leave, the remaining leave entitlement would be any balance of the twelve weeks not used during the preceding twelve months.

Check your faculty handbook and, if applicable, your collective-bargaining agreement, to determine if there are options other than the FMLA to allow you to take leave to care for your sick child. For example, some institutions have sick-leave policies that allow professors to use their own sick leave to care for immediate family members who are ill, or provide faculty members a preset number of personal leave days for any purpose. Some institutions allow employees to donate unused paid-time off to other employees who need it. These types of plans might also provide the additional leave you need to care for your child.

**Question 4.** My spouse had a stroke and is currently in the intensive-care unit at a nearby hospital. I want to take FMLA leave for the duration of his stay in the hospital, but my department chair has denied my leave request. Although she acknowledges that a stroke counts as a serious health condition under the FMLA, my chair argues that because my husband is in an intensive-care unit, he is receiving round-the-clock medical care and consequently I am not needed in the hospital to “care for” him. Can my FMLA leave request be denied for this reason?

**Answer.** Probably not, unless you have used up your twelve weeks of FMLA leave for the designated twelve-month period. The US Department of Labor has determined that “caring for” a family member with a serious health condition includes physical and/or psychological care. Physical care includes actions such as providing for your family member’s basic hygiene and his or her nutritional needs and safety, and even taking your family member for medical appointments when he/she is unable to go alone. Psychological care is specifically defined to include providing psychological comfort and reassurance that would be beneficial to a seriously ill family member who is receiving inpatient (or home) care.<sup>129</sup>

**Question 5.** My brother normally cares for our mother who has a serious health condition. He needs to go out of town for two weeks and has asked me to care for her. May I take FMLA leave for this purpose?

**Answer.** Likely, yes. The 2009 revised FMLA regulations clarify the term “to care for” to include situations when an employee needs to substitute for others who normally care for a family

member with a serious health condition. The employee does not have to be the only individual available to care for the family member to be entitled to FMLA leave.<sup>130</sup>

**Question 6.** My mother, who lives 500 miles away, slipped and broke her hip. I need to take some time off to travel to her city and make arrangements for her to be cared for in a nursing home when she is discharged from the hospital. May I take leave to make these arrangements?

**Answer.** Likely, yes. The 2009 revised FMLA regulations clarify that caring for a family member with a serious health condition may include situations in which the employee needs leave to make arrangements for *changes* in care.<sup>131</sup>

**Question 7.** My brother, sister, and I are making arrangements to share caregiving responsibilities for our father who had a stroke. I would like to take FMLA leave intermittently during the upcoming academic year to assist in this effort. Am I entitled to do so?

**Answer.** Likely, yes. FMLA regulations clarify that employees are entitled to take FMLA leave on an intermittent basis to care for a family member with a serious health condition when the employee is only needed intermittently. This could include situations in which other care is normally available, or care responsibilities are shared with another member of the family, or even a third party.<sup>132</sup>

**Question 8.** I need to take FMLA leave to care for my stepson who has a serious health condition. The human resources office at my university has insisted that I provide documentation proving my relationship to my stepson. Do I need to prove my family relationship, and if so, what documentation will suffice?

**Answer.** Yes, your college or university may ask you to provide documentation of your family relationship. The documentation can take the form of a simple written statement that you provide to your human resources department. The statement need not be notarized. Alternatively, you could provide a court document, child's birth certificate, etc. Employers may ask to examine original forms, but if they are required, the originals must be returned to the employee.<sup>133</sup>

**Question 9.** My 25-year old son broke his leg and needs help getting to doctor's appointments and physical therapy, and with bathing and cooking. He does have a serious health condition; may I take FMLA leave to care for him?

**Answer.** Probably not. Under the FMLA, you do not qualify to take leave because your child is over the age of seventeen. In the case of a son or daughter who is eighteen or older, the child must have a physical or mental impairment that substantially limits one or more of the major life activities of an individual (that is, a disability as defined under the Americans with Disabilities Act). Examples of these types of disabilities occur when a person is blind or deaf, cannot breathe, learn, think, concentrate, or interact with others. You can check your faculty handbook, and if applicable, collective-bargaining agreement, to see if there might be some other type of paid or unpaid leave that you can take to care for your son.<sup>134</sup>

**Question 10.** I live with my domestic partner and his two young children from a prior relationship. I do not financially support the children, but I do fully share caregiving responsibilities for them with my domestic partner. One of the children has been diagnosed with a serious health condition. Am I entitled to FMLA leave to care for my partner's child?

**Answer.** Likely, yes. You would qualify for FMLA leave as someone who is standing in *loco parentis* for a child. Whether an employee stands in *loco parentis* to a child depends on multiple factors, including the age of the child, the degree to which the child depends on the person standing in *loco parentis*, the amount of financial support, and the extent to which duties commonly associated with parenthood are exercised.<sup>135</sup> The US Department of Labor has clarified that a person need not provide both day-to-day care of a child *and* financial support to be considered as standing in *loco parentis*.<sup>136</sup> Given that you are providing day-to-day care for the children, you would be entitled to up to twelve weeks of FMLA leave to care for either of them if they experience a serious health condition.

**Question 11.** My husband and I divorced a few years ago. Both he and I have remarried, and our ten-year-old son lives with my ex-husband and his new wife. Our son was in an automobile accident, and I want to take FMLA leave to stay with him while he is in the hospital. Am I still entitled to FMLA leave, even though my ex-husband has primary custody of my son?

**Answer.** Yes, you are entitled to FMLA leave (as is your current husband and your ex-husband's current wife) to be with your son who has a serious health condition. The US Department of Labor has stipulated that neither the FMLA statute nor the regulations restrict the number of parents a child may have for the purpose of determining an employee's eligibility for FMLA leave. In situations where a child's biological parents divorce and remarry, the child is the son or daughter of both the biological parents and the stepparents. Thus, all four adults would be entitled to take up to twelve weeks of FMLA leave for a child with a serious health condition. If your college or university has questions about your relationship with your child, it may require you to provide reasonable documentation of your family relationship (for example, a birth certificate). But, in situations where legal documentation of a parental relationship does not exist, an employee may submit a simple written statement asserting parental responsibility.<sup>137</sup>

**Question 12.** My husband and I both work for the same university. He took ten weeks of FMLA leave earlier this year to care for his father who had a heart attack. Now, I need to take FMLA leave to care for my mother who had hip-replacement surgery. But my department chair said I am only entitled to two weeks of FMLA leave to care for my mother. How can this be?

**Answer.** Under the FMLA, when a husband and wife both work for the same employer and both seek leave to care for one of their respective parents with a serious health condition, the employer may choose to limit the amount of leave taken for this qualifying reason to a total of twelve weeks. Because your husband used ten weeks of your combined twelve-week leave entitlement, you only have two weeks left to use to care for your mother. If you do end up taking just two weeks of FMLA leave to care for your mother, you still retain ten weeks of your annual FMLA-leave entitlement, if you need it, for your own serious health condition or to care for your child or spouse who has a serious health condition.<sup>138</sup>

## **VII: QUALIFYING EXIGENCY LEAVE**

The National Defense Authorization Act (NDAA) of 2008 amended the FMLA to permit qualified employees to take any part of their regular twelve-week unpaid-leave entitlement for a qualifying event that occurs because a spouse, son, daughter, or parent of the employee has been notified of an impending call to active duty; because of exigencies that arise during the covered service member's period of active duty; or from exigencies related to the covered

service member's return from an active-duty assignment in a foreign country. This type of leave is known as Qualifying Exigency Leave (QEL).

With greater United States reliance on reserve and National Guard units in the conduct of military and foreign-aid operations, and with increasing numbers of foreign deployments of service members, more families are experiencing a wide variety of disruptions that stem from the departure of family members. Wills and other financial documents need to be drawn up, child-care arrangements altered, pre-deployment briefings attended, and so on. Congress amended the FMLA on the presumption that allowing employees to take unpaid, job-protected FMLA leave to deal with such exigencies would be beneficial to the families of covered service members. Further amendments were added by the National Defense Authorization Act of 2010. Because many faculty have some degree of flexibility in their work schedules, to the extent that a professor can (and wants to) attend to the exigencies associated with a call to service during times when they do not have to be on campus, they may not need to take any FMLA leave.

**Question 1.** My daughter has been a member of the *regular* US Armed Forces for ten years. She is deploying to a foreign post. May I take Qualifying Exigency Leave to help her with pre-deployment activities?

**Answer.** Yes. The statutory language of the National Defense Authorization Acts of 2008 and 2010 Congress explicitly defines the subgroups of service members the law covers. Qualifying Exigency Leave was initially available only when the National Guard of the Armed Forces Reserves called a service member to active duty. Exigency Leave initially did not apply to the deployment of members of the regular Armed Forces.<sup>139</sup> However, in the NDAA of 2010, Congress further amended the FMLA to allow eligible family members to take Qualifying Exigency Leave if a covered family member in the National Guard, Reserves, or regular Armed Forces is called to duty for deployment in a foreign country.<sup>140</sup>

**Question 2.** My father is a member of the National Guard. His unit has been activated by our state governor to provide emergency services following a natural disaster. Am I entitled to take Qualifying Exigency Leave?

**Answer.** Not under the FMLA because a family member's leave only applies to a federal call to duty that requires a foreign deployment. While the 2008 NDAA amendments allowed for Qualifying Exigency Leave when a member of the National Guard was called to duty by the federal government for a domestic national emergency, the 2010 amendments restricted the availability of QEL to situations where the federal government called the service member to duty for a *foreign deployment*.<sup>141</sup>

Your employer may have a policy that allows you to take personal time off for this purpose. Check your faculty handbook, college or university policies, and, if applicable, collective-bargaining agreement.

**Question 3.** I had heard that employees can only take FMLA leave for a son or daughter who is under the age of eighteen. I want to take Qualifying Exigency Leave to help my son who is deploying abroad with his National Guard Unit, but he is over the age of eighteen. Am I allowed to take Qualifying Exigency Leave to help him?

**Answer.** Yes. Typically when an employee wants to take leave to care for a son or daughter with a "serious health condition," the son or daughter must be under the age of eighteen. If the son or daughter is eighteen or older, a parent will not qualify to take FMLA leave for this particular reason unless the son or daughter is unable to care for himself or herself due to a mental or physical impairment. Eligibility for leave is different under the NDAA. Most service members are eighteen or older. So the US Department of Labor elected to use a different definition of son or daughter to determine a parent's eligibility for either of the two types of Military Family Leave. Specifically, a son or daughter remains a biological, adopted, foster child, stepchild, legal ward, or someone for whom the employee once stood *in loco parentis*. There is no age limit, however, for your son or daughter for whom you can take Qualifying Exigency Leave.<sup>142</sup>

**Question 4.** My son's Army unit is being deployed to a foreign country. What type of activities count as qualifying exigencies for which I can take leave?

**Answer.** If you are a faculty member with some flexibility in your work schedule, you may not always need to take FMLA leave to attend to qualifying exigencies. However, if you need (or want) to take Qualifying Exigency Leave, there are a number of circumstances in which you may.

In an attempt to clarify leave entitlements for employers and employees, the US Department of Labor produced a list of qualifying exigencies.<sup>143</sup> They are:

- Any issue (such as a medical, legal, packing and moving, or child care issue) caused by the fact that the covered service member has received seven days (or less) notification of deployment;
- To attend military events and related activities;
- To engage in child-care and school activities;
- To make financial and legal arrangements;
- To obtain counseling by someone other than a health-care provider;
- To spend time with a covered service member who is on short-term, temporary rest and recuperation (R&R) leave during their period of deployment;
- To attend post-deployment activities; and
- Additional activities.

**Question 5.** The Marine Corps Reserves has called my spouse to active duty from the Marine Corps Reserves and has ordered him to deploy abroad in six days. In what situations may I take qualifying exigency leave for this deployment?

**Answer.** Government regulations recognize that in cases of short-notice deployments there is a lot to be done and very little time to do it. For a period of seven days, beginning on the date the covered military member is called to duty or notified of an impending call to duty, you may take leave to attend to “any issue” that arises from the military call.<sup>144</sup> You are not required to demonstrate to your employer that your need for leave falls under one of the other categories of Qualified Exigency Leave. For example, if your spouse receives a call to duty for a foreign deployment on November 5 and is instructed to deploy on November 9, you would be eligible for leave from November 5 through November 11. You can take leave to attend a departure ceremony, to make legal or financial arrangements, or just to spend time with your spouse before he/she departs. Any leave you take on November 12 or after must qualify under one of the exigencies listed in Answer 4.

**Question 6.** My daughter has been deployed abroad for just over one year. She will return from her deployment in thirty days. Her military base is far from my home, and I cannot schedule her

arrival activities around my course schedule. May I take FMLA leave to attend her arrival ceremony and other post-deployment briefings sponsored by her unit?

**Answer.** Yes. You may take Qualifying Exigency Leave to attend any official ceremony, military-sponsored program or event related to your daughter's deployment or return from deployment. You may take leave to attend family support or assistance programs and informational briefings that are sponsored or promoted by the military, by a military- service organization (such as the USO), or by the American Red Cross.<sup>145</sup>

**Question 7.** In thirty days my spouse leaves for a military deployment to a foreign country. May I take FMLA leave to arrange for a change in our child-care plans or to attend parent-teacher conferences?

**Answer.** You may take leave to make new child-care arrangements. This type of Exigency Leave covers circumstances where the departure or continued absence of your spouse disrupts your preexisting child-care arrangements. You can take leave to enroll a child in summer camp or summer day care if your spouse is still on call-to-duty status and you need this care to attend to your summertime work responsibilities. Leave can be taken to enroll your son or daughter in or transfer him or her into a new school when the change your spouse's impending deployment necessitates a school change. You can also use FMLA leave to provide child care yourself on an urgent, immediate-need basis (but not a routine or everyday basis). For example, if your child becomes sick (but not with a serious health condition) and cannot attend school for a few days, you can take FMLA leave to stay home and care for your child. (If your child has a serious health condition, you would be entitled to take leave under FMLA provisions that provide leave for the care of a family member with a serious health condition.) You may take leave to attend meetings with teachers or counselors at your child's school or daycare facility, if the meetings are necessary due to circumstances arising from your spouse's active-duty service or call. However, government regulations do not authorize the use of FMLA leave to attend meetings about routine academic or day-care matters.<sup>146</sup> As covered in Section 16, some states have provisions in their own Family and Medical Leave laws that allow parents to take family and medical leave to attend to routine academic matters.

**Question 8.** My son's National Guard unit was deployed abroad six months ago. Some problems have come up regarding his eligibility for various military-service benefits, and I have to leave town for a few days to represent him before the government agency that authorizes benefits. May I take FMLA leave to do this?

**Answer.** Yes. However, if your university gives you the flexibility to rearrange your courses or offer alternative assignments, you may not need FMLA leave for this purpose. But should you need (or want) to take time off, you may take FMLA leave for this purpose while your son is deployed, or for ninety days following the termination of his active-duty status. You may also take FMLA leave to attend meetings with attorneys or financial advisors to execute financial and health-care powers of attorney, transfer signature authority for his bank account, and to prepare a will for your son.<sup>147</sup>

**Question 9.** My spouse's Army unit will be deploying to a combat zone. I would like to utilize intermittent FMLA leave to take our children to attend group-counseling sessions for the children of service members. Is this a Qualifying Exigency?

**Answer.** Yes. You may take FMLA leave when the need for counseling arises out of the active-duty status, or call to active duty, of a covered service member. For this type of leave, the counseling does not have to be provided by a "qualified health-care provider" (as defined by the FMLA). It can be provided by clergy member, guidance counselor, or other facilitator. You may take leave to attend counseling for yourself, for the covered service member, or for the child of a covered service member.<sup>148</sup>

**Question 10.** My spouse's National Guard unit is serving abroad. He has been granted four days of rest-and-recuperation leave. This is not enough time for him to return home. So I would like to take a week of FMLA leave to meet him in a location closer to his post. I don't want to take time off in the middle of the semester, but my spouse's leave schedule is inflexible. What are my leave benefits?

**Answer.** Spouses, parents, or children may take FMLA leave to spend time with a covered service member who is on short-term rest-and-recuperation (R&R) leave during the period of

deployment. You may take up to five (business) days of FMLA leave for each instance of R&R leave granted by the military.<sup>149</sup>

**Question 11.** My mother is returning from a deployment abroad. She does not live in my town, and I would like to take FMLA leave to attend post-deployment activities. For what activities may I take FMLA leave?

**Answer.** The Yellow Ribbon Reintegration Program, established by the 2007 National Defense Authorization Act, directs the Department of Defense to provide reintegration programs for National Guard and Reserve members and their families at approximately thirty-, sixty- and ninety-day intervals following a unit's demobilization or release from active duty. The FMLA regulations specify that eligible family members may take FMLA leave to attend arrival ceremonies, reintegration briefings and events, as well as any other official ceremony or program sponsored by the military for ninety days following the termination of the covered military service member's active duty status.<sup>150</sup> In situations where a military-sponsored reintegration program takes place just a few days outside of the ninety-day period, time off from work to attend the program should also be included as part of the FMLA-leave entitlement.<sup>151</sup>

**Question 12.** My son was killed in action while serving abroad. While my university offers three days of bereavement leave for the death of a family member, it will take me more time to meet my son's body and to make the funeral arrangements. Am I entitled to take FMLA leave to attend to these matters?

**Answer.** Yes. You may take FMLA leave to address issues that arise from the death of a covered service member.<sup>152</sup> Such issues include (but are not limited to) meeting and recovering the body, making funeral arrangements, and attending the burial of the covered military member. You may be required to take your bereavement leave and FMLA concurrently. But if you need more time off than your bereavement leave provides, you may take time off as unpaid FMLA leave.

**Question 13.** Are there any other qualifying exigencies related to a covered service member's call to duty, foreign deployment, or return from active duty for which I may take FMLA leave?

**Answer.** The Department of Labor’s 2009 regulations recognize that there may be unforeseen exigencies surrounding the call-to-duty, deployment, or return from foreign deployment of a member of the regular Armed Forces, Reserves, or National Guard in which it would be appropriate for an employer to grant an employee FMLA leave.<sup>153</sup> Thus, a final category of qualifying-exigency leave includes unpaid time off from work to address “other events” arising out of the covered military member’s active-duty status or call to active duty for a foreign deployment, provided that both the employee and the employer agree that the event qualifies as an exigency and that both agree to the timing and duration of the leave.<sup>154</sup>

**Question 14.** What constitutes a federal call to duty and what paperwork can I show my department chair to demonstrate that my request for qualifying-exigency leave is legitimate?

**Answer.** The US Department of Defense issues a set of “orders” to a military service member who is being called to duty. The orders can be used to validate your request for leave. A federal call to duty is designated as such by the Secretary of Defense and the orders of your covered service member will specify the nature of his or her deployment.<sup>155</sup>

#### **VIII: MILITARY-CAREGIVER LEAVE**

The National Defense Authorization Act (NDAA) of 2008 amended the Family and Medical Leave Act to permit eligible employees to take up to twenty-six weeks of FMLA leave to care for a current member of the Regular Armed Forces, or a member of the Reserves or National Guard who has a serious injury or illness incurred in the line of duty or while on active duty, and who is undergoing medical treatment, is recuperating, or receiving therapy either as an inpatient or outpatient. Eligible employees may also take up to twenty-six weeks of leave to care for a *current* military-service member who became disabled as a result of military service and who is on the military’s Temporary Disability Retired List (TDRL).<sup>156</sup> Leave for these purposes is known as Military Caregiver Leave (MCL). The terms “in the line of duty, while on active duty” are not redundant. A service member who is serving on active duty but breaks a leg while playing a pickup baseball game on base, has not been injured in the line of duty.

The National Defense Authorization Act of 2010 further amended the Family and Medical Leave Act to allow FMLA-eligible employees to take up to twenty-six weeks of military-caregiver leave in some circumstances to care for a *veteran* of military service.<sup>157</sup> For the

purpose of taking military-caregiver leave, the veteran must be the employee's spouse, parent, son, or daughter and must be undergoing medical treatment, recuperating, or in therapy for a serious injury or illness and a member of the regular Armed Forces, Reserves or National Guard during any part of the five-year period preceding the first medical treatment, recuperation, or therapy.<sup>158</sup>

The 2010 NDAA amendments to the Family and Medical Leave Act also broaden the definition of a "serious illness or injury" suffered by a covered service member. Initially, this type of leave was only available for a serious illness or injury suffered in the line of duty, while on active duty, that left the service member unfit to perform the duties of his/her military position, grade, rank, or rating. The 2010 NDAA extends the definition to include injuries or illnesses covered service members suffered prior to active duty but which active duty aggravated and which leaves the service member unfit for duty. Employees who are the son, daughter, spouse, parent, or the "next of kin" of a covered service member are eligible to take military-caregiver leave for qualifying reasons.<sup>159</sup>

**Question 1.** My son was injured while serving in the military. What constitutes a serious illness or injury for which I might take FMLA leave?

**Answer.** The serious injury or illness must leave the service member unfit to perform the regular duties of his/her military position, grade, rank, or rating. The service member who does become seriously injured or ill must be: (1) undergoing medical treatment, recuperating, or in therapy for his/her condition; or (2) in an outpatient status and receiving treatment from a private health-care provider, or from a Veterans Affairs (VA), or military medical facility;<sup>160</sup> or (3) on the Temporary Disability Retired List.<sup>161</sup>

It is possible for a serious injury or illness sustained by a covered service member to simultaneously qualify an FMLA-eligible employee to take military-caregiver leave, or leave to care for a family member with a serious health condition. In this type of situation, federal regulations mandate that the employee's leave must *not* be simultaneously designated as both types of FMLA leave. It may *only* be designated as military-caregiver leave. For example, suppose an employee takes four weeks of FMLA leave to care for a spouse who fractured his/her pelvis while serving abroad and who has returned to the United States for medical care. All the FMLA leave the employee takes to care for his or her spouse must be solely designated as

military-caregiver leave. Thus, the employee has not used any of his or her annual twelve-week entitlement of FMLA leave, which is available for *other* qualifying reasons (for example, birth or adoption of a child, serious health condition of a parent or child, and so on).<sup>162</sup>

**Question 2.** My daughter was seriously injured while serving in the line of duty, on active duty, but her injury occurred at a domestic military base where she has been stationed for the last two years. Am I still entitled to take military-caregiver leave?

**Answer.** Under the 2010 NDAA, only serious illnesses or injuries that occur as part of a foreign deployment trigger an eligible employee's entitlement to military-caregiver leave.<sup>163</sup> If your daughter's injuries qualify as a serious health condition, you may be entitled to take up to twelve weeks of FMLA leave to care for her under a different mandate of the law (See Section 6.)

**Question 3.** My spouse was honorably discharged from the military and has been home for one year. However, she recently began to experience medical problems that appear to have been caused by events that happened while she was serving in the line of duty, while on active duty during a foreign deployment. Am I entitled to military-caregiver leave?

**Answer.** Under the 2010 National Defense Authorization Act, if your wife was discharged in any circumstance other than dishonorably, or completed her service as an officer, or has retired, she is considered a "veteran." Employees may take military-caregiver leave for a family member who is a veteran and who has been separated from the military for five years or less, prior to the date when medical treatment, recuperation, or therapy begins for his/her serious illness or injury. Finally, if your wife is a veteran and she had a preexisting serious illness or injury that her military service aggravated, you may also take military-caregiver leave to care for her, as long as she has been separated from the military by five years or less, prior to her medical treatment, recuperation, or therapy.<sup>164</sup> It would appear that you are eligible for military-caregiver leave.

**Question 4.** My spouse has chosen a career as a member of the regular Armed Forces. He has been home for six months and is between deployments. Recently, he began experiencing medical problems that make him unable to perform his regular duties and that appear to be

caused by events that happened while he was on a patrol during his last deployment abroad.  
Am I entitled to military-caregiver leave?

**Answer.** The US Department of Labor considered whether to put a time limit on when to begin military-caregiver leave and decided it would be inappropriate to impose a temporal requirement. The date of the onset of symptoms does not affect your entitlement to military-caregiver leave as long as the covered service member is *currently* in the regular Armed Forces, the Reserves, the National Guard, or on the TDRL and experienced a serious illness or injury while in the line of duty.<sup>165</sup>

**Question 5.** How is the twenty-six week leave entitlement calculated under the military-caregiver leave provisions of the FMLA?

**Answer.** FMLA-eligible employees may take a total of twenty-six work weeks of unpaid military-caregiver leave in a single twelve-month period. The twelve months begin on the first day you take military-caregiver leave—regardless of the method used by your college or university to determine your leave entitlement for other FMLA-qualifying reasons.<sup>166</sup> If you are on a nine- or ten-month contract and start caring for a covered service member during summer break, winter break, or some other full week when your institution is not in session and faculty employees typically do not report to work, those weeks do not count against your FMLA-leave entitlement.

Calculations for taking FMLA leave on an intermittent basis or by working part-time are made on the same basis as for other qualifying reasons for FMLA leave-taking. (See Section 2 for details.)

Military-caregiver leave is available on a per-service-member, per-injury basis. Consequently, if you do not use all of your twenty-six week military-caregiver leave entitlement to care for a covered service member during the single twelve-month leave period, the remaining part of the twenty-six week leave entitlement to care for that particular family member, for that particular illness or injury, is forfeited.<sup>167</sup> For example, suppose your daughter is in the military and experiences a serious injury or illness in the line of duty for which you take four weeks of military-caregiver leave. When you return to work, you will forfeit your remaining twenty-two weeks of military-caregiver leave, but retain all of your annual twelve-week leave entitlement for other FMLA-qualifying reasons (for example, birth or adoption, serious illness of

a spouse, parent, son or daughter, and so on). Suppose that two years after you take military-caregiver leave, your daughter suffers a second serious injury while serving in the line of duty and while on active duty. Because this is a different serious illness or injury from the first one, you may take up to another twenty-six weeks of FMLA leave to care for her.<sup>168</sup>

**Question 6.** During the same month, both of my adult children were seriously injured in the line of duty while on a foreign deployment. Am I entitled to take a full year (fifty-two weeks) of FMLA leave to care for them?

**Answer.** No. military-caregiver leave is available on a per-service-member, per-injury basis, but is capped at a total of twenty-six weeks in a given twelve-month period. The twelve months begins on the first day you take military-caregiver leave, regardless of the method used by your college or university to determine your leave entitlement for other FMLA-qualifying reasons. Thus, you may take a maximum of twenty-six weeks of leave to care for your two children. Remember that full weeks during which classes are not in session (for example, winter break, spring break, and so on) do not count against your FMLA leave entitlement.<sup>169</sup>

**Question 7.** My father served in the Vietnam War and has long retired from military service. However, he is suffering from a flare-up of war-related injuries. May I take FMLA leave to care for him?

**Answer.** The military-caregiver leave provisions of the FMLA do not apply to leave to care for a veteran who is receiving medical treatment, recuperating, or in therapy more than five years after the veteran's separation from the military. If your father's injuries were suffered in the Vietnam War, you would not qualify for military-caregiver leave. However, if your father's condition qualifies as a serious health condition under the original provisions of the FMLA (as described in Section 6), you may be entitled to up to twelve weeks of FMLA leave to care for your father.

**Question 8.** I took military-caregiver leave when my spouse sustained a serious injury in the line of duty, while on active duty during his first deployment abroad. Two years later, during his

second deployment abroad, he sustained another unrelated injury in the line of duty. Am I entitled to take another twenty-six weeks of FMLA leave to care for my spouse?

**Answer.** If your spouse has sustained a *different* injury or illness in the line of duty, in a subsequent leave year, you may take up to twenty-six weeks of leave to care for him or her. military-caregiver leave is different from FMLA leave taken for other qualifying reasons because it is not a yearly entitlement that renews each year. Because the military-caregiver leave entitlement is available on a per-service-member, per-injury basis, you may take an additional twenty-six weeks of military-caregiver leave to care for a service member who sustained a second injury unrelated to the first. You are prohibited from taking military-caregiver leave if your spouse needs additional care in a different FMLA leave year for the initial injury or illness that the service member sustained in the first deployment.<sup>170</sup>

**Question 9.** My father, who is on active duty, was injured in the line of duty and sustained two serious injuries (one to his legs and one to his head). Am I entitled to take fifty-two weeks of military-caregiver leave for each of his two injuries?

**Answer.** Military-caregiver leave is not available in multiple twenty-six week increments for multiple injuries incurred simultaneously. You are entitled to a maximum of twenty-six weeks of leave to care for your father. If you return to work before you have utilized the full leave entitlement, you forfeit any remaining military-caregiver leave but retain your eligibility to take FMLA leave for other qualifying reasons (for example, birth or adoption, serious health condition of your spouse, parent, son or daughter).

**Question 10.** Two months ago, I completed twelve weeks of FMLA leave following childbirth. Now I need to take leave to care for my husband who was injured in a military operation abroad. Am I entitled to more FMLA leave?

**Answer.** Yes. You qualify for an additional fourteen weeks of leave under the FMLA's military-caregiver provisions because you have already used the maximum of twelve weeks of FMLA leave you were entitled to use for a different qualifying reason. Specifically, because you have used twelve weeks of FMLA leave this year, you retain fourteen weeks of FMLA military-

caregiver leave that you may utilize to care for a covered service member. However, you do not have fourteen additional weeks of FMLA leave to use for other FMLA-qualifying reasons.<sup>171</sup>

**Question 11.** During the fall semester, I took military-caregiver leave by working a part-time schedule, using four weeks of FMLA leave. I am pregnant and due at the start of the spring semester. How much FMLA leave may I take in the spring for the birth of my child?

**Answer.** Employees are allowed only up to twenty-six weeks of FMLA leave when one of the qualifying reasons for taking leave is to care for a covered service member with a serious injury or illness sustained in the line of duty. However, the maximum leave entitlement for the other FMLA-qualifying reasons remains at twelve weeks. Because you used less than fourteen weeks of military-caregiver leave, you retain the full twelve weeks of FMLA leave you are entitled to for reasons other than military-caregiver leave.<sup>172</sup>

**Question 12.** My son has a serious injury incurred in the line of duty. He needs help getting to physical therapy and doctor appointments as well as with other aspects of his recuperation. However, I cannot afford to take twenty-six weeks of *unpaid* leave. What are my options?

**Answer.** Depending on the flexibility of your academic schedule, if you can attend to your son's needs on days and times when you do not have to be on campus, you may not need to take any FMLA leave to care for him. Alternatively, you may want to consider taking reduced-schedule, or intermittent FMLA leave. If you take FMLA leave by working part-time, your administration must pay you based on the percentage of your normal schedule that you work. If you reduce your work load to 80 percent of normal, you must be paid 80 percent of your normal salary. (See the example in Section 2.) If you take FMLA leave equal to 20 percent of your normal schedule, every week of the semester you will use the equivalent of one day of FMLA leave (for example, 5 days x .20 = 1 day). Finally, check your faculty handbook, and if applicable, collective-bargaining agreement. If your institution allows employees to use paid sick leave to care for a sick family member, and/or has some other type of paid-time off, you may be able to take some of this leave concurrently with your military-caregiver leave so that your FMLA leave is *paid*.

**Question 13.** I noticed that only a spouse, son, daughter, or parent of a covered service member may take Qualifying Exigency Leave. But any of these family members as well as a covered service member's "next of kin" may take military-caregiver leave. Who qualifies as next of kin for military-caregiver leave?

**Answer.** A covered service member's "next of kin" is the nearest blood relative of the service member other than the spouse, parent, son or daughter. The order of priority for determining who is next of kin is: a blood relative who has been granted legal custody of the service member by a court decree or statutory provisions; brothers and sisters; grandparents; aunts and uncles; and finally, first cousins. Alternatively, a service member may specifically designate (in writing) his or her next of kin for the purposes of military-caregiver leave. If the service member does not (or cannot) make the designation, and multiple family members share the same level of relationship, they all are entitled to take military-caregiver leave to care for the service member. For example, suppose a service member is seriously injured in the line of duty but has no siblings and four living grandparents. All four grandparents are entitled to take FMLA leave to care for the service member, as long as they work for covered employers and meet the twelve months/1,250-hour test.

The spouse, parent, son, daughter, and next of kin all are entitled to take FMLA leave.<sup>173</sup>

**Question 14.** My son experienced a serious illness while serving in the line of duty, while on active duty, but he is substantially older than 18. Am I entitled to take military-caregiver leave to care for him?

**Answer.** For the purposes of military-caregiver leave, a son or daughter does not have to be under the age of 18 for the parent to qualify for leave.<sup>174</sup> The US Department of Labor concluded that limiting benefits to those under the age of 18 would severely undermine the Congressional intent behind the 2008 National Defense Authorization Act because most military members are 18 years old when they join.

**Question 15.** My husband and I are both employed by the same university. Our daughter's Army Reserve unit was called up, and while serving on active duty on a foreign deployment, she sustained a serious injury in the line of duty. Her injury will require almost a year of medical

treatments. Are my husband and I each allowed to take twenty-six weeks of leave to care for our daughter, for a combined total of fifty-two weeks of leave?

**Answer.** When a husband and wife have the same employer, the employer is not required to provide more than a combined total of twenty-six weeks of military-caregiver leave, which the husband and wife may split. If neither you nor your husband has used any of your FMLA leave entitlement this year, and your daughter needs care, you may take up to twenty-six weeks of FMLA leave and your husband may take the balance of the twenty-six weeks that you have not used. Alternatively, depending on the flexibility in your work schedules, you may be able to schedule care for your daughter around the different times you both need to be on campus, in which case you may not need to use your FMLA leave entitlement to care for your daughter. Or you may be able to care for her by taking FMLA leave on an intermittent basis, or by working a part-time schedule. Although you may want to speak to your department head about minimizing disruptions to your department, you and your husband can make the final decision about how to split your twenty-six weeks of military-caregiver leave.<sup>175</sup>

**Question 16.** My spouse sustained a serious injury while serving in the line of duty, while on active duty during a foreign deployment. She is recuperating in a military hospital in a different state, and I want to take military-caregiver leave to be with her. When I requested leave, my department chair told me that my spouse did not need my care because she is being cared for by the staff at the hospital. Do I have to wait until my spouse is released from the hospital to take leave under the FMLA?

**Answer.** No. The FMLA's definition of someone who is "needed to care for a service member" is broad. It includes both physical and psychological care, such as sitting at your spouse's bedside and providing comfort and reassurance. Also included are situations in which your spouse's serious injury or illness render her unable to provide for her own medical needs, or situations in which you are needed to cook for, feed, or bathe your spouse. It also includes times when your spouse needs you to drive her to medical appointments, or to arrange for changes in care, such as transfer from a military hospital back to your home.<sup>176</sup> Note, intermittent FMLA leave is an option when your spouse's medical ailment is intermittent, or when you are only needed

intermittently to provide care (for example, when you share care with another family member or a third party).<sup>177</sup>

**Question 17.** My spouse works as a civilian contractor on a US military base in a foreign country. She was seriously injured while working for the US military and will be returning home. May I take up to twenty-six weeks of military-caregiver leave to care for her?

**Answer.** Probably not. Military-caregiver leave is only available for the family of a covered service member (that is, a person currently serving in the regular Armed Forces, Reserves or National Guard) or a veteran.<sup>178</sup> However, if your spouse's injury qualifies as a serious health condition as defined by the FMLA, you would be eligible to take leave under other provisions of the law. (See Section 6.)

#### **IX: WHEN IS FMLA LEAVE PAID?**

The FMLA requires covered employers to provide only *unpaid* leave to their FMLA-eligible employees who take leave for FMLA-qualifying reasons. The interaction between the FMLA and various benefits policies, however, sometimes creates situations when professors may take FMLA leave with pay. For example, unpaid FMLA leave for your own serious health condition may run concurrently with your employer's paid sick-leave benefits. Some employers offer broad "paid time off" benefits when employees accrue paid time off from work that they can use for a variety of reasons (for example, their own illness, illness of a family member, vacation, and so on). If you accrue paid time off, you may be able to utilize these benefits to take FMLA leave and be paid. The key to knowing whether you may take FMLA leave as paid leave is to familiarize yourself with options for taking paid leave that are stipulated in your faculty handbook, and if applicable, in your collective-bargaining agreement.

**Question 1.** May I use my accumulated paid sick leave and/or annual leave to take paid FMLA leave for my own serious health condition?

**Answer.** Yes. You may always choose, or your institution may require, that you take your accumulated paid sick leave and/or vacation concurrently with your unpaid FMLA leave.<sup>179</sup> For

example, suppose you work at a university where you accumulate one day of paid sick leave and one day of paid annual leave for each month of appointment. Suppose after you have accumulated twenty-five days of sick leave and twenty-five days of annual leave, you develop a serious health condition for which you need to take FMLA leave. Based on the above, you may take up to the first ten weeks of FMLA leave as paid leave (combining your accrued sick and annual leave). If you need additional time off after the ten weeks, you may take an additional two weeks of unpaid FMLA leave. Your college or university is not required to let you substitute paid sick or medical leave for unpaid FMLA leave when your school's policy would not normally cover such leaves. For example, if you want to take FMLA leave to care for your seriously ill child, you may not be able to use your own accumulated sick leave to take paid FMLA leave if your school does not normally allow faculty to use their own sick leave to care for sick family members.

**Question 2.** When may I use my paid sick leave to supplement my FMLA leave to care for a seriously ill family member?

**Answer.** It depends. Some institutions allow employees to use some or all of their accumulated sick leave to care for an ill immediate family member. If your institution falls into this group, you may elect, or your institution may require, that you use your paid sick leave concurrently with your FMLA leave in order to take FMLA leave on a paid basis.<sup>180</sup>

Another option might be to use your accumulated vacation leave. If your institution does not allow you to use your own sick leave to care for an ill family member but you have accumulated fifteen days of paid vacation leave, you may choose to use those days to “pay for” up to three weeks of FMLA leave. If you need more than three weeks of leave to care for your family member who has a serious health condition, you will probably have to take any or all of the remaining nine weeks of FMLA leave as unpaid leave.

Your institution is not required to give you any more paid leave than you have previously accumulated in order for you to take paid FMLA leave. However, some universities have “paid-leave banks” in which faculty members who have not used all their accumulated sick or vacation leave may donate unused leave for others who have exhausted theirs and need paid time off for certain qualifying reasons. Check your letter of appointment, faculty handbook, and,

if applicable, collective-bargaining agreement to determine if your institution offers such a policy.

**Question 3.** I was injured while working on campus. The injuries I have experienced qualify as a serious health condition under the FMLA. May I take accrued sick leave to take my FMLA and workers'-compensation leave as fully paid leave?

**Answer.** FMLA leave and workers'-compensation pay are two different issues, but FMLA regulations acknowledge that there may be overlap between these issues. Generally speaking, FMLA allows you to take paid sick leave concurrently with FMLA leave so that your FMLA leave is paid. On the other hand, state workers'-compensation laws typically provide that employees will receive up to two-thirds of their normal pay as a benefit when they cannot work due to a qualifying injury. Because workers'-compensation laws provide for employees to be paid while out of work, employees usually cannot "double dip" by also taking paid time off. The FMLA does provide that employers and employees may agree to the use of paid time off to supplement workers'-compensation benefits when those benefits are less than 100 percent of the employee's salary and state law permits.<sup>181</sup>

#### **X: INTERACTIONS BETWEEN FMLA LEAVE AND FURLOUNDS**

A furlough is time off from work—without pay—that employers sometimes require on a temporary basis as a means to reduce expenditures on salaries. Furloughs have been widely utilized during the recession that began in December 2007, with some colleges and universities mandating that faculty take specific days during the year as unpaid days off from work, some mandating that employees schedule a specified number of floating furlough days in a given time period, and others mandating some combination of fixed and floating furlough days. Because furlough days are unpaid time off from work, employees are typically prohibited from taking furlough days on paid holidays and from using vacation days, sick days, or other paid time off during a furlough day. Faculty are not permitted to do any of their college or university work during a furlough day, so hours worked during a furlough day cannot be counted for any work-related purpose. Given the increased use of furloughs by colleges and universities, questions have arisen about how the FMLA and furloughs interact.

**Question 1.** My university just announced that all faculty and academic professionals are required to take six furlough days during the current semester. I am currently on unpaid FMLA leave. How will the furlough requirement affect my leave?

**Answer.** Check the website of your university's human resources department for specific information. Because both your furlough days and your FMLA leave are unpaid time off from work, you may be permitted to take required furlough days concurrently with your unpaid FMLA leave.

**Question 2.** My university just announced that all faculty and academic professionals are required to take eight furlough days during the current academic year. I am currently on *paid* FMLA leave for my own serious health condition. I am taking FMLA leave concurrently with accumulated paid sick leave. How will the furlough requirement affect my FMLA leave?

**Answer.** Check the website of your university's human resources department for specific information. Because a furlough day is unpaid time off from work, and your particular FMLA leave is paid time off from work, you may be required to take the specified number of furlough days after you have completed your paid FMLA leave.

**Question 3.** My university just announced that all faculty and academic professionals are required to take two furlough days a month during the current semester. I am currently on paid FMLA leave following the birth of my child. I am taking FMLA leave concurrently with paid sick leave for six weeks. Then I intend to take another six weeks of leave to bond with my baby, but this leave will be unpaid. How will the furlough requirement affect my FMLA leave?

**Answer.** Check the website of your university's human resources department for specific information. A furlough day is unpaid time off from work. The first part of your FMLA leave is paid time off, and the second part is unpaid time off. Suppose that three furlough days occur during the period you are on paid leave, and another three occur while you are on unpaid FMLA leave. You may be required to take the first three days of furlough leave once your paid FMLA

leave has expired. These three days, plus the subsequent three furlough days could be completed during the unpaid portion of your FMLA leave.

**Question 4.** I am a department chair and have a faculty member who is taking unpaid intermittent FMLA leave. My university has announced furloughs, and I must furlough this professor, along with the rest of the department, for four days during the current semester. Is it legal to furlough an employee who is taking FMLA leave, or will I need to address a compliance issue?

**Answer.** Time off on unpaid FMLA leave cannot be the basis for any employment decision or disciplinary action, nor can an employer retaliate against an employee who takes FMLA leave.<sup>182</sup> However, you can take employment actions regarding an employee on FMLA leave that would have been taken anyway, whether or not the employee was on FMLA leave. If your university is requiring all faculty to take a specified number of furlough days, you may furlough an employee who is taking FMLA leave because this decision is unrelated to the particular employee's usage of leave.

**Question 5.** My university is requiring faculty to take twenty-one mandatory furlough days this year. How will the furloughs affect the eligibility requirement that employees work 1,250 hours in the twelve months before the FMLA leave commences?

**Answer.** For the purpose of meeting the 1,250 hour requirement, the FMLA only counts actual hours worked.<sup>183</sup> Because faculty are prohibited from working for their university on furlough days, time you spend on furlough would not count toward the 1,250 hours. You may still qualify for FMLA leave. First, the calculation of 1,250 hours worked is based on your actual work schedule. If, despite taking twenty-one furlough days, you continue to work at least 1,250 hours on whatever schedule (for example, five, six, or seven days a week), you still qualify for FMLA leave. For example, suppose that you are on a nine-month contract that calls for thirty-eight weeks of work. If you worked five days a week during this period, that equals 38 weeks x 5 days = 190 days of work. When you subtract 21 furlough days, you have 169 days of work. If you work an average of 7.4 hours a day during your work days, you still meet the 1,250-hour test. If your

administration denies your FMLA-leave request, they bear the burden of proving you did not work 1,250 hours during the twelve months prior to your first day of leave.<sup>184</sup>

Employers are free to provide employees with more generous leave than required under the FMLA.<sup>185</sup> Employers may stipulate that furlough leave will be considered time worked for the purposes of calculating employee eligibility for FMLA, even though time worked on furlough days will not be counted for other work purposes.

**Question 6.** I am taking unpaid FMLA leave and have been told that I can schedule my furlough days on the same days that I am taking FMLA leave. If I am taking furlough days on FMLA leave days, do those days on FMLA leave still count against my annual twelve-week leave entitlement?

**Answer.** It depends. Some universities count days when an employee takes both FMLA leave and a furlough day against the employee's twelve-week FMLA-leave entitlement. However, employers also have the option to provide FMLA leave on more generous terms than federal mandates require.<sup>186</sup> Thus, an employer may adopt a policy that furlough-day absences taken on FMLA-leave days will not count against the FMLA entitlement of an employee.

**Question 7.** I am taking unpaid FMLA leave by working half-time this semester. I am also being required to take five furlough days this term. How do unpaid FMLA leave and mandatory furlough days interact in my case?

**Answer.** While you are on FMLA leave, your work "week" is two and one-half days of work and two and one-half days of unpaid time off. If you take your furlough days while you are on unpaid FMLA leave, you may meet your furlough requirement after two weeks of FMLA leave (that is, 2.5 days of unpaid leave a week x 2 weeks = 5 days of unpaid time off). Check the website of your college or university to ensure that you may take your furlough concurrently with your unpaid FMLA leave.

## **XI: WHAT ARE THE FMLA-NOTICE OBLIGATIONS?**

To take FMLA leave, you must provide your administration with certain information in a timely fashion. The notification requirements vary depending upon whether leave is foreseeable or not.

When leave is foreseeable, employees should provide notice of at least thirty days in advance of the need for leave. Examples of foreseeable circumstances include leave for an expected birth, adoption, or foster-care placement; a planned medical treatment for a serious health condition of the employee or a family member; or a planned medical treatment for a serious illness or injury of a covered service member.<sup>187</sup> For foreseeable leave due to a qualifying exigency related to military service, the employee must provide notice as soon as practicable, regardless of how much notice there is of the impending call to duty and/or deployment.<sup>188</sup>

When it is impossible to provide thirty days' notice, faculty should notify their employer "as soon as practicable" regarding their need for FMLA leave. Unforeseen situations include when an employee is not exactly sure when the need for leave will begin (for example, international adoption), an unexpected change in a medical condition, or a medical emergency.<sup>189</sup> The definition of "as soon as practicable" varies based on individual cases, but typically you are expected to notify your college or university on the same or next business day after you learn of your need for leave.<sup>190</sup> Your notice should include information about when you need your leave to commence; whether you are requesting leave as a continuous block, on a reduced schedule, or an intermittent basis; how long you expect the leave to last; and why you are requesting it (for example, birth, adoption, your own serious health condition, qualifying exigency).<sup>191</sup>

A third-party may provide notice when you are unable to personally provide it. The notice should include enough information for your employer to reasonably determine whether the FMLA applies to your leave request. The notice should also include the expected duration of the leave.<sup>192</sup>

Whether an employee provides notice of the need for foreseeable or unforeseeable leave, the first time notice is given for an FMLA-qualifying reason, you need not expressly request leave under the FMLA. Your mention of the qualifying reason why you need leave is expected to trigger your employer to either grant your request or to request additional information required to make a decision regarding your leave request. If you are seeking FMLA leave for a qualifying reason for which you have previously been granted FMLA leave (for example, a serious health condition that requires multiple treatments, or a prenatal condition), you must specifically reference the qualifying reason for leave or expressly state that you are requesting leave under the FMLA.<sup>193</sup>

Whether you are notifying your college or university of a foreseeable or an unforeseeable need for leave, you are expected to follow your school's usual notice and procedural requirements for requesting leave (for example, contacting your department chair or human resource personnel). These requirements should be spelled out in your faculty handbook or on your human resource department's website.

**Question 1.** Whom do I notify at the university of my need for leave?

**Answer.** Employers covered by the FMLA are required to notify employees of their rights to FMLA leave and how they should notify their employer when they seek to take it.<sup>194</sup> Notice of these requirements can be posted electronically and must be included in employee handbooks (if the employer has one).<sup>195</sup> Check your faculty or personnel handbook or contact a benefits specialist in your institution's department of human resources. Absent unusual circumstances, if you do not follow your institution's customary notice and procedural requirements for requesting either foreseeable or unforeseeable leave, your FMLA leave request may be delayed.<sup>196</sup>

**Question 2.** My faculty handbook lists a phone number to call in the human resources department if I need FMLA leave. I called the number, but it was after normal business hours and the voice mailbox was full. Will this affect my eligibility to take leave?

**Answer.** The FMLA regulations recognize that sometimes it is impossible for employees to follow their employer's customary notification procedures for requesting leave. Voice mailboxes do fill up. E-mail systems do go down, or, you may have a medical emergency that makes it impossible for you to send an e-mail or make a phone call. In such circumstances your request for FMLA leave should not be affected. However, you should notify your employer as soon as practicable.<sup>197</sup>

**Question 3.** I need nonemergency surgery for a serious health condition. How much notice must I give my administration of my need for FMLA leave?

**Answer.** When the need for leave is foreseeable, such as a nonemergency surgery, you must give tell your administration at least thirty days in advance, if practicable.<sup>198</sup> State law, leave policies in your faculty or personnel handbook, or provisions in a collective-bargaining agreement may allow for less advance notice of the need for foreseeable leave. Your administration may not arbitrarily substitute stricter FMLA notice requirements.<sup>199</sup>

In planning a medical treatment for your own serious health condition (or for the serious health condition of your parent, child, or spouse), you are required to consult with your administration and make reasonable efforts to schedule the leave in as nondisruptive a way as possible whether you take leave as a continue block, on an intermittent basis, or by working part-time.<sup>200</sup>

For example, if you need nonemergency surgery for a serious health condition and you have spring break coming up shortly, your institution may ask if you can schedule your operation during the break. However, if your physician or other qualified health-care provider does not approve an alternative surgery schedule, it is likely your administration would need to grant your initial FMLA leave request and make any necessary changes in your work schedule.<sup>201</sup>

Note, if you can schedule your surgery (or other medical treatments) for a time when you do not have specific on-campus time commitments, you may not need to request FMLA leave for treatment of your serious health condition.

Exceptions to the thirty-day notification requirement exist when the provision of such notice is not “practicable.”<sup>202</sup> For example, you may not know *exactly* when you will need to take leave because your condition changes unexpectedly, or your doctor makes an unexpected change in your treatment plan. In foreseeable-leave cases in which it is impossible to provide your employer with thirty days’ notice, you should instead notify your employer “as soon as practicable,” that is, normally on the day you find out you need leave, or within one business day.<sup>203</sup>

Finally, if your leave is foreseeable, and you fail to notify your administration in a timely manner, your college or university may elect to waive the thirty-day notification requirement, or it may hold up your leave until at least thirty days after you have provided notification.<sup>204</sup>

**Question 4.** I had a foreseeable need for FMLA leave, but did not provide my college with thirty days’ advance notice. My college human resources department is deciding whether to approve

my leave and has requested information on why I failed to provide thirty days' notice. Do I have to provide this information?

**Answer.** Yes, your college may request the information as a condition for evaluating your leave request. The thirty days' notice requirement for foreseeable leave is flexible to accommodate situations in which it is impracticable for an employee to provide thirty days of notice. For example, you may have a serious health condition, which initially is misdiagnosed. When the proper diagnosis is made, you may find you need leave for treatment within a shorter time period. In order to determine whether it was practicable for you provide notice thirty days before your need for leave, your employer may condition approval of your leave request upon your providing a reason it was impracticable for you to provide the specified amount of notice.<sup>205</sup>

**Question 5.** I had an unexpected medical emergency requiring an overnight stay in a hospital. I telephoned my dean to notify him of my condition and my need for FMLA leave. Do I need to follow up with a written request for FMLA leave? Is the fact that I gave notice of my need for leave with less than thirty days' notice a problem?

**Answer.** Your administration may ask you to follow up a verbal request for FMLA leave with a request in writing, but it may not deny or delay your request if you gave timely verbal notice.<sup>206</sup> When you get a chance, check your faculty handbook to ascertain if written notice is required for a leave request, and if so, the customary procedure for providing notification.

When the need for leave is unforeseeable, you are obligated to notify your employer as soon as practicable. Normally, you are expected to do this on the day you find out you need leave, or within one business day. But, if that is not practicable given your medical condition, FMLA notice requirements allow you more time. If your medical condition prevents you from making the written request for leave yourself or from checking on your school's requirements regarding written requests for leave, you may ask a third party to do it for you.<sup>207</sup>

**Question 6.** I have been diagnosed with a serious health condition of a personal nature. Is it possible to invoke my rights to FMLA leave by just calling in "sick"?

**Answer.** Probably not. FMLA regulations explicitly state that “calling in ‘sick’ ” and not providing additional information is insufficient to meet your obligation to notify your employer of your need for leave.<sup>208</sup> You need not reveal personal details regarding your condition, but you do need to let your employer know that you are experiencing a circumstance that qualifies for FMLA leave. For example, you might notify your employer that you have a medical condition that leaves you unable to perform the functions of your job; or that you have been hospitalized overnight; or that you are pregnant, whatever the general circumstances of your situation are. You are also expected to stipulate how long you expect to be on leave. Your employer may request a medical certification from your health-care provider. But medical facts provided need only be sufficient to support your need for leave.<sup>209</sup>

**Question 7.** I need to take FMLA leave for my own serious health condition. Do I need to obtain a note from my doctor? If so, what information must be included?

**Answer.** If you have a serious health condition that makes you unable to perform one or more of the essential functions of your job, your administration may require you to provide medical certification of the condition. (The administration may also require that you provide a medical certification from a qualified health-care provider in support of your FMLA leave to care for your seriously ill spouse, child, or parent.) Your employer may ask you for a verbal or written medical certification.<sup>210</sup> If your need for leave is foreseeable, you should be notified within five business days of your leave request that your employer wants a medical certification. If your need for leave is unforeseeable, you should be notified of your employer’s request for medical certification within five business days of the commencement of your leave. Your employer can request medical certification at a later date, if your employer has reason to question the appropriateness or duration of your leave.<sup>211</sup>

In certain circumstances, when an employee has a foreseeable need for treatment, you are expected to respond to a valid request for medical certification within fifteen days.<sup>212</sup> There are exceptions to the fifteen-day response time if, despite good-faith efforts, you are unable to comply. For example, you might immediately forward your employer’s request for a medical certification to your health-care provider, who might not respond within fifteen days. In such situations, the fifteen-day time limit should be extended.

The US Department of Labor’s WH-380 forms list all the information that must be provided in a medical certificate, and “the information on the form must relate only to the serious health condition for which the current need for leave exists.”<sup>213</sup> If your health-care provider provides this information, either on the WH-380E form (for a serious health condition experienced by the employee), the WH-380F form (for a serious health condition experienced by a family member), or in a memorandum or other document, your administration may not require additional information, such as your medical records, as a condition for approving your leave. The WH-380E form is available at <http://www.dol.gov/whd/forms/WH-380-E.pdf>. The WH-380F form is available at <http://www.dol.gov/whd/forms/wh-380-f.pdf>.

If your college or university administration requires you to provide a medical certification for foreseeable FMLA leave and you fail to do so, your administration may deny your request for leave or delay the start of your leave until you provide the required information.<sup>214</sup> If your administration requires you to provide medical certification for an FMLA leave that is *not* foreseeable and you fail to do so, your administration may refuse to designate the leave you take as FMLA leave. In this case, depending on the institution’s policies, your leave may not be subject to the mandates of the FMLA, such as job protection and maintenance of your health-insurance benefits.<sup>215</sup>

**Question 8.** I will be adopting a child sometime during the fall semester, but the adoption agency cannot provide an exact date. My department plans the fall teaching schedule in February. Must I notify my chair in February regarding the date I want to begin leave in the fall?

**Answer.** You are not legally required to notify your chair of your need for leave so far in advance. However, at the same time, you may wish to notify your department well before the thirty-day legal requirement to ensure a smooth transition for your students and the department in covering your absence.

If the adoption agency tells you at least thirty days in advance of when you must pick up your child, you must give your employer at least thirty days’ notice of your need for leave. On the other hand, if the planned adoption date is unknown with precision or if it changes with less than thirty days’ notice, you only need to provide your administration with notification of your need for leave “as soon as practicable.”<sup>216</sup>

**Question 9.** My mother needs emergency surgery. What kind of notice do I need to provide my administration?

**Answer.** If you (or your child, spouse, or parent) experience a medical emergency that causes a serious health condition, it may be impossible to provide your administration advance notice, and advance notice may not be required. If you are personally unable to provide advance notice, your spokesperson (for example, your spouse, other adult family member, or responsible person) can do so “as soon as practicable under the facts and circumstances of the particular case.”<sup>217</sup> In such circumstances, you or your representative should notify your administration either in person, or by letter, telephone, fax, or e-mail of your immediate need for leave.<sup>218</sup> To avoid any questions about whether and when you notified your administration, when possible it is best to notify the school in writing. You, or your spokesperson, may be expected to provide more information to the administration, such as the expected duration of leave, when it is practical to do so.<sup>219</sup>

**Question 10.** I can find no reference to the FMLA in our faculty handbook. What information is my university required to provide employees about the FMLA? And where would that information be located?

**Answer.** If you have a faculty handbook describing benefit policies, such as salaries and leaves (such as sabbaticals or sick leave), it must also include information about the FMLA.<sup>220</sup> Information in handbooks can be in hard-copy or electronic form. Furthermore, your university must post information about the FMLA in “conspicuous places” on campus.<sup>221</sup> The US Department of Labor makes posters that employers can use for this purpose. When you request leave for FMLA purposes, your administration is also required to provide you with a written notice stipulating expectations, obligations you must meet as part of your leave as well as consequences of failing to meet the obligations.<sup>222</sup> The written notice should include information pertaining to whether you must furnish medical certification of a serious health condition, substitute accrued paid leave for unpaid FMLA leave, maintain health-insurance premium payments, and so on.<sup>223</sup>

**Question 11.** I notified my dean of my impending need for FMLA leave two weeks ago, but I still do not know whether my request was approved. My department chair and I need to make plans. How much time does the dean have to notify me if my request for leave was approved?

**Answer.** Once your employer has enough information to determine whether your leave is being taken for an FMLA-qualifying reason (for example, after receiving a complete medical certification), your employer must notify you within five business days of your completed leave request, barring extenuating circumstances.<sup>224</sup> If the dean fails to respond to your request for leave within five business days of your completed leave request, it could constitute an interference with your FMLA leave rights, and your employer could be liable for compensation and benefits lost by reason of the violation.<sup>225</sup> If you fail to hear from your dean about the status of your request within a reasonable amount of time, you may want to send a memo or an e-mail as a gentle reminder that you and your department chair would like to know the status of your request so the two of you can make plans for covering your absence. Copy yourself on the e-mail or memo you send. If there are any disagreements about whether or not you qualify for FMLA leave, discuss them with your dean and possibly a benefits specialist in your human resources department. If you still have not heard from your dean by the start date you listed for your leave, any leave you take is probably subject to the full protections of the FMLA.

**Question 12.** My request for twelve weeks of FMLA leave was approved, but my department chair has asked me to check in every four weeks to report on my intention to return to work following the end of my leave. Must I comply?

**Answer.** Yes, your department chair (or another university official) may require periodic reports on your status and intention to return to work during your FMLA leave. However, the department chair may not require these reports in an unfair way.<sup>226</sup> For example, it would be impermissible to demand periodic reports from women on leave following childbirth and not from faculty members or academic professionals taking other types of FMLA leave.

**Question 13.** My request for twelve weeks of FMLA leave to care for my spouse (who has a serious health condition) was approved. However, I am now six weeks into my leave, and my spouse's medical condition has improved to the point where I can now return to work. What

notification requirements do I need to meet in order to let my employer know that I am ready to return to work sooner than expected?

**Answer.** Employees may not be required to take more FMLA leave than they require to resolve the circumstance that precipitated their need for leave. Your employer may require you to provide notification of the change within two business days of the changed circumstance, but you may return to work as soon as you are able.<sup>227</sup>

**Question 14.** I just learned that I am pregnant with a due date seven months from now. What notification requirements apply to me if I request FMLA leave? Also, how can I provide an exact date for when I will need to go on leave? I do know my due date, but it is unlikely that I will deliver on that day.

**Answer.** Because the birth of a child is a foreseeable circumstance, you need to provide your employer with at least thirty days' notice of when you will need leave. However, you might want to provide more than thirty days' notice to allow you and your colleagues to make plans for how to cover your leave. Additionally, if you intend to take *paid* maternity leave concurrently with your unpaid FMLA leave, your employer may stipulate that you provide more than thirty days' notice to receive the paid leave. You need not know exactly when you will deliver your baby, but you should provide notice about the anticipated time when you will begin leave (for example, your due date) and the expected duration of the leave.<sup>228</sup>

**Question 15.** I need to take Qualifying Exigency Leave because my spouse is deploying abroad with his military unit. To what notification requirements am I subject?

**Answer.** Occasionally, deployments are made on very short notice (for example, a few days or a week). In that case, your need for leave would be unforeseeable, and you should notify the designated person at your university as soon as practicable. Alternatively, your spouse may have already deployed, and you need to take FMLA leave on an unforeseeable basis because your child is having problems at school (related to your spouse's deployment) and you need to meet with school personnel. Again, you must provide notice as soon as practicable.

In other circumstances, military personnel may have several months' notice of a call to duty or an impending deployment to a foreign country. In these circumstances, your need for FMLA leave will be foreseeable. Regulations regarding Qualifying Exigency Leave require that you notify your employer as soon as practicable—that is, on the same day or next business day after you learn of the deployment or call to duty.<sup>229</sup>

Your FMLA notification should specify that you need leave for a qualifying exigency and the type of exigency involved. (See Section 7, Answer 4.) You should also stipulate the expected duration of the leave if it is in a continuous block of time. If you request reduced-schedule or intermittent leave, you should estimate the frequency and duration of time you will need.<sup>230</sup> Your employer may ask you for a copy of the covered service member's military orders to certify the validity of your leave request.<sup>231</sup> Your employer may also ask for information specific to certain types of exigencies (for example, a document confirming a meeting with a counselor or school official, a bill for legal or financial services, and so on). The US Department of Labor has developed an optional form, WH-384, which employees and employers can use to certify Qualifying Exigency Leave.<sup>232</sup>

**Question 16.** I need to take leave to care for my father, a recently retired military veteran who is suffering from a serious injury received in the line of duty. What notification requirements apply?

**Answer.** The notification requirements are the same as those for a family member experiencing a serious health condition. If your need for leave is foreseeable, you should provide at least thirty days' notice to your employer. If your need for leave is unforeseeable, you should provide notice as soon as practicable. Your notice should specify the type of leave you need (continuous block, reduced-schedule, or intermittent) and should specify the expected duration of your leave. If you will be taking leave intermittently, you should specify the frequency with which you expect to need leave. You should notify your employer by whatever method is designated in your faculty handbook, or on your human resources department's website.

## **XII: MEDICAL-CERTIFICATION REQUIREMENTS**

Under some circumstances your institution may require you to submit a medical certification before giving final approval for FMLA leave for your own serious health condition or for you to care for a family member with a serious health condition.

The medical certification must be completed by a qualified health-care provider as defined by the FMLA. Health-care providers must be licensed to practice in their state. The US Department of Labor's list of qualified health providers includes doctors of medicine or osteopathy, podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (only for manual manipulation of the spine to correct a subluxation diagnosed by X-ray). Other qualified health-care providers include nurse practitioners, certified nurse-midwives, clinical social workers, and physician assistants. Christian Science practitioners listed with the First Church of Christ Scientist are designated as qualified health-care providers, although employers may require a second opinion (but not treatment) from another type of qualified health-care provider. The list also includes any health-care provider from whom your employer or the benefits manager of your employer's group health plan will accept certification of a serious health condition to verify a claim for health-insurance benefits. In the case of foreign countries, a qualified health-care provider is one of the providers in the above list who: (1) practices in a country other than the United States; (2) is authorized to practice under the laws of that country; and (3) is performing within the scope of his or her practice as defined by that nation's laws.<sup>233</sup>

Specific information that may be required in a medical certification includes:

- The health-care provider's name, address, telephone number, fax number and his or her type of medical practice or specialization;
- The approximate date on which the serious health care condition started and its probable duration;
- A description of the medical facts regarding the patient's serious health condition. This need not be an exhaustive list of medical information, but must include enough specifics to support your need for leave (for example, information on hospitalizations, doctor visits, referrals for further evaluation or treatment, or any other regimen of continuing treatment);
- If medical certification is for your own serious health condition, the information in the medical certification should be sufficient to justify that you are unable to perform one

or more of the essential functions of your job, as well as any relevant work restrictions;  
and

- If medical certification is for a covered family member, enough information should be provided to justify that the family member is in need of care, and an estimate of the likely duration and frequency of leave required to care for your family member.<sup>234</sup>

Additional medical-certification requirements may apply if you seek to take your FMLA leave on an intermittent schedule or by working part-time. These include:

- Enough information to establish that your planned medical treatments (or those of your family member) make intermittent leave or part-time work medically necessary; and
- Enough information to establish that any periods of medical incapacity you may experience (or your covered family member may experience) make intermittent leave or part-time work medically necessary.<sup>235</sup>

To simplify the process of providing a medical certification, the US Department of Labor provides two medical certification forms on its website, one for your own serious health condition, the other if you need leave to care for a covered family member with a serious health condition. Form WH-380E, for your own serious health condition, is available at <http://www.dol.gov/whd/forms/WH-380-E.pdf>. The WH-380F form, for the serious health condition of your covered family member, is available at <http://www.dol.gov/whd/forms/wh-380-f.pdf>.

The Health Insurance Portability and Accountability Act (HIPAA) of 1996 imposes standards regarding the security and privacy of a patient's health-care data. HIPAA's standards regarding privacy of a person's health records apply to providers of medical services (for example, doctors), employer-sponsored health plans, and health insurers. Protected health information (PHI) that is disclosed (for example, to provide an FMLA-leave certification) must include only the minimum necessary information to substantiate the claim for FMLA leave. When employers receive protected health information as part of an FMLA leave request, they are required to maintain it as confidential in employee medical files, which must be kept separate from other personnel files.<sup>236</sup>

**Question 1.** My human resources director said it would be much easier to authorize my FMLA leave for my serious health condition if he could communicate directly with my health-care provider and has asked me to sign a waiver allowing for direct communications. Do I need to sign a waiver to receive FMLA leave?

**Answer.** No, you are not obligated to sign a waiver allowing your HR department to communicate directly with your health-care provider regarding your medical condition as a condition of receiving FMLA leave, but you may elect to do so. If your employer requests a medical certification of your serious health condition (or of the serious health condition of a family member), you are required to provide it, but you need not authorize direct contact between your employer and your health-care provider. You may ask your health-care provider to complete the Department of Labor's certification form and send it directly to you, and you can submit it to your employer.<sup>237</sup>

**Question 2.** I intend to take sick leave under my college's medical-leave program concurrently with FMLA leave for my serious health condition. My college's paid sick-leave policy requires more information than is required under the FMLA. How much information must I provide?

**Answer.** If you plan to take only unpaid FMLA leave, then you need not provide more information than required under the FMLA. If you also plan to take *paid* medical leave under your employer's sick-leave plan, you may be required to provide additional medical information.

**Question 3.** Under the FMLA, must I provide *medical* documentation to my college or university if I am taking leave for the birth of a child, adoption of a child, or foster-care placement?

**Answer.** No, medical certification is not required if you take FMLA leave for placement in your home of an adopted or foster-care child, or for the birth of your own child. Your institution may require you to provide medical certification when you seek FMLA leave for your own serious health condition or to care for an immediate family member who has a serious health condition.<sup>238</sup> Check your faculty or personnel handbook or contact your human resource department to determine whether your institution requires such certification.

**Question 4.** I am taking FMLA leave for my own serious health condition and, following my college's policy, I submitted a medical certification. The day after I turned in the certification, my dean called saying that I need to send the director of human resources all medical records related to my current illness. Must I make all my medical records available to the institution?

**Answer.** No, your institution may not ask for additional information (including your medical records) from your health-care provider, if you have submitted a *complete* medical certification signed by your health-care provider. However, a health-care provider representing your institution may contact your health-care provider (with your permission) to clarify information already included in the medical certification. Any contact must be made by a health-care provider paid by your employer or by a human resources professional, leave administrator, or management official from your college or university. Under no circumstances may your direct supervisor (for example, department chair) contact your health-care provider to clarify any portion of your medical certification.<sup>239</sup>

**Question 5.** I was in a serious car accident. When does my FMLA leave begin, and how soon must I provide medical certification to my college?

**Answer.** When you have a serious health condition, FMLA leave begins the first day you miss work. This might be the day you were in the accident, or it could be later if the accident occurred during a break. For example, if the onset of your serious health condition occurred on the first day of winter break, your FMLA leave would begin the day you were expected to return to the office or the classroom. If your accident happens on a Monday morning on your way to teach your first class of the week, your FMLA leave would begin on the date of the accident. Once the institution learns from you, or your spokesperson, that you are taking leave for an FMLA-qualifying reason, your college may seek a medical certification of your condition. If your college asks for medical certification, you have fifteen days to provide it, unless extenuating circumstances make it impracticable (for example, your health-care provider cannot complete the form before then, or your medical condition is so severe that you are incapable of following through with administrative details).<sup>240</sup>

**Question 6.** The director of human resources at my university has my doctor’s certification of my illness. She wants me to get a second opinion from the doctor at the university’s campus health center. Must I comply with a request for a second opinion?

**Answer.** Your university has the right to require a second opinion after reviewing your health-care provider’s medical certification if the human resources director has reason to doubt the validity of the medical certification.<sup>241</sup> Your university may select the health-care professional to provide the second opinion, subject to the constraint that the person selected cannot be employed by, or under contract with, your university on a regular basis.<sup>242</sup>

If your administration wants you to get a second opinion, they must pay all costs associated with obtaining the second opinion. They must pay the health-care provider and reimburse you for all out-of-pocket travel expenses (for example, cab fare, parking, gas, or tolls) incurred to obtain the second opinion.<sup>243</sup>

**Question 7.** The opinion of my doctor was different from the second opinion provided by the doctor the administration selected. How do we settle the dispute? Am I entitled to FMLA leave during its resolution?

**Answer.** You and your administration must jointly select a qualified health-care professional to provide a third opinion. The third opinion will be final.<sup>244</sup> Your institution must pay all costs associated with obtaining a third opinion, including medical bills and out-of-pocket travel expenses.<sup>245</sup> You are provisionally entitled to all FMLA benefits from the time you notified your employer of your need for leave until you receive the third medical opinion.<sup>246</sup> If the final opinion does not support your claim to FMLA leave, any leave time you took is not counted as FMLA leave, and your administration may, at its discretion, re-designate the leave time you used under the institution’s existing leave policies.<sup>247</sup>

**Question 8.** I am currently on FMLA leave for my own serious health condition. Am I required to get a medical release saying I am “fit for duty” before I return to my position?

**Answer.** Maybe. Your administration may require certification from your health-care provider that you are able to return to work if you took full-time (not intermittent or reduced-schedule)

FMLA leave for your own serious health condition. They may not require “fitness-for-duty” reports in an inconsistent manner. For example, it would be impermissible to require fitness-for-duty certificates from women returning from leave after childbirth while not requiring them from faculty members and academic professionals claiming other nonpregnancy-related serious health conditions. Required fitness-for-duty certificates must be job-related and limited to the particular health condition that triggered your initial need for FMLA leave. If a fitness-for-duty certificate is required, your college or university must provide a list of your essential job functions (for you to pass on to your health-care provider) at the time your FMLA leave request is approved. Your administration may not ask for a general statement or assessment of your physical health but may only request a certification that you are fit to perform your essential job functions. Unlike the second or third medical opinions, the cost of this certification and the related out-of-pocket expenses are borne by the faculty member, not by the institution. If a fitness-for-duty certification is required, your employer may delay restoring you to your job until you provide one.<sup>248</sup>

**Question 9.** I provided to my college a medical certification of my serious health condition. Two weeks into my FMLA leave, my department chair wants a recertification of my condition. Must I comply?

**Answer.** Possibly. Your institution may ask for a recertification once every thirty days for conditions that are chronic, permanent, long-term, or pregnancy-related. Your employer may also ask for recertification at shorter time intervals than thirty days if:

- You ask for an extension of your initial leave;
- Circumstances described in the previous medical certification have changed significantly (for example, change in the duration or frequency of absences from work, medical complications); or
- Your administration obtains information that casts doubt on the continuing validity of the most recent certification.<sup>249</sup>

**Question 10.** I have a chronic serious health condition and will likely need to take FMLA leave in multiple leave years. To what certification requirements am I subject in each new leave year for my chronic health condition?

**Answer.** If you have a chronic serious health condition for which you may be taking FMLA leave in multiple leave years, your employer may require you to provide a medical certification of your serious health condition on an annual basis.<sup>250</sup>

**Question 11.** My father, who lives in China, has been diagnosed with a serious health condition, and I need to take FMLA leave to go care for him. What medical certification do I need to provide?

**Answer.** Your college or university must accept medical certifications (first, second, and third opinions if needed) from a health-care provider who is licensed to practice in the country where your family member is located. If the certification of the foreign health-care provider is not in English, the employee is responsible for providing an English translation of the certification, if the employer requests it.<sup>251</sup>

**Question 12.** I provided a medical certification to my employer regarding my serious health condition and have been told that the certification is incomplete. What are my options?

**Answer.** The information your health-care provider sent your employer may be vague, ambiguous, or the certification form may be incomplete. Your employer must inform you of the specific needed additional information and give you seven calendar days to provide it. If you do not provide a completed certification, you will be considered to have failed to provide a medical certification, and your leave request may be denied. If the resubmitted certification is still missing some information, your leave can be delayed or denied until your employer receives the required information.<sup>252</sup>

**Question 13.** I want to take military-caregiver leave to care for my son who sustained a serious illness in the line of duty while serving abroad. Is there a specific type of health-care provider (for example, a military doctor) who must be consulted to certify that my son sustained his illness while in the line of duty and that he is undergoing medical treatment, recuperation, or therapy.

**Answer.** FMLA regulations recognized that much of the medical care received by current members of the military, and veterans, is provided outside the military health-care system. Those who are in a position to provide medical certification include qualified health-care providers who work for either the Department of Defense (for example, a doctor at a military hospital) or the Department of Veterans Affairs (for example, a doctor at a VA hospital). Also included are qualified health-care providers who are part of the TRICARE medical network of the Department of Defense (DOD), or qualified health-care providers employed strictly in the private sector and outside the DOD network.<sup>253</sup> The definition of a qualified health-care provider (for example, doctor, nurse practitioner, and so on) is the same for all types of FMLA leave.<sup>254</sup> (See Section 5.) The US Department of Labor has developed an optional form, WH-385, to use to meet the medical-certification requirements for military-caregiver leave.<sup>255</sup>

### **XIII: JOB PROTECTION WHEN YOU TAKE FMLA LEAVE**

With a few exceptions, the FMLA requires that your college or university return you to your position at the end of your leave. If your appointment has been filled, or if it has been restructured to accommodate your leave, you are entitled to another job with equivalent pay, benefits, and working conditions.<sup>256</sup> Given the seasonal nature of the academic job market and the fact that FMLA leaves of twelve or fewer weeks do not fit neatly into semesters of fourteen weeks (or longer), it is unusual to replace a full-time faculty member who unexpectedly takes FMLA leave during the academic year with a full-time, permanent substitute. Accordingly, job restoration tends to be less of an issue for faculty members than for employees in other occupations, but issues can arise.

While all covered employees are entitled to FMLA leave for qualifying reasons, there are circumstances under which your college or university is not obligated to restore you to your position or to an equivalent position at the conclusion of your leave. Key employees—that is, those who are on salary and who are among the highest paid 10 percent of all the college's or university's employees—are not automatically guaranteed job-protected FMLA leave. Job-protected FMLA leave can be denied to a key employee only if *restoring* the employee to his or her job would cause “substantial and grievous economic injury” to the operation. This is not the same as determining that the absence of the employee will cause a substantial and grievous injury.<sup>257</sup>

An employer who concludes that reinstatement may be denied on these grounds must notify the employee that he or she is a key employee, and that the employer does not intend to reappoint the employee. This must be done at the time the employee requests FMLA leave.<sup>258</sup> Normally, the notification would be provided before the leave begins, but when it is provided afterwards (for example, FMLA leave due to the unexpected onset of a serious health condition), the employer must provide the employee with a reasonable amount of time for the employee to return to work. If the employer does not notify a key employee that the employee's FMLA leave will not be job-protected, the employer must restore the employee to the same or an equivalent position even if substantial and grievous economic injury will result from reinstatement.<sup>259</sup> A key employee who has been notified that his or her FMLA leave is not job-protected may still request reinstatement at the end of the leave period. If that happens, the employer must determine anew if restoration of the employee would still cause a substantial and grievous economic injury based on the facts at that time.<sup>260</sup>

An employee who takes FMLA leave has no greater right to reinstatement than one who had been continuously employed during the FMLA leave period. For example, if a professor is working on a contract with a specific duration, the contract expires while the employee is on FMLA leave, and the employer would not have otherwise renewed the faculty member's contract (for example, due to programmatic changes), the professor is not entitled to job restoration.<sup>261</sup> However, contract nonrenewal may not be used as a mechanism to discriminate or retaliate against eligible employees who have exercised their rights to take FMLA leave for a qualifying reason.<sup>262</sup>

If a professor takes FMLA leave for a serious health condition, and after the employee's FMLA leave expires, the professor still cannot perform one or more of essential job functions, the college or university does not have to restore the professor to his or her position. However, faculty members may retain a right to reinstatement under state FMLA laws, state workers'-compensation laws, employer medical-leave policies, or if applicable, collective-bargaining agreements. If the serious health condition also qualifies as a "disability" under the Americans with Disabilities Act, the employee may be entitled to reinstatement under the ADA, even if not under the FMLA.<sup>263</sup> (See Section 17.)

Finally, an employee who fraudulently obtains FMLA leave from an employer is not entitled to be reinstated to his or her position (or to maintenance of health benefits under the FMLA).<sup>264</sup>

**Question 1.** I anticipate returning from FMLA leave a few weeks before the end of the semester. My department chair says I must remain on unpaid leave until the semester is over before returning to my appointment next semester. Must I take more FMLA leave than I requested?

**Answer.** No. If you are fit to work, your institution must allow you to return to your previous position or to an equivalent position when you want to return from leave.<sup>265</sup>

**Question 2.** I will be returning from my FMLA leave mid-semester. My department chair and I both agree that I should not return to teaching my classes halfway through the term. What constitutes an equivalent position to which I could return?

**Answer.** 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 and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.<sup>266</sup>

The position you assume when you return from your leave should provide you with the same pay and benefits as you would have received if you had not gone on leave. For example, if faculty in your department, division, or university receive an across-the-board pay increase while you are on unpaid FMLA leave, you are entitled to be paid at the higher rate when you return to your position.<sup>267</sup> Likewise, if retirement, sick leave, or other benefits are increased while you are on leave, you are entitled to the new standard. You should also have equivalent working conditions, meaning that: you should be reinstated to the same or a proximate work site so that your commuting time does not significantly increase;<sup>268</sup> if you had a private office before your leave, you should have one after you return from leave; and, your work schedule should be the same or equivalent to what it was before you went on leave, unless you request a different schedule and your administration approves it. For example, suppose you normally teach two classes and spend the remainder of your working hours conducting research, advising students, and doing committee work, an equivalent position might entail substituting advising, research or committee work for the time you would have spent teaching.<sup>269</sup>

**Question 3.** My department chair says that upon my return from FMLA leave, I must teach large, evening undergraduate classes rather than the small, daytime graduate seminars. Can she require me to do so?

**Answer.** It depends. The FMLA provides that employees are entitled to return to the same or an equivalent work schedule.<sup>270</sup> The issue is whether a change in course and time would be retaliatory or constitute an equivalent work schedule. You will want to consider whether the change in your course assignments is unusual, inappropriate, or punitive in some way. The requirement that an employee must be restored to the same or an equivalent position does not apply to conditions of employment that are intangible or unmeasurable aspects of a position. A substantial change in your course schedule (from day to night) combined with new preparations, larger courses (that may require more work) may appear to be measurable changes in your work conditions. Such a substantial change could be found to be retaliatory which is prohibited under the FMLA.<sup>271</sup>

**Question 4.** During my FMLA leave last spring, I did not teach my usual two courses. My department chair says I must teach one extra course during the fall and spring semesters of the coming academic year to “make up” those courses. Is that true?

**Answer.** Probably not. Such a policy seems to violate the FMLA provision prohibiting retaliation against those who have exercised their FMLA rights.<sup>272</sup> Additionally, if your normal course load is four courses a year, requiring you to teach six courses upon your return from FMLA leave does not appear to be returning you to the same or an equivalent position.<sup>273</sup>

**Question 5.** I am the dean of the College of Business at my university, and I need to take FMLA leave. Will my leave be job-protected?

**Answer.** Maybe. First, you should determine if you are a “key employee” of your university because key employees are not automatically entitled to return to their positions at the conclusion of their FMLA leaves.<sup>274</sup> You are a “key employee” of your university if your earnings are among the highest paid 10 percent of all who work for the university. Earnings include

salary, premiums, incentives and bonuses.<sup>275</sup> As an academic dean, you may fall within the key employee category.

If you are a key employee, your university is not required to restore you to your prior position (or an equivalent one), but only if your restoration would cause a “substantial and grievous economic injury” to your university’s operations. Whether your absence would cause such an injury may not be considered.<sup>276</sup>

If your university determines that your return from leave will create a serious and grievous economic injury, it must notify you right away that you will not be reinstated. If possible, your university should notify you before you go out on FMLA leave. If you are not notified until after you have begun your FMLA leave, you must be given the option of immediately returning to your position.<sup>277</sup> Your university must maintain your group health-insurance benefits during the period of your leave, even if you will not be restored to your prior position. If you are denied reinstatement because you are a key employee, your university may not ask you to repay the cost of your health-insurance premiums while you were out on leave.<sup>278</sup>

It is possible that a few faculty members might fall within the highest-paid 10 percent of employees at a university. However, it would appear difficult for an administration to demonstrate that a “key” professor’s reinstatement after an FMLA leave would cause substantial and grievous economic injury to the institution. In addition, these few professors would most likely be protected by tenure. As a result, although it is possible to conceptualize the “key employee” restriction applying to, for instance, the top chef at a gourmet restaurant or a comptroller of a large corporation, it seems unlikely that faculty will often be affected by the restriction.

As one commentator noted, “It is expected that universities will rarely, if ever, be able to demonstrate the degree of economic injury necessary to deny reinstatement to employment, particularly when such injury must be caused by the reinstatement of the ‘key employee,’ not by his or her absence during the FMLA leave. Accordingly, universities should carefully consider whether it even makes any sense to include a ‘key employee’ exception in their FMLA policy.”<sup>279</sup>

**Question 6.** My department chair says I am able to take FMLA leave only if I can find a replacement to teach my courses. Is that correct?

**Answer.** Probably not. Requiring you to find your own replacement as a condition for granting your leave would probably be considered an impermissible interference with your attempts to exercise your FMLA rights.<sup>280</sup> If your need for leave is foreseeable and service is part of your job duties, however, you may be asked to serve on a search committee to find your replacement. At the same time, you may wish to be involved in the selection of your replacement, if feasible and appropriate, to ensure a smooth transition for your students and colleagues.

**Question 7.** I was injured while working on campus. My injuries qualify as a serious health condition under the FMLA. I took leave under the FMLA and the workers'- compensation laws of my state. But, I am now fully recovered and ready to return to work. Does my university have an obligation to return me to my regular position?

**Answer.** If your workplace injury resulted in a serious health condition and you qualify for FMLA leave, you should be reinstated to the same or an equivalent position as mandated by the FMLA.<sup>281</sup>

#### **XIV: THE FMLA AND WORKPLACE BENEFITS**

If you take FMLA leave, the law requires that your college or university continue to provide some, but not all, of your normal workplace benefits. The FMLA mandates that employees out on leave are entitled to keep their group health-insurance benefits under the same conditions that would apply if they were continuously working during the leave period. For example, if your employer normally pays 50 percent of your monthly health-insurance premiums and you pay the other 50 percent, the arrangement must continue while you are on FMLA leave.

If you intend to maintain your health-insurance benefits while on leave, you are required to pay your normal share of your health-insurance premium during that time, even if you are on *unpaid* leave. If you are able to take paid FMLA leave by combining your FMLA leave entitlement with sick leave, personal leave, or some other type of paid leave, your employer may continue to deduct your share of your health-insurance premium from your regular paychecks. If you take FMLA leave on an intermittent basis or by working part-time, your administration will also be able to deduct your share of your health-insurance premium from your regular paychecks. However, if you take unpaid FMLA leave in a continuous block, you will

need to make arrangements with your human resources department to pay your share of your health-insurance premiums.<sup>282</sup>

If your college or university changes health plans or provides additional insurance benefits while you are on FMLA leave, you must be given the same opportunities as other employees to change health-insurance plans or subscribe to the additional benefits. For example, if an employer changes health plans so that dental care is included in the new plan, an employee on FMLA leave must be given the same opportunity as other employees to take advantage of the new insurance opportunity. Any health-insurance plan changes in coverage, premiums, or deductibles that apply to all employees would also apply to a faculty member out on FMLA leave.<sup>283</sup>

A professor's entitlement to other workplace benefits (for example, retirement contributions, education benefits, and accrual of paid sick leave), depends on state law, the employer's workplace policies, and, if applicable, collective-bargaining agreements. All of the above may entitle a faculty member to a larger package of benefits than he or she would receive under the FMLA alone.

**Question 1.** What happens to my health-insurance benefits while I am out on FMLA leave?

**Answer.** The coverage you receive must be at the same level and under the same conditions that you would have received had you not taken leave.<sup>284</sup> For example, if your university normally pays 100 percent of your health-insurance premium, it must continue to pay 100 percent while you are on FMLA leave. If your university normally pays 50 percent of your monthly health-insurance premium, it is not required to pay more than this amount while you are on FMLA leave. You are responsible for the amount of the premium you normally pay, even if you are on *unpaid* FMLA leave.<sup>285</sup>

**Question 2.** I took twelve weeks of FMLA leave and forgot to send in my check for the portion of my health-insurance premium by the due date specified by our human resources department. Will my health insurance be canceled? If it is canceled, can I reinstate it when I return to work?

**Answer.** If your college pays less than 100 percent of your health-insurance premium, it is permitted to cancel your health-insurance coverage if your premium payment is more than

thirty days late as long as your employer mails notification of cancellation to you fifteen days before coverage ends.<sup>286</sup> If your coverage is stopped during the leave period because you failed to make your premium payments, your college must restore you to full group health coverage upon your return to work. Under these circumstances, you must be restored to the same level of coverage and benefits that you would have had if you had not taken FMLA leave. Your college or university may not require you to wait for an open season to reenroll.<sup>287</sup> Practically, it will often be simpler for your college to continue your coverage, despite your failure to pay the required portion of your health-insurance premium, rather than expend the effort to reenroll you in the insurance program.

If you failed to pay your premiums during FMLA leave, and *if* your administration continued to pay your share of your health insurance premiums while you were on leave, then your college may demand repayment for your share of the health- insurance premiums you did not pay.<sup>288</sup>

**Question 3.** My college and I split 50-50 the premiums for my health insurance. Can my university stop paying its share of my health-insurance premiums while I am on FMLA leave?

**Answer.** Generally not. But if your premium payment is more than thirty days late, your university can discontinue your health-insurance coverage, although it must mail you a letter notifying you of this fact at least fifteen days before the date that coverage will cease.<sup>289</sup> Also, if you choose not to return to work following your FMLA leave, your university may stop paying its share of your health-insurance premiums on the date that your FMLA leave ends. In addition, if your appointment would have ended at some point during your leave (for example, due to nonrenewal of your contract for reasons not related to your FMLA leave), your university may then stop paying its share of your health-insurance premium.<sup>290</sup>

**Question 4.** I took FMLA leave at the end of the spring semester. While out on leave, I accepted a job at another college. Can the college where I was originally appointed when I applied for FMLA leave demand that I reimburse it for its share of health-insurance premiums it paid while I was out on leave?

**Answer.** Possibly. If you accepted the job at another college because you were at the end of a multiyear contract that your original employer did not intend to renew, your original employer may not demand that you reimburse it for health-insurance premiums paid on your behalf. In this case, your failure to return to work was not caused by your actions.<sup>291</sup> However, your college may seek reimbursement for health-insurance premiums it paid on your behalf if you do not return to work following your leave because of a reason within your control. For example, if you received and accepted a job offer from another college, despite being able to return to your prior position, your college may demand that you reimburse it for health-insurance premiums it made on your behalf while you were out on FMLA leave.<sup>292</sup>

**Question 5.** If my serious health condition proves more severe than originally anticipated and I cannot return to work after my FMLA leave expires, must I reimburse my university for the share of my health-insurance premiums that it paid while I was on FMLA leave?

**Answer.** No. If you cannot return to work because of the continuation, recurrence, or the onset of another serious health condition, or the serious health condition of a covered family member, or for some other circumstance beyond your control, your university may not require you to reimburse its share of your health-insurance premiums.<sup>293</sup> However, if you cannot return to work because of your health condition, your employer may require medical certification of your (or your covered family member's) serious health condition from a qualified health-care provider. If your employer demands medical certification, you bear the costs of obtaining it.<sup>294</sup>

**Question 6.** I took twelve weeks of FMLA leave to care for my seriously ill mother. Before I was able to return to teaching, my spouse unexpectedly got a new job in a different state, and I am moving with him. Am I obligated to reimburse my university for the portion of my health-insurance premiums it paid while I was on FMLA leave?

**Answer.** No, not if your spouse is taking a job more than seventy-five miles from your campus because that is considered a circumstance "beyond the employee's control" under the FMLA.<sup>295</sup>

**Question 7.** I took twelve weeks of FMLA leave in the spring semester to care for my newborn baby. I then returned to work for five weeks to teach summer school. Because my wife earns enough to support our family, I have decided not to work for several years so I can stay home with my child. Am I obligated to reimburse my college for the portion of my health-insurance premiums that it paid while I was on FMLA leave?

**Answer.** No. If you return to work for more than thirty calendar (not business) days following your FMLA leave, your college cannot ask you to reimburse its share of your health-insurance premiums.<sup>296</sup>

**Question 8.** Am I entitled to other fringe benefits besides health insurance while I am on FMLA leave?

**Answer.** No, not under the FMLA. You should review your letter of appointment, faculty handbook, and, if applicable, collective-bargaining agreement to determine your university's policy for providing fringe benefits when faculty and academic professionals are on various types of paid or unpaid leaves of absence that might run concurrently with FMLA leave.<sup>297</sup> For example, if faculty on medical leave are allowed to count the time they are on leave as time served toward determining the date of their next sabbatical, and if you take unpaid FMLA leave and paid medical leave concurrently for your own serious health condition, you should be entitled to count your leave time toward determining the date of your next sabbatical. Or, for example, suppose you take a reduced-schedule FMLA leave by working half-time, if university policy provides that employees working at least half-time are entitled to the university's full range of benefits, then you, too, are entitled to the full range of fringe benefits (for example, life insurance, long-term disability insurance, tuition benefits for a spouse or children) during the period you are on FMLA leave.

Upon your return to work, FMLA leave should not cause you to lose benefits you were entitled to before you went out on leave. If the package of benefits awarded to other employees either increases or decreases while you are on FMLA leave, your employer must notify you of the change because you are entitled to the increase and subject to that decrease as well.<sup>298</sup>

If your fringe benefits have been stopped while you are out on FMLA leave, your benefits (for example, health insurance, disability insurance, and so on) must be resumed with

no new qualification period, physical exam, or the like when you return to work. Consequently, some universities will elect to maintain other benefits (for example, life and disability insurance) for employees by continuing to pay the premiums during periods of FMLA leave. For example, suppose you need to take FMLA leave for your own serious health condition. If your coverage is allowed to lapse while you are on leave, it is possible that you may not be able to obtain life or disability insurance under your institution's plan. Because your university is obligated to provide you with all the benefits you are entitled to when you return to work, your human resources department may decide to pay the premiums necessary to keep these policies in force during your leave. Your university does not need your permission to continue paying the premiums. And in such cases, your university may even ask you to repay your share of the premiums that it paid during your period of leave.<sup>299</sup>

**Question 9.** If the faculty receives a general salary increase and I am on FMLA leave, am I also entitled to that raise?

**Answer.** Unless your state law or institutional policy provides otherwise, FMLA is unpaid leave, and you are not entitled to pay during the leave. But upon your return, you are entitled to any unconditional pay increases that may have been authorized during your FMLA leave, such as a cost-of-living adjustment granted to all faculty members.<sup>300</sup> If you are able to combine a continuous block of FMLA leave with paid sick leave, personal leave, or some other type of paid leave, you are entitled to the pay increase at the same time that other employees receive it. Additionally, if you are taking FMLA leave on an intermittent basis or by working part-time, you are also entitled to an unconditional pay increase at the same time that others receive it.

Regarding discretionary pay increases, such as merit pay, if you are denied merit pay solely on the grounds that you took FMLA leave, that would appear to violate FMLA's prohibition against retaliating against employees electing to take leave. If, however, you do not receive a merit pay increase because your leave interfered with your ability to perform job functions that result in the award of merit pay (for example, for research, publications, presentations, or service), you may not be entitled to such discretionary pay upon your return.

**Question 10.** I am four years into my pre-tenure probationary period. What will happen to the time I have already accumulated on my tenure clock while I am on FMLA leave? Must I count my time on leave as part of my probationary period?

**Answer.** The FMLA, by itself, neither requires nor prohibits counting the time you are on FMLA leave as time on your tenure clock.<sup>301</sup> Section 825.215(d)(2) provides that an “employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave.” In the end, the answer to this question lies in the interaction between the FMLA and the benefits laid out in your letter of appointment, faculty handbook, and, if applicable, collective-bargaining agreement. Ideally, you should be allowed to choose whether to count time you are on FMLA leave toward your probationary period because you know best how your FMLA leave will affect your ability to produce a record of work required for promotion and tenure. Moreover, if you take only part of a semester as FMLA leave, the concept of extending your probationary period by just a few weeks (or months) is somewhat artificial in academe given the nature of the academic calendar.

It may be more helpful for you to check your institution’s policy on “stopping the tenure clock.” Many colleges and universities enable a professor who is the primary or coequal caregiver to stop the tenure clock for a set period of time, usually a semester or a year, at the option of the faculty member, following the birth or adoption of a child.<sup>302</sup> Some institutions also permit faculty to stop the tenure clock for other reasons that would also qualify for FMLA leave (for example, your own serious health condition, serious health condition of a covered family member, and so on).

**Question 11.** I was injured while working. My workers’-compensation injury also qualifies as a serious health condition under the FMLA. I understand state law may not require employers to pay their normal percentage of an employee’s group health- insurance premium when an employee is on leave following a workplace injury (that is, a workers’-compensation leave). Does that mean my college does not have to continue paying its portion of my health-insurance premium while I am receiving workers’ compensation and recovering from my workplace injury?

**Answer.** Typically, state workers’-compensation laws require coverage of medical expenses related to a workplace injury but do not mandate continued payments of premiums for an

employee's group health-insurance plan. But if you take FMLA leave concurrently with leave under your state workers'-compensation law, your college must comply with FMLA regulations and continue to pay its normal contribution to your health-insurance premium while you are on leave.<sup>303</sup>

#### **XV: INTERACTION BETWEEN THE FMLA AND LETTERS OF APPOINTMENT, FACULTY HANDBOOKS AND, IF APPLICABLE, COLLECTIVE-BARGAINING AGREEMENTS**

At its most basic, the FMLA provides job protection, mandates unpaid leave, and requires continued health insurance during leave. Employers, however, must observe all of their employment policies or practices that provide greater leave rights to employees than are provided by the FMLA. Likewise, leave entitlements established under the FMLA may not be diminished by any employer policy or practice.<sup>304</sup> Policies that provide greater leave benefits than those mandated by the FMLA may be covered by your letter of appointment, faculty handbook, and, if applicable, collective-bargaining agreement.

**Question 1.** Our collective-bargaining agreement (CBA) provides me with up to six months of fully paid medical leave upon my first day of employment with the university. How does my medical-leave benefit interact with my FMLA-leave entitlements?

**Answer.** The FMLA does not diminish your university's contractual obligation to comply with any benefit plan or CBA that provides more generous family- and medical- leave benefits than the FMLA.<sup>305</sup> However, your university may require that you take paid medical leave simultaneously with unpaid FMLA leave so that you are not entitled to six months of paid leave followed by twelve weeks of unpaid leave, unless the CBA provides otherwise.<sup>306</sup> There are several scenarios that might be relevant to your case.

Example 1: Suppose you experience a serious health condition but have only been employed by your university for five months. You do not qualify for FMLA leave yet, but you still qualify for up to six months of paid medical leave under the provisions of your CBA. Your collective-bargaining agreement will determine if your job is protected and the benefits to which you are entitled on leave.

Example 2: Suppose you have been employed by your university long enough to be eligible for FMLA leave. You experience some minor medical ailments, which cause you to use

two weeks of your medical leave. Because none of your ailments qualified as a serious health condition, you will not have utilized any of your FMLA leave, and your CBA will determine all the benefits to which you are entitled while on leave.

Example 3: Suppose you are an FMLA-eligible employee. You need twelve weeks of FMLA leave in the fall semester to care for your mother, who has a serious health condition. Unless your CBA entitles you to paid personal time off for reasons other than your own medical illness, your leave will be unpaid. If you subsequently experience a serious health condition of your own in the spring semester, you would still be entitled to up to six months of paid medical leave under your CBA because your CBA provides greater leave benefits than the FMLA.

Example 4: Suppose you are an FMLA-eligible employee. During the fall semester you experience a serious health condition and need to take six months of medical leave. Your medical leave will be paid, as required by your CBA, but your university may require you to take FMLA leave concurrently with your medical leave (during the first twelve weeks). If, after you return to work, you want to take leave to care for a family member with a serious health condition, you will have exhausted your FMLA leave entitlement and will need to inquire if your university offers other options so you can take leave to care for your family member.

**Question 2.** I am an FMLA-eligible employee. My college provides paid short-term disability leave, which I am taking for my own serious health condition. I expect to return to work before I have taken twelve weeks of leave. My college's human resources director says that because I am taking paid leave under the college's plan, I am not entitled to job protection under the FMLA. Is this so?

**Answer.** No, your institution may not diminish any of your rights under the FMLA by offering in trade some other more generous benefit. As long as the reason you give for seeking leave is an FMLA-qualifying reason, your institution is obliged to designate your leave as FMLA leave and to provide you with all FMLA-mandated benefits.<sup>307</sup> If you want to clarify for your employer that you have the protections of the FMLA while you are on medical leave for an FMLA-qualifying reason, you could write a letter to your human resources director stating that you intend to exercise your option to take your college's short-term disability leave concurrently with your FMLA leave.<sup>308</sup>

**Question 3.** I am pregnant. My department chair says that if I want to use the college's paid maternity leave policy, I must "waive" my rights under the FMLA. Is that true?

**Answer.** Employees are not allowed to waive their FMLA leave rights, and employers may not try to induce employees to trade off the right to FMLA leave for some other benefit offered by the employer.<sup>309</sup>

**Question 4.** I am pregnant. When I spoke to my department chair about maternity leave, he said I could take the college's standard six weeks of *paid* maternity leave following the birth of the baby, or, I could take twelve weeks of *unpaid* FMLA leave. Is this correct?

**Answer.** You may not be forced to trade off your FMLA rights for other types of benefits.<sup>310</sup> If your college has a medical leave policy that allows you to take up to six weeks of paid maternity leave following the birth of your child, utilizing it does not require you to waive your entitlement to twelve weeks of unpaid FMLA leave. However, your administration may require that you take six weeks of your annual twelve-week *unpaid* FMLA leave entitlement concurrently with your *paid* medical leave.<sup>311</sup> In this circumstance, the first six weeks of your FMLA leave would be paid under your medical leave policy. If you choose to take an additional six weeks of leave to bond with your baby, it would be unpaid FMLA leave.

**Question 5.** Our faculty senate has proposed amending our university policy to allow qualified employees to take FMLA leave to care for a family member with a serious health condition, but it redefines "family" to include domestic partners and parents-in-law. Because it would fit better into our semester schedule, we also propose to extend the leave period to sixteen weeks when an employee requests FMLA leave for birth, adoption, to care for a family member with a serious health condition, or for an employee to recover from his or her own health condition. Is this allowable?

**Answer.** Yes, colleges and universities are prohibited from providing less than what the FMLA requires, but they can always grant greater rights. Therefore, you may use your normal university processes for establishing employee benefits to make FMLA leave entitlements on your campus more generous than those mandated by federal law.<sup>312</sup>

**Question 6.** Letters of appointment for full-time faculty at my institution specify that we are nine-month employees on contract from September through May, but we are paid in twelve equal monthly installments. If I take an FMLA leave following the late April birth of my child, will the summer months count against my twelve weeks of FMLA leave because I am paid on a twelve-month basis?

**Answer.** Not likely. Although faculty typically do work on their scholarship and pedagogy during the summer, they are often not under contract during these months. Your letter of employment designates you as a nine-month employee. Because you are not under contract during the summer months, time you spend away from work during the time you are not under contract does not count against your FMLA leave entitlement. If you are not under contract, you can take time off from work during the three summer months without requesting FMLA leave. The fact that you are paid over a twelve-month period does not make you a twelve-month employee.

#### **XVI: INTERACTION BETWEEN THE FEDERAL FMLA AND STATE FAMILY- AND MEDICAL-LEAVE LAWS**

Many states and the District of Columbia have a variety of family- and medical- leave laws, which modify and increase the benefits available to professors under the federal FMLA. Some states mandate longer periods of leave than the federal law, extend the number of qualifying reasons for which a person can take leave, and extend the FMLA mandates to employers with fewer than fifty employees. Because colleges and universities typically have many more than fifty employees, most faculty already work for employers covered by the federal FMLA.

State or local law supersedes federal law when it provides greater family- or medical-leave rights than the FMLA. If an employee qualifies for federal FMLA leave and state FMLA leave, leave taken counts against the employee's entitlement under both laws. An employer covered only by state—and not federal—law must comply only with that law. For example, an employer may be required under state law to provide family and medical leave to an employee to care for a domestic partner, but is not required to do so under the federal FMLA. In such a circumstance, the conditions governing the employee's leave are set out by the state law, not the federal FMLA.<sup>313</sup>

As of the writing of this guidebook, the following states did not have their own family- and medical-leave statutes (meaning that the federal FMLA is the applicable statute): Alabama, Delaware, Indiana, Maryland, Michigan, Mississippi, Missouri, Nebraska, New York, Ohio,

Pennsylvania, Puerto Rico, and Virginia.<sup>314</sup> In some states with family- and medical-leave laws that provide more extensive benefits than federal law, benefits only apply to state employees and therefore cover faculty at public universities but not at private schools. States with specific public-employee laws include: Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Illinois, Kansas, Nevada, New Mexico, North Dakota, Oklahoma, South Carolina, South Dakota, Texas and Utah. Other states have more expansive family- and medical-leave laws that apply to employees in both the private and public sectors.

**Question 1.** I live in a state where the law expands the definition of a family member to include a domestic partner and the child of a domestic partner. May I take FMLA leave to care for my domestic partner who has a serious health condition?

**Answer.** Many states recognize that caregiving responsibilities extend beyond immediate family members. In states with their own family- and medical-leave statutes, you would be entitled to leave under the conditions set out by state law, including, in your case, leave to care for your domestic partner. At the time of publication, the following states have expanded FMLA coverage to additional family members:

**Table 2: States with Expanded Definitions of Family Members<sup>315</sup>**

<b>State</b>	<b>Definition of Family (beyond child, spouse and parent)</b>
California	Domestic partner and domestic partner’s child
Connecticut	Civil-union partner, parent-in-law
District of Columbia	A person related to the employee by blood, legal custody, or marriage; a person with whom the employee lives and has a committed relationship; a child who lives with employee and for whom the employee permanently takes parental responsibility and provides care
Hawaii	Grandparent, parent-in-law, grandparent-in-law, or an employee’s reciprocal beneficiary <sup>316</sup>
Maine	Domestic partner, and domestic partner’s child, siblings
New Jersey	Civil-union partner and child of a civil-union partner, parent-in-law, stepparent
Oregon	Domestic partner, grandparent, grandchild, parent-in-law
Rhode Island	Domestic partners of state employees, parent-in-law
Vermont	Civil union partner, parent-in-law
Wisconsin	Parent-in-law

To be clear, however, as of this writing, faculty and academic professionals cannot currently take leave to care for domestic partners under federal FMLA law because of the Defense of Marriage Act.<sup>317</sup>

**Question 2.** Do any states expand the reasons for which a covered employee may take family and medical leave?

**Answer.** A small number of states have expanded the qualifying reasons for which a covered employee can take family and medical leave beyond those defined by the FMLA. In some circumstances, the amount of annual leave taken for these reasons may be less than twelve weeks. These states are listed below in Table 3.

**Table 3: States with Expanded Reasons for Employees to Take FMLA Leave**

<b>State</b>	<b>Additional Reasons to Take Leave</b>
California	To attend a child’s school or educational activities
Colorado	To address the effects of domestic violence, stalking, or sexual assault
Connecticut	To become an organ or bone-marrow donor
District of Columbia	To attend a child’s school or educational activities
Florida	To address the effects of domestic violence, stalking, or sexual assault
Hawaii	To address the effects of domestic violence, stalking, or sexual assault
Illinois	To attend a child’s school or educational activities
Maine	To become an organ donor or for the death of a family member who was killed while on active duty
Massachusetts	To attend a child’s school or educational activities, to take family members to routine medical visits
Minnesota	To attend a child’s school or educational activities, death of a family member (including siblings) member killed while on active duty
North Carolina	To attend a child’s school or educational activities,
Oregon	To care for a child who has a nonserious injury or illness and requires home care
Rhode Island	To attend a child’s school or educational activities
Vermont	To attend a child’s school or educational activities, to take family members to routine medical visits

**Question 3.** Do any states make it easier for employees to qualify for FMLA leave?

**Answer.** In order to qualify, the FMLA requires that employees work for their employer for twelve months (which need not be consecutive) and for 1,250 hours in the year prior to taking leave. Some state family and medical leave laws lower the threshold by reducing either the number of months an employee must work to qualify for leave (that is, less than twelve months) and/or by reducing the number of hours an employee must work in the prior year to less than 1,250 hours. Currently, the District of Columbia and the following states make it easier to qualify for leave: Connecticut, Illinois, Minnesota, New Jersey, Oregon, Washington, and Wisconsin.

**Question 4.** Do any state family- and medical-leave laws mandate that spouses working for the same employer must not share FMLA leave when they take it for the birth or adoption of a child?

**Answer.** Currently, five states specify that spouses who work for the same employer do not have to share their FMLA leave for the birth or adoption of a child. These states are Hawaii, Maine, Minnesota, New Jersey, and Wisconsin.<sup>318</sup>

**Question 5.** My state law provides employees up to sixteen weeks of unpaid family and medical leave for the birth or adoption of a child, placement of a child for foster care, serious health condition of a family member, or the employee's own serious health condition. May I take sixteen weeks of leave following the birth of my child, instead of the twelve weeks mandated under federal law?

**Answer.** Yes. The federal FMLA sets a minimum level of benefits available to those who take family and medical leave, but you may take advantage of your state's more generous family- and medical-leave law.<sup>319</sup> For example, the District of Columbia mandates that eligible employees be entitled to a maximum of sixteen weeks of family leave and sixteen weeks of medical leave over a twenty-four month period.<sup>320</sup>

**XVII: INTERACTION BETWEEN THE FMLA AND OTHER FEDERAL LAWS: THE AMERICANS WITH DISABILITIES ACT, THE REHABILITATION ACT, AND THE PREGNANCY DISCRIMINATION ACT**

There are a variety of interactions between the FMLA and various other federal employment laws that offer protections for employees who are pregnant or experiencing other health conditions.

The Americans with Disabilities Act (ADA) of 1990 and the Rehabilitation Act of 1973 prohibit discrimination against individuals who have an actual disability, individuals who once had a disability, or individuals who are not disabled but are perceived as having a physical or mental disability, as well as individuals who have relationships with people who have a qualified disability (for example, a caregiver of a disabled person). Because the ADA currently applies to all employers of fifteen or more workers, virtually all US colleges and universities are subject to its mandates. State disability laws also may protect you from employment discrimination.

In understanding the interaction between the ADA and the FMLA, it is important to note that not all “serious health conditions” defined under the FMLA will cause or be defined as a disability, as the ADA defines the term. Under the ADA, you have a disability if you suffer from a mental or physical impairment that is not temporary (that is, likely to last for more than six months and which substantially limits your ability to engage in one or more major life activities). Major life activities include, but are not limited to, feeding and bathing yourself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.<sup>321</sup> If you suffer a serious health condition that causes such an impairment, the ADA requires your college or university to make reasonable accommodations to your work environment or to give you work assignments that will allow you, as a qualified employee with a disability, to continue to perform the essential functions of your position upon your return from FMLA leave, unless doing so would impose an undue hardship on your employer. Accommodations that constitute an “undue hardship” are those that are extremely difficult to implement or expensive when considered along with factors such as the employer’s size, financial resources, and the nature and structure of its business operation. Thus, the burden of what constitutes an undue hardship is likely to be higher for a large, well-endowed university, than for a small, poorly endowed college.

Nothing in the FMLA diminishes the obligations that federal and state antidiscrimination laws impose on employers. Institutions are required to comply with whichever statute “provides

the greater rights” to faculty members.<sup>322</sup> Therefore, it is possible that a faculty member who takes twelve weeks of FMLA leave for his or her own serious health condition may be entitled to additional leave as an ADA accommodation, if the serious health condition also qualifies as a disability under the ADA. The relationship between the FMLA, ADA, workers’ compensation, and short-term disability leave is highly complex, and you should discuss with your institution and possibly your own lawyer about how the policies interact.<sup>323</sup>

Be aware that once your FMLA leave is exhausted, if the ADA is not triggered, any extension of leave is most likely governed by your institution’s internal benefits policies (for example, long-term disability leave) or collective-bargaining agreement, if applicable. You should check on how much extra time you may take, how your benefits, such as health insurance, will be treated while you are on leave, your reinstatement rights, and so on. The Equal Employment Opportunity Commission enforces the ADA. Go to <http://www.eeoc.gov/laws/types/disability.cfm> for more information on ADA mandates.

Like the ADA, the Rehabilitation Act of 1973 protects employees with physical and mental disabilities from discrimination at work. The act defines disability discrimination in the same way as the ADA. Because the Rehabilitation Act covers government employers (employers who receive federal financial assistance, and employers with federal government contracts) the categories, as defined, include most colleges and universities. Nothing in the FMLA diminishes the obligations that the Rehabilitation Act imposes on colleges and universities. They are required to comply with whichever statute provides greater protection to faculty members.<sup>324</sup> At the same time, however, an institution may reserve the right to have any short-term disability leave run concurrently with your FMLA leave.<sup>325</sup>

The Pregnancy Discrimination Act of 1978 (PDA) amended Title VII of the 1964 Civil Rights Act to make it illegal for employers with fifteen or more workers to discriminate against women because of their pregnancies. Since the PDA applies to all employers with fifteen or more workers, virtually all US colleges and universities are subject to its mandates. Under the PDA, colleges and universities that offer short-term medical, sick, or disability leave must, at a minimum, provide pregnant women the same type of leave available to nonpregnant employees on the same terms and with at least the same level of benefits. Institutions may offer more generous benefits to pregnant faculty during any period of medical disability but may not offer benefits on less generous terms. For example, a college that provides up to three months of job-protected, paid medical leave after one month of an appointment must also provide a pregnant

female professor with up to three months of job-protected, paid pregnancy-related medical leave after only one month of an appointment.

Newly appointed women faculty will often find that they qualify for maternity benefits under the PDA before they qualify for maternity leave benefits under the FMLA, because many colleges and universities have short-term medical-leave policies allowing professors to accumulate job-protected, paid medical leave immediately. Moreover, to the extent that a college's medical-leave plan provides for any period of paid leave, a pregnant faculty member may obtain more generous benefits under the PDA than under the FMLA. However, if you are pregnant and an FMLA-eligible employee, you may simultaneously exercise your rights to the benefits of both laws. Nothing in the FMLA diminishes the obligations imposed upon colleges and universities by the PDA. When PDA and FMLA mandates differ, college and university administrations are required to comply with whichever statute provides broader benefits to faculty members.<sup>326</sup> At the same time, institutions may reserve the right to have short-term disability leave run concurrently with FMLA leave.<sup>327</sup>

The Equal Employment Opportunity Commission enforces the Pregnancy Discrimination Act. Go to <http://www.eeoc.gov/laws/types/pregnancy.cfm> for more information. You may also wish to consult the AAUP guidebook *Pregnancy In the Academy: Questions and Answers*, available on the AAUP website at <http://www.aaup.org/reports-publications/publications/see-all/guidebooks-newsletters>.

**Question 1.** I was in an accident that left me with a major visual impairment. I will be able to return to my teaching job at the university, but upon my return I will need special computer equipment that costs \$4,000. Before I was in the accident, I volunteered as our athletic department's assistant gymnastics coach. I will no longer be able to coach. Am I entitled to job-protected leave and accommodation under the FMLA or the ADA?

**Answer.** Yes. If your visual impairment rises to the level of a disability under the ADA but leaves you able to perform your essential job functions, as outlined in your letter of appointment (for example, teaching, research, and service), your institution must provide an accommodation to enable you to resume work. However, your institution may decline to make an accommodation for your disability if it is not reasonable, or if the cost is so expensive or disruptive that it would impose an "undue hardship" on your university. A single equipment expenditure of \$4,000

seems neither unreasonable, nor likely to pose such an undue hardship for most colleges and universities. Although you may be unable to coach gymnastics, if you were not hired to assume this responsibility as well as teach, coaching would not be considered an essential function of your faculty position. To meet your service obligations, you could substitute another type of service for coaching.<sup>328</sup> Your administration must work with you to identify the possibilities.

**Question 2.** I originally took twelve weeks of FMLA leave for my own serious health condition. My condition resulted in a disability that my college has agreed to accommodate under the provisions of the Americans with Disabilities Act.” However, our director of Human Resources insists that in order to return to work I must produce a medical certification detailing my overall physical condition. Must I provide the director so much information regarding my health?

**Answer.** Probably not. When an employee with ADA-defined disabilities returns to work after FMLA leave, the institution may only require a fitness-for-duty certificate addressing job-related aspects of the employee’s physical condition. For example, suppose an automobile accident leaves you with a severe hearing impairment necessitating an accommodation for you to perform your teaching duties as a foreign-language instructor. In this case your HR director may only ask you for medical information related to your hearing loss. The director may not ask you for other medical information unrelated to your ability to perform your job.<sup>329</sup>

**Question 3.** I have experienced a serious health condition for which I originally was granted twelve weeks of FMLA leave. The serious health condition has continued. I will eventually be able to perform all the essential functions of my position, but I will need four more weeks of leave for occupational therapy. Am I entitled to more leave, given that I have already used my FMLA leave and all my accumulated sick leave?

**Answer.** It depends. If your serious health condition does not qualify as a “disability,” under the ADA, you may not be entitled to the accommodation of four additional weeks of leave. If, however, the serious health condition does meet the ADA-standards of a “disability,” the ADA will apply. The ADA does not impose a time limit on how much leave your institution must provide for you to recover from your disability if: (1) upon recovery you will be able to perform the essential functions of your job; and (2) the amount of leave you need can be granted by your

institution without causing it undue hardship. Unless your institution can demonstrate that giving you four more weeks of leave will cause the institution an undue hardship, you probably would be granted the additional four weeks of leave, as long as your serious health condition qualifies as an ADA-disability.<sup>330</sup> You may also qualify for additional leave under one of your employer's workplace policies (for example, long-term disability leave), or, if applicable, your collective-bargaining agreement.

**Question 4.** I am pregnant and wondering under what conditions I am entitled to leave under my college's maternity leave policy, the FMLA, and the ADA?

**Answer.** A normal pregnancy and delivery do not create a disability as defined by the ADA. If you have a complicated pregnancy or delivery that creates a mental or physical impairment that will substantially interfere with one of more major life activities on a long-term basis, your administration must provide any reasonable accommodations you need to be able to return to, and perform the essential functions of, your job.<sup>331</sup> Under the Pregnancy Discrimination Act, you are entitled to paid maternity leave under your institution's policies for such leave.<sup>332</sup> You are also entitled to take up to twelve weeks of job-protected leave under the FMLA. You may elect, or your college may require you, to take your maternity leave and FMLA leave concurrently.<sup>333</sup>

**Question 5.** My husband and I are both faculty members in the same department at our college. I am pregnant, and my due date is during the middle of the semester. Our department is small, and my department chair says I may take FMLA leave, but only if my husband will teach a course overload by covering my classes during the time I am out on leave. My husband does not want to teach an overload. Can the department chair require this arrangement?

**Answer.** Under the FMLA, your university may not "interfere with, restrain, or deny" any FMLA rights due you.<sup>334</sup> Accordingly, your department chair's requirement that your husband teach a course overload would appear to constitute onerous conditions to discourage you from taking FMLA leave or otherwise to create a hardship for you.

In addition, your husband may have more protection against being required to teach a course overload under the PDA than under the FMLA. The PDA requires employers to treat leaves taken for pregnancy-related reasons at least as favorably as short-term medical leaves

taken for nonpregnancy-related reasons. Unless your university requires faculty spouses to cover for professors who take other types of short-term medical leaves, it would violate the PDA to condition your maternity leave on such a requirement.<sup>335</sup>

**Question 7.** I am a part-time faculty member, and although I have taught part-time at my university for five years, I do not work 1,250 hours a year and, therefore, do not qualify for FMLA leave. I am pregnant. Do I qualify for any type of maternity leave?

**Answer.** It depends. Check your institution's short-term sick-leave policy, which should be detailed in your faculty handbook or related materials. Many colleges and universities enable part-time faculty to accumulate sick leave in proportionate to their teaching course load. For example, if your university allows full-time faculty to accumulate one day of job-protected, paid sick leave a month of appointment, it may allow you, a part-time faculty member, to accumulate a half day of job-protected sick leave a month. Accordingly, if this is the case at your university, for each year of employment you would earn six full days of paid sick leave, and after five years, you would have accumulated thirty days of paid sick leave to use toward six weeks of paid maternity leave following the birth of your baby. The university may not deny you the right to use your sick leave for pregnancy-related short-term medical disabilities.

#### **XVIII: ACTIONS TO TAKE WHEN YOU BELIEVE YOUR COLLEGE OR UNIVERSITY IS VIOLATING YOUR RIGHT TO FMLA LEAVE**

All employers covered by the FMLA, including colleges and universities, are prohibited from retaliating against, interfering with, or denying eligible employees their right to FMLA benefits. Sometimes, human resources personnel, deans, or department chairs do not fully understand how the FMLA applies in atypical faculty work environments like working at home, flexible work hours, nine-month job contracts, and so on. Some administrative personnel may not realize that FMLA leave is an entitlement and not a discretionary benefit. Because employees face a variety of difficulties in obtaining FMLA leave, the US Department of Labor created a process to help employees obtain the leave to which they are entitled.

Complaints may be filed by mail, telephone, or in person at local offices of the Wage and Hour Division of the US DOL. Local district office locations can be found at <http://www.dol.gov/whd/america2.htm>.

No particular form is required to file a complaint with the Department of Labor, but it should include details of an employer's actions and omissions that form the basis of the complaint as well as relevant dates. In addition, copies of any supporting evidence, such as memoranda and e-mails, should be included. A complaint should be filed within a reasonable time of an employee's discovery that his or her FMLA rights may have been violated, but no later than two years after the last alleged unlawful action, or three years following the violation if the college's or university's violation was "willful."<sup>336</sup> It is not necessary to have an attorney file a complaint of a FMLA-leave violation.

Alternatively, an eligible employee may file a private lawsuit in federal court against an employer for denying FMLA-leave rights. Lawsuits may be brought against public or private institutions<sup>337</sup> and must be filed within two years of the offending employer's last violation, or within three years if the violation was "willful."<sup>338</sup> If a court finds that an employer violated one or more provisions of the FMLA, an eligible employee may receive one or more of the following: wages or benefits lost as a result of the violation; monetary losses sustained as a result of the violation (for example, costs of paying someone else to care for a family member with a serious health condition); interest on financial losses; reinstatement to a lost position; an illegally denied promotion; reasonable attorney's fees; and reasonable expert-witness fees. **A faculty member or academic professional contemplating a lawsuit should be sure to consult an attorney familiar with employment and higher-education law.**

**Question 1.** What are my options if my college denies my FMLA-leave request?

**Answer.** First make sure that you are an FMLA-eligible employee and that you have met all requirements for notification of your need for leave and medical-certification requirements, if applicable. If your application for FMLA leave is complete, you may first want to pursue internal grievance mechanisms. For example, you could speak with your department chair, immediate supervisor, human resources personnel, or university ombudsperson. If you believe that your leave request is being improperly denied, or granted to you on less generous terms than you are entitled, clarifying the nature of your request and the specifics of your leave entitlement may result in your leave request being granted appropriately.

If you believe your institution has violated any of your FMLA rights (your rights to leave, to reinstatement, to continuation of health-insurance benefits, and so on), you may file a complaint with the US Department of Labor.<sup>339</sup>

**Question 2.** I submitted proper notification to the designated person at my university regarding my request for FMLA leave for a qualifying exigency. I ended up taking leave under one of my university's workplace-benefits programs, and the leave was not designated as FMLA leave. Now, three months after the conclusion of my earlier leave, I need leave to care for my mother who has a serious health condition. When I notified my university that I was requesting FMLA leave for this purpose, I was informed that I have already used three weeks of FMLA leave. After unsuccessfully grieving this decision, I have decided to file a complaint with the Department of Labor. If the Department of Labor finds that my university violated my FMLA rights, what relief will I be entitled to receive? Is my university allowed to retroactively designate leave I took earlier in the year as FMLA leave?

**Answer.** Your university should have notified you of your eligibility to take FMLA leave within five business days of your initial request for FMLA leave.<sup>340</sup> If your employer required more information to designate your leave as time off under the FMLA, your employer was obligated to notify you. However, the DOL's 2009 federal regulations recognize that employers may on occasion have reason to retroactively designate leave taken as FMLA leave. If your university failed to designate your first leave as FMLA leave and wants to do so retroactively, they may do so: (1) with an oral or written notification to you; and (2) if the university's failure to designate your prior leave as FMLA leave does not cause any financial harm or injury to you.<sup>341</sup> If your university's retroactive designation of your first leave as FMLA leave was due to their failure to follow notification procedures, and it causes you harm, the university may be liable.

Specifically, your university may be liable for compensation and benefits that you lost (or will lose) because of the retroactive designation of your first leave as FMLA leave. They may also be liable for your other actual monetary losses as a result of their retroactive designation of your leave (for example, if you now have to hire a third party to provide some of your mother's care). Redress of the harm caused by your employer's retroactive designation of your first leave should be tailored to fit the harm caused to you.<sup>342</sup>

**Question 3.** I believe my administration is denying me benefits under both the FMLA and the ADA (or the FMLA and the PDA, or the FMLA and the Rehabilitation Act). What are my options?

**Answer.** If you believe your rights have been violated under the FMLA and other federal antidiscrimination laws, you may file a complaint with the US Department of Labor as specified above. If you also have a complaint under the ADA, Rehabilitation Act, or the PDA, you will have to file additional complaints with the Equal Employment Opportunity Commission (EEOC) to enforce your rights under these laws. Generally, it is unlawful to discriminate against an employee based on pregnancy or disability or to retaliate against an employee for filing a discrimination charge or for participating in a government investigation of a discrimination charge.

Although the EEOC provides forms for individuals who wish to file complaints, it also accepts informal complaints. Complaint letters must provide the following information: (1) your name; (2) the name of the person or entity (that is, college or university) that you are complaining against; (3) an explanation of the nature of the alleged discrimination; (4) the basis of the alleged discrimination (for example, disability or pregnancy); and (5) the times and places the discrimination occurred.

Federal antidiscrimination laws limit the time you have to file a charge of discrimination. Typically, you must file a charge within 180 calendar days from the last date in which the discrimination took place. Frequently, you need not file your complaint at both the state and federal level. If you file it at a state (or local) agency that has a work-sharing agreement with the EEOC, it will be automatically filed with the EEOC. If you file your complaint with the EEOC first, it will file with the appropriate state or local agency (if there is one). EEOC local office locations can be found at <http://www.eeoc.gov/field/index.cfm>. Contact the office to obtain more information about how to file a charge. You do not need an attorney to file a charge of discrimination with the EEOC.

While you may bring lawsuits to enforce your rights under the FMLA, ADA, and PDA, you may not bring separate suits when your institution's same acts result in violations of more than one of the laws. You may file only one lawsuit listing all the laws you believe your institution has violated. Additionally, you may not file a lawsuit under the ADA or the PDA (or any other part of Title VII of the 1964 Civil Rights Act) until the EEOC issues you a "right to sue" letter. You cannot file a lawsuit without first filing a charge of discrimination with the EEOC. If you are

contemplating a lawsuit, be sure to consult an attorney familiar with employment and higher-education law.

**Question 4.** Two years ago I had a baby and took FMLA leave concurrently with my university's paid maternity leave. I was hired on the tenure track, but I recently learned that my bid for tenure was denied. I have reason to believe that my tenure denial is linked to my decision to take maternity leave and FMLA leave. What are my options?

**Answer.** The FMLA makes it unlawful for a covered employer to discriminate or retaliate against an employee who has taken (or is seeking to take) FMLA leave. Employers are not allowed to use the fact that an employee took FMLA leave as a negative factor in an employment decision, including those related to tenure and promotion.<sup>343</sup>

Additionally, under the Pregnancy Discrimination Act, it is illegal for a covered employer to discriminate in an employment decision against a woman who is pregnant or used the employer's maternity-leave benefits.

Universities often have internal grievance procedures for circumstances in which an employee believes a tenure decision was made incorrectly. You may also want to ultimately file complaints with the Department of Labor (FMLA violation) and the Equal Employment Opportunity Commission (PDA violation). You do not need an attorney to file complaints with either agency. (See above for more information about the procedures for filing complaints.) However, because tenure denials are high-stakes disputes, you may want to consult with a private attorney familiar with both employment and higher-education law before taking action.

**Question 5.** I believe my college wrongly denied my request for FMLA leave for a qualifying reason. After following internal grievance procedures with no success, I filed a complaint with the US Department of Labor. Shortly after I filed the complaint, my dean approached me with settlement offer, with which I am satisfied. Can I settle my claim directly, or do I need the Department of Labor or a federal court to release my FMLA claim?

**Answer.** If your college has proposed a satisfactory settlement, you and your university may resolve your claim without approval from the US Department of Labor or a court.<sup>344</sup> However, you may want to consult with a private attorney who is familiar with employment and higher-

education law before signing a settlement agreement. Your college's attorney cannot simultaneously represent both you and the college.

## Conclusion

The application of the FMLA to the academic community is obviously complicated. Many typical higher education work situations were not at the forefront of lawmakers' minds when writing relevant statutory provisions of the FMLA. Additionally, statutory law, case law, and federal regulations are constantly evolving. This manual attempts to provide some guidance, although at times tentative, on issues of concern to faculty and academic professionals.

Most of what is described here are details regarding academic employees' *eligibility and entitlements* to family and medical leave. But, as Robert Drago and Carol Colbeck demonstrated in their studies of faculty attempting to navigate the often conflicting demands of work and family, having leave benefits does not necessarily create an environment in which faculty believe they can actually use their benefits.<sup>345</sup> Drago and Colbeck's survey of more than 5,000 faculty found that from 32 to 33 percent of male and female faculty said they did not ask for parental leave even though it would have benefitted them. From 23 to 25 percent of faculty said they did not ask for a reduced teaching load when they needed it for family reasons because it would have put an undue burden on others.

Colleges and universities engage in substantial contingency planning for circumstances that have a potential to disrupt their academic programs. Plans abound for how to manage problems of under-enrollment or over-enrollment, flu epidemics, faculty walkouts, and so on. But, ad hoc decision-making is commonly used to address mid-semester absences due to family or medical reasons. This is unsound.

With dual-career couples grounded in the workforce and faculty needing to care for both their children and their parents, absences for family and medical reasons by faculty and academic professionals are *not* going to be rare events. FMLA leave should not be contingent on the presence of a colleague willing to provide uncompensated coverage for the work of an absent colleague.

Administrators and faculty must develop contingency plans to minimize the disruptions such absences may cause. This is a matter of good managerial practices and a way to avoid unlawful personnel actions.

Elements of a sound contingency plan should include:

- Options for modified duties for faculty and academic professionals who need to miss substantial amounts of a semester when they take family and medical leave;

- Appropriations to department budgets to hire adjunct faculty or pay current faculty to teach additional courses when a colleague needs to take more than a few weeks of FMLA leave, or when a professor opts to work part-time;
- Clearly defining options for handling teaching, research, and administrative duties when only a few days or weeks of FMLA leave are needed.

**Finally, if you have questions about your own particular situation, confer with a local lawyer who has experience in the practice of FMLA and in the world of academe.**

# Appendices

## Appendix 1: Helpful Web Sites and Telephone Numbers

US Department of Labor, FMLA toll-free telephone number: (800) 959-FMLA

US Department of Labor, Code of Federal Regulations, Title 29, Chapter V, Part 825. The Family and Medical Leave Act. (All of the current rules and regulations pertaining to the FMLA.) [http://www.dol.gov/dol/allcfr/Title\\_29/Part\\_825/toc.htm](http://www.dol.gov/dol/allcfr/Title_29/Part_825/toc.htm)

US Department of Labor, FMLA homepage and links <http://www.dol.gov/whd/fmla/>

US Department of Labor, The Family and Medical Leave Act of 1993. (Text of the original law.) <http://www.dol.gov/whd/regs/statutes/fmla.htm>

US Department of Labor, The Family and Medical Leave Act of 1993, as amended. (Text of the original law as amended by the National Defense Authorization Act of 2008 and 2010.) <http://www.dol.gov/whd/fmla/fmlaAmended.htm>

US Department of Labor, Fact Sheet #28: The Family and Medical Leave Act of 1993. (An overview of FMLA provisions.) <http://www.dol.gov/whd/regs/compliance/whdfs28.pdf>

US Department of Labor, Fact Sheet #28: The Family and Medical Leave Act of 1993. (An overview of Military Family Leave provisions.) <http://www.dol.gov/whd/regs/compliance/whdfs28a.pdf>

US Department of Labor, The Family and Medical Leave Act of 1993; Final Rule, *Federal Register*, Vol. 73, No. 222, November 17, 2008, 67934:68133. <http://www.dol.gov/federalregister/PdfDisplay.aspx?DocId=21763>

US Department of Labor, Final Rule on Family and Medical Leave: Providing Military Family Leave and Updates to the Regulations (A factsheet addressing key changes in FMLA rules and regulations.) <http://www.dol.gov/whd/fmla/finalrule/factsheet.pdf>

US Department of Labor, Frequently Asked Questions and Answers about the Revisions to the Family and Medical Leave Act. (Addresses FAQs on provisions for Family and Medical Leave for the birth or adoption of a child, employee's own serious health condition, and leave to care for a spouse, child, or parent with a serious health condition.) <http://www.dol.gov/whd/fmla/finalrule/NonMilitaryFAQs.pdf>

US Department of Labor, Frequently Asked Questions on the Effect of the Uniformed Services Employment and Reemployment Rights Act on Leave Eligibility under the Family and Medical Leave Act. (Addresses leave rights of employees who are military reservists and members of the National Guard when they return from periods of military service.) <http://www.dol.gov/vets/media/fmlaq-a.pdf>

US Department of Labor, Military Family Leave Provisions of the FMLA: Frequently Asked Questions and Answers. (Addresses FAQs on the provisions for Qualifying Exigency Leave and Military Caregiver Leave.)

<http://www.dol.gov/whd/fmla/finalrule/MilitaryFAQs.pdf>

US Department of Labor, Wage and Hour Division, Opinion Letters — Family and Medical Leave Act. (Opinion letters addressing questions about the implementation of FMLA provisions that are not clarified in the Code of Federal Regulations.)

<http://www.dol.gov/whd/opinion/fmla.htm>

US Equal Employment Opportunity Commission, Disability Discrimination. (Overview of antidiscrimination provisions of the Americans with Disabilities Act and the Rehabilitation Act.) <http://www.eeoc.gov/laws/types/disability.cfm>

US Equal Employment Opportunity Commission, Pregnancy Discrimination. (Overview of the antidiscrimination provisions of the Pregnancy Discrimination Act.)

<http://www.eeoc.gov/laws/types/pregnancy.cfm>

National Partnership for Women and Families. The Family and Medical Leave Act (FMLA) Frequently Asked Questions. (Advocacy group answers FAQs.)

[http://www.nationalpartnership.org/site/DocServer/The\\_Family\\_and\\_Medical\\_Leave\\_Act\\_FAQs\\_Dec\\_2009.pdf?docID=6501](http://www.nationalpartnership.org/site/DocServer/The_Family_and_Medical_Leave_Act_FAQs_Dec_2009.pdf?docID=6501)

National Partnership for Women and Families. State-by-State Guide to Unpaid, Job-Protected Family and Medical Leave Laws.

<http://www.nationalpartnership.org/site/DocServer/StateunpaidFMLLaws.pdf?docID=969>

National Partnership for Women & Families. State Family and Medical Leave Laws that are More Expansive than the Federal FMLA.

<http://www.nationalpartnership.org/site/DocServer/StatesandunpaidFMLLaws.pdf?docID=968>

## Appendix 2: US Department of Labor Forms that can be Used by Employees or Employers

Certification by a Health Care Provider for an Employee's Serious Health Condition, WH-380-E. (Form can be used by a qualified health care provider to medically certify and employee's need for the FMLA leave.) <http://www.dol.gov/whd/forms/WH-380-E.pdf>

Certification by a Health Care Provider for a Family Member's Serious Health Condition, WH-380-F. (Form can be used by a qualified health care provider to medically certify and employee's need for FMLA leave to care for a family member.) <http://www.dol.gov/whd/forms/WH-380-F.pdf>

Notice of Eligibility and Rights & Responsibilities, WH-381. (Form can be used by employers responding to an employee's request to take FMLA leave, specifying the employee's rights to leave and responsibilities while under leave. May be used if the employer needs additional information to determine if the employee's leave request is qualifying or non-qualifying.) <http://www.dol.gov/whd/forms/WH-381.pdf>

Designation Notice, WH-382. (Form can be used by employers who have a legal obligation to designate an employee's request for FMLA leave — as qualifying or non-qualifying.) <http://www.dol.gov/whd/forms/WH-382.pdf>

Certification of Qualifying Exigency for Military Family Leave, WH-384. (Form can be used by an employee requesting to take FMLA leave for a Qualifying Exigency.) <http://www.dol.gov/whd/forms/WH-384.pdf>

Certification of Qualifying Exigency for Serious Injury or Illness of a Covered Service Member — for Military Family Leave, WH-385. (Form can be used by an employee requesting to take Military Caregiver Leave.) <http://www.dol.gov/whd/forms/WH-385.pdf>

### Appendix 3: Helpful Books

Guerin, Lisa, and Deborah C. England, (2009), *The Essential Guide to Family and Medical Leave*, NOLO.

Tyner, Karen M., (2010), *A Guide to the FMLA and ADA*, American Chamber of Commerce Resources, 3<sup>rd</sup> edition.

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<sup>1</sup> §§ 825.104, .600(b). All citations refer to Title 29 of the Code of Federal Regulations, Chapter V, Part 825, “The Family and Medical Leave Act of 1993,” unless otherwise indicated. 29 CFR § 825.

<sup>2</sup> §§ 825.108, .110(9)

<sup>3</sup> § 825.110(a)(1)

<sup>4</sup> § 825.110(b)(1)

<sup>5</sup> § 825.110(b)(3)

<sup>6</sup> § 825.110(a)(2)

<sup>7</sup> § 825.110(c)(3)

<sup>8</sup> 825.110(c)(1)

<sup>9</sup> §§ 825.108, .110(a)(3)

<sup>10</sup> The regulation that private employers with fewer than 50 employees at a work site don’t have to provide FMLA leave typically is not a binding constraint in academe as most private and college universities employ many more than 50 people.

<sup>11</sup> § 785.7. *Jewell Ridge Coal Corp. v. United Mine Workers*, 325 US 161 (1945)

<sup>12</sup> § 785.7

<sup>13</sup> § 785.12

<sup>14</sup> § 825.110(c)

<sup>15</sup> § 825.110(c)(3)

<sup>16</sup> § 825.201(b)

<sup>17</sup> § 825.201(b)

<sup>18</sup> § 825.110(b)(1)

<sup>19</sup> § 825.105(b)

<sup>20</sup> § 825.307(f)

<sup>21</sup> § 825.307(f)

<sup>22</sup> § 825.110(b)(2)(i)

<sup>23</sup> § 825.110(d)

<sup>24</sup> § 825.200(b)(1)-(4)

<sup>25</sup> § 825.200(e)

<sup>26</sup> § 825.200(d)(1)

<sup>27</sup> § 825.112

<sup>28</sup> § 825.127(b)(3)

<sup>29</sup> § 825.203

<sup>30</sup> § 825.202(a)

<sup>31</sup> § 825.204(a)

<sup>32</sup> § 825.204(b), (c)

<sup>33</sup> § 825.202(c)

<sup>34</sup> § 825.202(c)

<sup>35</sup> § 825.203

<sup>36</sup> § 825.203

<sup>37</sup> § 825.203

<sup>38</sup> § 825.202(c)

<sup>39</sup> § 825.205(b)

<sup>40</sup> 29 U.S.C. § 213

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<sup>41</sup> § 825.206(a)  
<sup>42</sup> § 825.206(b)  
<sup>43</sup> § 825.700(a)  
<sup>44</sup> § 825.204(c)  
<sup>45</sup> § 825.205(b)  
<sup>46</sup> § 825.200(h)  
<sup>47</sup> § 825.700  
<sup>48</sup> § 825.204(c)  
<sup>49</sup> §§ 825.204(a), .601  
<sup>50</sup> § 825.205(b)  
<sup>51</sup> § 825.204(a)  
<sup>52</sup> § 825.204(d)  
<sup>53</sup> § 825.204(e)  
<sup>54</sup> § 825.204(b)  
<sup>55</sup> § 825.204(e). If it is physically impossible for an employee on intermittent leave or reduced-schedule leave to start work, or leave work, partway through a shift, an employer may require an employee to take more FMLA leave than the employee needs. Federal regulations specify examples, such as a flight attendant scheduled to work on a specific flight or a laboratory employee who cannot enter or leave a clean room during a certain period. § 825.205(a)(2). Situations in which a faculty member cannot *physically* leave work or start work partway through a day will likely be rare.  
<sup>56</sup> § 825.215(a)  
<sup>57</sup> § 825.702(b)  
<sup>58</sup> § 825.115(d)  
<sup>59</sup> § 825.125(b)(5)  
<sup>60</sup> § 825.113(d)  
<sup>61</sup> § 825.204  
<sup>62</sup> § 825.115  
<sup>63</sup> § 825.115(a)(5)  
<sup>64</sup> § 825.115(c)  
<sup>65</sup> § 825.115(d)  
<sup>66</sup> §§ 825.113-.114  
<sup>67</sup> § 825.115(e)  
<sup>68</sup> § 825.113(d)  
<sup>69</sup> § 825.119(a)  
<sup>70</sup> § 825.207(a)  
<sup>71</sup> § 825.300(b)-(c)  
<sup>72</sup> § 825.113(a)  
<sup>73</sup> § 825.113(d)  
<sup>74</sup> § 825.123  
<sup>75</sup> Federal Register/Volume 73, Number 222/Monday, November 17, 2008/Rules and Regulations, 67952-67953.  
<sup>76</sup> § 825.220(d)  
<sup>77</sup> § 825.702(d)(2)  
<sup>78</sup> § 825.702(d)(2)  
<sup>79</sup> § 825.120(a)(4)  
<sup>80</sup> § 825.120(a)(5)  
<sup>81</sup> § 825.120(a)(1), (2)  
<sup>82</sup> § 825.200  
<sup>83</sup> § 825.120(a)(4)  
<sup>84</sup> § 825.120(a)(1), (2)  
<sup>85</sup> §§ 825.207(a), .702(a)  
<sup>86</sup> §§ 825.207(a), .702(a)  
<sup>87</sup> § 825.207(a)

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<sup>88</sup> Because of state budget woes, implementation of Washington’s paid family-leave program was delayed and is now slated to begin on October 1, 2015.

<sup>89</sup> § 825.120(a)(2)

<sup>90</sup> § 825.215(a)

<sup>91</sup> § 825.120(b)

<sup>92</sup> § 825.207(a)

<sup>93</sup> § 825.120(a)(4)

<sup>94</sup> § 825.120(a)(1), (2)

<sup>95</sup> § 825.207(a)

<sup>96</sup> § 825.120(a)(3)

<sup>97</sup> § 825.120(a)(3)

<sup>98</sup> § 825.120(a)(6)

<sup>99</sup> § 825.120(a)(3)

<sup>100</sup> § 825.121(a)(3)

<sup>101</sup> The FMLA defines a spouse as an individual legally recognized under state law for the purposes of marriage in the state in which the employee lives and includes spouses in common-law marriages. § 825.122(a). However, the 1996 federal Defense of Marriage Act defines marriage as a legal union between one man and one woman and applies that definition to all federal statutes, regulations, rulings, and agency interpretations. 1 U.S.C. § 7.

<sup>102</sup> “Family and Medical Leave Act: FMLA-Equivalent Benefit Available for LGBT Workers,” the Human Rights Campaign, available at <http://www.hrc.org/resources/entry/family-and-medical-leave-act-fmla-equivalent-benefit-for-lgbt-workers>. “Labor and Employment Alert: Wisconsin FMLA Expanded to Cover Domestic Partners,” Quarles and Brady, LLP, July 2009, available at <http://www.quarles.com/publications/detail.aspx?publication=540>. “State Medical Leave Laws,” Movement Advancement Project, available at [http://www.lgbtmap.org/equality-maps/fmla\\_laws](http://www.lgbtmap.org/equality-maps/fmla_laws)

<sup>103</sup> § 825.800

<sup>104</sup> US Department of Labor, Wage and Hour Division, Administrator’s Interpretation No. 2010-3, June 22, 2010, available at— [http://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010\\_3.pdf](http://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.pdf).

<sup>105</sup> US Department of Labor, Wage and Hour Division, Administrator’s Interpretation No. 2010-3, June 22, 2010, available at —[http://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010\\_3.pdf](http://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.pdf).

<sup>106</sup> § 825.200(h)

<sup>107</sup> § 825.207(a)

<sup>108</sup> § 825.120(a)(5)

<sup>109</sup> § 825.204

<sup>110</sup> § 825.204(d)

<sup>111</sup> US Department of Labor, Wage and Hour Division, Administrator’s Interpretation No. 2010-3, June 22, 2010, available at— [http://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010\\_3.pdf](http://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.pdf).

<sup>112</sup> *Dillon v. Maryland National Capital Park and Planning Commission*, 382 F. Supp. 2d 777, 786-787 (D. Md. 2005).

<sup>113</sup> § 825.127(c)(3)

<sup>114</sup> § 825.127(c)(3)

<sup>115</sup> § 825.121(a)(1)

<sup>116</sup> § 825.121(a)(2)

<sup>117</sup> § 825.122(c)

<sup>118</sup> § 825.121(a)(1)

<sup>119</sup> § 825.121(a)(2)

<sup>120</sup> § 825.600

<sup>121</sup> § 825.121(b)

<sup>122</sup> § 825.121(a)(3)

<sup>123</sup> § 825.702

<sup>124</sup> § 825.207

<sup>125</sup> § 825.201(b)

<sup>126</sup> “Family and Medical Leave Act: FMLA-Equivalent Benefit Available for LGBT Workers,” the Human Rights Campaign, available at <http://www.hrc.org/resources/entry/family-and-medical-leave-act-fmla-equivalent-benefit->

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for-lgbt-workers. "Labor and Employment Alert: Wisconsin FMLA Expanded to Cover Domestic Partners," Quarles and Brady, LLP, July 2009, available at <http://www.quarles.com/publications/detail.aspx?publication=540>. "State Medical Leave Laws," Movement Advancement Project, available at [http://www.lgbtmap.org/equality-maps/fmla\\_laws](http://www.lgbtmap.org/equality-maps/fmla_laws).

<sup>127</sup> § 825.122

<sup>128</sup> § 825.200

<sup>129</sup> § 825.124(a)

<sup>130</sup> § 825.124(b)

<sup>131</sup> § 825.124(b)

<sup>132</sup> § 825.124(c)

<sup>133</sup> § 825.122(j)

<sup>134</sup> Federal Register/Volume 73, Number 222/Monday, November 17, 2008/Rules and Regulations, 67951-67952.

<sup>135</sup> Dillon v. Maryland National Capital Park and Planning Commission, 382 F. Supp. 2d 777, 786-787 (D. Md. 2005).

<sup>136</sup> US Department of Labor, Wage and Hour Division, Administrator's Interpretation No. 2010-3, June 22, 2010, available at— [http://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010\\_3.pdf](http://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.pdf).

<sup>137</sup> US Department of Labor, Wage and Hour Division, Administrator's Interpretation No. 2010-3, June 22, 2010, available at —[http://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010\\_3.pdf](http://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.pdf).

<sup>138</sup> § 825.201(b).

<sup>139</sup> § 825.126(b)(2)(i)

<sup>140</sup> Public Law 111-84, Section 565, National Defense Authorization Act for Fiscal Year 2010, October 28, 2009.

<sup>141</sup> Public Law 111-84, Section 565, National Defense Authorization Act for Fiscal Year 2010, October 28, 2009.

<sup>142</sup> § 825.126(b)(1)

<sup>143</sup> § 825.126(a)

<sup>144</sup> § 825.126(a)(1)

<sup>145</sup> § 825.126(a)(2)

<sup>146</sup> § 825.126(a)(3)

<sup>147</sup> § 825.126(a)(4)

<sup>148</sup> § 825.126(a)(5)

<sup>149</sup> § 825.126(a)(6)

<sup>150</sup> § 825.126(a)(7)

<sup>151</sup> Federal Register/ Vol. 73, No. 222/ Monday, November 17, 2008/ Rules and Regulations/ pp. 67961.

<sup>152</sup> § 825.126(a)(7)

<sup>153</sup> Federal Register/Vol. 73, No. 222/ Monday, November 17, 2008/ Rules and Regulations/ pp. 67959.

<sup>154</sup> § 825.126(a)(8)

<sup>155</sup> § 825.126(b)(3)

<sup>156</sup> Some members of the armed forces are retired from the military before their duty tour expires because of disabilities sustained during their service. If one of the military's physical evaluation boards finds a service member unfit to perform his or her duties because of a disability, which could be temporary, he or she may be placed on the Temporary Disability Retired List. While on the TDRL, the service member undergoes periodic medical examinations. The member may remain on the TDRL for a maximum of five years. If, following a periodic examination, the member is found fit for duty, he or she may be discharged from the TDRL and returned to active duty. If the disability is assessed by medical personnel to cause a 30 percent or greater disability, the service member will ultimately be transferred to the Permanent Disability Retired List (PDRL) and receive regular retiree benefits. If the disability stabilizes at a level of less than 30 percent, and the service member has less than twenty years of military service, he or she is discharged from the TDRL and receives severance pay but not regular retiree benefits.

<sup>157</sup> The US Department of Labor, Wage and Hour Division issued a Notice of Proposed Rule Making to implement the 2010 NDAA amendments to the FMLA. See: <http://www.dol.gov/whd/fmla/NPRM/index.htm>, and Federal Register/Vol. 77, No. 31/Wednesday, February 15, 2012/Proposed Rules/pp. 8960-9020.

<sup>158</sup> Public Law 111-84, Section 565, National Defense Authorization Act for Fiscal Year 2010, October 28, 2009.

<sup>159</sup> § 825.127

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<sup>160</sup> Federal Register/ Vol. 73, No. 222/ Monday, November 17, 2008/ Rules and Regulations/ pp. 67963.  
<sup>161</sup> § 825.127(a)  
<sup>162</sup> § 825.127(c)(4)  
<sup>163</sup> Public Law 111-84, Section 565, National Defense Authorization Act for Fiscal Year 2010, October 28, 2009.  
<sup>164</sup> Public Law 111-84, Section 565, National Defense Authorization Act for Fiscal Year 2010, October 28, 2009.  
<sup>165</sup> Federal Register/ Vol. 73, No. 222/ Monday, November 17, 2008/ Rules and Regulations/ pp. 67963.  
<sup>166</sup> § 825.127(c)  
<sup>167</sup> § 825.127(c)(1)  
<sup>168</sup> § 825.127(c)(2)  
<sup>169</sup> § 825.127(c)  
<sup>170</sup> § 825.127(c)(2)  
<sup>171</sup> § 825.127(c)(2)  
<sup>172</sup> § 825.127(c)(2)  
<sup>173</sup> Federal Register/ Vol. 73, No. 222/ Monday, November 17, 2008/ Rules and Regulations/ pp. 67967.  
<sup>174</sup> § 825.127(b)(1)  
<sup>175</sup> § 825.127(d)  
<sup>176</sup> § 825.124(a), (b)  
<sup>177</sup> § 825.124(c)  
<sup>178</sup> § 825.800  
<sup>179</sup> § 825.207  
<sup>180</sup> § 825.207  
<sup>181</sup> § 825.207(e)  
<sup>182</sup> § 825.220  
<sup>183</sup> § 825.110(a)(2), (c)(1)  
<sup>184</sup> § 825.110(c)(3)  
<sup>185</sup> § 825.700  
<sup>186</sup> § 825.700  
<sup>187</sup> § 825.302(a)  
<sup>188</sup> § 825.302(a)  
<sup>189</sup> § 825.302(a)  
<sup>190</sup> § 825.302(b)  
<sup>191</sup> § 825.302(c)  
<sup>192</sup> § 825.303(c)  
<sup>193</sup> §§ 825.302(c), .303(b)  
<sup>194</sup> § 825.300(a)  
<sup>195</sup> § 825.300(a)(3)  
<sup>196</sup> § 825.304  
<sup>197</sup> §§ 825.302(d), .303(c)  
<sup>198</sup> § 825.302(a)  
<sup>199</sup> §§ 825.302(g), .304(e)  
<sup>200</sup> § 825.302(e)  
<sup>201</sup> § 825.302(e)  
<sup>202</sup> § 825.302(a)  
<sup>203</sup> § 825.302(b)  
<sup>204</sup> § 825.304(b)  
<sup>205</sup> § 825.302(a)  
<sup>206</sup> § 825.303(c)  
<sup>207</sup> § 825.303(a)  
<sup>208</sup> § 825.303(b)  
<sup>209</sup> § 825.306(a)  
<sup>210</sup> § 825.305(a)  
<sup>211</sup> § 825.305(b)

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<sup>212</sup> § 825.305(b)  
<sup>213</sup> § 825.306(b)  
<sup>214</sup> § 825.313(a)  
<sup>215</sup> § 825.313(b)  
<sup>216</sup> § 825.304(b)  
<sup>217</sup> § 825.303(a)  
<sup>218</sup> § 825.303(b)  
<sup>219</sup> § 825.303(b)  
<sup>220</sup> § 825.300(a)(3)  
<sup>221</sup> § 825.300(a)  
<sup>222</sup> § 825.300  
<sup>223</sup> § 825.300(b), (c)  
<sup>224</sup> § 825.300(d)  
<sup>225</sup> § 825.301(e)  
<sup>226</sup> § 825.311(a)  
<sup>227</sup> § 825.311(c)  
<sup>228</sup> § 825.302(c)  
<sup>229</sup> § 825.302(a)  
<sup>230</sup> § 825.309(b)  
<sup>231</sup> § 825.309(a)  
<sup>232</sup> <http://www.dol.gov/whd/forms/wh-384.pdf>  
<sup>233</sup> § 825.125  
<sup>234</sup> § 825.306(a). Medical certification that you need to care for a covered family member includes both physical and psychological care. Thus it includes situations in which you are needed to drive your seriously ill family member to doctor appointments; to provide for your family member’s nutritional, hygienic, or safety needs at home; or to provide psychological comfort and reassurance when the family member is receiving physical care in a hospital or other medical facility § 825.124.  
<sup>235</sup> § 825.306(a)  
<sup>236</sup> § 825.500(g)  
<sup>237</sup> § 825.306(e)  
<sup>238</sup> § 825.305  
<sup>239</sup> § 825.307(a)  
<sup>240</sup> § 825.303(a)  
<sup>241</sup>  
<sup>242</sup> § 825.307(b)(2)  
<sup>243</sup> § 825.307(e)  
<sup>244</sup> § 825.307(c)  
<sup>245</sup> § 825.307(c), (e)  
<sup>246</sup> § 825.307  
<sup>247</sup> § 825.307  
<sup>248</sup> § 825.312  
<sup>249</sup> § 825.308(c)  
<sup>250</sup> § 825.305(e)  
<sup>251</sup> § 825.307(f).  
<sup>252</sup> § 825.305(c), (d)  
<sup>253</sup> § 825.310(a)  
<sup>254</sup> § 825.125  
<sup>255</sup> <http://www.dol.gov/whd/forms/wh-385.pdf>  
<sup>256</sup> §§ 825.214-215  
<sup>257</sup> §§ 825.206(b), .207, .218  
<sup>258</sup> § 825.219  
<sup>259</sup> § 825.219(a)

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<sup>260</sup> § 825.219(d)

<sup>261</sup> § 825.216(a)

<sup>262</sup> § 825.220

<sup>263</sup> § 825.216(c)

<sup>264</sup> § 825.216(d)

<sup>265</sup> § 825.214. Although special rules exist for employees of “local educational agencies” when they plan to take leave near the end of the academic term, the rules apply only to “public school boards and elementary and secondary schools” and “private elementary and secondary schools” — not “colleges and universities.” § 825.600(a)

<sup>266</sup> § 825.215(a)

<sup>267</sup> § 825.215(c)

<sup>268</sup> § 825.215(e)

<sup>269</sup> § 825.215

<sup>270</sup> § 825.215(e)(2)

<sup>271</sup> § 825.220

<sup>272</sup> § 825.220

<sup>273</sup> § 825.215

<sup>274</sup> § 825.216

<sup>275</sup> § 825.217

<sup>276</sup> § 825.218(a)

<sup>277</sup> § 825.219(b)

<sup>278</sup> § 825.219(c)

279. Thomas J. Flygare, *The Family and Medical Leave Act of 1993: Applications in Higher Education*, 2nd ed. (Washington, D.C.: National Association of College and University Attorneys, 1995), pp. 22-23.

<sup>280</sup> § 825.220(a)

<sup>281</sup> § 825.702(d)(2)

<sup>282</sup> § 825.210

<sup>283</sup> § 825.209

<sup>284</sup> § 825.209

<sup>285</sup> § 825.210(c)

<sup>286</sup> § 825.212(a)

<sup>287</sup> § 825.212(c)

<sup>288</sup> § 825.212(b)

<sup>289</sup> § 825.212

<sup>290</sup> §§ 825.209(f), .211(e)

<sup>291</sup> § 825.213(a)(2)

<sup>292</sup> § 825.213(a), (f)

<sup>293</sup> § 825.213(a)(1), (2)

<sup>294</sup> § 825.213(a)(3)

<sup>295</sup> § 825.213(a)(2)

<sup>296</sup> § 825.213(c)

<sup>297</sup> § 825.209(h)

<sup>298</sup> § 825.209(b), (c)

<sup>299</sup> § 825.213(b)

<sup>300</sup> §§ 825.214, .215(c)

<sup>301</sup> § 825.209(h)

302. For a general discussion of the topic, see AAUP, *Statement of Principles on Family Responsibilities and Academic Work* (November 2001) at <http://www.aaup.org/AAUP/pubsres/policydocs/contents/workfam-stmt.htm>.

<sup>303</sup> § 825.210

<sup>304</sup> § 825.700(a)

<sup>305</sup> § 825.700

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<sup>306</sup> § 825.700(a)  
<sup>307</sup> § 825.207(a)  
<sup>308</sup> § 825.207(a)  
<sup>309</sup> § 825.220(d)  
<sup>310</sup> § 825.220(d)  
<sup>311</sup> § 825.207(a)  
<sup>312</sup> § 825.700(a)  
<sup>313</sup> § 825.701  
<sup>314</sup> “State-by-State Guide to Unpaid, Job-Protected Family and Medical Leave Laws,” National Partnership for Women and Families, available at <http://www.nationalpartnership.org/site/DocServer/StateunpaidFMLLaws.pdf?docID=969>. See also “State Family and Medical Leave Laws that are More Expansive than the Federal FMLA,” available at <http://www.nationalpartnership.org/site/DocServer/StatesandunpaidFMLLaws.pdf?docID=968>.  
<sup>315</sup> “State Family and Medical Leave Laws that are More Expansive than the Federal FMLA,” National Partnership for Women and Families, available at <http://www.nationalpartnership.org/site/DocServer/StatesandunpaidFMLLaws.pdf?docID=968>.  
<sup>316</sup> In “About Reciprocal Beneficiary Relationships,” Hawaii Department of Health, available at <http://hawaii.gov/health/vital-records/vital-records/reciprocal/index.html>. A reciprocal beneficiary relationship is a legal relationship created when two consenting adults who are prohibited from marriage declare their intent to enter a reciprocal beneficiary relationship. Neither of the parties may be married or a party to another reciprocal beneficiary relationship.  
<sup>317</sup> 1 U.S.C. § 7  
<sup>318</sup> “State Family and Medical Leave Laws that Differ From the Federal FMLA,” National Conference of State Legislatures, available at <http://www.ncsl.org/print/employ/fam-medleave.pdf>.  
<sup>319</sup> § 825.701(a)  
<sup>320</sup> For a listing of states that offer their own family leave laws, see [http://www.nationalpartnership.org/site/DocServer/Existing\\_Family\\_Leave\\_Laws.pdf?docID=7081](http://www.nationalpartnership.org/site/DocServer/Existing_Family_Leave_Laws.pdf?docID=7081)  
<sup>321</sup> 42 U.S.C. § 12102 and ADA Amendments Act of 2008, Public law 110-325, Section 4, September 25, 2008. <http://www.eeoc.gov/laws/statutes/adaaa.cfm>  
<sup>322</sup> § 825.702(a)  
<sup>323</sup> Remember that your college’s or university’s attorney is responsible for representing your institution and cannot simultaneously represent you.  
<sup>324</sup> § 825.702(a)  
<sup>325</sup> § 825.207  
<sup>326</sup> § 825.702  
<sup>327</sup> § 825.207  
<sup>328</sup> § 825.702  
<sup>329</sup> §§ 825.306(d), .702(e)  
<sup>330</sup> 42 U.S.C. § 12111(9), (10)  
<sup>331</sup> 42 U.S.C. § 12111(9).  
<sup>332</sup> 42 U.S.C. § 2000e(k)  
<sup>333</sup> § 825.702(b), (c)  
<sup>334</sup> § 825.220(b)  
<sup>335</sup> 42 U.S.C. § 2000e(k)  
<sup>336</sup> § 825.401  
<sup>337</sup> *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 726, (2003).  
<sup>338</sup> § 825.400  
<sup>339</sup> §§ 825.400–401  
<sup>340</sup> § 825.300(b)  
<sup>341</sup> § 825.301(d)  
<sup>342</sup> §§ 825.301(e), .400(c)  
<sup>343</sup> § 825.220(c)

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<sup>344</sup> § 825.220(d)

<sup>345</sup> Drago, Robert, and Carol Colbeck, “The Mapping Project: Exploring the Terrain of U.S. Colleges and Universities for Faculty and Families,” (2003); see excerpts at <http://live.psu.edu/story/5532> and <http://www.psu.edu/ur/todelete/oped/drago.html>.

