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

This introductory page outlines the contents of this policy on the FMLA. See the following sections for statutory provisions on:

SECTION I: GENERAL PROVISIONS

COVERED EMPLOYER

Public agencies, including college districts, are "covered employers", without regard to the number of employees employed. Employers covered by the FMLA include any person who acting, directly or indirectly, in the interest of a covered employer to any of the employees of the public agency employer. *29 U.S.C. 2611(4); 29 C.F.R. 825.102, .104(a)*

"ELIGIBLE EMPLOYEE"

An "eligible employee" is an employee of a covered employer who:

1. Has been employed by the employer for at least 12 months. The 12 months need not be consecutive, subject to 29 C.F.R. 825.110(b);

2. Has been employed for at least 1,250 hours of service with such employer during the 12 months immediately preceding the commencement of leave; and

3. Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.

29 U.S.C. 2611(2); 29 C.F.R. 825.102, .110

[An employer that has no eligible employees must comply with the requirements at GENERAL NOTICE, below.]

QUALIFYING REASONS FOR LEAVE

Employers covered by the FMLA are required to grant leave to eligible employees:

1. For the birth of a son or daughter, and to care for the newborn child;

2. For placement with the employee of a son or daughter for adoption or foster care. [For the rules regarding leave for, "adoption" and "foster care," see 29 C.F.R. 825.121];

3. To care for the employee's spouse, son, daughter, or parent with a serious health condition;

4. Because of a serious health condition that makes the employee unable to perform the functions of the employee's job;

5. Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty (or has been notified of an impending call or order to covered active duty status); and

6. To care for a covered servicemember with a serious injury or illness incurred in the line of duty if the employee is the

spouse, son, daughter, parent, or next of kin of the covered servicemember.

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

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

QUALIFYING EXIGENCY

An eligible employee may take FMLA leave while the employee's spouse, son, daughter, or parent (the military member or member) is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty) for one or more of the following qualifying exigencies, as detailed in 29 C.F.R. 825.126:

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

29 C.F.R. 825.126

PREGNANCY OR BIRTH

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

DEFINITIONS

"ADOPTION" "Adoption" means legally and permanently assuming the responsibility of raising a child as one's own. The source of an adopted child (e.g., whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for FMLA leave. *29 C.F.R. 825.112(f)*

"COVERED ACTIVE DUTY OR CALL TO COVERED ACTIVE DUTY STATUS" "Covered active duty or call to covered active duty status" means:

1. In the case of a member of the Regular Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country; and
2. In the case of a member of the Reserve components of the Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country under a federal call or order to active duty in support of a contingency operation, as described by 29 C.F.R. 825.102.

29 C.F.R. 825.102, .122(a), .126(a)

"COVERED SERVICEMEMBER" "Covered servicemember" means:

1. A current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy; is otherwise in outpatient status; or is otherwise on the temporary disability retired list for a serious injury or illness; or
2. A covered veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness.

"COVERED VETERAN" "Covered veteran" means an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves), and was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran.

29 C.F.R. 825.102, .122(a), .127(b)

"FOSTER CARE" "Foster care" means 24-hour care for children in substitution for, and away from, their parents or guardian. Such placement is made by or with the agreement of the state as a result of a voluntary agreement between the parent or guardian that the child be removed from the home, or pursuant to a judicial determination of the necessity for foster care, and involves an agreement between the state and the foster family that the foster family will take care of the child. Although foster care may be with relatives of the child, state action is involved in the removal of the child from parental custody. *29 C.F.R. 825.122(g)*

"MILITARY CAREGIVER LEAVE"	"Military caregiver leave" means leave taken to care for a covered servicemember with a serious injury or illness under the FMLA. *29 C.F.R. 825.102*
"NEXT OF KIN OF A COVERED SERVICEMEMBER"	"Next of kin of a covered servicemember" means the nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered servicemember's only next of kin. *29 C.F.R. 825.102, .122(e), .127(d)(3)*
"PARENT"	"Parent" means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee when the employee was a son or daughter. This term does not include parents "in law." *29 C.F.R. 825.102, .122(c)*
"PARENT OF A COVERED SERVICEMEMBER"	"Parent of a covered servicemember" means a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered servicemember. This term does not include parents "in law." *29 C.F.R. 825.102, .122(j), 127(d)(2)*
"SERIOUS HEALTH CONDITION"	"Serious health condition" means an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in 29 C.F.R. 825.114 or continuing treatment by a health-care provider as defined in 29 C.F.R. 825.115. Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not serious health conditions unless inpatient hospital care is required or unless complications develop. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness or allergies may be serious health conditions, but only if all the conditions of 29 C.F.R. 825.113 are met. *29 C.F.R. 825.102*

"SERIOUS INJURY OR ILLNESS"

"Serious injury or illness" means:

1. In the case of a current member of the Armed Forces, including a member of the National Guard or Reserves, an injury or illness that was incurred by the covered servicemember in the line of duty on active duty in the Armed Forces or that existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces and that may render the servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating; and

2. In the case of a covered veteran, an injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) and manifested itself before or after the member became a veteran, and is:

    a. A continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating;

    b. A physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave;

    c. A physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service or would do so absent treatment; or

    d. An injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the U.S. Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

29 C.F.R. 825.102, .127(c)

"SON OR DAUGHTER"

"Son or daughter" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, as defined at 29 C.F.R. 825.122(d)(3), who is either under age 18, or age 18 or older and "incapable of self-care because of a mental or physical disability," as defined at 29 C.F.R.

825.122(d)(1)–(2), at the time that FMLA leave is to commence. *29 C.F.R. 825.102, .122(d)*

"SON OR DAUGHTER OF A COVERED SERVICEMEMBER"

"Son or daughter of a covered servicemember" means a covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age. *29 C.F.R. 825.102, .122(h), .127(d)(1).*

"SON OR DAUGHTER ON COVERED ACTIVE DUTY OR CALL TO COVERED ACTIVE DUTY STATUS"

"Son or daughter on covered active duty or call to covered active duty status" means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on covered active duty or call to active duty status, and who is of any age. *29 C.F.R. 825.102, .122(h), .126(a)(5)*

"SPOUSE"

"Spouse" means a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including common law marriage in states where it is recognized. *29 C.F.R. 825.102, .122(b)*

SECTION II: LEAVE ENTITLEMENT AND USE

AMOUNT OF LEAVE

Except in the case of military caregiver leave, an eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks of leave during a 12-month period for any one or more of the qualifying reasons.

A husband and wife who are employed by the same employer, including a college district, may be limited to a combined total of 12 weeks of FMLA leave during any 12-month period if leave is taken for the birth of a son or daughter or to care for the child after birth, the placement of a child for adoption or foster care or to care for the child after placement, or to care for a parent with a serious health condition.

29 U.S.C. 2612(a), (f); 29 C.F.R. 825.120(a)(3), .200–.201

DETERMINING THE 12-MONTH PERIOD

Except with respect to military caregiver leave, an employer is permitted to choose any one of the following methods for determining the 12-month period in which the 12 weeks of leave entitlement occurs:

1. The calendar year;
2. Any fixed 12-month leave year, such as a fiscal year, or a year starting on an employee's anniversary date;
3. The 12-month period measured forward from the date any employee's first FMLA leave begins; or

4. A “rolling” 12-month period measured backward from the date an employee uses any FMLA leave.

29 C.F.R. 825.200(b)

MILITARY CAREGIVER LEAVE

An eligible employee's FMLA leave entitlement is limited to a total of 26 workweeks of leave during a single 12-month period to care for a covered servicemember with a serious injury or illness. The single 12-month period is measured forward from the date an employee's first FMLA leave to care for the covered servicemember begins, regardless of the method used by the employer to determine the employee’s 12 workweeks of leave entitlement for other FMLA leaves. During the single 12-month period, an eligible employee's FMLA leave entitlement is limited to a combined total of 26 workweeks of FMLA leave for any qualifying reason. *29 U.S.C. 2612(a)(3)–(4); 29 C.F.R. 825.127(c), .200(f)–(g)*

The leave entitlement is to be applied on a per-covered-servicemember, per-injury basis such that an eligible employee may be entitled to take more than one period of 26 workweeks of leave if the leave is to care for different covered servicemembers or to care for the same servicemember with a subsequent serious injury or illness, except that no more than 26 workweeks of leave may be taken within any single 12-month period. An eligible employee may take more than one period of 26 workweeks of leave to care for a covered servicemember with more than one serious injury or illness only when the serious injury or illness is a subsequent serious injury or illness. When an eligible employee takes leave to care for more than one covered servicemember or for a subsequent serious injury or illness of the same covered servicemember, and the single 12-month periods corresponding to the different military caregiver leave entitlements overlap, the employee is limited to taking no more than 26 workweeks of leave in each single 12-month period. *29 C.F.R. 825.127(e)(2)*

A husband and wife who are eligible for FMLA leave and employed by the same employer may be limited to a combined total of 26 weeks of FMLA leave during the single 12-month period if leave is taken for the birth of a son or daughter or to care for the child after birth, for the placement of a child for adoption or foster care or to care for the child after placement, to care for a parent with a serious health condition, or to care for a covered servicemember with a serious injury or illness. *29 C.F.R. 825.127(f)*

HOLIDAYS, SUMMER VACATION, AND OTHER BREAKS

For purposes of determining the amount of leave used by an employee, the fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave. However, if an employee is using FMLA leave in increments of less than one week, the holiday will not count against the em-

ployee's FMLA entitlement unless the employee was otherwise scheduled and expected to work during the holiday. Similarly, if for some reason the employer's business activity has temporarily ceased and employees generally are not expected to report for work for one or more weeks (e.g., a school closing for several weeks for the Christmas/New Year holiday or an employer closing the plant for retooling or repairs), the days the employer's activities have ceased do not count against the employee's FMLA leave entitlement. *29 C.F.R. 825.200(h)*

INTERMITTENT OR REDUCED LEAVE SCHEDULE

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

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

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

29 U.S.C. 2612(b); 29 C.F.R. 825.202

TRANSFER TO ALTERNATIVE POSITION

If an employee requests intermittent or reduced schedule leave that is foreseeable based on planned medical treatment or if the employer agrees to permit such leave for the birth of a child or for placement of a child for adoption or foster care, the employer may require the employee to transfer temporarily to an available alternative position for which the employee is qualified and that has equivalent pay and benefits and better accommodates recurring periods of leave than does the employee's regular position. *29 U.S.C. 2612(b)(2); 29 C.F.R. 825.204*

CALCULATING LEAVE USE

When an employee takes leave on an intermittent or reduced leave schedule basis, the employer must account for intermittent or reduced schedule leave in accordance with 29 C.F.R. 825.205, using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave, provided it is not greater than one hour and provided further that an employ-

ee's FMLA leave entitlement may not be reduced by more than the amount of leave actually taken. An employer may not require an employee to take more leave than is necessary to address the circumstances that precipitated the need for the leave, provided that the leave is counted using the shortest increment of leave used to account for any other type of leave. In all cases, employees may not be charged FMLA leave for periods during which they are working. *29 C.F.R. 825.205*

SUBSTITUTION OF PAID LEAVE

Generally, FMLA leave is unpaid leave. However, an employee may choose to substitute accrued paid leave for unpaid FMLA leave. If an employee does not choose to substitute accrued paid leave, the employer may require the employee to do so. The term "substitute" means that the paid leave provided by the employer, and accrued pursuant to established policies of the employer, will run concurrently with the unpaid FMLA leave. An employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employer's normal leave policy. When an employee chooses, or an employer requires, substitution of accrued paid leave, the employer must inform the employee that the employee must satisfy any procedural requirements of the paid leave policy only in connection with the receipt of such payment. [See 825.300(c)] If an employee does not comply with the additional requirements in an employer's paid leave policy, the employee is not entitled to substitute accrued paid leave but the employee remains entitled to take unpaid FMLA leave. *29 U.S.C. 2612(d); 29 C.F.R. 825.207(a)*

COMPENSATORY TIME

If an employee requests and is permitted to use accrued compensatory time to receive pay during FMLA leave, or if an employer requires such use, the compensatory time taken may be counted against the employee's FMLA leave entitlement. *29 C.F.R. 825.207(f)*

FMLA AND DISABILITY LEAVE PLANS

Leave taken pursuant to a disability leave plan would be considered FMLA leave for a serious health condition and counted in the leave entitlement permitted under the FMLA if it meets the criteria set forth in 29 C.F.R. 825.112–825.115. In such cases, the employer may designate the leave as FMLA leave and count the leave against the employee's FMLA leave entitlement. Because leave pursuant to a disability benefit plan is not unpaid, the provision for substitution of the employee's accrued paid leave is inapplicable, and neither the employee nor the employer may require the substitution of paid leave. However, employers and employees may agree, where state law permits, to have paid leave supplement the disability plan benefits, such as in the case where a plan only provides replacement income for two-thirds of an employee's salary. *29 C.F.R. 825.207(d)*

FMLA AND WORKERS' COMPENSATION

A serious health condition may result from injury to the employee "on or off" the job. If the employer designates the leave as FMLA leave, the leave counts against the employee's FMLA leave entitlement. Because the workers' compensation absence is not unpaid, neither the employee nor the employer may require the substitution of paid leave. However, an employer and an employee may agree, where state law permits, to have paid leave supplement workers' compensation benefits.

If the health-care provider treating the employee for the workers' compensation injury certifies that the employee is able to return to a "light duty job" but is unable to return to the same or equivalent job, the employee may decline the employer's offer of a "light duty job." As a result, the employee may lose workers' compensation payments, but is entitled to remain on unpaid FMLA leave until the employee's FMLA leave entitlement is exhausted. As of the date workers' compensation benefits cease, the substitution provision becomes applicable and either the employee may elect or the employer may require the use of accrued paid leave.

29 C.F.R. 825.207(e)

MAINTENANCE OF HEALTH BENEFITS

During any FMLA leave, an employer must maintain the employee's coverage under any group health plan on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period. If an employer provides a new health plan or benefits or changes health benefits or plans while an employee is on FMLA leave, the employee is entitled to the new or changed plan/benefits to the same extent as if the employee were not on leave. Any other plan changes (e.g., in coverage, premiums, deductibles, and the like) that apply to all employees of the workforce would also apply to an employee on FMLA leave.

Notice of any opportunity to change plans or benefits must also be given to an employee on FMLA leave. If the group health plan permits an employee to change from single to family coverage upon the birth of a child or otherwise add new family members, such a change in benefits must be made available while an employee is on FMLA leave. If the employee requests the changed coverage, it must be provided by the employer.

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

29 U.S.C. 2614(c); 29 C.F.R. 825.209(a), (c)–(e)

PAYMENT OF PREMIUMS

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

FAILURE TO PAY PREMIUMS

Unless an employer has an established policy providing a longer grace period, an employer's obligations to maintain health insurance coverage cease if an employee's premium payment is more than 30 days late. In order to terminate the employee's coverage, the employer must provide written notice to the employee that the payment has not been received. Such notice must be mailed to the employee at least 15 days before coverage is to cease, advising that coverage will be dropped on a specified date at least 15 days after the date of the letter unless the payment has been received by that date. If the employer has established policies regarding other forms of unpaid leave that provide for the employer to cease coverage retroactively to the date the unpaid premium payment was due, the employer may drop the employee from coverage retroactively in accordance with that policy, provided the 15-day notice was given. In the absence of such a policy, coverage for the employee may be terminated at the end of the 30-day grace period, if the required 15-day notice has been provided.

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

29 C.F.R. 825.212

RECOVERY OF BENEFIT COST

If an employee fails to return to work after FMLA leave has been exhausted or expires, an employer may recover from the employee its share of health plan premiums during the employee's unpaid FMLA leave, unless the employee's failure to return is due to one of the reasons set forth in 29 C.F.R. 825.213. An employer may not recover its share of health insurance premiums for any period of FMLA leave covered by paid leave. *29 C.F.R. 825.213*

MAINTENANCE OF OTHER BENEFITS

An employee's entitlement to benefits other than group health benefits during a period of FMLA leave (e.g., holiday pay) is to be determined by the employer's established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as appropriate). *29 C.F.R. 825.209(h)*

RIGHT TO REINSTATEMENT

On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave began, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee is entitled to reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence. However, an employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. *29 C.F.R. 825.214, .216(a)*

MOONLIGHTING DURING FMLA LEAVE

If an employer, including a college district, has a uniformly applied policy governing outside or supplemental employment, the policy may continue to apply to an employee while on FMLA leave. An employer that does not have such a policy may not deny FMLA benefits on the basis of outside or supplemental employment unless the FMLA leave was fraudulently obtained. *29 C.F.R. 825.216(e)*

PAY INCREASES AND BONUSES

An employee is entitled to any unconditional pay increases that may have occurred during the FMLA leave period, such as cost of living increases. Pay increases conditioned upon seniority, length of service, or work performed must be granted in accordance with the employer's policy or practice with respect to other employees on an equivalent leave status for a reason that does not qualify as FMLA leave.

Equivalent pay includes any bonus or payment, whether it is discretionary or non-discretionary. However, if a bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold, or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied, unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave. For example, if an employee who used paid vacation leave for a non-FMLA purpose would receive the payment, then the employee who used paid vacation leave for an FMLA-protected purpose also must receive the payment.

29 C.F.R. 825.215(c)

"KEY EMPLOYEES"

A "key employee" is a salaried eligible employee who is among the highest paid ten percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed. An employer may deny job restoration to a key employee if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer; the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that such injury

would occur; and in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice. *29 U.S.C. 2614(b); 29 C.F.R. 825.102, .217–.219*

SECTION III: NOTICES AND MEDICAL CERTIFICATION

EMPLOYER NOTICES

GENERAL NOTICE

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

If a covered employer has any eligible employees, it shall also provide this general notice to each employee by:

1. Including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist; or

2. By distributing a copy of the general notice to each new employee upon hiring.

In either case, distribution may be accomplished electronically.

Employers may duplicate the text of the DOL prototype notice WHD Publication 1420 or may use another format so long as the information provided includes, at a minimum, all of the information contained in that notice.

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

29 U.S.C. 2619; 29 C.F.R. 825.300(a)

ELIGIBILITY NOTICE

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

Notification of eligibility may be oral or in writing; employers may use DOL optional form WH-381 to provide such notification to employees. The employer is obligated to translate the notice in any situation in which it is required to translate the general notice.

If, at the time an employee provides notice of a subsequent need for FMLA leave during the applicable 12-month period due to a different FMLA-qualifying reason, and the employee's eligibility status has not changed, no additional eligibility notice is required. If, however, the employee's eligibility status has changed, the employer must notify the employee of the change in eligibility status within five business days, absent extenuating circumstances.

29 C.F.R. 825.300(b)

RIGHTS AND RESPONSIBILITIES NOTICE

Employers shall provide written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. The rights and responsibilities notice must include the information described by 29 C.F.R. 825.300(c)(1). The employer is obligated to translate the notice in any situation in which it is required to translate the general notice.

This notice shall be provided to the employee each time the eligibility notice is provided. The notice of rights and responsibilities may be distributed electronically so long as it meets the requirements of 29 C.F.R. 825.300.

If the specific information provided by the notice of rights and responsibilities changes, the employer shall, within five business days of receipt of the employee's first notice of need for leave subsequent to any change, provide written notice referencing the prior notice and setting forth any of the information in the notice of rights and responsibilities that has changed.

29 C.F.R. 825.300(c)

DESIGNATION NOTICE

When the employer has enough information to determine whether leave is being taken for an FMLA-qualifying reason, the employer must notify the employee whether the leave will be designated and will be counted as FMLA leave within five business days absent extenuating circumstances. Only one notice of designation is required for each FMLA-qualifying reason per applicable 12-month period, regardless of whether the leave taken due to the qualifying reason will be a continuous block of leave or intermittent or reduced schedule leave. If the employer determines that the leave will not be designated as FMLA-qualifying, the employer must notify the employee of that determination.

The designation notice must be in writing. If the leave is not designated as FMLA leave because it does not meet the requirements of the Act, the notice to the employee that the leave is not designated as FMLA leave may be in the form of a simple written statement. If the information provided by the employer to the employee in the

designation notice changes (e.g., the employee exhausts the FMLA leave entitlement), the employer shall provide, within five business days of receipt of the employee's first notice of need for leave subsequent to any change, written notice of the change.

The designation notice must include the information required by 29 C.F.R. 825.300(d)(1) (substitution of paid leave), (d)(3) (fitness for duty certification), and (d)(6) (amount of leave charged against FMLA entitlement). For further provisions on designation of leave, see 29 C.F.R. 825.301.

29 C.F.R. 825.300(d)

RETROACTIVE DESIGNATION

An employer may retroactively designate leave as FMLA leave, with appropriate notice as described above at DESIGNATION NOTICE or with an appropriate designation notice to the employee, if the employer's failure to timely designate leave does not cause harm or injury to the employee. In addition, an employer and an employee may agree that leave will be retroactively designated as FMLA leave. *29 C.F.R. 825.301(d)*

EMPLOYEE NOTICE

An employee giving notice of the need for FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave and otherwise satisfy the requirements for notice of foreseeable and unforeseeable leave, below. If the employee fails to explain the reasons, leave may be denied. *29 C.F.R. 825.301(b)*

FORESEEABLE LEAVE

An employee must provide at least 30 days' advance notice before FMLA leave is to begin if the need for leave is foreseeable based upon an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or a family member, or a planned medical treatment for a serious injury or illness of a covered servicemember. If 30 days' notice is not practicable, the employee must give notice as soon as practicable. For leave due to a qualifying exigency, the employee must provide notice as soon as practicable regardless of how far in advance the leave is foreseeable. The form and content of the notice must comply with 29 C.F.R. 825.302(c).

When planning medical treatment, the employee must consult with the employer and make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations, subject to the approval of the health-care provider.

29 C.F.R. 825.302

UNFORESEEABLE LEAVE	When the approximate timing of leave is not foreseeable, an employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case. It generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements applicable to such leave. The form and content of the notice must comply with 29 C.F.R. 825.303(b). *29 C.F.R. 825.303(a)*
COMPLIANCE WITH EMPLOYER REQUIREMENTS	An employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. Where an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA leave may be delayed or denied. *29 C.F.R. 825.302(d), .303(c)*
CERTIFICATION OF LEAVE	An employer, including a college district, may require that an employee's FMLA leave be supported by certification, as described below. The employer must give notice of a requirement for certification each time certification is required. At the time the employer requests certification, the employer must advise the employee of the consequences of failure to provide adequate certification. *29 U.S.C. 2613; 29 C.F.R. 825.305(a), (d)*
TIMING	In most cases, the employer should request that an employee furnish certification at the time the employee gives notice of the need for leave or within five business days thereafter or, in the case of unforeseen leave, within five business days after the leave commences. The employer may request certification at a later date if the employer later has reason to question the appropriateness of the leave or its duration. The employee must provide the requested certification to the employer within 15 calendar days after the employer's request, unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts or the employer provides more than 15 days to return the certification. *29 C.F.R. 825.305(b)*
INCOMPLETE OR INSUFFICIENT CERTIFICATION	The employer shall advise an employee if it finds a certification incomplete or insufficient and shall state in writing what additional information is necessary to make the certification complete and sufficient. The employer must provide the employee with seven calendar days (unless not practicable under the particular circumstances despite the employee's diligent, good faith efforts) to cure any such deficiency. If the employee fails to provide the employer with a complete and sufficient certification, despite the opportunity to cure the certification, or fails to provide any certification, the employer may deny the taking of FMLA leave.

A certification is “incomplete” if one or more of the applicable entries have not been completed. A certification is “insufficient” if it is complete, but the information provided is vague, ambiguous, or non-responsive. A certification that is not returned to the employer is not considered incomplete or insufficient, but constitutes a failure to provide certification.

29 C.F.R. 825.305(c)–(d)

MEDICAL CERTIFICATION OF SERIOUS HEALTH CONDITION

When leave is taken because of an employee's own serious health condition, or the serious health condition of a family member, an employer may require the employee to obtain medical certification from a health-care provider that includes the information described at 29 C.F.R. 825.306(a). An employer may use DOL optional form WH-380E when the employee needs leave due to the employee's own serious health condition and optional form WH-380F when the employee needs leave to care for a family member with a serious health condition. An employer may not require information beyond that specified in the FMLA regulations.

While an employee may choose to comply with the certification requirement by providing the employer with an authorization, release, or waiver allowing the employer to communicate directly with the health-care provider, the employee may not be required to provide such an authorization, release, or waiver.

For the definition of “health-care provider,” see 29 C.F.R. 825.102 and 29 C.F.R. 825.125.

29 C.F.R. 825.306

GENETIC INFORMATION

Any receipt of genetic information in response to a request for medical information shall be deemed inadvertent if an employer uses language such as that at 29 C.F.R. 1635.8(b)(1)(i)(B*). 29 C.F.R. 1635.8(b)(1)(i)(A)* [See DAAA(LEGAL)]

AUTHENTICATION AND CLARIFICATION

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

“Authentication” means providing the health-care provider with a copy of the certification and requesting verification that the infor-

mation on the form was completed and/or authorized by the health-care provider who signed the document; no additional medical information may be requested.

"Clarification" means contacting the health-care provider to understand the handwriting on the certification or to understand the meaning of a response. An employer may not ask the health-care provider for additional information beyond that required by the certification form. The requirements of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule must be satisfied when individually identifiable health information of an employee is shared with an employer by a HIPAA-covered health-care provider.

29 C.F.R. 825.307(a)

SECOND AND THIRD OPINIONS

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

FOREIGN MEDICAL CERTIFICATION

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

RECERTIFICATION

An employer may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless 29 C.F.R. 825.308(b) or (c) apply. The employee must provide the requested recertification to the employer within the time frame requested by the employer, which must allow at least 15 calendar days after the employer's request, unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

The employer may ask for the same information when obtaining recertification as that permitted for the original certification. As part of the information allowed to be obtained on recertification for leave taken because of a serious health condition, the employer may provide the health-care provider with a record of the employee's absence pattern and ask the health-care provider if the serious

health condition and need for leave is consistent with such a pattern.

Any recertification requested by the employer shall be at the employee's expense unless the employer provides otherwise. No second or third opinion on recertification may be required.

29 C.F.R. 825.308

ANNUAL MEDICAL CERTIFICATION

Where the employee's need for leave due to the employee's own serious health condition, or the serious health condition of the employee's covered family member, lasts beyond a single leave year, the employer may require the employee to provide a new medical certification in each subsequent leave year. Such new medical certifications are subject to the provisions for authentication and clarification set forth in 29 C.F.R. 825.307, including second and third opinions. *29 C.F.R. 825.305(e)*

CERTIFICATION—QUALIFYING EXIGENCY LEAVE

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

The employer may require that the leave for any qualifying exigency be supported by a certification that addresses the information described at 29 C.F.R. 825.309(b). DOL optional form WH-384, or another form containing the same basic information, may be used by the employer; however, no information may be required beyond that specified in 29 C.F.R. 825.309. The employer may verify in accordance with 29 C.F.R. 825.309(d).

29 C.F.R. 825.309

CERTIFICATION—MILITARY CAREGIVER LEAVE

When leave is taken to care for a covered servicemember with a serious injury or illness, an employer may require the employee to obtain a certification completed by an authorized health-care provider of the covered servicemember. The employer may request that the health-care provider provide the information described at 29 C.F.R. 825.310(b). In addition, the employer may request that the employee and/or covered servicemember address in the certification the information described at 29 C.F.R. 825.310(c). The employer may require the employee to provide confirmation of a covered family relationship to the seriously injured or ill servicemember pursuant to 29 C.F.R. 825.122(j).

DOL optional form WH-385, WH-385-V, or another form containing the same basic information, may be used by the employer for this certification; however, no information may be required beyond that specified by 29 C.F.R. 825.310. An employer must accept as sufficient certification invitational travel orders (ITOs) or invitational travel authorizations (ITAs) issued to any family member to join an injured or ill servicemember at his or her bedside. An employer must accept as sufficient certification of the servicemember's serious injury or illness documentation indicating the servicemember's enrollment in the U.S. Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

An employer may seek authentication and/or clarification of the certification under the procedures described above. Second and third opinions, as described above, are not permitted for leave to care for a covered servicemember when the certification has been completed by one of the types of health- care providers identified in 29 C.F.R. 825.310(a)(1)–(4). However, second and third opinions are permitted when the certification has been completed by a health care provider as defined in 29 C.F.R. 825.125 that is not one of the types identified in 29 C.F.R. 825.310(a)(1)–(4). Additionally, recertifications, as described above, are not permitted for leave to care for a covered servicemember.

Where medical certification is requested by an employer, an employee may not be held liable for administrative delays in the issuance of military documents, despite the employee's diligent, good-faith efforts to obtain such documents.

29 C.F.R. 825.310

INTENT TO RETURN TO WORK

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

FITNESS FOR DUTY CERTIFICATION

As a condition of restoring an employer who took FMLA leave due to the employee's own serious health condition, an employer may have a uniformly applied policy or practice that requires all similarly situated employees (i.e., same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health-care provider that the employee is able to resume work.

An employer may seek a fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. Additionally, an employer may require that

the certification specifically address the employee's ability to perform the essential functions of the employee's job. In order to require such a certification, an employer must provide an employee with a list of the essential functions of the employee's job no later than with the designation notice required by 29 C.F.R. 825.300(d) and must indicate in the designation notice that the certification must address the employee's ability to perform those essential functions.

The cost of the certification shall be borne by the employee, and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification.

29 C.F.R. 825.312(a)–(c)

FAILURE TO PROVIDE CERTIFICATION

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

For failure to provide timely certification of foreseeable leave, see 29 C.F.R. 825.313(a). For failure to provide timely certification of unforeseeable leave, see 29 C.F.R. 825.313(b). For failure to provide timely recertification, see 29 C.F.R. 825.313(c). For failure to provide timely fitness-for-duty certification, see 29 C.F.R. 825.313(d).

Note: Prototypes of the DOL notice and certification forms are available from the nearest office of the DOL Wage and Hour Division or on the Internet at http://www.dol.gov/whd.

SECTION IV: MISCELLANEOUS PROVISIONS

RECORDS

The FMLA provides that covered employers, including qualified college districts, shall make, keep, and preserve records pertaining to its obligations under the FMLA in accordance with the recordkeeping requirements of the Fair Labor Standards Act (FLSA) and the FMLA regulations. Employers must keep these records for no less than three years and make them available for inspection, copying, and transcription by representatives of the DOL upon request.

If an employer is preserving records electronically, the employer must comply with 29 C.F.R. 825.500(b). Covered employers who have eligible employees must maintain records with the data set

forth at 29 C.F.R. 825.500(c). Covered employers with no eligible employees must maintain just the data at 29 C.F.R. 825.500(c)(1). Covered employers in a joint employment situation, see 29 C.F.R. 825.500(e).

Records and documents relating to certifications, recertifications, or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files. If the Genetic Information Nondiscrimination Act of 2008 (GINA) is applicable, records and documents created for purposes of the FMLA containing family medical history or genetic information as defined in GINA shall be maintained in accordance with the confidentiality requirements of Title II of GINA [see 29 C.F.R. 1635.9], which permit such information to be disclosed consistent with the requirements of the FMLA. If the Americans with Disabilities Act (ADA) is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements [see 29 C.F.R. 1630.14(c)(1)], except as set forth in 29 C.F.R. 825.500(g).

29 C.F.R. 825.500

PROHIBITION AGAINST DISCRIMINATION AND RETALIATION

The FMLA prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights. *29 U.S.C. 2615; 29 C.F.R. 825.220*