

# TABLE OF CONTENTS

---

---

<b>PREFACE</b> .....	<b>i</b>
<b>CHAPTER 1: BRIEF OVERVIEW OF THE FMLA IN THE FEDERAL SECTOR</b> .....	<b>1</b>
I. FMLA BASICS .....	1
II. FOUR FEDERAL SECTOR VARIANTS OF THE FMLA .....	1
A. TITLE II OF THE FMLA (CIVIL SERVICE EMPLOYEES) .....	2
B. TITLE I OF THE FMLA (POSTAL AND ALL NON-CIVIL SERVICE EMPLOYEES).....	2
C. THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995 (CONGRESSIONAL EMPLOYEES).....	2
D. PRESIDENTIAL AND EXECUTIVE ACCOUNTABILITY ACT OF 1996 (EMPLOYEES OF THE EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES) .....	2
III. SEVEN CRITICAL QUESTIONS TO DETERMINE WHETHER LEAVE IS COVERED BY THE FMLA .....	3
A. QUESTION 1—WHAT VERSION OF THE FMLA APPLIES TO THE EMPLOYEES REQUEST FOR FMLA LEAVE?.....	3
B. QUESTION 2—DOES THE EMPLOYEE MEET THE ELIGIBILITY REQUIREMENTS FOR FMLA LEAVE?.....	4
C. QUESTION 3—IS THE NEED FOR LEAVE FOR A REASON COVERED BY THE FMLA?.....	4
1. Leave Due to Birth, Adoption, Foster Care Placement, or a Serious Health Condition .....	4
2. Military Family Leave .....	5
D. QUESTION 4—DID THE EMPLOYEE PROVIDE TIMELY AND ADEQUATE NOTICE OF HIS OR HER NEED FOR FMLA LEAVE? .....	6
E. QUESTION 5—DID THE EMPLOYEE PROVIDE DOCUMENTATION SUBSTANTIATING HIS OR HER REQUEST FOR FMLA LEAVE?.....	6
F. QUESTION 6—DOES THE EMPLOYEE HAVE FMLA LEAVE AVAILABLE? .....	7
G. QUESTION 7—HAVE YOU TIMELY NOTIFIED THE EMPLOYEE THEY ARE ELIGIBLE AND THAT THE LEAVE IS FMLA QUALIFYING? .....	8
IV. A FINAL WORD .....	9

**CHAPTER 2: THE EMPLOYEE REQUESTS LEAVE: NOW WHAT? ... 11**

- I. THE FOUR FEDERAL SECTOR VERSIONS OF THE FMLA: AN INTRODUCTION ..... 11
- II. EMPLOYEES OF THE EXECUTIVE OFFICE OF THE PRESIDENT (PEOAA) ... 12
- III. CONGRESSIONAL EMPLOYEES (CAA)..... 12
- IV. NON-CIVIL SERVICE EMPLOYEES: TITLE I OF THE FMLA..... 13
  - A. GENERAL RULE ..... 13
  - B. INDIVIDUAL MANAGERS AND SUPERVISORS AS EMPLOYERS..... 14
  - C. JOINT EMPLOYMENT: FMLA OBLIGATIONS TO NON-EMPLOYEES FROM TEMPORARY HELP AGENCIES ..... 15
  - D. SUCCESSORS-IN-INTEREST ..... 16
- V. CIVIL SERVICE EMPLOYEES: TITLE II OF THE FMLA ..... 16
  - A. GENERAL RULE ..... 16
  - B. INDIVIDUAL MANAGERS AND SUPERVISORS ..... 19
  - C. JOINT EMPLOYERS..... 19
  - D. SUCCESSOR-IN-INTEREST..... 19

**CHAPTER 3: WAS THE EMPLOYEE’S REQUEST FOR LEAVE TIMELY AND ADEQUATE? .....21**

- I. TIMELY NOTICE OF THE NEED FOR FMLA LEAVE ..... 21
  - A. FORESEEABLE NEED FOR LEAVE 30+ DAYS IN ADVANCE..... 21
  - B. FORESEEABLE NEED FOR LEAVE LESS THAN 30 DAYS IN ADVANCE..... 22
  - C. UNFORESEEABLE NEED FOR LEAVE ..... 22
  - D. QUALIFYING EXIGENCY LEAVE..... 22
  - E. CHANGES TO SCHEDULED LEAVE..... 23
  - F. AFTER-THE-FACT NOTICE OF THE NEED FOR LEAVE ..... 23
  - G. WHAT CAN YOU DO IF AN EMPLOYEE FAILS TO PROVIDE TIMELY NOTICE OF THE NEED FOR FMLA LEAVE? ..... 23
    - 1. Where the Need for Leave is Foreseeable..... 24
    - 2. Where the Need for Leave is Not Foreseeable ..... 24
    - 3. Waiving the Employee’s Untimely Notice ..... 25
  - H. EFFECT OF AGENCY LEAVE POLICIES ON TIMELINESS OF EMPLOYEE NOTICE ..... 25
- II. ADEQUATE NOTICE ..... 25
  - A. GENERAL RULE ..... 25
  - B. EMPLOYER DUTY TO INVESTIGATE FURTHER ..... 26
  - C. INTERMITTENT AND REDUCED LEAVE SCHEDULE ..... 27
  - D. CONSTRUCTIVE NOTICE..... 27

E.	PRIOR KNOWLEDGE OF EMPLOYEE’S FMLA CONDITION.....	28
F.	FALSE OR MISLEADING REASONS FOR LEAVE .....	28
G.	FAILURE TO PROVIDE ADEQUATE NOTICE OF THE NEED FOR FMLA LEAVE.....	28
III.	HOW THE EMPLOYEE MAY REQUEST FMLA LEAVE .....	29
A.	WHO MAY PROVIDE NOTICE .....	29
B.	THE MEANS OF PROVIDING NOTICE.....	29
C.	EFFECT OF EMPLOYER’S “USUAL AND CUSTOMARY” REQUIREMENTS FOR REQUESTING LEAVE .....	29
D.	FREQUENCY OF EMPLOYEE NOTICE .....	30

**CHAPTER 4: DOES THE EMPLOYEE MEET THE ELIGIBILITY REQUIREMENTS FOR FMLA LEAVE? .....33**

I.	TITLE I: FMLA ELIGIBILITY FOR NON-CIVIL SERVICE EMPLOYEES .....	33
A.	GENERAL RULE .....	33
B.	12 MONTHS .....	34
C.	1,250 HOURS WORKED .....	36
D.	50 EMPLOYEES WITHIN 75 MILES .....	37
E.	EFFECT OF SUSPENSIONS, TERMINATION, LAYOFFS, FURLOUGHS, AND RIF’S .....	38
F.	TIME SPENT AS A TEMPORARY EMPLOYEE: JOINT EMPLOYMENT AND ELIGIBILITY .....	39
G.	ELIGIBILITY AND MULTIPLE FMLA ABSENCES.....	39
H.	EMPLOYER NOTICE TO THE EMPLOYEE OF FMLA ELIGIBILITY.....	40
II.	TITLE II: FMLA ELIGIBILITY REQUIREMENTS FOR CIVIL SERVICE EMPLOYEES .....	40
A.	GENERAL RULE: 12 MONTHS OF CIVIL SERVICE EMPLOYMENT ..	40
B.	MILITARY LEAVE .....	41
C.	EFFECT OF SUSPENSIONS, TERMINATION, LAYOFFS, FURLOUGHS, AND RIF’S .....	41
D.	TIME SPENT AS A TEMPORARY EMPLOYEE: JOINT EMPLOYMENT AND ELIGIBILITY.....	42
E.	ELIGIBILITY AND MULTIPLE FMLA ABSENCES.....	42
F.	EMPLOYER NOTICE TO THE EMPLOYEE OF FMLA ELIGIBILITY.....	42
III.	CAA AND CONGRESSIONAL EMPLOYEES .....	42
A.	GENERAL RULE .....	42
B.	12 MONTHS.....	43
C.	1250 WORK HOURS.....	43
D.	MILITARY LEAVE .....	43

E.	EFFECT OF SUSPENSIONS, TERMINATION, LAYOFFS, FURLOUGHS, AND RIF'S .....	44
F.	TIME SPENT AS A TEMPORARY EMPLOYEE: JOINT EMPLOYMENT AND ELIGIBILITY .....	44
G.	ELIGIBILITY AND MULTIPLE FMLA ABSENCES.....	44
H.	EMPLOYER NOTICE TO THE EMPLOYEE OF FMLA ELIGIBILITY .....	44
IV.	EMPLOYEES OF THE EXECUTIVE OFFICE OF THE PRESIDENT (PEOAA) ...	45
A.	GENERAL RULE .....	45
B.	12 MONTHS.....	45
C.	1250 WORK HOURS .....	46
D.	MILITARY LEAVE .....	46
E.	EFFECT OF SUSPENSIONS, TERMINATION, LAYOFFS, FURLOUGHS, AND RIF'S .....	46
F.	TIME SPENT AS A TEMPORARY EMPLOYEE: JOINT EMPLOYMENT AND ELIGIBILITY .....	46
G.	ELIGIBILITY AND MULTIPLE FMLA ABSENCES.....	46
H.	EMPLOYER NOTICE TO THE EMPLOYEE OF FMLA ELIGIBILITY .....	46

**CHAPTER 5: IS THE LEAVE FOR A REASON COVERED  
BY THE FMLA? .....49**

I.	DOES THE LEAVE INVOLVE A COVERED FAMILY MEMBER?.....	49
A.	SPOUSE .....	50
1.	Civil, Religious, and Common Law Marriage .....	50
2.	Divorce.....	51
B.	SON OR DAUGHTER.....	52
1.	Relationship.....	52
2.	Age .....	53
C.	PARENT.....	55
D.	NEXT OF KIN.....	56
E.	WHO IS NOT COVERED .....	56
II.	IS THE LEAVE NEEDED FOR CHILDBIRTH, ADOPTION, FOSTER CARE PLACEMENT? .....	57
A.	BIRTH, AND TO CARE FOR THE NEWBORN .....	57
B.	ADOPTION, AND TO CARE FOR A NEWLY ADOPTED SON OR DAUGHTER .....	59
C.	FOSTER CARE PLACEMENT, AND TO CARE FOR THE NEWLY PLACED SON OR DAUGHTER .....	60
III.	MEDICAL LEAVE: IS THE LEAVE DUE TO A SERIOUS HEALTH CONDITION? .....	61
A.	WHOSE CONDITION?.....	61

1.	Employee’s Own Serious Health Condition.....	62
a.	Unable to Perform an Essential Job Function.....	62
b.	Absences to Receive Medical Treatment.....	63
2.	Serious Health Condition of Spouse, Son, Daughter, or Parent.....	64
B.	SERIOUS HEALTH CONDITIONS .....	65
1.	Inpatient Care.....	66
2.	Continuing Treatment by a Health Care Provider .....	66
a.	Incapacity of More Than Three Days Plus Health Care Provider Treatments .....	66
b.	Pregnancy or Prenatal Care.....	68
c.	Chronic, Serious Health Conditions.....	68
d.	Permanent or Long-Term Conditions .....	69
e.	Absences to Receive Multiple Treatments .....	70
3.	Minor Illnesses and Cosmetic Treatments .....	71
4.	Substance Abuse .....	72
5.	Mental Illness.....	73
6.	Health Care Provider Defined.....	73
a.	Commonly Recognized Health Care Providers .....	73
b.	Additional Health Care Providers Recognized by Title II for Civil Service Employees.....	74
c.	Additional Health Care Providers Recognized by Title I, the CAA, and the PEOAA for Non-Civil Service Employees.....	74
IV.	MILITARY FAMILY LEAVE .....	76
A.	MILITARY CAREGIVER LEAVE.....	76
1.	Covered Service Member.....	76
a.	Current Member of the Armed Forces .....	76
b.	Covered Veteran .....	77
2.	Single 12-Month Period .....	78
B.	QUALIFYING EXIGENCY LEAVE.....	79
1.	Eight Qualifying Exigencies.....	79
a.	Short Notice Deployment.....	79
b.	Military Events and Related Activities .....	80
c.	Childcare and School Activities .....	80
d.	Financial and Legal Arrangements.....	81
e.	Non-Medical Counseling.....	81
f.	Rest and Recuperation .....	81
g.	Post-Deployment Activities.....	81
h.	Parental Care .....	82
i.	Additional Activities .....	82

<b>CHAPTER 6: HAVE YOU TIMELY NOTIFIED THE EMPLOYEE THAT LEAVE IS FMLA QUALIFYING? .....</b>	<b>87</b>
I. EMPLOYER NOTICE OBLIGATIONS TO CIVIL SERVICE EMPLOYEES (TITLE II) .....	87
II. EMPLOYER NOTICE OBLIGATIONS TO NON-CIVIL SERVICE EMPLOYEES .....	88
A. POSTER.....	88
B. HANDBOOKS, MANUALS & OTHER WRITTEN GUIDANCE .....	89
C. EMPLOYEE ELIGIBILITY .....	89
D. FMLA LEAVE DESIGNATION .....	90
E. NOTICE OF FMLA RIGHTS AND RESPONSIBILITIES .....	91
F. MEDICAL CERTIFICATION REQUIREMENT .....	93
 <b>CHAPTER 7: UNDER WHAT CIRCUMSTANCES CAN YOU REQUIRE EMPLOYEES TO SUBSTANTIATE THE NEED FOR FMLA LEAVE WITH DOCUMENTATION?.....</b>	<b>95</b>
I. SERIOUS HEALTH CONDITION MEDICAL CERTIFICATION: OVERVIEW ..	95
A. INITIAL SERIOUS HEALTH CONDITION MEDICAL CERTIFICATION .....	96
1. When Must an Employer Request Serious Health Condition Medical Certification?.....	96
2. How Much Time Does the Employee Have to Provide the Completed Serious Health Condition Medical Certification? .....	97
3. What Information May You Ask for in the Serious Health Condition Certification? .....	97
4. Who Pays for the Medical Certification? .....	100
5. What Can You Do if the Certification is Incomplete? .....	100
6. Can You Seek Clarification on Something in the Certification?.....	101
7. Employer Rights When an Employee Fails to Provide Medical Certification.....	102
8. What Effect do Agency Leave Policies Have on an Employer's Ability to Require Medical Documentation?..	103
9. Challenging the Employee's Serious Health Condition Medical Certification.....	103
B. RECERTIFICATION OF SERIOUS HEALTH CONDITION .....	105
C. PERIODIC STATUS REPORTS OF SERIOUS HEALTH CONDITION..	108
II. DOCUMENTATION SUPPORTING MILITARY CAREGIVER LEAVE .....	108
A. MEDICAL CERTIFICATION .....	108

B.	INVITATIONAL TRAVEL ORDERS/AUTHORIZATIONS .....	112
C.	CLARIFICATION AND AUTHENTICATION OF CERTIFICATIONS AND ITO/ITAS.....	112
D.	SECOND/THIRD HEALTH CARE PROVIDER CHALLENGE PROCESS.....	112
E.	RECERTIFICATION .....	113
III.	DOCUMENTATION SUPPORTING QUALIFYING EXIGENCY LEAVE .....	113
A.	ACTIVE DUTY ORDERS.....	113
B.	CERTIFICATION .....	113
C.	INCOMPLETE OR INSUFFICIENT CERTIFICATION.....	115
D.	AUTHENTICATION AND CLARIFICATION OF CERTIFICATION ....	115
E.	SECOND/THIRD OPINION CHALLENGE PROCESS .....	115
F.	RECERTIFICATION .....	116
G.	EMPLOYEE FAILURE TO SATISFY QUALIFYING EXIGENCY LEAVE DOCUMENTATION REQUIREMENTS.....	116
IV.	DOCUMENTATION TO CONFIRM FAMILY RELATIONSHIPS .....	116

**CHAPTER 8: HOW MUCH FMLA LEAVE IS AN EMPLOYEE ENTITLED TO TAKE? ..... 121**

I.	CALCULATING THE 12-MONTH FMLA LEAVE PERIOD FOR BIRTH, ADOPTION, FOSTER CARE PLACEMENT, SERIOUS HEALTH CONDITIONS, AND QUALIFYING EXIGENCY LEAVE.....	121
A.	NON-CIVIL SERVICE EMPLOYEES.....	122
1.	Calendar and Other Fixed 12-Month Leave Periods .....	122
2.	Measuring Forward Leave Year .....	123
3.	Rolling Back Method.....	123
4.	Changing the Method of 12-Month Leave Period Calculation .....	124
5.	Failure to Select a Leave Year Method.....	124
B.	CIVIL SERVICE EMPLOYEES .....	124
II.	CALCULATING A SINGLE 12-MONTH PERIOD FOR MILITARY CAREGIVER LEAVE .....	124
III.	CALCULATING THE AMOUNT OF FMLA LEAVE AVAILABLE DURING THE 12-MONTH PERIOD: 12 OR 26 WEEKS .....	125
A.	12 WORKWEEKS OF FMLA LEAVE FOR BIRTH, ADOPTION, FOSTER CARE PLACEMENT, SERIOUS HEALTH CONDITIONS, OR A QUALIFYING EXIGENCY .....	125
1.	Civil Service Employees Covered by Title II .....	125
2.	Non-Civil Service Employees.....	126

B.	26 WORKWEEKS OF MILITARY CAREGIVER LEAVE: PER COVERED SERVICE MEMBER, PER INJURY STANDARD .....	128
C.	THE MARRIAGE PENALTY: LIMITATIONS ON THE AMOUNT OF LEAVE AVAILABLE TO SPOUSES WHO WORK FOR THE SAME EMPLOYER .....	129

**CHAPTER 9: WHAT CONTROL DO YOU HAVE OVER HOW  
FMLA LEAVE IS SCHEDULED? .....133**

I.	HOW FMLA LEAVE IS TAKEN .....	133
II.	WHY LEAVE IS BEING TAKEN .....	134
A.	BIRTH, ADOPTION, FOSTER CARE PLACEMENT.....	134
B.	SERIOUS HEALTH CONDITIONS .....	134
C.	MILITARY CAREGIVER LEAVE .....	136
D.	QUALIFYING EXIGENCY LEAVE .....	137
E.	TRANSFERRING AN EMPLOYEE TO AN EQUIVALENT ALTERNATIVE POSITION.....	137
1.	Civil Service Employees Covered by Title II of the FMLA....	137
2.	Non-Civil Service Employees Covered by Title I, the CAA, and the PEOAA.....	138

**CHAPTER 10: CAN AN EMPLOYEE TAKE PAID LEAVE IN  
CONJUNCTION WITH FMLA LEAVE? .....141**

I.	ACCRUED PAID LEAVE .....	141
A.	WHO MAKES THE ELECTION OF PAID LEAVE: THE AGENCY OR EMPLOYEE?.....	142
B.	WHEN MUST THE ELECTION BE MADE?.....	143
C.	WHAT PAID LEAVE BALANCES ARE AVAILABLE FOR SUBSTITUTION? .....	144
D.	IS THERE ANY PRIORITY BETWEEN PAID LEAVE BALANCES THAT MAY BE ELECTED?.....	146
II.	WORKERS' COMPENSATION .....	146
III.	COMPENSATORY TIME OFF .....	147
IV.	TEMPORARY DISABILITY LEAVE.....	147
V.	FLEXIBLE WORK SCHEDULES AND ACCRUED CREDIT HOURS.....	147
VI.	EFFECT OF AGENCY PAID LEAVE POLICIES ON FMLA LEAVE NOTICE AND CERTIFICATION REQUIREMENTS.....	148



**CHAPTER 11: HOW ARE HEALTH AND OTHER EMPLOYMENT BENEFITS HANDLED DURING AN EMPLOYEE'S ABSENCE ON FMLA LEAVE? .....149**

- I. RETENTION OF ACCRUED EMPLOYMENT BENEFITS ..... 149
- II. ACCRUAL OF EMPLOYMENT BENEFITS DURING FMLA LEAVE ..... 149
- III. MAINTENANCE OF HEALTH BENEFITS DURING FMLA LEAVE..... 150

**CHAPTER 12: WHAT ARE AGENCY RESPONSIBILITIES TO RETURN AN EMPLOYEE TO WORK FROM FMLA LEAVE? ..... 153**

- I. THE RIGHT TO RETURN TO WORK FROM FMLA LEAVE ..... 153
  - A. GENERAL RULE ..... 153
  - B. SAME POSITION..... 154
  - C. EQUIVALENT POSITION ..... 154
  - D. LAPSED QUALIFICATIONS ..... 155
  - E. VOLUNTARY MOVE TO AN ALTERNATIVE POSITION; LIGHT DUTY ..... 156
- II. EMPLOYEE REQUIREMENTS TO PERFECT RIGHT TO RETURN TO WORK..... 156
  - A. RETURN TO WORK FROM FMLA LEAVE ..... 156
  - B. ABILITY TO PERFORM ALL ESSENTIAL JOB FUNCTIONS..... 157
  - C. FITNESS-FOR-DUTY MEDICAL CERTIFICATIONS..... 158
    - 1. General Rule ..... 158
    - 2. Contents of Fitness-for-Duty Certification..... 159
    - 3. Cost ..... 160
    - 4. Questioning the Fitness-for Duty Certification..... 160
    - 5. Failure to Provide Fitness-for-Duty Certification ..... 161
    - 6. Unfit for Duty..... 161
  - D. WHEN MUST AN EMPLOYEE BE RETURNED TO WORK ..... 161

**CHAPTER 13: ARE AGENCIES REQUIRED TO KEEP FMLA LEAVE RECORDS?.....165**

- I. RECORD KEEPING REQUIREMENTS ..... 165
- II. WHAT RECORDS MUST BE KEPT ..... 165
  - A. NON-CIVIL SERVICE EMPLOYEES: TITLE I, THE CAA, AND THE PEOAA..... 165
    - 1. Non-Medical Records ..... 165
    - 2. Medical Records ..... 166
  - B. TITLE II ..... 167

1.	Non-Medical Records .....	167
2.	Medical Records .....	167
III.	HOW MUST RECORDS BE KEPT AND FOR HOW LONG? .....	168
IV.	DISCLOSURE OF FMLA RECORDS.....	169
<b>CHAPTER 14: HOW DOES THE FMLA INTERACT WITH THE REQUIREMENTS OF AGENCY LEAVE POLICIES AND OTHER LAWS? .....</b>		
<b>171</b>		
I.	AGENCY LEAVE POLICIES .....	171
II.	OTHER LAWS .....	172
A.	DISABILITY, REASONABLE ACCOMMODATION AND THE FMLA .....	173
B.	WORKERS' COMPENSATION .....	174
<b>CHAPTER 15: HOW IS THE FMLA ENFORCED? .....</b>		
<b>177</b>		
I.	PROHIBITED ACTS .....	177
A.	NON-CIVIL SERVICE EMPLOYEES (TITLE I, THE CAA, AND THE PEOAA).....	177
1.	Interference with FMLA Rights .....	177
2.	Discrimination .....	178
a.	Use of FMLA Leave.....	179
b.	Opposition to Unlawful Practices Protected .....	181
c.	Participation in FMLA Proceedings Protected.....	181
d.	Wavier of FMLA Rights Prohibited .....	182
3.	Posting Violations .....	182
B.	CIVIL SERVICE EMPLOYEES .....	182
II.	ENFORCEMENT.....	183
A.	CIVIL SERVICE EMPLOYEES: TITLE II .....	183
1.	File a Grievance .....	183
2.	File a Complaint With the Office of Special Counsel .....	183
3.	Appeal to MSPB .....	184
4.	Unfair Labor Practice Charges.....	184
B.	NON-CIVIL SERVICE EMPLOYEES: TITLE I.....	185
1.	File an Administrative Complaint With the Department of Labor .....	185
2.	File a Civil Suit in Federal Court Against the Federal Employer .....	186
3.	Other Avenues to Enforce Title I FMLA Rights.....	186
C.	CONGRESSIONAL EMPLOYEES: THE CAA.....	186
1.	Counseling/Mediation .....	187

2.	Election to Proceed Administratively .....	187
3.	Election to File a Civil Action in Federal Court .....	187
D.	EMPLOYEES OF THE EXECUTIVE OFFICE OF THE PRESIDENT: PEOAA .....	187
III.	REMEDIES .....	188
A.	CIVIL SERVICE EMPLOYEES: TITLE II .....	188
B.	NON-CIVIL SERVICE EMPLOYEES: TITLE I, THE CAA, AND THE PEOAA .....	188