CHAPTER 1
BRIEF OVERVIEW OF THE FMLA IN THE FEDERAL SECTOR

I. FMLA BASICS

The federal FMLA mandates the federal government as an employer to provide eligible employees in a 12-month period with up to 12 weeks of unpaid, job-protected leave due to birth, adoption, foster care placement, or a serious health condition, and up to 26 workweeks of military family leave, and to restore employees returning from FMLA leave to the same or an equivalent position at the expiration of their leave. Federal employers may demand that employees substantiate their need for FMLA leave with appropriate medical or other documentation. Eligible employees may take leave in a single, continuous block of time, intermittently (i.e., two or more absences for the same covered condition), or on a reduced leave schedule (i.e., from full-time to part-time). Accrued and available paid leave may run concurrently with unpaid FMLA leave.

Federal employers must maintain group health benefits during the employee's FMLA absence on the same conditions as if the employee had not gone on leave. As a condition of being allowed to return to work, federal employers may require an employee to provide medical or other documentation substantiating the employee's fitness to return to duty. Employees who exercise FMLA rights do not gain greater job protection from unrelated adverse actions based on performance or discipline unrelated to the taking of FMLA leave. Federal employers are prohibited from interfering with, discriminating, or retaliating against employees for exercising FMLA rights.

II. FOUR FEDERAL SECTOR VARIANTS OF THE FMLA

The FMLA applies to all federal employees. However, four different versions of the FMLA apply to the federal sector. In some cases, only one version of the FMLA applies to a federal employer. In other circumstances, two versions of the FMLA apply to federal employers, albeit to different groups of employees. The good news: the core entitlements of each FMLA variant are similar. The bad news: they are not always identical. Following the requirements of one FMLA variant will not guarantee compliance with the requirements of other federal sector FMLA variants. Managers and supervisors must ensure they apply the correct FMLA standards in any given situation. *FMLA Basics* will help you do that.

The four federal sector variants of the FMLA are, Title II, Title I, CAA, and PEOAA as described below.

A. TITLE II OF THE FMLA (CIVIL SERVICE EMPLOYEES)

Title II of the FMLA is the version of the FMLA with which most federal managers and supervisors are familiar. It applies to all civil service employees throughout the federal government and is governed by regulations issued by the Office of Personnel Management (OPM) at 5 CFR 630.1201–1211 (2016). Title II is codified at 5 USC 6381–6387.

B. TITLE I OF THE FMLA (POSTAL AND ALL NON-CIVIL SERVICE EMPLOYEES)

Title I of the FMLA applies to all non-civil service employees throughout the federal government. For example, it applies to all postal employees and civilians in the military, among others. It also applies to federal employees not covered by any other federal sector FMLA variant. Title I is governed and enforced by regulations issued by the Department of Labor (DOL) at 29 CFR 825.100–800 (2016). DOL's FMLA implementing regulations were the first FMLA regulations issued, and form the basis for all other federal sector FMLA regulations. Title I is codified at 29 USC 2601, 2611–2619, 2631–2636 and 2651–2654.

C. THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995 (CONGRESSIONAL EMPLOYEES)

The Congressional Accountability Act of 1995 (CAA) provides certain employees of the House and Senate with family and medical leave. The CAA created the Office of Compliance to regulate and enforce FMLA rights and other employment laws. The Office of Compliance adopted FMLA regulations nearly identical to the DOL's Title I regulations. The FMLA provisions of the CAA are codified at 2 USC 1312.

D. PRESIDENTIAL AND EXECUTIVE ACCOUNTABILITY ACT OF 1996 (EMPLOYEES OF THE EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES)

The Presidential and Executive Accountability Act of 1996 (PEOAA) provides family and medical leave to employees of the Executive Office of the President of the United States. The PEOAA closely resembles the FMLA provisions of the CAA and Title I. The FMLA provisions of the PEOAA are codified at 3 USC 402 and 412. Regulations implementing the PEOAA FMLA provisions have not been issued.

See Chapter 2 for a more in depth discussion of the four federal sector variants.

III. SEVEN CRITICAL QUESTIONS TO DETERMINE WHETHER LEAVE IS COVERED BY THE FMLA

As supervisors and managers, you assume a major role in assuring compliance with the FMLA. The employee's request for leave is often first made to you. Whether you obtain advice from human resources, the law department or another source, at the end of the day, you are often responsible for identifying an employee's request for leave as possibly falling within the protections of the FMLA. You may also play a critical role in approving or disapproving employee FMLA leave requests. To ensure compliance and avoid costly FMLA violations, it is incumbent upon you to make informed FMLA decisions.

To make an informed decision whether an employee's initial request for leave is covered by the FMLA, I offer the following seven questions as a guide. Unless indicated otherwise, the seven questions apply to all federal sector variants of the FMLA. Correctly determining whether leave is covered by the FMLA is critical to FMLA compliance. The remaining chapters of *FMLA Basics* detail the answers to these seven questions.

A. QUESTION 1—WHAT VERSION OF THE FMLA APPLIES TO THE EMPLOYEES REQUEST FOR FMLA LEAVE?

You initially need to determine the version of the FMLA that applies to the employee's leave request. This will depend on the federal employer and the employee's civil service status. For example, most, but not all, federal employees are covered by Title II of the FMLA. OPM has issued FMLA regulations governing Title II of the FMLA. All employees of the Postal Service, in contrast, are covered by Title I of the FMLA. Congressional employees and employees of the Executive Office of the President have their own FMLA requirements, although they very closely track those of non-civil service employees covered by Title I of the FMLA. Generally, this determination is not complicated.

This determination can, however, get tricky because of the increasing use of short-term temporary or intermittent employees. Some of these employees do not have civil service status. The complication arises mainly with federal employers who are predominately staffed with civil service employees. Just remember, if the individual is employed by the federal government he or she is covered by the FMLA. If the federal employee is not a civil servant, he or she is likely covered by Title I of the FMLA. Employees from temporary agencies are not federal employees. They may, however, have independent FMLA rights under state or federal laws that need to be considered.

B. QUESTION 2—DOES THE EMPLOYEE MEET THE ELIGIBILITY REQUIREMENTS FOR FMLA LEAVE?

Being an employee of the federal government is not the only requirement to qualify for FMLA leave. Federal employees must meet specified eligibility requirements. The eligibility requirements for the four federal sector variants of the FMLA are not the same.

Civil service employees covered by Title II of the FMLA must meet one eligibility requirement: 12 months of employment as a civil service employee. Congressional employees and employees of the Executive Office of the President have two eligibility requirements to meet: 12 months of employment and 1250 hours of work in the 12 months immediately preceding the commencement of leave as a congressional employee or employee of the Executive Office of the President, respectively. Non-civil service employees covered by Title I of the FMLA (e.g., employees of the Postal Service, civilians in the military, etc.) must meet three eligibility requirements. In addition to the 12 months and 1250 hours requirements, they must also work at a worksite where there are at least 50 employees within 75 miles. See Chapter 4 for further discussion on eligibility.

C. QUESTION 3—IS THE NEED FOR LEAVE FOR A REASON COVERED BY THE FMLA?

To be covered by the benefits and protections of the law, the need for leave must be for a reason covered by the FMLA. FMLA leave is available for certain family, medical, or military circumstances, but not all circumstances. There are two general categories of FMLA leave: leave due to birth, adoption, foster care placement or a serious health condition, and military family leave. Initially, you should determine if the employee's request for leave is due to one of these covered conditions.

1. Leave Due to Birth, Adoption, Foster Care Placement, or a Serious Health Condition

FMLA leave is available to an eligible employee in four general circumstances:

- Birth of an employee's son or daughter and care for the newborn;
- Placement with an employee of a son or daughter for adoption or foster care;
- Care for a serious health condition of a spouse, son or daughter, or parent; or,
- A serious health condition that renders the employee unable to perform the functions of his or her position.

These broad definitions are expanded upon by the regulations implementing the federal sector versions of the FMLA. The issue is addressed further in Chapter 5.

2. Military Family Leave

The FMLA was statutorily modified in 2008 and 2010 to permit eligible employees to take leave due to certain military family obligations. Two types of military family leave were added: qualifying exigency leave and military caregiver leave. In both types, the eligible employee taking leave is a covered family member of a current or former military servicemember. The eligible employee is not a servicemember who needs leave from work related to their military service.

Regulations implementing the FMLA identify eight qualifying exigencies due to the military service of a covered family member entitling an eligible employee to FMLA leave:

- Short notice deployment;
- Military events and related activities;
- Childcare and school activities;
- Financial and legal arrangements;
- Counseling;
- Rest and recuperation;
- Post-deployment activities;
- Parental care; and,
- Additional activities.

Military caregiver leave is available to an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember who sustained a serious injury or illness during active military duty and is undergoing medical treatment. Leave is available for the eligible employee to provide care for the covered servicemember.

Details regarding the requirements to secure qualifying exigency FMLA leave and military caregiver leave are found in Chapter 5.

For a leave request to fall within the benefits and protections of the FMLA, determine whether the reason for the leave meets the criteria of at least one FMLA covered condition. If not, do not designate it as FMLA leave. If leave is not for a covered condition within the meaning of the FMLA, it does not receive

the benefits and protections of that law. The leave may be governed by other laws (e.g., workers' compensation), or regulations (e.g., annual or sick leave), or agency policy. Absences not covered by the FMLA may be subject to disciplinary action. See Chapter 5 for further discussion on this issue.

D. QUESTION 4—DID THE EMPLOYEE PROVIDE TIMELY AND ADEQUATE NOTICE OF HIS OR HER NEED FOR FMLA LEAVE?

Assuming an eligible employee seeks leave for a covered condition, he or she must timely and adequately notify their employer of their need for FMLA leave. Leave that is timely initially depends on whether the need for leave is foreseeable. If it is foreseeable more than 30 days in advance, the employee is supposed to give you at least 30 days advance notice. If the need for leave is foreseeable but less than 30 days in advance, the employee must give you notice as soon as practicable under the circumstances. Where the employee's need for leave is unforeseeable, the employee must give you notice of the need for leave as soon as practicable under the circumstances. An employer's policies for requesting leave apply, provided they give the employee at least the minimum period of time to request leave as set forth in the FMLA.

Delay in requesting foreseeable leave may allow the employer to delay the start of that leave. A delay is generally not grounds for denying the employee's leave request altogether. A delay in requesting leave that is not foreseeable may, however, justify the denial of leave. Here again, delay or denial of a late request for leave is not required by the FMLA. An employer may simply ignore the fact that the request was untimely and grant the leave.

An employee's request for leave must provide enough information to adequately inform the employer that the leave request may fall within the benefits and protections of the FMLA. An employee is not required to specifically identify the leave as "Family Medical Leave" or "FMLA" leave. An employee need only state facts that fall within one of the permissible reasons for FMLA leave. Management presumably knows the conditions covered by the FMLA. Based on the facts articulated by the employee, you may identify the leave as FMLA-qualifying. If you are unsure whether the leave falls within the protections of the FMLA based on the information provided by the employee, make further clarifying inquiries. If an employee fails to adequately articulate a need for leave covered by the FMLA, you are not required to treat the leave as such. See Chapter 3 for further discussion on this issue.

E. QUESTION 5—DID THE EMPLOYEE PROVIDE DOCUMENTATION SUBSTANTIATING HIS OR HER REQUEST FOR FMLA LEAVE?

The FMLA allows federal employers to require employees to substantiate their

need for FMLA leave with appropriate documentation. The FMLA does not require that you demand documentation in every instance. Conversely, an employee is not automatically required by the FMLA to provide you with medical or non-medical documentation. If you want the employee to document his or her need for FMLA leave, ask the employee for supporting documentation.

There are two types of FMLA leave documentation: medical and non-medical. The type of documentation you may require an employee to provide to support their FMLA leave request is tightly regulated. The United States Department of Labor (DOL) has developed forms that conform to the requirements of the FMLA. No other information may be required. The Office of Personnel Management (OPM) has not created its own documentation forms and encourages federal employers to use the DOL forms.

An employee generally has a minimum of 15 calendar days to provide documentation from the date of your request. In some circumstances, the FMLA requires that you allow an employee more than the minimum 15-day period. An employer's leave policies cannot require an employee to provide medical documentation in less than 15 calendar days for FMLA leave.

Generally, you may not delay or deny an employee's request for FMLA leave during the minimum 15-day period while you wait for supporting documentation. If the need to begin leave occurs during the minimum 15-day period, you must allow the employee to take leave. The leave is provisionally approved as FMLA leave. Whether it is ultimately approved as FMLA leave depends on whether the employee provides adequate medical documentation.

If the medical certification provided is incomplete, notify the employee and give him or her a reasonable opportunity to cure the problem. You cannot simply deny FMLA leave. There is also a procedure that employers may use to challenge the medical certification provided by the employee.

F. QUESTION 6—DOES THE EMPLOYEE HAVE FMLA LEAVE AVAILABLE?

Eligible employees are entitled to take up to 12 workweeks of unpaid leave during a 12-month period. How the 12 workweeks of leave is calculated differs depending on which version of the FMLA applies to the employee requesting leave.

For civil service employees, Title II measures the 12-month period based on the measuring forward method. For all other federal employees, federal employers may elect from among the following four options for calculation of the 12-month FMLA leave year: (1) the calendar year; (2) any other fixed leave year; (3) the measuring forward method; and (4) the rolling back method. Each

method has strengths and weaknesses from a management perspective. For example, a fixed leave year allows an employee to take the maximum amount of FMLA leave (12 or 26 weeks) back-to-back beginning at the end of one leave year and the beginning of the next. The rolling back method makes it all but impossible for an employee to run FMLA leave back-to-back. On the downside, the rolling back method is much more difficult to administer.

The four federal sector FMLA variants also differ regarding the availability of certain types of FMLA leave when spouses work for the same employer, and whether holidays falling within an FMLA leave of absence count against the employee's 12 or 26 workweek entitlements. Regarding the former, non-civil service, congressional, and employees of the Executive Office of the President are subject to a marriage penalty that caps the amount of certain FMLA leave available to husbands and wives working for the same federal employer. The marriage penalty does not apply to civil service employees subject to Title II. Holidays falling within an employee's FMLA absence may count against an employee's 12- or 26-workweek entitlements under Titles I, the CAA, and the PEOAA. It does not count against a civil service employee's FMLA entitlement under Title II.

Finally, 12 or 26 workweeks of FMLA leave does not in every instance mean 480 hours (12 weeks) or 1040 hours (26 weeks) of leave. The amount of FMLA leave available to a federal employee depends on his or her work schedule prior to starting leave. For example, if an employee is regularly scheduled to work 60 hours a week, the employee might be entitled to 720 hours of leave as his or her 12 workweek entitlement. Although this calculation will likely be determined by your human resources department, as supervisors and managers, it is helpful to know how and why these calculations are made.

G. QUESTION 7—HAVE YOU TIMELY NOTIFIED THE EMPLOYEE THEY ARE ELIGIBLE AND THAT THE LEAVE IS FMLA QUALIFYING?

Federal employers have FMLA notice obligations to employees under some federal sector FMLA variants. For non-civil service employees covered by Title I, employers must timely notify employees whether they are eligible for FMLA leave and whether their request qualifies as FMLA leave. Under Title I, federal employers must also timely notify employees of their FMLA rights and responsibilities. DOL has created forms to accomplish these tasks. Generally, under Title I, you must notify the employee within five business days, without extenuating circumstances, of when you determined that the employee satisfied the eligibility requirements. You must also notify the employee that you have designated the leave as FMLA leave within five business days, absent

extenuating circumstances, of when you acquired knowledge that the leave is being taken for an FMLA reason.

Title II does not impose similar notice obligations on employers for civil service employees.

IV. A FINAL WORD

The above questions help you initially determine whether an employee's leave request is or may be covered by the FMLA. They are not the only questions you should ask to ensure compliance with the FMLA.

In the following chapters, I address important FMLA principles you should know as federal supervisors and managers.

CHAPTER 2
THE EMPLOYEE REQUESTS LEAVE: NOW WHAT?

There are four federal sector versions of the FMLA. Most federal employers are covered by more than one version.

An FMLA inquiry generally begins when an employee requests a leave of absence from work. The first issue is to determine which, if any, of the four federal sector versions of the FMLA applies to your agency and the requesting employee. Make this initial determination for two reasons: (1) there are four federal sector versions of the FMLA, and (2) most federal employers are covered by more than one version.

I. THE FOUR FEDERAL SECTOR VERSIONS OF THE FMLA: AN INTRODUCTION

All federal employers and employees are covered by the FMLA. They are not necessarily covered by the same version of the FMLA.

Four versions of the FMLA apply to different segments of the federal workforce. Most federal employers are concurrently covered by two versions of the FMLA. Depending on the composition of the workforce, employees of the same federal employer may be covered by different versions of the FMLA. However, any individual employee is only covered by one version of the FMLA at any given time. The four versions, while having identical requirements on some points, are strikingly different on others. Applying the requirements of one variant to employees covered by a different FMLA version does not ensure compliance. Erroneously applying the requirements of one FMLA variant to employees covered by another may guarantee a violation of the FMLA.

A violation of the FMLA is not without consequence. As discussed more fully below and in Chapter 15, some versions of the FMLA allow an aggrieved employee to file a lawsuit for monetary damages against federal employers, managers, and supervisors involved with the alleged FMLA violation. Judgments ranging into the hundreds of thousands of dollars have been awarded for even inadvertent violations. To avoid subjecting yourself and your agency to significant monetary liability (which is also unlikely to benefit your career), it is incumbent upon managers and supervisors responsible for approving leave or issuing attendance-based discipline to correctly apply the version of the