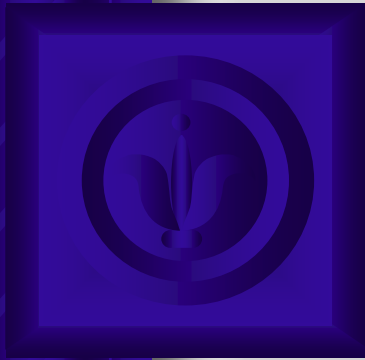


# Family & Medical Leave Act Workshop

**LHRMA**

**May 13, 2008**

**Lincoln, NE**



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# FMLA—Lion or Lamb?

- ❖ **Adopted in 1993**
- ❖ **Provides for *unpaid* leave and job protection**
- ❖ **Covers only 5 percent of U.S. private-sector employers**
  - ❖ **But that 5 percent employs more than 50 percent of all private-sector employees**

# Synopsis

- ❖ Covered employers must grant an eligible employee up to a total of 12 work weeks of unpaid leave during any 12-month period for one or more of the following reasons:
  - ❖ Birth and care of the newborn child of employee;
  - ❖ Placement with the employee of a child for adoption or foster care;
  - ❖ To care for an immediate family member with a “serious health condition”; or
  - ❖ To take medical leave when the employee is unable to work because of a “serious health condition.”

# Coverage- Employer

- ❖ The FMLA applies to:

- ❖ Public Agencies

- ❖ State, local, and federal employers and local schools

- ❖ Private-Sector Employers

- ❖ Employers who employ 50 or more employees in 20 or more work weeks in the current or preceding calendar year; and

- ❖ Employers who are engaged in commerce or any industry or activity affecting commerce including joint employers and successors of covered employees.

# Coverage- Employee

- ❖ Employers must determine whether an employee is covered by FMLA at the time the employee requests leave or at the time an employer becomes aware of facts which might trigger eligibility.

# Coverage- Employee

- ❖ To be eligible for FMLA benefits, an employee must:
  - ❖ Work for a covered employer;
  - ❖ Have worked for the employer for a total of 12 months
  - ❖ Have worked at least 1,250 hours over the previous 12 months; and
  - ❖ Work at a location where at least 50 employees are employed by the employer within 75 miles.



# Coverage

- ❖ It is possible for an employer to be covered under FMLA, but not have any eligible employees.
- ❖ Example: Employer employs 50 or more workers, but less than 50 employees work within 75 miles.

# Key Employees Coverage

- ❖ “Highly compensated employees” or “key employees”
  - ❖ Salaried, eligible employees who are among the highest paid 10% of the employer’s employees within 75 miles of the facility where the employee works.

# Key Employees (cont'd)

- ❖ Highly compensated employees are not specifically excluded from FMLA coverage, although an employer is allowed to deny them restoration under the following conditions:
  - ❖ If the denial of restoration is necessary to prevent substantial and grievous economic injury to the operations of the employer;
  - ❖ If the employer notifies the employee of its intent to deny restoration as soon as the employer determines that substantial and grievous economic injury would occur; and
  - ❖ In any case where after leave has already commenced, the employee elects not to return to employment after receiving such notice.

# Leave Entitlement- Conditions

- ❖ Care for a Newborn Child or a Newly Placed Child

- ❖ A “child” includes a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability.

- ❖ Leave taken under these conditions must conclude within 12 months after birth or placement.

# Leave Entitlement- Conditions

## ❖ Spouses Employed by the Same Employer

- ❖ If a husband and wife work for the same employer, the employer may limit their aggregate number of weeks of leave.
- ❖ Spouses are jointly entitled to a combined total of 12 work weeks of family leave for the birth and care of the newborn child, placement of a child for adoption or foster care, or care for a sick parent in a 12-month period.
  - ❖ A “spouse” means a husband or wife as defined or recognized under State law for purposes of marriage in a State where the employee resides, including common law marriage in States where it is recognized.

# Leave Entitlement- Conditions

- ❖ Care for an Immediate Family member
  - ❖ The FMLA leave ends immediately upon the death of the employee's seriously-ill family member.
  - ❖ However, the employee may be entitled to take time off for bereavement leave under policy or contract.

# Serious Health Condition

- ❖ The FMLA was not intended to cover short-term conditions because these are usually covered by the employers sick leave policy.
- ❖ “Serious health conditions”
  - ❖ illnesses, injuries, impairments, or physical or mental conditions that involve inpatient care or continuing treatment by a health care provider.

# Inpatient Care

- ❖ Any period of incapacity or treatment connected with inpatient care (*i.e.*, an overnight stay) in a hospital, hospice, or residential medical-care facility and any period of incapacity or subsequent treatment in connection with such inpatient care.



# Continuing Treatment

- ❖ Continuing treatment by a health care provider which includes any period of incapacity (*i.e.*, inability to work, attend school, or perform other regular daily activities) due to:
  - ❖ A health condition, including treatment and recovery, that lasts more than 3 consecutive days;

# Continued..

- ❖ Any subsequent treatment or period of incapacity relating to the same condition, that also includes:
  - ❖ Treatment 2 or more times by or under the supervision of a health care provider; or
  - ❖ One treatment by a health care provider with a continuing regimen of treatment;
- ❖ Pregnancy or prenatal care;
- ❖ A chronic serious health condition which continues over an extended period of time, requires periodic visits to a health care provider, and may involve episodes of incapacity (e.g. asthma, diabetes);

# Continued...

- ❖ A permanent or long-term condition for which treatment may not be effective (e.g., Alzheimer's, a severe stroke, terminal cancer);
- ❖ Any absences to receive multiple treatments for restorative surgery or for a condition which would likely result in a period of incapacity of more than 3 days if not treated.

# Chronic Serious Health Conditions

- ❖ Chronic serious health conditions pose difficult challenges for employers as they relate to intermittent leave and the limited notice requirements than an employer might impose for “flare-ups” of conditions.
- ❖ Under FMLA regulations, an employee may qualify for leave for such chronic conditions if they are related to the “continuing treatment by a health care provider” definition.

# Continued...

- ❖ A “chronic serious health condition” is defined in the regulations as one that:
  - ❖ Requires periodic visits for treatment by a health care provider or by a nurse or PA under direct supervision of a health care provider;
  - ❖ Continues over an extended period of time; and
  - ❖ May cause episodic rather than continuing period of incapacity.

# Continued...

- ❖ Even if the employee or family member with a chronic serious health condition does not receive treatment or the absence does not last more than 3 days, he or she still may qualify for FMLA leave.
- ❖ Examples:
  - ❖ The absence of an employee with asthma who is unable to report for work due to a heart attack;
  - ❖ The absence of an employee who stays at home because the employee's health care provider has counseled them that they should not leave the house when the pollen count exceeds a certain level.

# Continued...

- ❖ Substance Abuse as a “serious health condition”
  - ❖ Covered employees possess the right to take FMLA leave for appropriate treatment of their own substance abuse problems or to provide necessary care for covered members of their immediate families who are receiving drug or alcohol treatment. Employers are prohibited from taking adverse actions against employees who exercise their leave rights in either of these circumstances.

# Continued...

- ❖ The regulations limit the use of FMLA leave for this purpose to treatment by a “health care provider.”
- ❖ Employee cannot “self-refer” themselves to any other type of treatment program without the proper approval.



# Intermittent Leave

- ❖ Under some circumstances, employees may take FMLA leave intermittently– which means taking leave in blocks of time or reducing their normal weekly or daily work schedule.
- ❖ If FMLA leave is for birth and care or placement for adoption or foster care, use of intermittent leave is subject to the employer's approval.
- ❖ FMLA leave may be taken intermittently whenever medically necessary to care for a seriously ill family member, or because the employee is seriously ill and unable to work.

# Intermittent Leave

- ❖ Don't Charge More Leave than Necessary
  - ❖ An employer can charge only the amount of leave an employee actually takes while on intermittent/reduced schedule leave.
  - ❖ Employers cannot require employees to take more FMLA leave than necessary to address the circumstances that cause the need for leave.
  - ❖ Employers may account for FMLA leave in the shortest period of time that their payroll systems use, provided it is one hour or less.

# Intermittent Leave

- ❖ Employees Must Work With Employers When Scheduling Intermittent Leave
  - ❖ Sometimes an employee needs intermittent/reduced schedule for foreseeable medical treatment.
  - ❖ If this occurs, the employee must work with his employers to schedule the leave so as not to unduly disrupt the employer's operations (subject to approval by the health care provider).
  - ❖ Under these circumstances, the employer can temporarily transfer the employee to an alternative job with equivalent pay and benefits that better accommodates recurring periods of time.

# Intermittent Leave

- ❖ **Accrued Sick Leave/ Vacation Leave**
  - ❖ Subject to certain conditions, employees or employers may use accrued paid leave (such as sick or vacation leave) to cover some or all of the FMLA leave.
  - ❖ Employers must designate if an employee's use of paid leave is FMLA leave, based on information the employee provides.

# Notices- Employee Notices

## Foreseeable Need

- ❖ Eligible employees seeking to use FMLA leave may be required to provide:
  - ❖ 30-day advance notice of the need to take FMLA leave when the need is foreseeable;
  - ❖ Notice to the employer “as soon as practicable” when the need is not foreseeable;
  - ❖ Sufficient information for the employer to understand that the employee needs leave for FMLA-qualifying reasons;
  - ❖ Where the employer was not made aware that an employee was absent for FMLA reasons and the employee wants the leave counted as FMLA leave, timely notice after return to work that leave was taken for an FMLA-qualifying reason.

# Notice- Employer Notices-

Providing Notice to Employees Requesting FMLA Leave

- ❖ Covered employers must provide information to employees about FMLA. They must:
  - ❖ Post a Notice provided by the Secretary of Labor explaining the rights and responsibilities under FMLA.
  - ❖ Include information about employees rights and obligations under FMLA in employee handbooks or other written material, including Collective Bargaining Agreements.

# Continued...

- ❖ Provide a written notice designating the leave as FMLA and detail specific expectations and obligations of an employee who exercises FMLA entitlements. This notice should be provided to the employee within 1-2 business days after receiving the employee's notice of need for leave and should include the following:
  - ❖ That the leave will be counted against the employee's annual FMLA leave entitlement;
  - ❖ Any requirements for the employee to furnish medical certification and the consequences of failing to do so;

# Continued...

- ❖ The employee's right to elect to use accrued paid leave for unpaid FMLA leave and whether the employer will require the use of paid leave, and the conditions related to using paid leave;
- ❖ Any requirement for the employee to make co-premium payments for maintaining group health insurance and the arrangement for making such payments;
- ❖ Any requirement to present a fitness-for-duty certification before being restored to his/her job;
- ❖ Rights to job restoration upon return from leave;



# Continued...

- ❖ Employee's potential liability for reimbursement of health insurance premiums paid by the employer during leave if the employee fails to return to work after taking FMLA leave; and
- ❖ Whether the employee qualifies as a “key” employee and the circumstances under which the employee may not be restored to his or her job following leave.

# Providing Notice to Disabled Employees

- ❖ Employers must ensure that notices that are distributed to disabled employees comply with provisions of the ADA.
  - ❖ Employers with 15 or more employees are subject to the provisions of the ADA.
  - ❖ Under the ADA, employers must give disabled workers equal access to the benefits provided to non-disabled employees, and this extends to the communication process as well as receiving the actual benefits.
  - ❖ Employer must provide a reasonable accommodation to its disabled employees unless it would pose an “undue hardship” on the employer.
  - ❖ There are many ways to accommodate a disabled employee in providing them with proper notice of the FMLA procedures. The best way to fully comply with the law is to ask the employee what he or she would prefer in terms of receiving notice.

# FMLA Poster

- ❖ All covered employers must display a poster prepared by the Department of Labor. The poster summarizes the major provisions of the FMLA and tells employees how to file a complaint.
- ❖ The poster must be displayed in a conspicuous place where employees and applicants can see it.
- ❖ A poster must be displayed at all locations even if there are no eligible employees.
- ❖ An employer that willfully violates this posting requirement may be subject to a fine of up to \$100 for each separate offense.

# Do Not Interfere With FMLA Rights

- ❖ It is unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided by FMLA.
- ❖ It is also unlawful for an employer to discharge or discriminate against any individual for opposing any practice of involvement in any proceeding related to FMLA.

# Record Keeping

❖ All of the following records must be retained for 3 years:

❖ Basic payroll and identifying employee data which includes:

- ❖ Name, address, occupation of employee;
- ❖ Rate of pay and terms of compensation;
- ❖ Daily/weekly hours worked per pay period;
- ❖ Additions to/deductions from wages;
- ❖ Total compensation paid.

\*Note: If employees are exempt from the FLSA, employers need not keep a record of actual hours worked, so long as eligibility for FMLA leave is presumed for any employee who has been employed at least 12 months.

# Continued...

- ❖ Dates FMLA leave taken by employees (i.e. leave requests, time records, etc..);
- ❖ Hours of leave, if FMLA leave is taken in increments less than a day;
- ❖ Notices, including:
  - ❖ Copies of any employee notices of FMLA leave, if in writing;
  - ❖ Copies of all general and specific notices given to employees as required under FMLA and regulations;
- ❖ Any document (including electronic records) that describes employee benefits or employer policies/practices relating to the taking of paid and unpaid leave;

# Continued...

- ❖ Premium payments of employee benefits; and
- ❖ Records of any dispute between employer and employee about the designation of leave as FMLA leave. (This includes an written statement from employer or employee of reasons for designation and for disagreement.)

# Certification- Requirements

- ❖ Employers may also require employees to provide:
  - ❖ *Medical Certification* supporting the need for leave due to a serious health condition affecting the employee or an immediate family member. The employer must give the employee at least 15 calendar days to obtain the certification.



# Continued...

- ❖ *Second or Third Medical Opinions* (at the employer's expense). The employer may choose the health care provider for the second opinion, except that in most cases the employer may not regularly contract with or otherwise regularly use the services of the health care provider. 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. This third opinion shall be final and binding. The third health care provider must be approved jointly by the employer and the employee.

# Continued...

- ❖ *Periodic Re-certification.* The FMLA regulations allow employers to request recertification of a serious health condition. If the leave is for pregnancy, or a chronic condition, re-certification may be requested no more than every 30 days unless:
  - ❖ Circumstances described by the previous certification have changed significantly; or
  - ❖ The employer receives information casting doubt upon the employee's stated reason for absence.

# Continued...

- ❖ *Periodic Reports* during FMLA leave regarding the employee's status and intent to return to work. As a condition of restoration of employment, an employer may have a uniformly applied policy requiring all similarly situated employees who take leave for their own serious health condition to obtain certification from the health care providers that they are able to resume working. The policy must be based on the nature of the illness or duration of the absence.

# ADA Issues Related to Certification

- ❖ It is likely that many employees eligible for leave under the FMLA will qualify as “disabled” under the ADA. For example, heart conditions requiring ongoing treatment and most cancers are considered “serious health conditions” under the FMLA, as well as disabilities under the ADA. Therefore, employees with such conditions are entitled to protection under both laws.

# Continued...

- ❖ Under the ADA, an employer is prohibited from requiring its current employees to submit to a medical examination unless it is “job related and consistent with business necessity.” On the other hand, the FMLA permits an employer to require its employees to provide written certification from a health care provider to verify the need for medical leave. Thus, it is necessary that the requiring such certification, employers must ensure that they are “job-related and consistent with business necessity.”

# Pay and Benefits- Benefits and Employees who Take FMLA Leave

- ❖ An employee is not entitled to the accrual of additional benefits or seniority that would have occurred during the period of leave.
- ❖ That employee is entitled to accrue hours of service during periods of paid leave.
- ❖ An employer may not deprive an eligible employee who takes FMLA leave of any previously accrued benefits, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions.

# Continued...

- ❖ An employee's entitlement to other benefits is determined by the employer's policy regarding benefits coverage or accrual during other types of leave. Thus, if an organization typically provides employees on unpaid leave with full benefits (other than health benefits), these same benefits must be provided to an employee on unpaid FMLA leave.
- ❖ After a period of leave covered by FMLA, an eligible employee must be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

# Job Restoration

- ❖ Generally... upon return from FMLA leave, an employee must be restored to his or her original job, or to an “equivalent” job, which means virtually identical to the original job in terms of pay, benefits, and other employment terms and conditions.
- ❖ In addition, an employee’s use of FMLA leave cannot result in the loss of any employment benefit that the employee earned or was entitled to before using (but not necessarily during) FMLA leave.



# Waiver of Rights

- ❖ Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA.
- ❖ 29 C.F.R. § 825.220(d)
- ❖ The regulation refers to all rights under the FMLA, including the right to bring an action or claim for a violation of the Act.
- ❖ Both the prospective and retrospective waiver of FMLA rights, including claims for past violations, is not allowed.
- ❖ This regulation comports with the statutory language making it illegal for employers to interfere with, restrain, or deny the exercise of any right provided under the statute.

# Penalties for Non-Compliance

- ❖ An employer that violates an employee's rights under the FMLA is subject to liability in a civil action. An employee may seek a variety of remedies for employer violations including:
  - ❖ Lost Wages: Including salary, benefits, or other compensation lost as a result of the violation;
  - ❖ Liquidated damages: Can include amount ordinarily equal to lost wages, benefits, other compensation, or actual monetary loss. An employer can avoid this award only if it proves that the violation was in good faith, and that it had reasonable grounds to believe that its actions did not violate the FMLA;
  - ❖ Prejudgment Interest: Interest on the amount of wages, benefits, or other compensation denied or lost;
  - ❖ Equitable Relief: Includes employment reinstatement and promotion.

# FMLA—Family of Servicemembers

- ❖ **Effective January 28, 2008**
- ❖ **Eligible employees are entitled to up to 12 weeks for leave because of “any qualifying exigency” arising out of the fact that the spouse, son, daughter, or parent of the employee is on active duty or been notified of impending call to active duty.**
  - ❖ **“Any qualifying exigency”**

# Family of Servicemembers (cont'd)

- ❖ **Eligible employees who are the spouse, son, daughter, parent or next of kin of a covered servicemember who is recovering from a serious injury or illness sustained in the line of duty on active duty are entitled to up to 26 weeks of leave in a single 12-month period to care for the servicemember.**

# Nebraska Military Leave Act

- ❖ **Effective April 5, 2007**
- ❖ **Employers with 15 to 50 employees:**
  - ❖ **Must give up to 15 days of unpaid family military leave**
- ❖ **Employers with more than 50 employees:**
  - ❖ **Must give up to 30 days of unpaid family military leave**
  - ❖ **Preempted by FMLA amendments**

# Nebraska Family Military Leave (cont'd)

## ❖ Family Military Leave

- ❖ Leave requested by an employee who is the spouse or parent of a person called to military service lasting 179 days or more with the state or U.S.

## ❖ Notice

- ❖ Employee must give 14 days notice if leave will be 5 or more consecutive workdays

## ❖ Reinstatement

- ❖ Same or equivalent position

## ❖ Benefits

- ❖ Must make it possible for employee to continue benefits at employee's expense.

# Proposed FMLA Regulatory Changes

**Proposed changes published on February 11**

- ❖ **Includes new regulations for Servicemember Leave**
- ❖ **First substantial update in 15 years**
- ❖ **Comment period ended April 11**
  - ❖ **Over 4,000 comments filed**
- ❖ **Mixed reviews from business and labor**

# Proposed Regulatory Changes— Intermittent Leave

- ❖ **Would require employees to follow workplace call-in procedures when using unscheduled, intermittent leave except in cases of emergency**
- ❖ **But would keep current regulation allowing employees to take FMLA in the smallest increment permitted under the employer's timekeeping system**



# Proposed Regulatory Changes— Medical Certification

- ❖ **New WH-380 medical certification form**
- ❖ **Current regulations do not specify the time period during which an employee must see a medical provider after 3 consecutive days of incapacity**
  - ❖ **Proposed regulation would require 2 such visits within 30 days of incapacity**
- ❖ **Current regulations only require employees with chronic health conditions to make “periodic visits” to a medical provider**
  - ❖ **Proposed regulations would require 2 visits/year**

# Proposed Regulatory Changes— Medical Certification

- ❖ **Current regulations prohibit most direct communication between employer and employee's medical provider**
  - ❖ **Proposed regulations would allow an employer to contact an employee's medical provider directly.**
  - ❖ **Permission from the employee would be required, by the failure to grant such permission could be construed as fail**
- ❖ **Proposed regulations clarify when medical certification forms are “incomplete” and “insufficient” and the process for curing**
  - ❖ **“Incomplete” = 1 or more unanswered questions**
  - ❖ **7 calendar days to cure, with 7 additional days if unable to obtain information**
  - ❖ **Employers may deny FMLA leave to employees who fail to cure stated deficiencies**

# Proposed Regulatory Changes— Paid Leave

- ❖ **Current regulations are unclear regarding relationship between FMLA and use of accrued paid leave.**
  - ❖ **Proposed regulations would require employees to meet the employer's paid leave rules in order to use accrued paid leave while on FMLA**
  - ❖ **Would require employers to notify employees of any additional requirements for use of paid leave**
  - ❖ **Confirm that public employers may require employees to use accrued comp time while on FMLA leave**

# Proposed Regulatory Changes— Workers' Compensation

- ❖ **Proposed regulations clarify that an employer may continue to run an employee's FMLA leave concurrent with workers' comp absence.**
- ❖ **Would clarify that an employee may decline an employer's offer of light duty and instead elect to remain on FMLA leave**
- ❖ **Proposes to clarify that an employee's right to FMLA leave and job restoration are not affected by light duty assignments.**
  - ❖ **Current regulation provides that job restoration rights are available until 12 weeks have passed, including any period of FMLA leave taken and "the period of light duty"**

# Proposed Regulatory Changes-- Miscellaneous

- ❖ **Proposed regulations confirm that common ailments can qualify as a “serious health condition”**
  - ❖ **Current regulations falsely suggest that common ailments (e.g., flu, common cold, headaches) cannot be “serious health conditions”**
- ❖ **Male employees may take FMLA leave if their pregnant spouse has severe morning sickness and are in need of assistance**

# Proposed Regulatory Changes-- Miscellaneous

- ❖ **Proposed regulations require employer to notify employee within 5 business days that leave is designated as FMLA leave**
  - ❖ **Current regulation is 2 business days**
- ❖ **Implements *Ragsdale v. Wolverine*:**
  - ❖ **But proposed regulations suggest that employee's can still recover damages for failure to timely designate leave if they can demonstrate harm**

# Proposed Regulatory Changes-- Miscellaneous

- ❖ **Proposed regulations reaffirm that employees on leave for an entire week are charged with an entire week of FMLA, even if the employer is closed for a holiday**
- ❖ **However, for employees using leave in increments of less than a full week, the holiday will NOT count unless the employee was otherwise scheduled and expected to work on the holiday**

# Proposed Regulatory Changes— Miscellaneous

- ❖ **Employers who extend FMLA to employees before they reach 12 months of service cannot count pre-12 month FMLA leave against the 12 weeks of leave required under the FMLA**
- ❖ **Employee's prior service with employer counts towards 12 months needed to be an “eligible employee” provided break in services does not exceed 5 years**



# Proposed Regulatory Changes— Miscellaneous

- ❖ **Proposed regulations clarify that missed overtime must be counted against FMLA leave if the employee would otherwise be required to report for duty**
- ❖ **Example: if an employee who normally is scheduled to work 48 hours/week has a “serious health condition” limiting the employee to 40 hours/week, the employee would be charged 8 hours FMLA leave.**

***You be the jury!***